

Left Out



Despite a major push in recent years to crack down on corporate bribes to foreign officials, virtually none of the money paid in penalties has gone back to countries where the crimes occurred. Preliminary results of a report on government settlements in hundreds of bribery cases showed that out of \$6.4 billion in penalties, only \$185 million, or less than three percent, went to compensate victim countries.

“Countries where the bribes have been paid, where the damages of corruption have taken place, are either not aware at all, or not being involved in the process,” said Oliver Stolpe, a senior advisor to the Stolen Asset Recovery Initiative (StAR) who led the study. StAR is a joint effort of the World Bank and the United Nations Office on Drugs and Crime.

This lack of inclusion is a major factor in the poor rate of return for settlement money, research suggests.

When companies pay bribes to steal contracts or bulldoze over regulations, it means big losses for countries where the crime took place. Over the last decade, the United Nations has tried to stanch the hemorrhaging with international agreements and a crackdown on graft. But increasingly, the errant companies’ home countries, such as the United States, the United Kingdom and other European nations have settled directly with offenders instead of resolving these cases through litigation.

“We have seen over the last ten years, finally, some real enforcement action against companies that paid bribes abroad,” said Stolpe, who first discussed the report’s findings at the International Anti-Corruption Conference in Brasília in November. “And the reason that we have seen that is basically due to the settlements.”

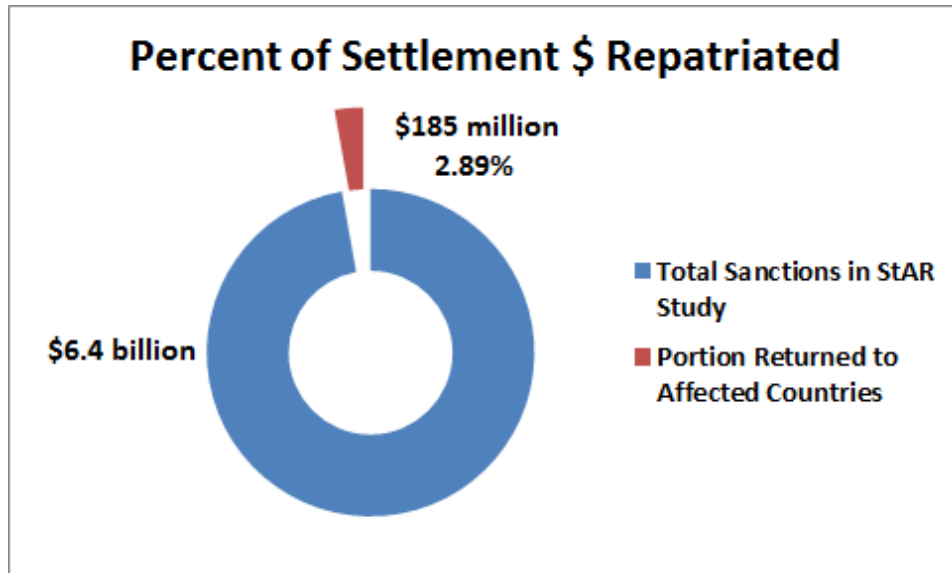
Despite the increase in prosecutions, the use of settlements is leaving victim countries out of the bargain. The StAR researchers covered a range of cases settled between 1999 and 2011. The amount of penalties in the study accounted for overall sanctions, not necessarily confiscated funds. Asset seizures and other

measures that effectively block offenders from the fruits of their graft accounted for only a third of the \$6.4 billion in penalties collected.

When a government prosecutes a company for violating its own laws, such as the Foreign Corrupt Practices Act in the United States, it faces no obligation to share fines or settlements with foreign governments.

But Maud Perdriel-Vaissiere, managing director of Sherpa, a Paris-based advocacy group for victims of economic crimes, said a system of asset recovery that bypasses direct victims of corruption is untenable.

“It is a big injustice,” she said, arguing that the practice actually fosters corruption. “If eventually the authorities decide to bring a case against [a] company, it is the country where the company is registered that gets the fines out of the settlement.”



Frustration prompted the Socio-Economic Rights and Accountability Project in Nigeria last year to write a letter to the U.S. Securities and Exchange Commission, demanding that the country be included in future negotiations.

The letter, reviewed by 100Reporters, asks for “adequate damages against multinational corporations involved in bribery in Nigeria.”

[The Socio-Economic Rights and Accountability Project appealed for to the SEC to include victim countries in bribery settlement cases. \(p. 2\)](#)

- SERAP is Well-Qualified to Propose and to Help Implement Sensible Discretionary Remedies for Victims of FCPA Violations.

In a country where systemic corruption and the resulting poverty, inequality and discrimination deprive many Nigerians of dignity and freedom to explore ways towards development and prosperity, SERAP works to hold government and public officials at the local, state and federal levels accountable for acts of corruption, which are conducive to violations of socio-economic rights of citizens. SERAP also aims to ensure Nigeria's full compliance with the human rights and anti-corruption treaties to which it has voluntarily subscribed. There are similar NGOs in other developing countries plagued by bribery and corruption.

SERAP and many comparable developing country NGOs are members of the UN Global Compact. They work closely with its office in New York to contribute to the Global Compact's objective of requiring businesses to work against corruption in all its forms, including extortion and bribery. SERAP also coordinates with Transparency International in Nigeria and Amnesty International in London. In addition, SERAP works with the UNCAC Coalition, a group of civil society organizations promoting the implementation of the UN Convention Against Corruption; among the Coalition's US members is the American Bar Association's Rule of Law Initiative.

SERAP receives support for its work from the MacArthur Foundation USA, The Royal Netherlands Embassy in Abuja (Nigeria's capital), the Open Society Initiative for West Africa (OSIWA) in Abuja, the National Endowment for Democracy USA, the International Commission of Jurists (ICJ), Amnesty International's International Secretariat in London, and the West African Bar Association, among others. Members of SERAP's International Advisory Board include Professor Dinah Shelton of George Washington University Law School, and Professor Donald Kommers of Notre Dame.

- SERAP's Experience in Nigeria Confirms That Bribery and Corruption Increase Costs to Victimized Government Entities And to Society At Large But That Damage Remedies Are Often Elusive.

It is axiomatic that victimized foreign government entities bear the cost of bribery and corruption of their officials. Procurement and investment agreements corrupted by bribery invariably lead to increased costs, not only in higher prices but also in needlessly expanded and ultimately inefficient projects. This usually results in excess costs of at least 10 percent as a direct result of the bribery and corruption. This has often been the case in Nigeria.

Victimized governmental agencies are, however, typically without a practical remedy for recovering their economic injury attributable to bribery and corruption. The US FCPA and similar laws in other OECD member states do not provide for private enforcement. International arbitration, if available under the terms of a contract, and if the home country government even permits a victimized entity to pursue it, is expensive and highly time-consuming, particularly when large multinational companies are defendants. While local law can, in theory, provide for a remedy, litigation in the local courts is often fraught with political risk, and can be time-consuming and expensive in the best of circumstances; even if such cases are eventually

The letter cites a 2011 case in which the U.S. Department of Justice rejected Costa Rica's request for restitution against an alleged bribe payer, Alcatel-Lucent. The letter said the department successfully argued that "in essence, because the senior employees of the Costa Rican entity were pervasively corrupt, the

entity itself was a guilty co-conspirator and thus was not entitled to restitution under US criminal laws.”

A spokesman for the Department of Justice declined to comment for this story.

Charles Monteith, Head of Legal and Case Consultancy for the Basel Institute’s International Centre for Asset Recovery, said the U.S. and other countries involved in settlements are often reluctant to repatriate money to nations where corruption is still rampant.

“There are problems with returning money to governments that have been involved in corruption. That’s the bottom line.”

There is also a host of sticky legal issues. In some countries, returning stolen assets requires that a particular victim be named—impossible in cases where a national budget has been raided.

Some governments do not allow companies to be criminally prosecuted, only people, Monteith added.

In most countries, only that part of a contract won through bribes is considered tainted. Tracing bribes to specific pieces of large and complex projects can bog down a case for years. In the United States and the United Kingdom, the entire amount of a dirty contract is considered to be illicit, and provides a starting point for negotiations.

“The repatriation system needs to be simpler. And it needs to be universally accepted,” Monteith said.

Akaash Maharaj, secretary-general of the Global Organization of Parliamentarians Against Corruption (GOPAC), said settlements should be ruled out unless “all of the money that is possible to be identified is returned to the rightful owners.”

Maharaj’s group is urging the United Nations Office of Drugs and Crime to set up enforceable guidelines around settlements in corruption cases. The issue is slated for consideration later this year at the Conference of the States Parties to the United Nations Convention against Corruption.

“Financial institutions that are part of the international system must agree to a broader range of common protocols and common regulations to assist the investigators of international crimes,” he said.

Even beyond settled cases, very little of the world’s recovered stolen assets end up back in the coffers of their home nations.

In 2003, 140 countries signed The United Nations Convention against Corruption, a breakthrough anti-graft agreement that established a legal means for nations to recover assets lost to corruption. But the aim of this convention has fallen short. According to the Organisation for Economic Co-operation and Development, out of an estimated \$1.2 billion assets frozen between 2006 and 2009, only \$277 million were returned to the country of origin.

A recent StAR report indicated the amount returned from illegally held assets over a 15-year period added up to only \$5 billion, a pittance compared to \$20 to \$40 billion in state revenues that StAR estimates developing countries lose through corruption each year.

Christian Larson, Program Officer on Economic Governance at the secretariat of the Organization for Security and Co-operation in Europe, said prosecutors and law enforcement agencies often have rules in place that allow recovered assets to be used to cover some of their costs.

“When countries engage private firms to assist with asset recovery, a lot of money goes to paying back the professionals who have helped to track it down and confiscate it.”

Requesting countries have complained that by the time legal proceedings surrounding the return of stolen assets are concluded, very little money is actually returned, Larson said.

Heather Lowe, legal counsel and director of government affairs at Global Financial Integrity, said the current system relies on Mutual Legal Assistance Treaties, which demand that countries requesting stolen assets make highly detailed claims to banks. Countries holding the money require hard evidence like bank account numbers and the exact amount of the suspicious funds. Each country has its own standards, and developing countries often don't have easy access to that level of detail—unless the countries leading the prosecution share information with them.

“A small country that is struggling financially needs to literally figure out exactly how to draft and phrase its request so that it comports with the other country's law before the other country will even consider it,” Lowe said.

And that can take a long time to get right. Lowe argues that the obstacles to recovering corruption damages are so great that countries should instead try to crack down on money laundering and block financial outflows in the first place.

“It is a far better use of resources to prevent those assets from fleeing in the future. And that, really, that's what we need to be focusing on,” she said.

Maharaj, of the lawmakers' body, said the stakes couldn't be higher. The amount of money the world loses to corruption each year, he said, could pay tenfold for all of the key priorities in tackling poverty, health, gender inequality, environment and other development goals that the United Nations pledged to reach by 2015.

“The failure to repatriate these funds almost certainly kills more people every year than war and famine combined.”