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## **Long Session Report: Global Solutions**

**Session Title: Left Out of the Bargain: Settlements in Foreign Bribery Cases**

**Date & Time: 8 November 2012 17:30 – 19:30**

**Report prepared by: Brigitte Strobel-Shaw, Corruption and Economic Crime Branch, UNODC**

### **Experts:**

**Mr. Guillermo Jorge, International Centre for Asset Recovery, Basel Institute**

**Mr. Emmanuel Akomaye, Economic and Financial Crimes Commission, Nigeria**

**Mr. Ricardo Saadi, Department of Asset Recovery and International Legal Cooperation, Ministry of Justice, Brazil**

**Moderated by: Mr. Luiz Augusto Fraga Navarro de Britto Filho, Deputy Minister, Office of the Comptroller General**

**Session coordinated by: Mr. Oliver Stolpe, Stolen Asset Recovery Initiative of the World Bank and UNODC**

### **Summary of Panellists' Contributions & Discussion Points (please be as detailed as possible)**

On the basis of the preliminary findings of a study currently being conducted by the Stolen Asset Recovery (StAR) Initiative of the World Bank and the United Nations Office on Drugs and Crime (UNODC) on settlements in foreign bribery cases, the workshop discussed the

implications of settlements on asset recovery. Specific questions that were raised included: (1) Are settlements creating impediments to international cooperation and/or asset recovery? (2) Is the practice of settlements in its current form affecting the implementations of the relevant UNCAC provisions? AND (3) Who has legitimate claims to the proceeds of corruption recovered in the context of settlements?

Mr. Oliver Stolpe provided an overview of the preliminary findings of the above study. He highlighted the growing relevance of settlements and related procedures in most jurisdictions, of both common and civil law tradition, when dealing with international bribery cases. The complexity of such cases, had led to the development and application of a variety of rather diverse procedures to conclude criminal cases in an abbreviated fashion. Mostly, these include the following common features: they are concluded short of a full trial, feature some form of admission of guilt/facts by alleged offender, are offered normally by the by the prosecuting authority, sometimes (but not always) leave some room for the alleged offender to negotiate the terms of the settlement, and they are being used particularly frequently when the alleged offender is a legal person. At the same time across various jurisdictions, a number of key differences can be observed, including varying legal forms (criminal, civil and/or administrative) as well as various degrees of judicial oversight and of transparency of such abbreviated procedures and the terms of the settlement.

The study further confirmed, that despite concerns raised by law enforcement authorities in some jurisdictions, there were no legal obstacles created by the double jeopardy or *ne bis in idem* principles which precluded the parallel or subsequent prosecution of the same offender for the same offences in other jurisdictions once a case had been settled in one jurisdiction.

Moreover, while the study found that there were no legal obstacles caused by settlements for international cooperation, nevertheless it could identify only a very small number of cases (only approximately 5% of the total sample) in which the cases settled had also led to law enforcement actions in other affected countries.

Finally, it would also appear that only a very few settlements had led to the return of assets to the countries whose public officials had been bribed. Out of the total of US \$ 6.4 Billion, which had been imposed as part of settlements on the bribe payers in the form of different types of

monetary sanctions, only US \$ 185 Million (3%) had been recovered and returned to the countries whose officials had been the bribe recipients.

Mr. Stolpe concluded by informing participants that the study will most likely be completed and published during the first quarter of 2013. Presently, StAR was conducting some additional research on any law enforcement actions which might have been taken by the countries whose public officials had been bribed subsequent or parallel to a settlement concluded by the country of the bribe payer.

Mr. Guillermo Jorge raised concerns with regard to the uncoordinated law enforcement approach in transnational corruption cases across jurisdictions, leading potentially to multiple enforcement actions in different jurisdictions against the same offenders for what were essentially the same offences. Thus, he raised the question of whether there was a need for a more coordinated approach, possibly to be achieved through the introduction of an international double jeopardy principle. He further suggested that in order to effectively implement the basic principle of compensating the victims of corruption, already enshrined in the UN Convention against Corruption, there was a need for countries to overcome the notion of corruption offences being victimless crimes. As concerns settlements this would also mean that the participation of victims should be considered in their negotiation.

Mr. Ricardo Saadi highlighted the need for settlements with a view to enable law enforcements authorities to handle effectively and efficiently complex corruption cases, including cases of foreign bribery. Referring to the lengthy judicial process in Brazil, he outlined some of the related risks of prosecuting cases of transnational bribery, including cases being unsuccessful due to procedural mistakes, witnesses being unavailable or no longer accurately recalling events dating back several years. The Brazilian Government had therefore introduced a bill in parliament proposing to establish the criminal liability of legal persons and the possibility of settling cases where offences had been committed by legal persons. He, however, acknowledged that settlements had also disadvantages, as they could potentially lead companies to treat criminal responsibility as yet another economic risk.

Mr. Emmanuel Akomaye outlined the practice of settlements in Nigeria, where they are being used to resolve cases of both domestic and transnational nature. He underscored some of the key criticisms that are

voiced against such settlements, in particular that they lack transparency and, thus, rather frequently give room to speculations as relates to the underlying facts, terms and motives for settling in the first place. While recognizing the advantages of settlements, he warned against the practice potentially making prosecutors lazy. Turning to the issue of Chapter V of the UN Convention against Corruption, he expressed his concern about the overall lack of measurable progress in its effective implementation. Still there were only very few cases in which assets ended up being returned to the countries that had been most affected by the incidents of foreign bribery. Equally, the volume of returns left much to be desired. The increased awareness of the immense amounts being looted from countries through various forms of corruption had not yet translated into a significant increase of assets being returned to such countries. Settlements in cases of foreign bribery constituted only a part, yet a significant one, of this problem. The proceeds of such bribery cases were regularly confiscated in the context of settlements, yet hardly ever returned to the countries where the bribes had been paid. Applying the principle of proximity, this raised the question of who had to be considered the primary victims of foreign bribery, and therefore should benefit first and foremost from any assets recovered as part of such settlements.

Acknowledging that UNCAC had no direct provisions on settlements, he argued that this, however, by no means should mislead countries to believe that the proceeds of foreign bribery, if recovered as part of a settlement, should not be returned in accordance with the provisions of the Convention to compensate the primary victims of corruption. In this context, he also discarded the notion that shareholders of the bribing companies should be considered as victims, as the monies used to finance bribes were typically factored into the costs of doing business. He further felt that all assets recovered through settlements, whether in the form of measures to deprive the offenders of the proceeds of corruption or in the form of fines should be subject to provisions of Chapter V of the UNCAC. Finally he called for early tripartite discussions involving the settling authorities, the alleged offenders and the victim country.

The following discussion highlighted the advantages of settlements with a view to avoiding lengthy judicial procedures and their high costs as well as often uncertain outcomes. As such, settlements were often considered an efficient and effective tool to handle complex cases of

foreign bribery, in particular when large multi-national companies were involved. The question of what constituted a fair settlement was also discussed. In this context, while the UNCAC did not address the issue of settlements per se, the need for the punishment to be proportionate and dissuasive still applied. The sums in the settlement cases did often not correspond to the amounts of money involved and were thus neither dissuasive nor proportionate. Settlements, particularly in cases where companies are involved, can turn the criminal activity of bribery with the associated criminal responsibility into a purely commercial/economic risk for the company.

The discussion also re-emphasised that there were no legal obstacles for countries whose officials had been bribed to initiate their own cases against both the payers and recipients of bribes, to request mutual legal assistance in this context, and to engage with the settling jurisdiction in international cooperation for the purpose of asset recovery. Yet, at present such parallel enforcement action, international cooperation or asset recovery were the absolute exception. In fact, Member States dealt with settlements in foreign bribery cases not as a transnational but rather as a domestic issue and therefore in most cases did make no effort to inform the authorities of the countries whose officials had been bribed of their investigations or of the possible options for pursuing the recovery of the proceeds of the offences involved.

It was also raised that frequently, when settling, the offender did not have to acknowledge in the statement of facts the payment of a bribe, but a lesser offence (e.g. book keeping offences). However, it was felt that such cases, even if offences did not directly fall within the realm of UNCAC, should not automatically be excluded from the application of the provisions of Chapter V of the Convention, as settling countries continued to report such cases as successful law enforcement action against foreign bribery in the context of the Working Group on the OECD Anti-Bribery Convention.

UNCAC establishes the recovery of assets as a fundamental principle. It also provides countries with a comprehensive set of legal avenues for successful cooperation in the tracing, seizing, confiscation and recovery of the proceeds of corruption. Furthermore, it calls for punishments in bribery cases that are proportionate and dissuasive. Against that background, the general sense of the workshop was that the very small share of monetary sanctions resulting from settlements was not

satisfactory. Thus, participants felt that there was a need to identify and jointly overcome the barriers apparently created by settlements to the effective recovery and return of the proceeds of foreign bribery.

Another source of concerns voiced with regard to settlements was the frequent opacity of the terms of settlements and/or the underlying facts. The lack of transparency with regard to the content of settlements not only creates an impression that full justice is not done, but also prevents evidence generated through the investigations leading up to the settlements becoming easily available to the jurisdictions where the bribes were paid for further investigations of the offenders involved.

## **Main Outcomes (include interesting questions from the floor)**

Over the past decade, enforcement actions against foreign bribery have increased significantly, largely due to the frequent recourse to and effective use of settlements.

It is also clear that settlements are being used to resolve cases of foreign bribery and related offenses, both in financial centers and in developing nations. While the workshop agreed that settlements are an efficient and effective tool to handle complex cases of foreign bribery, it also recognized some of the inherent weaknesses of settlements with regard to their transparency, judicial oversight and, potentially, their fairness.

Monetary sanctions imposed as part of these settlements are very significant, exceeding USD 6 bn. over the last thirteen years. At the same time, only a very small number of these settlements have allowed other countries affected by the foreign bribery – specifically those whose public officials had been bribed – to recover even parts of the monetary sanctions imposed as part of these settlements.

Moreover, settlements have mostly been concluded without the involvement of or cooperation with the jurisdictions whose officials had been bribed by foreign companies and their agents, resulting in very little law enforcement actions within these jurisdictions both against the payers as well as the recipients of such bribes.

The main source of concern raised by many participants, is the opacity of settlements in many jurisdictions as well as the lack of a proactive and collaborative approach by the settling jurisdictions mostly missing to take actions to solicit the authorities of the jurisdictions whose officials had been bribed to open their own investigations, to request for mutual legal assistance, if warranted, or to pursue the recovery of the proceeds of corruption.

UNCAC does not directly deal with settlements. However, it establishes the recovery of assets as a fundamental principle. It also provides countries with a comprehensive set of legal avenues for successful cooperation in the tracing, seizing, confiscation and recovery of the proceeds of corruption. Against that background, the very small share of monetary sanctions resulting from settlements being ultimately

recovered does suggest that the current practice of settlements does not live up to objectives of the Convention.

### **Recommendations, Follow-Up Actions**

The workshop called for increased transparency of settlements, as well as a more proactive approach by settling jurisdictions in engaging the jurisdictions whose officials have been bribed.

More specifically, settling authorities should reach out to their counterparts in other jurisdictions as early as possible by providing them information on the underlying facts and (intended) terms of the settlement with a view to soliciting enforcement actions against the bribe recipient and assisting them in identifying the best possible avenues to pursue the recovery of the proceeds of corruption and ensure the compensation of the victims of foreign bribery.

Moreover, it was recommended that when there was no immediate victim to be compensated for the damages suffered as a result of the foreign bribery, to consider investing monetary sanctions imposed as part of settlements into strengthening bilateral and international asset recovery efforts.

### Highlights (please include interesting quotes)

“ While Settlements may not prevent the recovery of the proceeds of corruption nor create any legal obstacles inhibiting international cooperation in the pursuit of bribe payers and bribe recipients, they certainly have not helped to advance the objective of recovering and returning assets, as established by the UN Convention against Corruption”

“ There is a need for more transparency, more cooperation and a more proactive and collaborative approach by countries pursuing settlements in foreign bribery cases with their counterparts in those jurisdictions whose officials have been bribed.”

“ The victims of foreign bribery are in the countries where the bribes have been paid – authorities must keep this in mind when negotiating settlements”

“The monetary sanctions imposed as part of settlements, in particular fines, should be used to strengthen the bilateral and international asset recovery effort”

### Key Insights Recommended to be included in the IACC Declaration

Several participants emphasised the need for countries to develop clear legal frameworks regulating the conditions and process of settlements was seen as a way forward to provide greater clarity to all concerned.

There is also a need for increased transparency of settlements, as well as a more proactive approach by settling jurisdictions in engaging the jurisdictions whose officials have been bribed.

Countries that are pursuing settlements could transmit spontaneously information to other affected countries concerning basic facts of the case, in line with Articles 46 paragraph 4 and 56 of UNCAC, thus allowing the other countries to use this evidence in their own domestic processes. More specifically settling authorities should reach out to their counterparts in those jurisdictions whose officials have been bribed as early as possible by providing them information on the underlying facts and (intended) terms of the settlement with a view to

- (1) soliciting enforcement actions against the bribe recipient;
- (2) assisting them in identifying the best possible avenues to

pursue the recovery of the proceeds of corruption; and  
(3) ensuring the compensation of those who have suffered most from the consequences of corruption.

Countries could further proactively share information pertaining to concluded settlements with other potentially affected countries. This information could enable other affected countries to initiate law enforcement actions within their own jurisdiction against the payer and/or taker of the bribe.

Moreover, it was recommended that when there was no victim to be compensated for the damages suffered as a result of the foreign bribery, to consider investing monetary sanctions imposed as part of settlements into strengthening bilateral and international asset recovery efforts.

At the same time, countries whose officials received bribes were encouraged to step up their own efforts to investigate and prosecute the recipients of these bribes.

**Rapporteur's name and date submitted**

Brigitte Strobel Shaw/ Oliver Stolpe      **14 November 2012**

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