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Prompted by the U.S. practice of resolving foreign bribery prosecutions through pre-trial settlements, other nations are beginning to do so as well. In recent years, Denmark, Germany, Italy, the Netherlands, Norway, Switzerland, and the United Kingdom have all settled criminal charges alleging their nationals bribed foreign officials short of a full trial. Settlements are a negotiated resolution. Rather than a trial where the accused can be judged guilty, he or she or it (if the defendant is a corporation) concedes wrongdoing. In return, the prosecution agrees to a punishment less than what the court could impose were the defendant convicted. In some countries, the agreement on punishment may legally bind the court, and even where the courts remain free to decide the sentence, they almost always impose the one the two parties agreed upon. Depending on national law, the settlement may allow a defendant to admit to a lesser charge than bribery or, in the case of a corporation, permit a subsidiary rather than the parent corporation to admit guilt.

Concerns about Settlements

Settlement is now standard practice in OECD foreign bribery cases. Since February 1999, when the OECD Antibribery Convention entered into force, and June 1, 2014, the latest period for which figures are available, the OECD Secretariat reports that more than two-thirds of all prosecutions have been resolved by settlement. The convention requires member states to prosecute their nationals for bribing foreign officials, and while settlement is permitted, the settlement must comply with article three of the convention. That article requires governments to impose upon those who have bribed foreign officials “effective, proportionate and dissuasive criminal penalties.”

Anticorruption activists say that many settlements have ignored these requirements. The major complaint is that corporations have paid too little to settle the cases – far less than the gains realized from the bribery. In separate reports issued after the OECD data on settlements

appeared, Transparency International and Corruption Watch UK both contended that not only are the amounts the companies have had to pay to resolve charges been too low but settlements have let corporate defendants off too easily in other ways. They have:

i) allowed the corporate executives involved to escape punishment,

ii) failed to exclude the firms from bidding on public contracts,

iii) failed to impose more stringent terms on companies where, in TI's words, "bribery has been systematic and pervasive over a long period of time," and

iv) omitted provisions compensating those injured by the bribery.

In a letter to the OECD Secretary General signed by Global Witness, the UNCAC Coalition, TI and Corruption Watch, the four urge the OECD to provide guidelines countries should follow when settling corporate bribery prosecutions. Guidelines are now under development.

Purpose of Paper

This paper examines how the questions raised about settlement affects developing countries. First and most importantly, should developing states even consider entering into settlements with those accused of bribing their public officials or committing other corruption-related offenses? If so, what principles should guide the settlement decision? Second, what impact can settlements in OECD nations have on developing states, and should the OECD's forthcoming guidelines address them? In answering these questions, the paper summarizes current learning on the effects of settlements on developing countries; analyzes how a settlement in one country affects criminal liability another country; considers if and how a secret settlement might obstruct justice or hinder investigations in other countries; and identifies questions requiring more research.

Developing Country Settlements

No matter a country's level of development, when a criminal case is brought the considerations the prosecution and the defense each face when deciding whether to go to trial or settle are the same. The defendant wants to minimize the punishment it faces. For corporations, punishment includes not only the fines the company would have to pay but prison terms executives could face in related proceedings, ineligibility to compete for public contracts, loss of future business from damage to reputation, legal fees, monies paid to crime victims, and any other cost that would result from conviction.

Assuming prosecutors are neither corrupt nor self-serving, the prosecution's incentive is to see the defendant's punishment is. in the words of the OECD antibribery convention, "effective, proportionate and dissuasive." And at the least cost to the state. Cost is an important consideration. Trials, particularly of complex corporate crimes like bribery, are costly. Lawyers and investigators must put in long hours over weeks if not months; witnesses and documentary

evidence located and brought to court; and finally, there is the court's time spent on the case. If the case settles short of a full trial, these resources can be used to pursue other cases.

As both TI and Corruption Watch acknowledge, settlement can thus further the public interest by freeing up resources for use elsewhere. But only if, as letter to the OECD Secretary General explains, the settlement is sufficiently severe to deter others tempted to pay bribes.

The OECD's own data suggests that this may not be the case, that settlements of foreign bribery cases are too lenient. In the 37 cases where data comparing the amount paid with a measure of the benefit realized was available, the OECD reports that in 17, the payment was less than 50 percent of the benefit. Other available data shows that corporate executives often avoided jail time and that victims were rarely compensated. As the four groups explain in their letter to the OECD Secretary General, the solution is to stiffen the terms offered defendants in settlement negotiations. Prosecutors should demand monetary payments commensurate with benefits realized from the crime, refuse to include any provision excusing or immunizing corporate executives from criminal responsibility, and provide for victim remedies. If a defendant refuses to agree to these terms, the case should be set down for trial.

These same principles should guide developing countries when considering whether to settle any case of corruption. However, just as in an OECD country, developing country prosecutors can only demand stiffer settlements if they are in a strong bargaining position vis-à-vis the defendant. This first requires that defendants think that if the settlement terms are refused, they will be convicted. Indeed, the more likely it is defendants believe they will be convicted if trial is had, the more likely a settlement will occur. This gives rise to the paradoxical conclusion that the principal function of a criminal justice system is to not to bring defendants to trial but to induce them to settle. On terms that, again as the OECD convention puts it, are "effective, proportionate and dissuasive."

Preconditions for Settlement. For defendants to believe conviction is the only alternative to settlement, defendants must believe that:

1) investigators have developed facts sufficient to prove a violation,

2) the government is willing and able to prosecute the case, and

3) the court can promptly and accurately determine the facts and apply the law.

If defendants think the criminal justice chain is incapable of performing each of these tasks for whatever reason – lack of capacity, scarcity of resources, corruption, lengthy delay – there no reason to accept a settlement, or at least one with any bite. Rejecting settlement means the case will to trial, which will either end in an acquittal, or as some complain, will last far beyond the lifespan of anyone involved.

The certainty of conviction absent settlement is not the only condition required for prosecutors to have enough leverage to demand a tough settlement. The punishment a defendant faces if convicted must also be substantial. If the law provides that the fine for bribery is €1 million, all else equal no defendant would agree to pay more in settlement.

While these principles hold whether a nation is industrialized or developing, their application depends upon country conditions, and in many developing countries, conditions are far different from those in OECD nations. Most notably, anticorruption agencies, prosecutions services, and even the courts have less resources and fewer trained personnel than those in OECD member states. The weakness of many countries' criminal justice systems has been raised at every meeting of the parties to UNCAC; at each meeting, developing states have asked wealthier states for technical assistance to strengthen the agencies responsible for investigating, prosecuting, and adjudicating corruption cases.

Criminal justice paradox. The paradox of the criminal justice system creates a cruel bind for many developing states. Until companies charged with corruption believe they will be convicted at trial, they will not agree to a pre-trial settlement. Cases must then be tried, soaking up resources that could be used to pursue more violators and thus lessening deterrence. Even worse, in very weak systems taking cases to trial may encourage more corruption. A string of acquittals, or interminable delays in bringing a case to a conclusion, may prompt those who might believe they would be caught and convicted for corruption to see they have nothing to fear.

States with weak criminal justice systems should concentrate the financial and human resources available for corruption cases on those they would have a good chance of winning if there is a trial. Successful prosecutions or stringent settlements will enhance the credibility of the system and thus the odds of more settlements on terms favorable to the prosecution. In addition to concentrating resources on fewer cases, developing states should redouble their efforts to partner with other countries on corruption cases. Most cases of any size involve actions that occurred in more than one country, with bribery often involving a developing state and a wealthier, industrialized state. If defendants see that they are up against not just a developing state but an industrialized one as well, they will be more willing to agree to tough settlement terms than if their only adversary is under-resourced and over-worked.

An interim measure developing states might consider is opening their courts to those injured by corrupt acts. Article 35 of UNCAC requires parties to ensure that those

> "who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation."

A forthcoming volume from the Open Society Justice Initiative describes how in countries as different as Cambodia and Nigeria actions brought for damages by corruption victims and civil

society groups representing them have furthered justice by one, compensating those injured by corrupt acts and two, deterring future corruption. In countries still erecting strong, robust criminal justice systems, closer attention to the requirement of article 35 is merited.

Certainly in the short-run, developing states should review the penalties provided by law for corruption. If the maximum does not exceed by a significant amount the gains from paying a bribe, at least some companies will treat the penalty simply as the cost of doing business. And as the discussion above explains, no settlement proposal can demand more than what a defendant would have to pay upon conviction at trial. Judging by research on fines and settlements of foreign bribery cases in the United States, the sums in OECD nations are also too low. The forthcoming guidelines should address whether OECD nations need to raise the statutory maximum to give prosecutors more leverage in settlement negotiations.

Accountability. In their letter to the OECD Secretary General, civil society groups urge that those responsible for negotiating settlements in OECD states be accountable for the settlement terms. So too should those who negotiate settlements in developing nations. In the absence of accountability, settlements may fail to advance the public interest. One possibility is that prosecutors may be bribed or intimidated to agree to favorable terms. There may also be career incentives at work. It may be better for a prosecutor's career to agree to a weak settlement than risk a loss at trial.

While accountability is essential, the challenge is how to achieve it. Transparency can be helpful. If prosecutors know the terms will be public, and thus subject scrutiny, they are less likely to make "sweet heart" deals. While the four organizations urge judicial oversight, this solution is problematic for several reasons. Separation of powers principles in some countries bar courts from overseeing prosecutors' decisions. Even where this is not the case, courts are unlikely to provide effective review unless they spend considerable time receiving and weighing the evidence that would be presented at trial. Avoidance of these measures is one reason why the prosecution and defendants agree to settle in the first place. Internal review by senior prosecutors is one alternative; the U.S. Department of Justice procedures for assessing the settlement terms proposed by front-line prosecutors provides an example.

OECD Country Settlements

A settlement is in effect a contract between a nation's prosecutors and the defendant, and like any contract it can affect the rights of those who are not parties. As the number of settlements in OECD countries has grown, developing country governments, civil society, and academics have expressed rising concern about the effect of these settlements on developing states and their citizens. In 2014 the World Bank/UNODC Stolen Asset Recovery Initiative identified three ways these rights could be comprised:

1) a settling party could avoid later prosecution in other countries by asserting the rule of *ne bid in idem* or double jeopardy, which provides that a defendant cannot be tried twice for the same offense;

2) settling prosecutors might be reluctant to provide information learned from their investigation to those in other jurisdictions, simply because they are tired of the case and want to move on or because they are precluded from doing so by the settlement; and

3) monies collected from a defendant in settlement with an OECD country might prevent developing countries from securing the return of stolen assets or compensation for the damages their citizens.

The StAR report concluded that as a matter of law the first concern, the possibility that a settling defendant could avoid prosecution in another jurisdiction by claiming double jeopardy, was remote. Its authors found no case where a court decision in one country barred prosecution in a second and recent research reveals none since the report's 2014 publication. The absence of any case law makes it even less likely a settlement agreement could be interposed to defeat a prosecution. Moreover, as a practical matter the accused would be raising the defense in the domestic court of the country prosecuting the matter, a further reason why the claim would be highly unlikely to succeed.

The StAR authors also found no instances, at least as of 2014, where a settlement had lessened the settling country's willingness to cooperate with a second country. Indeed, "depending upon how the settlement is structured," they argued, a settlement "could actually improve the likelihood of international cooperation." But as they acknowledged, most requests for assistance are confidential and there is thus no way of being sure there have not been instances where a request has been denied because of a settlement.

Revenue division from settlements. The most significant concern about settlements -- raised in the StAR report, the TI and Corruption Watch papers, academic commentary, and most recently in a note the UNODC Secretariat prepared for the November 2017 meeting of UNCAC state parties – is their effect on asset recovery and victim compensation in developing states. The concern arises from the enormous gap between monies paid OECD countries in settlement and the amounts developing states have recovered. From mid-2012 to May 1, 2016, the secretariat found that of the $3.98 billion collected through settlements and related mechanisms, save for $7 million the U.K. returned to Tanzania, all funds went to countries whose firms or nationals had paid bribes and none to countries whose officials had allegedly been bribed.

Although this enormous gap raises concerns, care must be taken before drawing any conclusion from the numbers alone. Violations of an OECD nation's antibribery laws leave a defendant open to at least four distinct monetary claims:

Forfeiture/confiscation: Subject to the nuances of national law, prosecutors can seize assets obtained through illegal means, such as bribe payments.

Punitive Fines: Fines are penalties imposed by law with the primary purpose of deterring future wrongdoing and perhaps too as a sign of condemnation or a means of retribution.

Compensation: As explained above, UNCAC parties must provide means for those damaged by corrupt acts to recover compensation.

Disgorgement: The laws of most jurisdictions require a wrongdoer to surrender the proceeds of the unlawful activity.

It could well be that the entire $3.98 billion paid to settle cases in OECD states represents a compromise of one or more of these claims. To determine whether it was, the UNODC requested information from countries that had settled cases. As of the September 4, 2017, the day before its report to UNCAC state parties, so few states had provided information that it could only reiterate what it had said in an earlier, July 2016 paper: there is "a need for more information" to make "an accurate assessment" of the terms of the various settlements.

Settlement concerns. The continuing concerns about settlements, expressed again at the just concluded meeting of UNCAC state parties, seems to be sparked by two fears. One is practical. That no matter whether OECD states have a legal right to the amounts agreed to in settlement, even the largest corporations can only afford to pay so much. If that limit is reached in a settlement with an OECD member, there simply won't be enough funds available to pay a fine levied by a developing state in a later proceeding. Nor will there be monies to compensate corruption victims in these states.

The second fear, similar to that raised about double jeopardy, is a risk of multiple claims against the same asset. An example might be disgorgement. Assume as part of a settlement with an OECD country a company disgorges the profits earned from bribing a developing country national. In a later disgorgement proceeding brought against the company by the developing state, the company might avoid liability by arguing it has already parted with the ill-gotten gains from its crime.

The possibility of multiple claims against the same funds can also arise in a forfeiture proceeding -- albeit by a different legal route. An example is the 2009 settlement of *United States v. Diaz*, a prosecution of a United States firm for bribing a Haitian official. At common law, Haiti would be entitled to the bribe money under the theory of constructive trust, a legal fiction providing that when an employee accepts a bribe, he or she accepts it on behalf of the employing government. In *Diaz*, the bribe was deposited in a U.S. bank, making it subject to U.S. anti-money laundering laws and hence giving the U.S. government a right to the funds as

well. Haiti and the U.S. government's competing claims were resolved as part of the settlement; the U.S. waived its right to the money in favor of the Haitian government.

Global Settlements. The easiest way to avoid competing claims would be through the negotiation of a global settlement, one that would take account of the interests of all countries whose laws defendant had violated. A global settlement would also be in the interest of the defendant; for it would put the matter to rest everywhere once and for all. Otherwise, a defendant could face the same fate as the Siemens executives who settled bribery charges with Munich prosecutors. The settlement resolved charges they had bribed officials of several foreign governments including Greece. The government of Greece was not a party to the settlement and does not recognize it. It has issued warrants for the executives' arrest, and so the executives cannot travel to any country which might execute the Greek warrants unless they are willing to stand trial in Greece for charges they thought they had resolved.

Settlement guidelines. While a global settlement binding all parties is the ideal, many obstacles must be overcome to reach one, from differences in law and legal culture to political disputes among the countries involved. Where a global settlement it not possible, the second-best solution is for a settling country to take steps to minimize the chance its settlement will prejudice the rights of other countries. The 2014 StAR report suggested seven measures. They are summarized below followed by suggested emendations.

1. *Oblige the settling defendant, under the direction of the settling jurisdiction, to cooperate with other countries investigating related matters.* "Under the direction" is a subtle but critical qualification. It is unfortunate but necessary to say that not all countries' criminal justice systems can be trusted, and where the requested cooperation calls for identifying a confidential informant or revealing other sensitive information, refusal may be necessary. Best the decision lie with the settling government, which is better placed to take what could be a heated response to a denial, then a settling defendant.

2. *State explicitly in the settlement the right of the settling nation to conduct further investigations to comply with a request from an UNCAC treaty partner*. Although such language does no more than restate existing law, it would put to rest fears that a settling country is "selling out" others to secure a settlement. It would also serve as a salutary reminder to those negotiating a settlement that one provision a settling defendant might covet, a ban on aiding other jurisdictions, is off the table.

3. *Make settlement agreements and the facts supporting them public.* The StAR authors explain that this would ensure other nations could easily determine if they should open their own investigation. Disclosure is also important for accountability reasons. The one caveat is that stated in paragraph one: it may be necessary to keep secret the identify of informants or other information that could put an individual in jeopardy or compromise an ongoing investigation.

4. *Require defendants to sign a complete statement of facts admitting to their acts of foreign bribery*. The rationale for this requirement is clear: to ease the burden on other states of investigating and prosecuting cases. Why should they have to cover ground another investigation has already? If the defendant has signed a sworn statement in a settlement with an OECD country admitting he, she, or it bribed official X in a developing country, the developing country investigators and prosecutors will find it easy to make out a case against the defendant and official X for bribery. But behind the word "complete" are knotty issues. Suppose, while investigating, the OECD country had discovered information that the defendant had bribed police in the developing country to assign extra staff to protect its facilities from a terrorist attack? Exercising the discretion granted under their country's law, the OECD prosecutors decline to investigate further. Given such complications, some wiggle room must be left. Instead of "a complete statement of the facts, a "reasonable statement of the facts under the circumstances" is probably the best formulation possible.

5. *State clearly that the settlement does not resolve pending or future cases in other jurisdictions*. As explained above, a defendant settling in an OECD country cannot raise the settlement to prevent prosecution in another country; double jeopardy does not apply. On first reading, this measure might appear simply to restate existing law – harmless if unnecessary. But there are some cases where it could be important. Suppose in a settlement agreement with an OECD country the defense and the prosecution agree that all defendant's profits from the bribery have been disgorged. Or that assets in an offshore bank account are not part of the bribery scheme. In a later case, developing country prosecutors seek an order freezing or seizing the offshore assets, claiming either they constitute part the bribery scheme or are part of a disgorgement action. The offshore nation's court could conceivable rely upon the settlement agreement to deny a freeze or seizure request, a scenario one developing state posited at the recent UNCAC state parties' meeting. Inclusion of the suggested provisions would obviate the possibility.

6. *Notify proactively countries whose officials have been bribed or are affected in any way by the settlement.* A simple extension of the transparency that should be part of settlement agreements and is already a requirement of U.S. law. Since May 2015, U.S. federal prosecutors have been required to provide crime victims timely notification "of any . . . deferred prosecution agreement" offered a defendant. The Department of Justice considers foreign governments whose employees have taken bribes to be crime victims and provides them notice of settlements in foreign bribery cases.

7. *Enhance coordinated action in multiple jurisdictions.* A necessity as emphasized below.

Areas for Further Research

The discussion above spotlighted two areas where further research is required. The first is applied research: to collect more information about settlements of bribery cases. As the UNODC

Secretariat explained in its note to the November 2017 meeting of UNCAC state parties, its request to governments for this data has been largely ignored. One reason may simply be a lack of time or resources on the part of those with the information. That problem has an easy solution. A far more difficult one is prying the data out of countries that fear that if the terms of their settlements were known, they would be criticized by other governments, civil society, or their own citizens. Some countries might be persuaded to part with the requested information with further effort. Those that don't, and their reasons, should at least be brought to the attention of other UNCAC parties and civil society.

The second area of required research is academic. What level and type of punishment must be written into the law to deter bribery? Particularly by corporations. A group of American professors have a paper in draft that concludes the fines set by the U.S. Foreign Corrupt Practices Act are too low to discourage corporations from bribing foreign officials. This appears to be the only research directly on point, and while an important contribution, further research verifying their conclusion and extending it to other countries is needed. Particularly in view of recent work by leading students of corporate crime generally. University of Maryland Criminologist Sally Simpson led a review of the learning on deterring corporate crime through criminal prosecutions. The conclusion: "Corporate crime is a poorly understood problem with little known about effective strategies to prevent and control it." Surveying research on the deterrent impact of prosecution on the behavior of corporations and executives for the 2017 edition of the *Oxford Handbook on Criminology,* U.K. professors Michael Levi and Nicholas Lord observe that little can be said and much remains to be learned.

Conclusion

The last of the seven recommendations the 2014 StAR report urges is for governments to harmonize settlements and prosecutions by stepping up coordination across all jurisdictions affected by an act of bribery. Greater coordination poses a major challenge to the international community. It would require first an international convention where nations agreed to outlaw bribery. That would have to be followed by an on-going dialogue among law enforcement authorities, policymakers, and citizens on how to resolve the many practical issues prosecutions in different nations for the same act raise.

In short, harmonizing the investigation and prosecution of bribery cases requires exactly the process the international community has embarked upon, beginning with the almost universal acceptance of UNCAC and proceeding with regular exchanges, formal and informal, among law enforcement professionals, governments, and civil society.

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