



**15th INTERNATIONAL  
ANTI-CORRUPTION  
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**BRASÍLIA BRAZIL  
7-10 NOVEMBER 2012**

### **Short 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:**

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

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

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

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

#### **Main Issues Covered (500 words or more, narrative form)**

On the basis of the findings of a study conducted by the Stolen Asset Recovery (StAR) Initiative of the World Bank and UNODC on settlements in foreign bribery cases, the workshop discussed the implications of settlements on asset recovery. Specific questions that were raised included: Do settlements impact on the effectiveness of asset recovery and more broadly on international cooperation in criminal matters? Do they specifically impact on the implementation of Chapter V of the United Nations Convention against Corruption (UNCAC) on asset recovery?

The panel highlighted the growing relevance of settlements in most jurisdictions when dealing with international bribery cases. Reasons for the use of settlements in these cases where the lengthy judicial processes with an uncertain outcome. As an example, the panel

noted that in Brazil judicial processes in complex transnational cases take on average 15 years. Furthermore, the high costs involved for countries where the bribes were paid to bring asset recovery proceedings in countries where the assets are held, often prevented or at least discouraged them from taking the cases forward. Thus, 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. Over the last thirteen years, monetary sanctions imposed as part of these settlements were exceeding USD 6.2 bn. Settlements therefore play a key role in asset recovery cases.

Despite these obvious advantages of settlements, a range of concerns were raised. These included the way in which settlements were handled often without a possibility to recover some part of these monetary sanctions for the countries where bribes were paid. Only 3 percent of the total volume of monetary sanctions has been ordered returned to countries that suffered damage as a result of the corruption. Overall, settlements have mostly been concluded without the involvement or cooperation of the jurisdictions to whose officials the bribes were paid.

Another source of concerns voiced with regard to settlements is that very little is known about their concrete terms. The lack of transparency with regard to the content of settlements not only creates an impression that full justice is not done, but also leads to the fact that evidence generated in the settlement proceedings is not available to the jurisdictions where the bribes were paid for further prosecution of the involved offenders.

In fact Member States dealt with settlements not as a transnational issue but as a domestic issue and therefore they did not treat the fines generated through settlements as proceeds of corruption which needed to be returned to the country of origin.

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 very small share of monetary sanctions resulting from settlements being ultimately recovered raises questions, notably on whether settlements create additional and specific challenges for the asset recovery process.

A further risk of the increased use of settlements was associated to the fact that settlements de facto take the crime and most importantly the offender out of the criminal justice system. Settlements, particularly in cases where companies are concerned, can turn the criminal activity of bribery with the associated criminal responsibility into a purely commercial/economic risk for the company which could be calculated.

The danger of creating a situation of double jeopardy was also discussed. While this presented no problem in most jurisdictions, companies agreeing to settlements have certainly used the argument of ne bis in idem in cases where they are taken to court in one jurisdiction after having agreed to settlements in another jurisdiction.

The workshop furthermore also discussed the need to come back to the basic notion of restorative justice in foreign bribery cases. There is a growing notion in many countries that corruption is not a victim less crime but a crime which hurts people collectively. The return of the assets to the countries of origin was a fundamental aspect of restorative justice in international bribery cases.

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 often neither dissuasive nor proportionate.

### **Main Outcomes/Outputs**

### **Recommendations, follow-up Actions (200 words narrative form)**

A range of measures were discussed which would make settlements more effective and transparent and ultimately more supportive of the asset recovery processes:

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.

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;

Along the same lines, countries pursuing settlements could inform other countries of the legal avenues available under their legal system to participate in the investigation and/or

claim damages suffered as a result of the 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.

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

## Highlights (200 words please include interesting quotes)

The questions asked at the outset whether settlements impact on the effectiveness of asset recovery and more broadly on international cooperation in criminal matters and whether they specifically impact on the implementation of Chapter V of the United Nations Convention against Corruption (UNCAC) on asset recovery were answered by Mr. Akomaye:

“The international cooperation and asset recovery regime foreseen by UNCAC only enjoys limited implementation. In this context, the practice of settlements has not helped and in fact the settlements under the currently structured regime are making the potency of chapter V of UNCAC very vulnerable. How often do we still need to discuss the fundamental nature of asset recovery to our success in preventing and fighting corruption”.

While settlements and asset recovery proceedings should not necessarily be seen as one or the other and could be pursued in parallel, this was rather rarely the case. The amounts of assets returned through settlements was extremely limited raising concerns about the rights of the victim for restoration.

The fines collected through settlements were already used in several jurisdictions to support law enforcement activities. Further consideration could be given to using part of the fines to support capacity building of law enforcement in countries where the bribes were paid.

While UNCAC has no direct provisions on settlements, several of its provisions are relevant for settlements. UNCAC encourages states to spontaneously share information, it also encourages finding avenues for informal. These are important provisions which are currently not applied in settlement proceedings.

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

Asset recovery is a fundamental principle of the United Nations Convention against Corruption. In the spirit of the Convention there is a need to develop an architecture for settlements which make them an important element of the asset recovery process and not an impediment to it, by, ensuring transparency and an early involvement of the country where the bribes were paid in the process.

Fines collected through settlements should benefit law enforcement in both the country where the settlement was negotiated as well as in the country where the bribes were paid.

**Rapporteur's name and date submitted**  
**Brigitte Strobel-Shaw, 8 November 2012**

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