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RECOVERING THE PROCEEDS OF CRIME

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Governments freeze assets as a way of imposing sanctions with respect to activities they disapprove of. And, as we have seen, governments also sometimes freeze assets in order to prevent financial resources being directed to activities they wish to prevent (nuclear proliferation, terrorism). But governments also act to recover assets which are the proceeds of crime and corruption. Thus, as a matter of domestic law, assets owned by those who are guilty of drug-related crime are at risk of forfeiture. In addition there are transnational moves to a more effective process for dealing with corruption at the international level, including recovering the proceeds of crime when they move across territorial borders. The World Bank Group and the United Nations Office on Drugs and Crime collaborate in a Stolen Asset Recovery Initiative.[2] A recent EU Commission Communication addressed international crime:[3]

Disruption of international crime networks
Penetration of the EU's economy by organized criminal groups is a security risk. Serious crimes with a cross-border dimension, such as corruption, trafficking in human beings, drugs, firearms and other illicit goods, and sexual exploitation of children cause grave harm to victims and to society as a whole. A number of those threats are growing in scale. Organised crime is increasingly flexible and is developing its activities within and beyond Europe's borders. It continues to pose an important threat to the EU's internal security and can have destabilising effects on third countries.
The EU must continue to adapt and strengthen its response to those threats, coordinating its action within the EU and beyond. Operational cooperation between Member States' authorities, focusing on priorities agreed at EU level within the Policy Cycle for Serious and Organised Crime is essential in this effort. Mutual trust should be strengthened, and the use of Joint Investigation Teams (JITs) and other joint operations should be increased, supported by EU funds and agencies. The need for EU action to ensure that JITs practical cooperation is not hampered by divergent national rules on investigative techniques should be examined.
Information exchange between Member States' law enforcement authorities with relevant EU agencies and among EU agencies should be stepped up, making full use of existing EU instruments. Europol's role as hub for information exchange across the EU should be strengthened, in close cooperation with Member States, OLAF and FRONTEX. All Member States should set up Single Points of Contact, taking into account the relevant framework of customs cooperation. Information exchange systems could be made more interoperable, taking into account the developments under the broader framework of the Interoperability Solutions for European Public Administration.
To support practical cooperation, EU-level training of law enforcement personnel should be developed further. The European Law Enforcement Training Scheme should be fully implemented in the years to

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[2] http://star.worldbank.org/star/.

[3] EU Commission Communication, An Open and Secure Europe: Making it Happen, COM(2014)0154 final.

come, to benefit a high number of officials from of all ranks of law enforcement, border guards and customs officers.

At the same time, the EU needs to intensify efforts specifically targeted at the crimes that cause the most harm to victims and to society. Corruption undermines trust in democracy, damages the internal market, discourages foreign investment, deprives public authorities of tax revenues, and facilitates the activities of organised crime groups. To tackle corruption more effectively, Member States should follow the suggestions made in the EU Anti-Corruption Report, which publication should continue in the years to come. Anti-corruption measures should be better linked to EU policy areas and EU funding should support institutional and administrative capacity-building. Cooperation between EU institutions, Member States and international organisations should be further developed.

Organised criminal groups are driven by the vast gains generated by illicit trafficking, corruption, financial crime and other criminal activities. More work is needed to combat that incentive and to prevent criminal profits from infiltrating the legal economy. The Directive on the freezing and confiscation of proceeds of crime in the EU needs to be transposed and implemented by all Member States without delay. Asset Recovery Offices, law enforcement, judicial and administrative authorities, such as tax or licensing bodies, should step up cooperation to improve tracing of assets. Money laundering helps criminal groups hide the proceeds of their crimes. To prevent the misuse of the financial system, the proposal for a fourth Anti-Money Laundering Directive must be adopted, transposed and implemented soon and the need for EU criminal anti-money laundering legislation must be examined.

Trafficking in human beings is a growing threat. The EU adopted an EU Strategy 2012-2016 aimed at eradicating this crime and a Directive which must now be fully transposed and implemented without delay. The implementation of the strategy must be completed, including aspects relating to human trafficking in third countries. A post-2016 Strategy should be established, covering among others prevention, assistance to victims, safe-return and reintegration, and the role of the internet. The need to criminalise the intentional use of services of human trafficking victims should be examined. To reach those objectives, the position of EU Anti-Trafficking Coordinator should be prolonged.

Trafficking in illicit drugs remains an extremely profitable business for organised crime. In 2013, Europol and the EU's Drugs Agency (EMCDDA) jointly produced the first ever "Drug Markets Report", which pointed to a growth in new psychoactive substances. The Commission proposed legislation to withdraw such substances quickly from the market if they are harmful to health, while respecting legitimate industrial and commercial uses. That legislation too should be adopted and implemented as part of the balanced approach reflected in the EU Drugs Strategy.

Sexual exploitation and abuse of children cause life-long damage to its victims. The EU Directive targeting on-line exploitation must be transposed and implemented as a matter of priority. The importance of protecting children against sexual crimes should be more mainstreamed into other EU policy areas, and the need for a comprehensive EU strategy examined.

Firearms-related violence continues to cause serious injuries and loss of human life throughout the EU and more must be done to address illicit trafficking in firearms. Reviewing existing EU legislation on the sale and intra-EU transfer of firearms would, if combined with stronger practical law enforcement efforts, reduce the risk of illegal use and trafficking of firearms.

Finally, the effectiveness of existing agreements and arrangements for the sharing of law enforcement information with third countries should remain under review and, if necessary, be developed further. The increasing use of Passenger Name Record (PNR) data, both in third countries and among Member States, should be addressed in the context of a new regulatory framework at EU level, guaranteeing a high level of data protection for both the processing of PNR data within the EU and for the transfer of PNR data from the EU to third countries. The EU PNR instrument should be finally adopted and implemented. Also, the Data Retention Directive should be reviewed, in parallel with a revision of the e-Privacy Directive and taking into account the negotiations on the Data Protection Framework.

In April 2014 the EU adopted a new Directive on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union. Here are the recitals from the directive (which explain its purpose and contents):

Whereas:
(1) The main motive for cross-border organised crime, including mafia-type criminal organisation, is financial gain. As a consequence, competent authorities should be given the means to trace, freeze, manage and confiscate the proceeds of crime. However, the effective prevention of and fight against organised crime should be achieved by neutralising the proceeds of crime and should be extended, in certain cases, to any property deriving from activities of a criminal nature.
(2) Organised criminal groups operate without borders and increasingly acquire assets in Member States other than those in which they are based and in third countries. There is an increasing need for effective international cooperation on asset recovery and mutual legal assistance.
(3) Among the most effective means of combating organised crime is providing for severe legal consequences for committing such crime, as well as effective detection and the freezing and confiscation of the instrumentalities and proceeds of crime.
(4) Although existing statistics are limited, the amounts recovered from proceeds of crime in the Union seem insufficient compared to the estimated proceeds. Studies have shown that, although regulated by Union and national law, confiscation procedures remain underused.
(5) The adoption of minimum rules will approximate the Member States¡¯ freezing and confiscation regimes, thus facilitating mutual trust and effective cross-border cooperation...
(10) Member States are free to bring confiscation proceedings which are linked to a criminal case before any competent court.
(11) There is a need to clarify the existing concept of proceeds of crime to include the direct proceeds from criminal activity and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds. Thus proceeds can include any property including that which has been transformed or converted, fully or in part, into other property, and that which has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds. It can also include the income or other benefits derived from proceeds of crime, or from property into or with which such proceeds have been transformed, converted or intermingled.
(12) This Directive provides for a broad definition of property that can be subject to freezing and confiscation. That definition includes legal documents or instruments evidencing title or interest in such property. Such documents or instruments could include, for example, financial instruments, or documents that may give rise to creditor claims and are normally found in the possession of the person affected by the relevant procedures. This Directive is without prejudice to the existing national procedures for keeping legal documents or instruments evidencing title or interest in property, as they are applied by the competent national authorities or public bodies in accordance with national law.
(13) Freezing and confiscation under this Directive are autonomous concepts, which should not prevent Member States from implementing this Directive using instruments which, in accordance with national law, would be considered as sanctions or other types of measures.
(14) In the confiscation of instrumentalities and proceeds of crime following a final decision of a court and of property of equivalent value to those instrumentalities and proceeds, the broad concept of criminal offences covered by this Directive should apply. Framework Decision 2001/500/JHA requires Member States to enable the confiscation of instrumentalities and proceeds of crime following a final conviction and to enable the confiscation of property the value of which corresponds to such instrumentalities and proceeds. Such obligations should be maintained for the criminal offences not covered by this Directive, and the concept of proceeds as defined in this Directive should be interpreted in the similar way as regards criminal offences not covered by this Directive. Member States are free to define the confiscation

of property of equivalent value as subsidiary or alternative to direct confiscation, as appropriate in accordance with national law.
(15) Subject to a final conviction for a criminal offence, it should be possible to confiscate instrumentalities and proceeds of crime, or property the value of which corresponds to such instrumentalities or proceeds. Such final conviction can also result from proceedings in absentia. When confiscation on the basis of a final conviction is not possible, it should nevertheless under certain circumstances still be possible to confiscate instrumentalities and proceeds, at least in the cases of illness or absconding of the suspected or accused person. However, in such cases of illness and absconding, the existence of proceedings in absentia in Member States would be sufficient to comply with this obligation. When the suspected or accused person has absconded, Member States should take all reasonable steps and may require that the person concerned be summoned to or made aware of the confiscation proceedings.
(16) For the purposes of this Directive, illness should be understood to mean the inability of the suspected or accused person to attend the criminal proceedings for an extended period, as a result of which the proceedings cannot continue under normal conditions. Suspected or accused persons may be requested to prove illness, for example by a medical certificate, which the court should be able to disregard if it finds it unsatisfactory. The right of that person to be represented in the proceedings by a lawyer should not be affected.
(17) When implementing this Directive in respect of confiscation of property the value of which corresponds to instrumentalities, the relevant provisions could be applicable where, in view of the particular circumstances of the case at hand, such a measure is proportionate, having regard in particular to the value of the instrumentalities concerned. Member States may also take into account whether and to what extent the convicted person is responsible for making the confiscation of the instrumentalities impossible.
(18) When implementing this Directive, Member States may provide that, in exceptional circumstances, confiscation should not be ordered, insofar as it would, in accordance with national law, represent undue hardship for the affected person, on the basis of the circumstances of the respective individual case which should be decisive. Member States should make a very restricted use of this possibility, and should only be allowed to provide that confiscation is not to be ordered in cases where it would put the person concerned in a situation in which it would be very difficult for him to survive.
(19) Criminal groups engage in a wide range of criminal activities. In order to effectively tackle organised criminal activities there may be situations where it is appropriate that a criminal conviction be followed by the confiscation not only of property associated with a specific crime, but also of additional property which the court determines constitutes the proceeds of other crimes. This approach is referred to as extended confiscation. Framework Decision 2005/212/JHA provides for three different sets of minimum requirements that Member States can choose from in order to apply extended confiscation. As a result, in the process of transposition of that Framework Decision, Member States have chosen different options which resulted in divergent concepts of extended confiscation in national jurisdictions. That divergence hampers cross-border cooperation in relation to confiscation cases. It is therefore necessary to further harmonise the provisions on extended confiscation by setting a single minimum standard.
(20) When determining whether a criminal offence is liable to give rise to economic benefit, Member States may take into account the modus operandi, for example if a condition of the offence is that it was committed in the context of organised crime or with the intention of generating regular profits from criminal offences. However, this should not, in general, prejudice the possibility to resort to extended confiscation.
(21) Extended confiscation should be possible where a court is satisfied that the property in question is derived from criminal conduct. This does not mean that it must be established that the property in question is derived from criminal conduct. Member States may provide that it could, for example, be sufficient for the court to consider on the balance of probabilities, or to reasonably presume that it is

substantially more probable, that the property in question has been obtained from criminal conduct than from other activities. In this context, the court has to consider the specific circumstances of the case, including the facts and available evidence based on which a decision on extended confiscation could be issued. The fact that the property of the person is disproportionate to his lawful income could be among those facts giving rise to a conclusion of the court that the property derives from criminal conduct. Member States could also determine a requirement for a certain period of time during which the property could be deemed to have originated from criminal conduct.

(22) This Directive lays down minimum rules. It does not prevent Member States from providing more extensive powers in their national law, including, for example, in relation to their rules on evidence.

(23) This Directive applies to criminal offences which fall within the scope of the instruments listed herein. Within the scope of those instruments, Member States should apply extended confiscation at least to certain criminal offences as defined in this Directive.

(24) The practice by a suspected or accused person of transferring property to a knowing third party with a view to avoiding confiscation is common and increasingly widespread. The current Union legal framework does not contain binding rules on the confiscation of property transferred to third parties. It is therefore becoming increasingly necessary to allow for the confiscation of property transferred to or acquired by third parties. Acquisition by a third party refers to situations where, for example, property has been acquired, directly or indirectly, for example through an intermediary, by the third party from a suspected or accused person, including when the criminal offence has been committed on their behalf or for their benefit, and when an accused person does not have property that can be confiscated. Such confiscation should be possible at least in cases where third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer was carried out free of charge or in exchange for an amount significantly lower than the market value. The rules on third party confiscation should extend to both natural and legal persons. In any event the rights of bona fide third parties should not be prejudiced.

(25) Member States are free to define third party confiscation as subsidiary or alternative to direct confiscation, as appropriate in accordance with national law.

(26) Confiscation leads to the final deprivation of property. However, preservation of property can be a prerequisite to confiscation and can be of importance for the enforcement of a confiscation order. Property is preserved by means of freezing. In order to prevent the dissipation of property before a freezing order can be issued, the competent authorities in the Member States should be empowered to take immediate action in order to secure such property.

(27) Since property is often preserved for the purposes of confiscation, freezing and confiscation are closely linked. In some legal systems freezing for the purposes of confiscation is regarded as a separate procedural measure of a provisional nature, which may be followed by a confiscation order. Without prejudice to different national legal systems and to Framework Decision 2003/577/JHA, this Directive should approximate some aspects of the national systems of freezing for the purposes of confiscation.

(28) Freezing measures are without prejudice to the possibility for a specific property to be considered evidence throughout the proceedings, provided that it would ultimately be made available for effective execution of the confiscation order.

(29) In the context of criminal proceedings, property may also be frozen with a view to its possible subsequent restitution or in order to safeguard compensation for the damage caused by a criminal offence.

(30) Suspected or accused persons often hide property throughout the entire duration of criminal proceedings. As a result confiscation orders cannot be executed, leaving those subject to confiscation orders to benefit from their property once they have served their sentences. It is therefore necessary to enable the determination of the precise extent of the property to be confiscated even after a final conviction for a criminal offence, in order to permit the full execution of confiscation orders when no property or insufficient property was initially identified and the confiscation order remains unexecuted.

(31) Given the limitation of the right to property by freezing orders, such provisional measures should not be maintained longer than necessary to preserve the availability of the property with a view to possible subsequent confiscation. This may require a review by the court in order to ensure that the purpose of preventing the dissipation of property remains valid.
(32) Property frozen with a view to possible subsequent confiscation should be managed adequately in order not to lose its economic value. Member States should take the necessary measures, including the possibility of selling or transferring the property to minimise such losses. Member States should take relevant measures, for example the establishment of national centralised Asset Management Offices, a set of specialised offices or equivalent mechanisms, in order to effectively manage the assets frozen before confiscation and preserve their value, pending judicial determination.
(33) This Directive substantially affects the rights of persons, not only of suspected or accused persons, but also of third parties who are not being prosecuted. It is therefore necessary to provide for specific safeguards and judicial remedies in order to guarantee the preservation of their fundamental rights in the implementation of this Directive. This includes the right to be heard for third parties who claim that they are the owner of the property concerned, or who claim that they have other property rights ("real rights", "ius in re"), such as the right of usufruct. The freezing order should be communicated to the affected person as soon as possible after its execution. Nevertheless, the competent authorities may postpone communicating such orders to the affected person due to the needs of the investigation.
(34) The purpose of communicating the freezing order is, inter alia, to allow the affected person to challenge the order. Therefore, such communication should indicate, at least briefly, the reason or reasons for the order concerned, it being understood that such indication can be very succinct.
(35) Member States should consider taking measures allowing confiscated property to be used for public interest or social purposes. Such measures could, inter alia, comprise earmarking property for law enforcement and crime prevention projects, as well as for other projects of public interest and social utility. That obligation to consider taking measures entails a procedural obligation for Member States, such as conducting a legal analysis or discussing the advantages and disadvantages of introducing measures. When managing frozen property and when taking measures concerning the use of confiscated property, Member States should take appropriate action to prevent criminal or illegal infiltration.
(36) Reliable data sources on the freezing and confiscation of the proceeds of crime are scarce. In order to allow for the evaluation of this Directive, it is necessary to collect a comparable minimum set of appropriate statistical data on freezing and confiscation of property, asset tracing, judicial and asset disposal activities.
(37) Member States should endeavour to collect data for certain statistics at a central level, with a view to sending them to the Commission. This means that the Member States should make reasonable efforts to collect the data concerned. It does not mean, however, that the Member States are under an obligation to achieve the result of collecting the data where there is a disproportionate administrative burden or when there are high costs for the Member State concerned.
(38) This Directive respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union ("the Charter") and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR"), as interpreted in the case-law of the European Court of Human Rights. This Directive should be implemented in accordance with those rights and principles. This Directive should be without prejudice to national law in relation to legal aid and does not create any obligations for Member States¡¯ legal aid systems, which should apply in accordance with the Charter and the ECHR.
(39) Specific safeguards should be put in place, so as to ensure that as a general rule reasons are given for confiscation orders, unless when, in simplified criminal proceedings in minor cases, the affected person has waived his or her right to be given reasons....
(41) Since the objective of this Directive, namely facilitating confiscation of property in criminal matters,

cannot be sufficiently achieved by the Member States but can rather be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective....
(42) ... Ireland has notified its wish to take part in the adoption and application of this Directive. In accordance with that Protocol, Ireland is to be bound by this Directive only in respect of the offences covered by the instruments by which it is bound.
(43)..., the United Kingdom is not taking part in the adoption of this Directive and is not bound by it or subject to its application. Subject to its participation in accordance with Article 4 of that Protocol, the United Kingdom is to be bound by this Directive only in respect of the offences covered by the instruments by which it is bound.
(44) ... Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application

Countries may act to help other countries recover assets that are the proceeds of crime or corruption. In 2010 Attorney General Holder discussed a new **Kleptocracy Asset Recovery Initiative:**[4]

... the United States will act in partnership and in common cause to help the African Union achieve its goals and fulfill its mission.
There are four specific areas where, I believe, America's support must continue and where I hope our partnership can be strengthened: in combating global terrorism and international crime; in promoting good governance and the rule of law; in creating the conditions and capacity for economic development; and, finally, in ensuring that Africa's women and girls are no longer disproportionately affected by violence or denied basic rights and equal opportunities to learn, to dream, and to thrive.
In each of these areas, the United States intends to serve, not as a patron but as a partner – as a collaborator, not a monitor.
First of all, because opportunity and prosperity cannot be realized without security, the United States will continue to direct every resource and tool at our command – from diplomacy and military tactics to our courts and intelligence capabilities – to defeat the global terror network. In protecting our people and defending our allies, we will respect the sovereignty of nations, as well as the rule of law. And we will look to engage more AU member nations in this work.
Second, we will strengthen current efforts to promote good governance and to combat and prevent the costs and consequences of public corruption.
Today, when the World Bank estimates that more than one trillion dollars in bribes are paid each year out of a world economy of 30 trillion dollars, this problem cannot be ignored. And this practice must never be condoned. As many here have learned – often in painful and devastating ways – corruption imperils development, stability, competition, and economic investment. It also undermines the promise of democracy.
As my nation's Attorney General, I have made combating corruption, generally and in the United States, a top priority. And, today, I'm pleased to announce that the U.S. Department of Justice is launching a new Kleptocracy Asset Recovery Initiative aimed at combating large-scale foreign official corruption and recovering public funds for their intended – and proper – use: for the people of our nations. We're

[4] Attorney General Holder at the African Union Summit, Kampala, Uganda (Jul. 25, 2010) at http://www.justice.gov/ag/speeches/2010/ag-speech-100725.html.

assembling a team of prosecutors who will focus exclusively on this work and build upon efforts already underway to deter corruption, hold offenders accountable, and protect public resources.
And although I look forward to everything this new initiative will accomplish, I also know that prosecution is not the only effective way to curb global corruption. We will continue to work with your governments to strengthen the entire judicial sector, a powerful institution in our democracy which depends on the integrity of our laws, our courts, and our judges. We must also work with business leaders to encourage, ensure, and enforce sound corporate governance. We should not, and must not settle for anything less.

In March 2014 the Department of Justice announced that it had frozen more than $458 million in corruption proceeds that former Nigerian dictator Sani Abacha and friends had spread around the world. [5] The complaint [6] describes three criminal schemes: the embezzlement of money from the Central Bank of Nigeria based on claims the monies were necessary for national security, a purchase of non-performing government debt at inflated prices, and the extortion of money from a French company and its local affiliate with respect to government contracts. The monies seem to have moved through the AUS and then been invested in London. The complaint describes the movement of the money and states: "in effect the conspirators lent money stolen from Nigeria back to Nigeria with zero risk and at enormous profit. By 2007, the bonds were liquidated, and the proceeds from the sale of the bonds, together with the proceeds of the Debt Buy-Back Fraud and Extortion, were deposited into the defendant accounts, using the defendant corporate entities and through U.S. financial transactions, as described herein. The defendant corporate entities are registered in the British Virgin Islands, and bank accounts and investment firms holding the other defendant assets are located in the United Kingdom, France, and the Bailiwick of Jersey." The UK courts co-operated in freezing the funds.[7] Nigeria has announced that it proposes to claim the funds.[8]

A recent Report from the Stolen Asset Recovery Initiative[9] states:

The fight against the bribery of foreign public officials is critical to the global fight against corruption

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[5] U.S. Freezes More Than $458 Million Stolen by Former Nigerian Dictator in Largest Kleptocracy Forfeiture Action Ever Brought in the U.S. (Mar. 5, 2014) at http://www.justice.gov/opa/pr/2014/March/14-crm-230.html

[6] Complaint in US v All Assets Held in Account Number 80020796, in the Name of Doraville Properties Corporation, at Deutsche Bank International Limited , in Jersey, Channel Islands, and All Interest, Benefits or Assets Traceable Thereto at http://www.justice.gov/iso/opa/resources/765201435135920471922.pdf .

[7] In Re Abacha [2014] EWHC 993 (Comm) at http://www.bailii.org/ew/cases/EWHC/Comm/2014/993.html.

[8] Nigeria To Claim $458 Abacha Loot Facing Forfeiture Proceedings In United States (Mar. 27, 2014) at http://saharareporters.com/news-page/nigeria-claim-458-abacha-loot-facing-forfeiture-proceedings-united-states .

[9] Jacinta Anyango Oduor et al, Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery (2013).

overall. It entails pursuing wiThequal determination those who pay bribes and those who accept them. Over the past decade, there has been significant progress in battling foreign bribery, with the clear trend of many cases being resolved through settlements rather than full trials. A settlement may be defined as any procedure short of a full trial.

This trend raises a number of questions that should be considered by the international community: What happens to the money associated with the settlements, and is it being returned to those most directly harmed by the corrupt practices? What are the effects of uneven transparency and varying levels of judicial review of these settlements? What is the impact of settlements on legal actions against the givers and recipients of bribes, in particular, on actions by the countries whose officials have allegedly been bribed?

.... The study found that across the globe there is an increased use of settlements to enforce foreign bribery laws. This growth in the use of settlements is taking place in jurisdictions irrespective of either common law or civil law tradition and in both developed and developing countries.

Progress has been made in recent years in the prosecution of foreign bribery cases. However, the report illustrates in detail for the fi rst time how little of the monetary sanctions collected by the countries of enforcement has been returned to the countries whose officials have been—or are alleged to have been—bribed.

Left Out of the Bargain looked at 395 settlements cases that took place between 1999 and mid-2012. These cases resulted in a total of $6.9 billion in monetary sanctions. Nearly $6 billion of this amount resulted from monetary sanctions imposed by a country different from the one that employed the bribed or allegedly bribed official. Most of the monetary sanctions were imposed by the countries where the corrupt companies (and related individual defendants) are headquartered or otherwise operate. Of the nearly $6 billion imposed, only about $197 million, or 3.3 percent, has been returned or ordered returned to the countries whose officials were bribed or allegedly bribed.

The main conclusion of the report is that significant monetary sanctions have been imposed with hardly any of the respective assets being returned to the countries whose officials have allegedly been bribed. The report highlights how the overwhelming majority of the jurisdictions harmed by foreign bribery are in the developing world and that the vast majority of the settlements involve state-owned enterprises and public procurement contracts, including projects that range from tens to hundreds of millions of dollars in infrastructure and natural resources sectors.

The reality is that, in the majority of settlements, the countries whose officials were allegedly bribed have not been involved in the settlements and have not found any other means to obtain redress...

Countries whose officials were allegedly bribed should step up their own efforts to mount effective investigations and prosecutions against the providers and recipients of these bribes. This would greatly improve their prospects of recovering assets and bolster deterrence against active and passive corruption.

• All jurisdictions negotiating settlements should proactively inform other affected countries of the legal avenues, both criminal and civil, available to them to seek redress and to recover assets. The study identifies innovative ways in which countries whose officials have been (or allegedly been) bribed could pursue the return of proceeds of corruption or other monetary compensation in the context of an enforcement action in another jurisdiction.

• Countries should consider pursuing legal proceedings irrespective of whether a settlement has taken place or may be under way in another jurisdiction. Prohibitions on trying the same crime twice (the principles of double jeopardy and ne bis in idem) may not necessarily preclude cases from being brought elsewhere, especially given the likely variations in the facts and the parties. Settlements do not change any legal obligation on the country where the settlement is concluded to respond to a request for international assistance.

• In the vast majority of settled cases, the jurisdictions whose officials were allegedly bribed have played little role in the settlement process, providing them limited opportunity to recover any of the proceeds of

such settlements, and they have not oft en undertaken their own prosecutions of such offences following settlements outside their jurisdictions. The report highlights a small number of cases to date in which such roles have been available and under what circumstances and illustrates future possibilities. The report provides examples of assets being returned in the form of reparations, restitution, and voluntary payments and even under a three-country memorandum of understanding. The funds have been returned directly to countries or to special funds administered by government or nongovernmental organizations for the benefit of the people of the affected countries. In chronicling these examples, the study calls for affected countries to be involved in settlement negotiations and to establish other ways in which they can seek redress for the corrupt acts.

• This study calls for greater transparency in settlements. The negotiation of settlements takes place between the authorities and implicated parties behind closed doors. One critical step would be to inform affected jurisdictions that a negotiation toward a settlement is taking place. The study shows that forms of settlements (such as Non-Prosecution Agreement, Deferred Prosecution Agreement, penalty notice, or a guilty plea) provide varying degrees of transparency. In some jurisdictions, the outcomes of settlements are publicly available, illustrating that greater transparency is possible. Most settlements are negotiated with little oversight by a judge and sometimes without any public hearing at the conclusion. The report emphasizes that once an agreement has been reached, it should not be shielded from public view. More transparency helps ensure fairness to all affected jurisdictions and parties.

In a response to this report, Matthew Stephenson drew a distinction between the recovery of proceeds of corruption in the hands of the recipients and actions taken against the payers of bribes.[10] He also distinguished between "a joint or coordinated enforcement action, in which multiple enforcers work together to reach a comprehensive settlement with the defendant corporation, and follow-on (or "me too") enforcement actions, brought by other jurisdictions or parties after one jurisdiction has already reached a settlement with the defendant."[11]

[10] What's Left Out of "Left Out of the Bargain" at http://globalanticorruptionblog.com/2014/03/18/whats-left-out-of-left-out-of-the-bargain/#more-112

[11] Id.