



Impact of foreign bribery legislation on developing countries and the role of donor agencies

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Abstract

Legislation prohibiting foreign bribery has been enacted and enforced by several countries, notably the United States and the United Kingdom, but its impact on developing countries is poorly understood. An analysis of literature and practice provides insights into factors that may help developing countries benefit from foreign bribery laws and minimize negative externalities. Lack of capacity, lack of political will, and weak flows of information emerge as key obstacles. Although donor agencies have been scarcely involved in this area, they are ideally positioned to play an important role in supporting developing countries by providing technical assistance, facilitating information flows, building political will, facilitating restitution, monitoring and managing returned funds, working with the private sector, and supporting further research.

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Executive summary

Foreign bribery laws (FBLs) prohibit a country's companies from bribing foreign public officials. FBLs were implemented first in the United States in the 1970s, and later in various other countries. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which came into effect in 1999, gave significant impetus to this process. Today, FBLs are one of the pillars of the global anti-corruption movement.

The impact of FBLs on developing countries is poorly understood. One of the main reasons is that until recently enforcement of FBLs was limited, and therefore their impact on other countries was unlikely to be significant. But this has changed in recent years: enforcement of existing laws has been stepped up, and additional countries have adopted and started enforcing FBLs. As a consequence, important questions are now being raised. When a developed country prosecutes a company for paying a bribe in a developing country, what are the implications for the latter – for its institutions and for its overall corruption environment and anti-corruption framework? How does this affect investigations of the same case that may be undertaken in developing countries? What are the consequences if the case is settled? How can developing countries obtain restitution of the proceeds of a bribe, and what are the main obstacles to restitution?

From a theoretical point of view, both positive and negative effects can be hypothesised. For instance, it can be argued that the investigation and prosecution of the bribe giver in a developed country could either encourage or discourage the launch of parallel investigations of the same case in the country of the bribe receiver.

Although there are numerous gaps in knowledge, the analysis of literature and practice with respect to enforcement of foreign bribery laws provides some important insights into their impact and, especially, into factors that may help developing countries benefit from these laws and minimise any negative externalities. Lack of technical capacity in critical areas, lack of political will to investigate and prosecute public officials, and weak flows of information between different jurisdictions emerge as critical factors preventing developing countries from benefitting from FBL enforcement in other jurisdictions. Another problematic factor in some cases is that the country enforcing its FBL may be reluctant to share information and monies recovered (e.g., fines or disgorgements) with the country where the bribe was paid.

While donor agencies have been scarcely involved in this area, they have an important role to play. Donor agencies are ideally positioned to understand the context in which foreign bribery takes place; they also act as a bridge between developed and developing countries and thus can help facilitate the flow of information in foreign bribery cases. Ultimately, foreign bribery is also a development problem and thus falls within the mandate of donor agencies. It can be argued, moreover, that donor agencies have a responsibility to ensure policy coherence, that is, to ensure that their home country's domestic policies are consistent with and do not undermine its development policy. This applies to issues related to illicit financial flows and particularly to foreign bribery.

Donor agencies can contribute to ensuring that developing countries benefit from FBL enforcement and that any negative externalities of such laws are mitigated by providing technical assistance, facilitating information flows, building political will, facilitating restitution, helping developing countries monitor and manage returned funds, working with the private sector, and supporting further research.

Abbreviations

CRO	Civil Recovery Order
DFID	UK Department for International Development
DOJ	US Department of Justice
DPA	deferred prosecution agreement
FBL	foreign bribery law
FCPA	US Foreign Corrupt Practices Act
FDI	foreign direct investment
GoT	government of Tanzania
ICAR	International Centre for Asset Recovery
ICE	Instituto Costarricense de Electricidad
IFF	illicit financial flow
MLA	mutual legal assistance
MVRA	Mandatory Victims Restitution Act
NGO	nongovernmental organisation
NPA	non-prosecution agreement
OECD	Organisation for Economic Co-operation and Development
SEC	US Securities and Exchange Commission
SERAP	Socio-Economic Rights and Accountability Project (Nigeria)
SNACC	Supreme National Authority for Combating Corruption (Yemen)
StAR	Stolen Asset Recovery Initiative
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime

1 Introduction

A now well-established stream of research indicates that developed countries play a key role in generating and attracting corruption-related illicit financial flows (IFFs) from developing countries. With some variation, many corruption schemes tend to fit the following pattern: a corporation based in a developed country offers or is asked to pay a bribe to a public official in a developing country in exchange for a benefit (contract, concession, licence, etc.). The proceeds of this corrupt transaction are then laundered by the public official in a tax haven or international financial centre, which is often a developed country that grants, among other things, the possibility of forming anonymous corporations (Does de Willebois et al. 2011).

When it comes to illicit financial flows and corruption, actors in developing and developed countries are often closely interconnected. One of the consequences is that laws and regulations adopted in developed countries and their enforcement are likely to have significant effects, both positive and negative, on developing countries (OECD 2013).

Foreign bribery laws (FBLs) are among those most likely to have significant direct and indirect effects on developing countries. Such laws were implemented first in the United States and then in a number of other countries members of the Organisation for Economic Co-operation and Development (OECD) following the signing of the OECD Anti-Bribery Convention. Foreign bribery laws generally operate under principles of both territorial and extraterritorial (that is, national) jurisdiction. For example, such laws may allow for the investigation and prosecution of actions taken by individuals and companies connected to a certain country, even when the actions are performed abroad (e.g., paying a bribe to a foreign public official).¹

Notwithstanding the potential impact of FBLs, they are still poorly understood. Consider a hypothetical case in which the United States prosecutes a US-based company for paying a bribe to obtain a contract in a developing country, say Nigeria. What does this mean for Nigeria? Do any legal or practical obstacles prevent Nigeria from prosecuting its own case against its public officials and against the US-based company? Will Nigerian prosecutors be able to access relevant information from US courts to support their own investigation, or will such information be difficult to access? What will be the effects on the Nigerian investigation of a settlement reached in the United States between the US government and the company? Will any fines, disgorged profits, or other monies paid in the United States be shared with Nigeria? And finally, what will be the general impact of such a case on Nigeria's ability and political will to prosecute similar cases in the future? This issue paper analyses such questions based on the existing literature and practice.

The paper looks particularly at two OECD countries, the United States and the United Kingdom, which are both major destinations for illicit flows from around the world and major investors in developing countries (Brun et al. 2011). They are also the two main enforcers of foreign bribery legislation (OECD Working Group on Bribery 2013). The paper focuses primarily on settlements as an example of how the implementation of foreign bribery laws can have an impact on developing countries. Settlements were chosen for several reasons. The overwhelming majority of foreign bribery cases filed in OECD countries – and in some countries, all such cases – have not been litigated, but have been concluded through some type of settlement (Oduor et al. 2013). This means that, with a degree of caution, settlements can be used as a proxy for bribery cases.² Settlements also raise numerous questions for developing and developed countries alike, including whether any recovered funds – fines, disgorgement of profits, voluntary payments, and so on – should be shared with the developing country in which the bribe was paid. Finally, while the literature on impacts of foreign bribery legislation on developing countries is scarce, a recent

study from the Stolen Asset Recovery Initiative (StAR) provides a new evidence base for a preliminary analysis of settlements and their impact on developing countries (Oduor et al. 2013).

The paper also examines the role of donor agencies in the area of foreign bribery. While such a role may not be immediately obvious, there is a significant potential for agencies to help mitigate some of the negative externalities that foreign bribery legislation may have and help ensure that the positive effects materialise. Research by the U4 Anti-Corruption Resource Centre suggests that donor agencies have a dual role to play with respect to IFFs, both by strengthening capacity in developing countries (for instance, capacity to investigate corruption cases that involve foreign companies) and by promoting policy coherence at home (for instance, by encouraging those tasked with implementing foreign bribery legislation to cooperate with their counterparts in developing countries). As more donor countries adopt foreign bribery laws and step up enforcement, these issues are likely to become even more relevant for donor agencies.

The remainder of this paper is structured as follows. Section 2 provides an overview of foreign bribery legislation and reviews the existing literature regarding the laws' potential and actual impacts on developing countries. Section 3 analyses the US Foreign Corrupt Practices Act and the UK Bribery Act, particularly the handling of settlements and their effects on the flow of information between countries, mutual legal assistance, and restitution of funds. This section also includes some general conclusions regarding the impact of FBLs on developing countries. Based on these findings, section 4 discusses the role of donor agencies in mitigating some of the negative externalities and supporting some of the positive effects that foreign bribery legislation has or may have on developing countries.

2 Overview of anti-bribery laws and their effects on developing countries

2.1 Assumptions and caveats

Before analysing the possible impacts of FBL implementation on developing countries, a few caveats are necessary. First, the intention here is not to suggest that the introduction of foreign bribery laws has been in any way a negative development in international anti-corruption law, or that the current trend toward increased enforcement is to be criticised. On the contrary, FBLs have been a positive, driving force behind the anti-corruption movement, although the broader question of whether they have resulted in a reduction of corruption is difficult to answer conclusively with existing data. The objective of the paper is rather to better understand whether and how the implementation of FBLs affects developing countries, and if there are any negative or positive externalities, to investigate how these can be mitigated or encouraged.

Second, the paper focuses on cases in which a company based in a developed country bribes a public official in a developing country and is then prosecuted in its home country for a violation of laws against foreign bribery.³ This seems to be the most typical scenario.⁴ It is clearly not the only one, however: foreign companies have also been found to pay bribes in other developed countries, although such bribery may be underreported or more difficult to unveil.⁵ Some of the legal issues posed by FBLs are likely to be the same regardless of the country – for example, the implications of FBLs for mutual legal assistance (MLA) and settlements. But the overall impact of FBLs is likely to be more significant in developing countries because of low capacity and resources and other constraints examined below.

Third, the paper looks closely at foreign bribery legislation in the United States and United Kingdom. This is because both countries are among the most active enforcers of FBLs, although the US is much more active than the UK: between 1999 and 2012, 62 individuals and 29 companies have been sanctioned in the US, versus five and two respectively in the UK (OECD Working Group on Bribery 2013).⁶ Both countries are also major providers of aid and investment in developing countries. However, other U4 partner countries such as Germany, Norway, and Australia have also sanctioned companies or individuals for violations of foreign bribery statutes or related offences. Other enforcers that are also providers of development aid include the Republic of Korea, Japan, and Italy.

Finally, as noted, an overwhelming majority of foreign bribery cases are settled, and very few go to court. It is therefore reasonable to use settlements as proxies for foreign bribery cases. However, readers should keep in mind that the widespread use of settlements, not only in foreign bribery cases but also in the prosecution of other financial crimes, has been somewhat controversial (see, for instance, Koehler 2009). Critics have argued that settlements are opaque compared to cases litigated in court, that they do not aim to ascertain the truth, that they rely excessively on internal investigations conducted by companies, that they undermine the deterrent effect of laws, and that they allow companies to “buy their way out of sanctions.” On the other hand, settlements usually signify a swifter and more certain outcome for all parties involved and can translate into significant savings for the investigating country. This paper only touches on these issues insofar as they are relevant to the impact of FBLs on developing countries, and does not address the more general debate on the appropriateness of settlements.

2.2 Foreign bribery laws: The framework

Foreign bribery laws are one of the pillars of the international legal anti-corruption framework and a driving force behind the global push for greater transparency and integrity in business transactions. The history of foreign bribery legislation starts in 1977, when the US Foreign Corrupt Practices Act (FCPA), prohibiting the bribery of foreign officials, was signed into law. The act came in reaction to a series of investigations by the US Securities and Exchange Commission, which investigated bribes paid by hundreds of US companies to foreign public officials in exchange for various types of business advantages and benefits. The law’s main justification was to protect the financial integrity of corporations connected to the United States.

Although enforcement was quite weak in the beginning, some saw the FCPA as putting American companies at a disadvantage compared to their counterparts in other industrialized countries. Some foreign companies paid bribes abroad as a matter of routine, and even had the option to deduct them from taxes in some countries. US businesses began lobbying US lawmakers for adjustments to the law. As part of the 1988 amendments to the FCPA, the US Congress directed the US president to “pursue the negotiation of an international agreement among the members of the Organisation of Economic Cooperation and Development.”⁷ Thus the United States started lobbying for the adoption of an international convention prohibiting foreign bribery within the OECD framework. This led to the establishment of an ad hoc working group and eventually to the signature of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, known as the Anti-Bribery Convention, in 1997.

The Anti-Bribery Convention requires states parties to adopt domestic legislation that, like the US FCPA, prohibits bribery of foreign public officials. While the United Nations Convention against Corruption (UNCAC) has broader reach and scope, the OECD convention is perhaps the most important international

legal instrument directed specifically against foreign bribery. It is also the most relevant to the objectives of this study, as most of the states parties are also major investors in and donors to developing countries. Currently there are 41 parties to the Anti-Bribery Convention: all 34 OECD members, plus Argentina, Brazil, Bulgaria, Colombia, Latvia, the Russian Federation, and South Africa. Together, the 41 parties account for nearly 80% of world exports and nearly 90% of global outward foreign direct investment (FDI) (OECD Working Group on Bribery 2013). All the parties are also represented in the OECD Working Group on Bribery, which is tasked with monitoring the implementation and enforcement of the convention through cycles of peer review.⁸

While the Anti-Bribery Convention requires countries to adopt legislation prohibiting foreign bribery, its implementation and enforcement have been somewhat inconsistent.⁹ As of December 2012, only 13 of the 41 signatories had criminally sanctioned any individuals or companies in connection with conducts prohibited under the convention. Most prosecutions have taken place in recent years and in a handful of countries, namely the United States (which accounts for about 31% of sanctioned individuals, 32% of sanctioned firms, and 70% of settlements from 1999 through July 2012), as well as Germany, Italy, the United Kingdom, the Republic of Korea, and Hungary (OECD Working Group on Bribery 2013; Oduor et al. 2013). Overall, 221 individuals and 90 entities were criminally sanctioned in 13 states parties between 1999 and 2012 (Box 1). Foreign bribery prosecutions in the US continue to climb.¹⁰

BOX 1. HIGHLIGHTS FROM THE 2013 ANNUAL REPORT ON ENFORCEMENT OF THE OECD ANTI- BRIBERY CONVENTION

- Data are for the period from February 1999, when the convention entered into force, through December 2012.
- 221 individuals and 90 entities were sanctioned under criminal proceedings for foreign bribery in 13 states parties.
- At least 83 of the sanctioned individuals were sentenced to prison for foreign bribery.
- At least 85 individuals and 120 entities were sanctioned in criminal, administrative, and civil cases for other offences related to foreign bribery, such as money laundering or accounting, in five states parties.
- Approximately 320 investigations were ongoing in 24 states parties as of December 2012.
- Prosecutions were ongoing against 148 individuals and 18 entities in 15 states parties for offences under the convention.

Sources: OECD Working Group on Bribery 2013

The OECD Anti-Bribery Convention is not the only legal instrument prohibiting foreign bribery. The UN Convention against Corruption, adopted in 2003, also requires signatories to criminalise foreign bribery (article 16). The UNCAC also includes other dispositions that are relevant for the purpose of this paper: article 46, on mutual legal assistance among states parties in cases of corruption, provides a blueprint for cooperation between developing and developed countries in foreign bribery cases¹¹; articles 54–59, covering cooperation among states parties in the recovery of the proceeds of corruption and compensation

for harm caused by corruption, provide a legal basis for restitution of funds recovered or fines imposed on the country where the bribe took place.

2.3 Literature review

2.3.1 The literature on FBLs

The literature devoted to examining the impact of foreign bribery laws on developing countries is limited, for several reasons. A first challenge is that isolating the flows of bribes from developed to developing countries is difficult. The hypothetical scenario presented in the introduction involves a company based in a developed country making an illicit payment to a public official in a developing country, upon request or on its own initiative, in exchange for a benefit. While some evidence indicates that this scenario is indeed frequent, empirical data are hard to come by (Box 2). Neither the conventions nor existing foreign bribery laws are designed specifically to target bribes paid in developing countries: they are concerned with bribes paid in all countries.

BOX 2. TRANSPARENCY INTERNATIONAL'S BRIBE PAYERS INDEX

One of the most valuable efforts to measure foreign bribery is Transparency International's Bribe Payers Index, which measures the perceived likelihood that corporations from certain countries will engage in corruption when doing business abroad. The index is compiled from a survey of over 3,000 business executives. The most recent Bribe Payers Index was published in 2011 (<http://bpi.transparency.org/bpi2011/>). Respondents were presented a list of 28 countries and asked to assess, based on their experience, how often firms headquartered in each country engage in bribery in the executive's country. The surveyed executives were based in 30 countries, including some developing countries such as Ghana, Indonesia, Nigeria, Pakistan, the Philippines, and Senegal. They were asked to assess corporations based in 28 countries, of which 18 are signatories to the OECD Anti-Bribery Convention.

While the survey provides some interesting insights into the prevalence of foreign bribery, the usual caveats regarding perception-based indexes apply.

Second, and perhaps more importantly, enforcement of foreign bribery laws was limited until recently. As long as enforcement remained weak, the laws' impact on developing countries was not seen as significant; rather, the focus was on the implications for the enforcing jurisdictions and for their companies.

Thus, much of the literature on FBLs, and particularly on the US FCPA, has focused on other issues. These fall into four broad areas of research:

- Understanding FBLs' practical implications and costs for companies (e.g., in terms of compliance programmes, internal controls, risk management, supply chain management, and use of third-party intermediaries). This area of research responds to concerns of the private sector regarding

technical and compliance aspects of FBLs (Koehler 2012; Erbstoesser, Sturc, and Chesley 2007; Isaak 2008; Copeland 2000).

- Understanding the practical effectiveness of FBLs as deterrents to corruption. The main impulse for this strand of literature comes from anti-corruption researchers and practitioners who are interested in the impact and effectiveness of FBLs, either as alternatives to or in conjunction with other anti-corruption interventions (Koehler 2009; Stevenson and Wagoner 2011; Hinchey 2011; Weiss 2008).
- Analysing the key components of FBLs (e.g., the definitions of public official, facilitating payment, successor liability, etc.). These studies also respond to a demand from the private sector and the legal profession following the emergence of certain aspects of FBLs as particularly problematic from a legal standpoint (Huskins 2008; Warin, Diamant, and Pfenning 2010; Yockey 2011; Erbstoesser, Sturc, and Chesley 2007; Root 2011; Gerber, Lawson, and Lunders 2010; Taylor 2000; Cohen, Holland, and Wolf 2008).
- Understanding the impact of FBLs on foreign direct investment and on competition among companies from different countries. Interest in this area comes from economists, who seek to analyse how corruption (and anti-corruption) can affect investment flows, and from those in both the private and public sectors who want to advance the argument that companies from countries without FBLs enjoy unfair competitive advantages. This argument can be used both to push more countries to adopt and enforce FBLs and to discourage those that have FBLs from enforcing them (Tronnes 2000; McLean 2012; Cuervo-Cazurra 2006; Larraín and Tavares 2004; Taylor 2000).

2.3.2 The literature on FBLs' impact on developing countries

More recently, with stepped-up enforcement of FBLs, particularly the FCPA, the prosecution of high-profile cases, some spanning several jurisdictions, and the imposition of fines and conclusion of settlements in the hundred-million-dollar range, the possible impact of FBLs on developing countries has attracted some attention. A few studies have started looking into the issue (for example, Davis 2009; Choi and Davis 2012). Overall, these studies suffer from the lack of a solid evidence base and are limited to hypothesising possible negative or positive impacts. Even in the few cases in which an effect of FBLs on developing countries can be proven empirically – for instance, a decrease in FDI from FBL-enforcing countries to developing countries – it remains unclear whether their overall impact on corruption is positive or negative.

Choi and Davis (2012) empirically test the hypothesis that the most severe sanctions in FCPA enforcement actions are imposed on companies and individuals who pay bribes in developing countries and in countries where anti-corruption institutions are weak. They find that the US Securities and Exchange Commission (SEC) and the US Department of Justice (DOJ), the institutions in charge of enforcing the FCPA, tend to impose greater sanctions for FCPA violations committed in countries with a lower gross national income per capita and weaker local anti-corruption institutions (measured using the World Bank's Governance Indicators). These findings, corroborated by Demas (2010), could be explained in different ways. One interpretation is that in enforcing the FCPA, the SEC and the DOJ tend to approach enforcement more severely if the bribe was paid in a developing country. This would imply that the FCPA also has a developmental objective and thus is explicitly meant to have an effect on developing countries.

Davis (2009) has conducted the only available attempt to map out the positive and negative impacts of FBLs on developing countries. His starting point is an analysis of how the enforcement of FBLs in developing countries by foreign governments (which he refers to as foreign institutions) could “displace and undermine, or alternatively complement and enhance, local anti-corruption institutions.” First, he categorises theoretically the potential advantages and disadvantages of FBL enforcement in developing countries by foreign governments; then he tests the various assumptions by searching the literature for evidence to corroborate them.

In his analysis, Davis considers a number of potential *advantages* of having foreign countries enforce anti-corruption laws such as FBLs in developing countries:

- It could make available financial, investigatory, and prosecutorial resources that developing countries may not otherwise have access to.
- Foreign governments may have access to better information that enables them to successfully prosecute cases.
- The involvement of foreign governments may increase the effectiveness of domestic anti-corruption institutions, if the two are able to cooperate.
- Foreign governments may have greater integrity and thus have advantages over developing-country governments.
- Foreign bribery investigations may help reduce the level of corruption in developing countries.

Overall, Davis finds limited evidence in the literature to corroborate or refute any of these hypotheses, suggesting that all require further study. On the last point, he finds evidence that FBLs may have some indirect effects on reducing corruption in developing countries by discouraging companies from doing business in the most corrupt ones. He cites findings by Cuervo-Cazurra (2008) that the high level of corruption in a given country reduces FDI from countries that have signed the OECD convention and increases flows from countries that also have high levels of corruption. This finding is indirectly corroborated by Habib and Zurawicki (2002), who analyse FDI data by looking at differences between levels of corruption in the source and destination countries and find that that foreign investors tend to avoid corrupt countries. It is, however, unclear whether this effect of FBLs on FDI also translates into a decrease or increase of corruption in developing countries. Spalding (2010) and Kwok and Tadesse (2006) argue, to the contrary, that by discouraging companies from “clean” countries from investing, FBLs deny developing countries the opportunity to be positively influenced by those companies (who can, for example, lobby for more transparency).

Regarding the possible *disadvantages* of FBLs for developing countries, Davis (2009) identifies three main hypotheses. First, in some cases foreign governments implementing FBLs may act in their own best interests, which may not coincide with the interests of developing countries; in such cases the laws may have negative effects on the latter (the “indifference” argument).

Davis finds evidence that enforcement of FBLs indeed is often not in the best interest of the country where the bribe was paid. For instance, several OECD countries have chosen to implement selectively only certain provisions of the OECD Anti-Bribery Convention, suggesting that they may do so in response to their national interests (OECD Working Group on Bribery 2013). Countries have also applied selective non-prosecutions in cases where national interest trumped other considerations (famously, the BAE case

in the United Kingdom).¹² Overall, however, more robust data are needed to understand what motivates some of these decisions.

A second hypothesis is that anti-corruption efforts may be incompatible with local needs, values, or desires (the “incompatibility” argument). This is based on the long-standing notion that corruption is perceived differently in different cultures and that the need for different cultures to apply punishment also varies. Davis finds this argument to be weak: differences in perception of corruption across cultures apply to petty bribery but do not extend to the payment of high-level bribes, those that FBLs are supposed to address. Large-scale corruption tends to be condemned almost universally, although different societies may punish it differently. Therefore, different levels of tolerance of corruption across countries should not produce negative effects when FBLs are implemented.

A third hypothesis is that relying on foreign governments to enforce their FBLs to prosecute acts that occur in developing countries may, over time, weaken those countries’ incentives and capacity to investigate and prosecute bribery cases domestically (the “institutional displacement” argument). According to this argument, anti-corruption institutions in developing countries develop integrity and competence not as a result of exogenous factors but by being given the opportunity to learn by doing. By this logic, if foreign institutions are relied on to conduct bribery investigations, this will slow down the process of building domestic capacity. Davis’s literature review finds no evidence validating the institutional displacement hypothesis. More common, he suggests, are cases in which foreign institutions have complemented local ones. He cites as evidence a number of cases in which developed and developing countries have cooperated to seize and return funds embezzled by corrupt leaders such as the Philippines’ Ferdinand Marcos and Zambia’s Frederick Chiluba. The StAR report by Oduor et al. (2013) also supports this view.

2.4 Questions for further research

Although Davis (2009) appears to cover the available literature in a comprehensive manner, his analysis suffers from the scarcity of empirical research and data. Davis also does not consider other possible impacts that FBL implementation may have on developing countries, particularly effects related specifically to the investigation and prosecution of cases. Nor does he look closely at the interaction between anti-corruption agencies, investigators, and prosecutors in developing and developed countries.

A first set of questions relates to the immediate effects of a foreign bribery investigation on a domestic one. Take again the hypothetical case of an FCPA investigation of a bribe paid by a US company to a Nigerian public official in Nigeria. How likely is this to trigger a Nigerian investigation of the official and/or the company? Generalising, the question is whether and how often FCPA investigation also results in a domestic investigation of public officials. This is a crucial point, as a concern common to both prosecuted companies and the jurisdictions in which they are based is that the demand side of the bribe – that is, the public official – is hardly ever prosecuted. If there is evidence that FBL investigations can trigger parallel ones domestically, that could be a strong argument in favour of foreign bribery enforcement.

The second set of questions centres on whether the existence of a foreign bribery investigation in a developed country has any positive or negative effects on a parallel investigation (e.g., of the same case, targeting the domestic public official, the foreign company, or both) in the developing country where the bribe was paid. This relates particularly to the flow of information from investigators and prosecutors in different countries, as well as the investigated company’s willingness or reluctance to disclose or share

information with another jurisdiction. It also relates more generally to mutual legal assistance and cooperation between jurisdictions in foreign bribery cases.

Another set of questions covers the issue of restitution in foreign bribery cases. In the example above, if a fine is imposed or funds are otherwise obtained or recovered by the US government following an FCPA investigation, prosecution, and/or settlement, are these monies shared with Nigeria, or should they be? And if so, following what criteria?

Finally, it is important to understand the impact that a settlement (as opposed to litigation) in a foreign bribery case may have on a developing country's own investigation and prosecution of the same case. Again, in the case above, if the US reaches a settlement with its domestic company over the FCPA case, does this in any way hinder or facilitate Nigeria's pursuit of its own domestic case? Are there any differences compared to cases that are litigated?

The following sections attempt to answer some of these questions by looking specifically at cases of foreign bribery settlements in the US and the UK. Because of the gap in research, not all of the questions posed above can be answered. The analysis will therefore focus on three areas where more information is available, namely transparency, mutual legal assistance, and restitution. These issues are also particularly relevant to the broad question of how FBLs affect developing countries.

3 Practical insights from settlements

3.1 Foreign bribery settlements in the United Kingdom

The UK Bribery Act, signed into law in April 2010 and in force from July 2011, applies to all "United Kingdom companies, citizens, and residents, regardless of where the bribery occurred," and to "any individual or company, irrespective of their nationality, when the relevant violative acts take place in the United Kingdom" (Jordan 2010, 865). The act defines a "relevant commercial organisation" as "a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere)" or "any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom."¹³ Put simply, any entity formed under UK laws is governed by the act, while foreign companies are only covered if they carry on a business in the United Kingdom.

Under the Bribery Act, natural persons are punishable for foreign bribery by up to 10 years of imprisonment, an unlimited fine, or both, while legal persons are punishable by an unlimited fine. In practice, the most significant foreign bribery cases, including all five foreign bribery convictions of individuals since 1999, as well as the cases examined below, were prosecuted not under the Bribery Act but under older statutes, such as the Prevention of Corruption Act of 1906 (OECD Working Group on Bribery 2012). Other acts, such as the Proceeds of Crime Act, were used as a legal basis to issue civil recovery orders in connection with foreign bribery cases. No foreign bribery cases have been prosecuted so far under the Bribery Act. So far, all foreign bribery cases brought in the UK against legal persons have been resolved through settlements.

Traditionally, the UK has reached settlements through guilty pleas (Box 3). Many defendants have pleaded guilty with the expectation of receiving a reduced sentence compared to what they would have received if they had proceeded to trial and been convicted. Some of the terms of these agreements are

uniform for all defendants: most fundamentally, they relinquish the right to have a trial. Other terms vary based on the case.

UK authorities have imposed liability in foreign bribery cases through criminal, civil, and administrative enforcement. Criminal and civil resolutions of cases vary significantly in terms of judicial involvement as well as level of transparency (OECD Working Group on Bribery 2012).

BOX 3. EXAMPLES OF CRIMINAL PLEAS IN THE UNITED KINGDOM

The UK construction firm Mabey & Johnson was charged with inflating contract prices to fund kickbacks to Iraqi officials participating in a contract to build bridges in Iraq; the firm was also charged with paying bribes to officials in Ghana and Jamaica. In 2009 Mabey entered into a plea agreement with the prosecuting Serious Fraud Office for breach of United Nations sanctions under the Oil for Food Programme (UKSFO 2009). Mabey pleaded guilty to two counts of conspiracy to corruption and agreed to the monetary sanctions the court imposed.

In its plea, Mabey agreed to pay reparations to the Development Fund for Iraq, to Ghana, and to Jamaica in amounts ultimately determined by the judge. The plea required several hearings in open court. As part of the sentence, the judge determined the amount and structure of the monetary penalties. The court ordered Mabey to pay reparations in the amount of £1,415,000 (including £658,000 to Ghana, £139,000 to Jamaica, and £618,000 to Iraq).

In the United Kingdom, two other legal persons, Innospec and BAE (Box), have been convicted by guilty plea of foreign bribery or closely related offences.¹

¹ See Oduor et al. (2013), chap. 6, cases 3 (BAE) and 6 (Innospec).

Recent foreign bribery cases in the UK have been resolved through civil enforcement actions brought by the Serious Fraud Office (SFO). For instance, in the context of contracts to furnish educational materials, a UK publishing house, Macmillan, was found to have operated in a way that “potentially presented a bribery and corruption risk” in three countries in Africa and “may have received revenue from unlawful conduct” (UKSFO 2011). Macmillan concluded an agreement with the SFO pursuant to the Proceeds of Crime Act, whereby it acknowledged responsibility and agreed to pay £11 million pursuant to a civil recovery order (CRO), a type of consent order. A CRO was also used to resolve several other recent cases.¹⁴

The extent of judicial involvement and transparency in settlements is an important factor in assessing the level of discretion involved in the decision, and it may also have implications for developing countries wanting to prosecute a parallel case. Under UK procedures, judicial involvement in settlements is significantly different in criminal and civil resolutions. Criminal settlements are negotiated between the prosecutors and the defendant. The plea agreement must contain an admission of facts and the offences, and the plea must be entered in a hearing in open court before a judge. Although the parties can confer in advance about what is an appropriate sentence and monetary punishment, they cannot fix a precise sentence.¹⁵ A judge imposes the sentence at a hearing after listening to the arguments of the parties.

In civil settlements the prosecutor and the defendant can agree on a specific penalty and the prosecutor must only request a judicial order in that amount. Their agreement is set forth in writing.¹⁶

3.2 Foreign bribery settlements in the United States

Most foreign bribery cases are prosecuted in the United States under the Foreign Corrupt Practices Act. As noted, primarily pursuant to the FCPA, the United States has been the leading enforcer of foreign bribery laws, based on number of cases, amounts confiscated, and fines imposed. It has also reached a settlement in more foreign bribery cases than any other country.

Table 1: Enforcement data from 39 parties to the OECD Anti-Bribery Convention: Decisions in foreign bribery cases, 1999–December 2012

Country	Number of individuals and legal persons sanctioned or acquitted/found not liable			
	Sanctioned		Acquitted	
	Individuals	Legal persons	Individuals	Legal persons
Argentina	0	0	0	0
Australia	0	0	0	0
Austria	0	0	0	0
Belgium	n.a	n.a	n.a	n.a
Brazil	0	0	0	0
Bulgaria	1	0	0	0
Canada	0	2	0	0
Chile	0	0	0	0
Czech Republic	0	0	1	0
Denmark	0	0	0	0
Estonia	0	0	0	0
Finland	0	0	0	0
France	4	0	2	0
Germany	21	0	0	0
Greece	0	0	0	0
Hungary	26	0	2	0
Iceland	0	0	0	0
Ireland	0	0	0	0
Israel	0	0	0	0
Italy	8	2	3	2
Japan	6	1	0	0
Korea, Rep. of	6	1	0	0
Luxembourg	0	0	0	0

Mexico	0	0	0	0
Netherlands	0	0	1	0
New Zealand	0	0	0	0
Norway	2	1	2	0
Poland	0	0	0	0
Portugal	0	0	0	0
Russian Federation	n.a.	n.a.	n.a.	n.a.
Slovak Republic	0	0	0	0
Slovenia	0	0	0	0
South Africa	0	0	0	0
Spain	0	0	0	0
Sweden	2	0	0	0
Switzerland	1	1	0	1
Turkey	0	0	1	0
United Kingdom	5	2	1	0
United States	62 **	29 **	1	0
Total	221 ***	90 ****	14	3
Administrative and civil cases	Sanctioned		Found not liable	
	Individuals	Legal persons	Individuals	Legal persons
Germany	1	7	0	0
Japan	0	1	0	0
United States	41 *****	55 *****	0	0
Total	42 *****	63 *****	0	0

* + 67 agreed sanctions

** including plea agreements

*** including plea agreements and agreed sanctions

**** including plea agreements, DPAs, and NPAs)

***** including settlements

Note: n.a. = not available.

Table 2: Settlements of foreign bribery cases and related offences, 1999–July 2013

Country in which the settlement took place	Total cases (no.)	Total cases (%)	Individuals	Legal persons
Canada	2	0.51	0	2
Costa Rica	1	0.25	0	1
Denmark	2	0.51	0	2
Germany	42	10.63	35	7
Greece	1	0.25	0	1
Italy	11	2.78	7	4
Japan	2	0.51	2	0
Kazakhstan	1	0.25	0	0
Lesotho	2	0.51	1	1
Netherlands	8	2.03	0	8
Nigeria	7	1.77	0	7
Norway	3	0.76	1	2
Switzerland	15	3.80	1	13
United Kingdom	19	4.81	6	13
United States	275	69.62	87	187
World Bank	4	1.01	0	4
Total	395	100	140	252

Source: Adapted from Oduor et al. 2013.

The FCPA has two main parts. One part prohibits payments to foreign officials (the anti-bribery provisions). The second part imposes accounting and record-keeping requirements on the domestic and foreign operations of publicly held companies (the books and records provisions).

The jurisdiction of the FCPA's anti-bribery provisions is quite extensive. The provisions apply to "domestic concerns" and "issuers," as well as to any person, including foreign individuals and entities, who acts while in US territory to further the improper inducement of a foreign public official. Jurisdiction over domestic concerns and issuers is based on nationality. The term "domestic concern" covers individuals who are US citizens, nationals, or residents, as well as companies that have their principal place of business in the United States or that are organised under the laws of any US state. The term "issuer" applies to entities that have securities registered with the US SEC or that are required to file SEC reports (for example, companies traded on US stock exchanges). Application of the US territorial principle requires some connection to US territory for the prohibited activity to be subject to US laws. For instance, any matter involving US interstate commerce gives rise to US jurisdiction.

In 1998, Congress extended the FCPA to more explicitly include the nationality principle as a basis of jurisdiction. As a result, jurisdiction can be based solely on the status of an individual as a US national or the fact that an entity is established under US laws or has its principal place of business in the United States. Hence, the US can assert the FCPA on the basis of the principles of nationality or territoriality, or both.

The United States has some unique procedures, employing both criminal and civil enforcement in many foreign bribery cases. The Department of Justice brings criminal prosecutions in its federal courts, resulting in monetary penalties for both legal and natural persons and often imprisonment for natural persons. The Securities and Exchange Commission brings civil proceedings through its enforcement powers to exact disgorgement of proceeds of crime from natural and legal persons, as well as other civil monetary penalties. Any given case may involve either or both of these US federal enforcement agencies. In practice, the bulk of the cases involve concurrent or parallel proceedings, although it sometimes happens that the SEC will file civil proceedings even though the case is not criminally prosecuted.

As noted, settlements are widely used under the FCPA. Almost 70% of the foreign bribery settlements reached between 1999 and 3 July 2012 occurred in the United States. More than 88% of criminal foreign bribery and related cases in the US have been resolved by settlement, while only about 12% have gone to trial (Oduor et al. 2013). While US courts have ordered restitution to, or paid for the benefit of, a country in a few cases, these cases tend to be exceptions (see section 3.5.1).

The US employs a plea agreement to resolve many charges of foreign bribery. A judge must review and consent to the plea agreement and determine whether it meets fundamental and procedural requirements, such as that the defendant voluntarily enters into the agreement after waiving his constitutional rights and that sufficient factual basis exists for the plea. When a legal person such as a corporation admits responsibility, it is called a criminal settlement or resolution.¹⁷

A difference between the US and UK settlements is that in some US cases, the plea agreement or criminal settlement may recommend a specific sentence (e.g., a period of imprisonment, monetary penalties, or appointment of a monitor for a period of years). In the US the defendant may also agree to cooperate with the prosecution to generate evidence against other offenders or disclose or even return proceeds of crime. In addition, the prosecution may require the defendant to cooperate with foreign authorities.¹⁸ The plea agreement is submitted to the court pending approval. It contains a statement of facts summarising the conduct that constitutes the offence to which the defendant is pleading guilty, especially the foreign bribery scheme.

During the plea hearing, the prosecution must describe to the judge the evidence it would have used if the case had gone to trial. Ultimately, when the judge approves and the defendant formally enters the guilty plea, the plea agreement is filed with the court and becomes a matter of public record, making the terms and underlying facts quite transparent.

The United States has two types of criminal settlements for legal persons. The prosecution can propose to a defendant a written agreement to admit responsibility and undertake certain obligations. In exchange, the prosecutor either will not file charges (the non-prosecution agreement, or NPA) or will file charges but without taking immediate further action on them (the deferred prosecution agreement, or DPA). In the latter case, the charges will be dismissed once the defendant has satisfactorily fulfilled his or her side of the agreement.

DPAs require the defendant to admit relevant facts showing wrongdoing, commit to certain compliance and remediation measures, and pay a fine and/or other monetary penalties. Under a DPA the prosecutor files a charging document with the court, but it simultaneously requests that the prosecution be postponed

to allow the entity to show its good conduct. If the defendant complies with the terms of the agreement, the prosecution dismisses the charge. Although DPAs are technically subject to judicial review and approval, most judges defer to the parties.¹⁹

An NPA, unlike a DPA, does not involve the court. The defendant must still admit relevant facts. The government maintains a right to file charges but agrees not to do so.²⁰ In return, the defendant is subject to terms similar to those often found in DPAs, such as (a) monetary sanctions; (b) requirements that the company improve its compliance programme; (c) requirements that the company hire, at its own expense, an independent monitor to oversee compliance, review the effectiveness of a company's internal control measures, and determine whether the company has otherwise fulfilled the terms of the agreement;²¹ and (d) extraordinary restitution provisions, which are payments or services to organisations or individuals not directly affected by the crime.²²

DPAs and NPAs do not result in convictions. The OECD Working Group on Bribery, federal judges, and civil society actors have questioned whether it is possible to evaluate the impact of NPAs and DPAs in deterring foreign bribery by US companies (OECD Working Group on Bribery 2010, 19).

3.3 Transparency

Whether information about FBL investigations is publicly available affects the impact of the FBL, both in the country that enforces the law and in other countries.

In the country of the bribe payer, transparency has a deterrent effect that may work in two ways. First, when information about penalties imposed against companies or individuals is published, other potential bribe payers realise the potential costs of breaking the law and may refrain from similar behaviour. Second, the publication of information on bribery cases subjects the defendants to reputational consequences and may discourage them from paying bribes again in the future.

In the country of the bribe receiver, there are also two main potential benefits. First, giving the public information about FBL investigations abroad can lead civil society to demand that the public officials involved be held accountable for their actions. Second, information from such investigations may be used by the government to launch its own parallel investigations (Box 4).²³

In theory, such benefits of transparency can materialise regardless of whether the case is litigated in court or settled, provided that the information is published. Settlements, however, present a unique challenge. While trials are usually public, settlements and other related procedures have varying degrees of publicity. For settlements, factors influencing the degree of transparency include whether the hearing is public, whether victims and other affected parties are informed that the settlement is taking place and are made aware of its outcome, as well as whether and at what stage of the process any relevant documents are made public (Oduor et al. 2013). In practice, different jurisdictions have very different levels of transparency when it comes to settlements.

The UK system requires public hearings in criminal settlements. However, it does not make the settlement documents available publicly. In a few cases, the court's sentencing remarks have been made publicly available (OECD Working Group on Bribery 2012, 20). Sentencing hearings are open to the public and sometimes reported by the media. The plea agreements are not made public, with rare exceptions.²⁴ Certain pleadings are released sporadically to the public, but most are not. In CRO settlements, the only document released is a press statement by the prosecution summarising the matter and the penalty

imposed. The exact nature of the conduct may not be set forth (as in, for example, the Macmillan matter; see UKSFO 2011). In some cases the prosecution has put a confidentiality clause into the settlement documents, requiring the prosecution not to disclose more details to the public domain.

In the United States, the DPAs and NPAs and accompanying statements of facts are publically released by the Department of Justice. The DOJ posts all of these documents on its website, where any interested person can review them. Many media groups and academics write about settlements. However, although the DPAs and NPAs and accompanying statements of facts are made public, other affected countries often do not learn of the settlement until it is finished and published.²⁵ While this does not prevent other countries from starting an investigation, it is clear that a more timely sharing of information would be preferable. Additionally, by the time the settlement is reached and the information is published, developing countries may have little if any chance to effectively claim any assets recovered in the enforcement action taken in the US (Oduor et al. 2013).

The US and the UK approach transparency in settlements differently, but overall, both provide at least some basic information. Other countries are more opaque. In general, “cases that settle tend to be less transparent than cases that proceed to full trial, in terms of both the agreements or decisions released and amount of proceedings open to the public” (Oduor et al. 2013, 84). This arguably makes it harder for the home country of the public official who has been bribed to gain access to relevant facts of the settlement and thus to rely on that information for a domestic investigation; it also reduces the potential deterrent effect of FBLs.²⁶

It is important to mention that the publication of information on a foreign bribery case by a developed country may not be sufficient to trigger an investigation in developing countries. Authorities in the latter may face obstacles in accessing and processing such information, even if it is published in a timely way. Anecdotal evidence suggests that prosecutors, judges, and other authorities in developing countries may lack Internet connectivity, e-mail access, English language skills, knowledge of foreign jurisdictions, and other basic resources that would make it possible to use the public information to launch a domestic investigation.

Under certain circumstances transparency may also have some unintended effects on a parallel investigation in a developing country. It could, for example, tip off the bribe receiver, enabling a public official to destroy evidence or hide the proceeds of corruption before local authorities have the opportunity to launch an investigation. In these cases, authorities in developing countries will benefit more from pursuing MLA as a way to obtain information before the information is published.

Is there any evidence that the current level of transparency is deterring the launch of, or otherwise negatively affecting, investigations in developing countries? Unfortunately, the dearth of published research on these issues prevents a comprehensive response. Ongoing projects, particularly qualitative analysis by Kevin Davis of FCPA cases in Latin America, may eventually shed some light on the issue. The StAR report, while strongly arguing in favour of more transparency, also suggests that when the level of transparency is low and when countries make little information on settlements available automatically and voluntarily, mutual legal assistance could fill the gap and ensure that relevant information is shared between jurisdictions (Oduor et al. 2013). This hypothesis is examined in the next section.

BOX 4. EXAMPLES OF ANTI-BRIBERY ENFORCEMENT ACTION IN DEVELOPING COUNTRIES AGAINST FOREIGN COMPANIES AND INDIVIDUALS

Nigeria. Oil-rich Nigeria has been one of the most active developing countries in the area of foreign bribery. It has settled various cases, one of which resulted in restitution payments, fines, and disgorgement exceeding US\$170 million. In this case, Siemens settled with the Nigerian government and agreed to pay the large sum in order to obtain the dismissal of charges and a commitment from the Nigerian government not to bring any criminal, civil, or administrative actions in the future.

In 2010, Nigeria entered into settlements with a joint venture called TSKJ, in which Kellogg, Brown, and Root LLC, Snamprogetti Netherlands BV, JGC Corporation, and Technip SA participated. The Nigerian investigation covered alleged bribes paid in connection with the construction and expansion by TSKJ of a natural gas liquefaction project in the Niger delta (Bonny Island). Under the settlement, the Nigerian government agreed to dismiss all ongoing lawsuits and charges against the companies participating in the joint venture and related individuals and to refrain from bringing criminal charges or civil claims in the future. Restitution payments totalled US\$127.5 million. Under the agreement, Halliburton also committed to assist Nigeria in the recovery of assets frozen in a Swiss bank account held by a former TSKJ agent.

Costa Rica. Costa Rican prosecutors filed a civil suit against a subsidiary of Alcatel-Lucent, arguing that the company's involvement in bribing Costa Rican public officials had resulted in damage to the country. The ensuing settlement, reached in 2010, resulted in the payment of US\$10 million in exchange for the cessation of all criminal and civil investigations. Interestingly, US courts dismissed a petition filed by the Costa Rican government aimed at obtaining restitution in connection with the parallel case brought in the United States against Alcatel-Lucent under the FCPA (see Box 7), arguing that the Costa Rican agency involved in the transaction was not a victim in the case.

Lesotho. Lesotho prosecuted a group of European and Canadian construction companies as well as its own officials in connection with bribes paid to secure contracts for the Lesotho Highlands Water Project. The successful prosecutions were the result of, among other things, mutual legal assistance obtained from France and Switzerland. Lesotho prosecutors filed charges against French company Schneider Electric SA, which pleaded guilty to 16 counts of bribery in 2004 and agreed to pay a penalty of approximately US\$1.4 million. Apart from this settlement, other companies and individuals were prosecuted and convicted by Lesotho in connection with this case (see Box 5).

Source: Adapted from Oduor et al. 2013.

3.4 Mutual legal assistance

As foreign bribery cases are, by definition, multijurisdictional, MLA is essential to ensure that investigators from different jurisdictions can access the information they need to investigate and prosecute a foreign bribery case. MLA is particularly relevant to developing countries, as they often lack investigatory capacity and can greatly benefit from the result of investigations conducted in other countries.

The main international legal framework for MLA in foreign bribery cases is provided by the UNCAC and the OECD Anti-Bribery Convention. The OECD convention (article 9) requires parties to provide “prompt and effective legal assistance” to other parties in foreign bribery investigations. The UNCAC requires states parties to “afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention” (article 46). Article 48 encourages parties to cooperate with one another in a variety of ways to combat corruption, while article 49 encourages parties to conclude bilateral or multilateral agreements for joint investigations.

While MLA has emerged as one of the key factors enabling governments to successfully prosecute foreign bribery cases, the OECD convention’s working group has recognised since 2007 the need to improve MLA procedures, both between states parties and between parties and non-parties. A recent OECD study on mutual legal assistance in foreign bribery cases stresses that governments parties to the convention may have difficulty obtaining MLA from other governments, both parties and non-parties, including “countries, particularly in the developing world, [which] may struggle with a lack of capacity to respond effectively to MLA requests, where, for instance they may lack the technical expertise, the institutional framework, or the human and financial resources to effectively respond to requests for assistance” (OECD 2012, 40). While this analysis is related to MLA requests filed by developed countries with developing countries, it is reasonable to assume that similar issues may also affect MLA requests flowing in the opposite direction.

In practice, for information sharing and MLA, countries tend to rely on bilateral agreements on criminal matters signed by ministries of justice more than on existing international frameworks. This raises the issue of trust between the developed countries investigating a foreign bribery case and the developing country, usually the recipient of an MLA request. There is anecdotal evidence that investigating countries tend to place low trust in the countries where the bribery happened and are thus reluctant to send MLA requests, assuming that these may somehow leak and tip off the investigated parties. This is even more likely to happen if the two countries do not have a bilateral agreement on cooperation in criminal matters.²⁷

Political and other nonlegal considerations may also interfere with MLA requests and may result in countries adopting very different approaches, depending on the circumstances. For instance, over the last 10 to 15 years the US government has given substantial assistance to Brazil in money laundering and asset forfeiture cases arising out of bribery cases in Brazil. Some of these cases, such as the prosecution of Paulo Maluf, former governor of São Paulo and current federal representative, have been brought by either the federal or state governments in the United States.²⁸ In the case of Pavlo Lazarenko, US prosecutors made mutual assistance requests to Ukraine and obtained significant assistance in their prosecution. Since then, however, in the asset forfeiture case in which the US and other governments are on opposing sides, the US has tried to block other governments and parties to the litigation from learning the results of mutual assistance made and even from seeing the actual mutual assistance requests.²⁹

What is the impact of settlements on MLA in foreign bribery cases? The StAR Initiative finds that, legally speaking, the settlements are not hindering international cooperation and that “depending on how the

settlement is structured, a settlement in another jurisdiction could actually improve the likelihood of international cooperation” (Oduor et al. 2013, 63). However, the practice seems to suggest that settlements do have an impact and that this impact is likely to be negative.

First, countries that are in the process of settling a foreign bribery case may be reluctant to share information with any other jurisdiction, including the one where the bribe was paid (typically a developing country), for fear that this may somehow jeopardise the negotiation or that information may leak. This could tip off the bribe takers (public officials), allowing them to cover their tracks or hide or launder the proceeds of the bribe abroad.³⁰ A second concern relates to the quality of information: settled cases, including those in the US and UK, are often based on the result of an internal investigation (“self-investigation”) conducted by the company being prosecuted. These investigations differ significantly from those conducted to prosecute cases that go to court, in which investigators are likely to use the full arsenal of weapons at their disposal to uncover the facts. Therefore, information shared with other countries in settled cases may be incomplete and of lower quality (Oduor et al. 2013, 52–53). Finally, in foreign bribery cases that are litigated in court, prosecutors are likely to file MLA requests with the country where the bribe was paid, which thus becomes immediately aware of the details of the ongoing investigation. This creates incentives to also investigate the bribe receiver, as it may be hard for the government that receives the MLA request to ignore it or decline to initiate its own investigation. By contrast, in settled cases, the developing country where the bribe occurred may not be aware that a settlement negotiation took place until the settlement is publicly announced.

The StAR study attempted to verify empirically this apparent disconnect between legal theory and practice by documenting instances of investigations conducted in developing countries following MLA requests related to foreign bribery cases from other jurisdictions. Requests sent to governments received very few responses, which leaves some open questions (see Box 5 for one well-known example).

BOX 5. THE LESOTHO HIGHLANDS WATER PROJECT

Nigeria. Oil- The Lesotho Highlands Water Project is a massive infrastructure project aimed at building a set of dams and underground tunnels to channel water from the Lesotho highlands to Gauteng province of South Africa and to produce hydroelectric power for Lesotho. The project design process began in the mid-1980s, and construction took place in two phases. Phase 1 ended in 2003, while phase 2 is ongoing. It is one of the largest dam projects and water transfer schemes in the world.

Because of its complexity, the project has involved numerous engineering and consulting firms from different countries. In the mid-1990s an audit conducted by Ernst & Young found irregularities which led to the dismissal of Masupha Sole, chief executive of the Lesotho Highlands Development Authority, the government agency in charge of managing the project. Investigations uncovered Sole's bank accounts in Switzerland, into which certain water project contractors had deposited significant funds. Authorities in Lesotho then opened bribery investigations into various foreign companies. Different defendants were prosecuted separately as part of the prosecutor's strategy:

- Masupha Sole, the public official, was the first to be charged. He was convicted on appeal and sentenced to 15 years in prison.
- Acres International, a Canadian engineering consulting firm, received a fine of US\$1.4 million.
- Lahmeyer International, a German consulting firm, was sentenced to a fine of US\$1.7 million. It appealed the conviction and on appeal the fine was increased to US\$1.9 million.
- Impregilo, an Italian construction company, received a fine of US\$1.4 million.
- Schneider Electric SA, a French company that had acquired Spie Batignolles, the company in charge of building the water tunnels, pleaded guilty to 16 counts of bribery and agreed to pay US\$1.6 million. This was the only company that settled.
- Jacob Michael du Plooy, a South African national who acted as an intermediary on behalf of Impregilo, was sentenced to pay a US\$80,000 fine.

This case is remarkable for several reasons. First of all, it is one of a very few cases in which the country of the bribe receiver took the initiative to prosecute and eventually convicted both its own public official and foreign companies in connection with a bribery case. All convictions were upheld on appeal; only one case was settled. Moreover, the local public official was prosecuted first, despite some evidence pointing to the foreign companies as the initiators of the bribes. In this way, prosecutors in Lesotho were able to refute the common criticism that developing countries rarely prosecute the demand side of the bribe. Indeed, in 2004 testimony before the Lesotho Senate, the prosecutor criticised the other foreign jurisdictions involved in the case for failing to investigate it and to provide further assistance.

Second, the successful prosecution was in part the result of MLA obtained from authorities in France and Switzerland, support from the European Union's Anti-Fraud Office (OLAF), and coordination with the World Bank, which had funded part of the project and also eventually sanctioned a company in connection with the case. Prosecutors in Lesotho were able to overcome domestic pressures from those arguing that such MLA requests were overly expensive and unlikely to succeed – arguably a political attempt to interfere with the investigation. >

Third, Lesotho did not receive any financial support for the investigation from donors, though some made such commitments. Eventually the lack of resources was overcome, but it was a factor that complicated the investigation, especially as the prosecuted companies used various dilatory techniques to avoid a conviction, including changing their corporate structure.

Finally, the independence of the judiciary in Lesotho emerged as a key factor contributing to the successful prosecutions. ■

Sources: Darroch 2007; Penzhorn 2004.

3.5 Restitution

Another important factor in understanding the impact of FBLs is restitution, which takes place when developing countries' governments are granted a portion of the funds recovered by developed countries when they enforce foreign bribery legislation. These funds may be obtained from either (a) the corrupt profits that the public official made by receiving a bribe, or (b) the corrupt profits that the company made as a result of paying a bribe. In practice, most cases involving restitution in foreign bribery cases thus far have involved the second situation, in which the company involved is required to pay a fine or disgorge its unlawful profits and return a portion of them to the country where the bribery took place.³¹

Restitution of the proceeds of bribery to developing countries is important for various reasons. First, it can send a strong signal that corruption is not a victimless crime and that those involved in corruption do not get to keep the proceeds of their crimes, thus countering a perception that is common in many developing countries. Second, the amounts paid in restitution in foreign bribery cases can be quite significant and could represent additional resources to be reinvested in anti-corruption activities or development projects. Additionally, developing countries' authorities, in order to claim restitution in foreign bribery cases prosecuted in developed countries, may need to participate actively in the foreign court case. This in turn can provide opportunities for investigators to gain access more easily to relevant information.

On the other hand, restitution in foreign bribery cases can also be somewhat controversial. For instance, public officials may have played an active role in demanding the bribe in the first place, thus raising the question of whether restitution is warranted. This may especially be the case if the government fails to investigate or punish its own public officials or to provide mutual assistance to the prosecuting country.

A long-standing argument against paying restitution to developing countries in which public officials were bribed is that because these countries were complicit, and not victims in the crime, any funds returned may end up being lost to corruption again. This argument has several flaws. First, it assumes that all public officials at all levels in a country are corrupt; second, it doesn't take into account possible regime changes and the role of international pressure; and finally, it doesn't consider that there are ways to prevent the money from being stolen again (see Box 9).

One important point to consider is *what* is being returned. As noted, companies violating foreign bribery laws are subject to a range of monetary sanctions, including fines and disgorgement of profits (returning the illegitimate profit obtained by paying the bribe). While there may be a robust legal argument in favour of returning to the victim country all or a portion of disgorged profits, as these are the direct result of the

bribe paid in the victim country, it may be more difficult to justify sending abroad a portion of the fine, which some may see as being triggered only by a breach of domestic law. This may seem like a purely legal point, but it becomes very practical when one considers that, for example, about one-quarter of all FCPA enforcement actions do not include disgorgement orders (Cassin 2014).

Other obstacles are more practical. For instance, it may be challenging for a government to prove in a foreign court the damages it has suffered from corruption and thus to make a strong argument in favour of restitution. This problem has been overcome in practice, as some of the cases described below indicate.

Finally, it is worth considering that a domestic investigation conducted in a developing country may make restitution unnecessary, as the developing country could independently impose its own monetary fines on, or reach a settlement with, a foreign company (see, for example, the Nigerian cases in Box 4). This may be a more effective way to deal with the problem. In other words, obtaining restitution in connection with settlements or prosecutions conducted in other countries can also be seen as a disincentive to launch a parallel case domestically, thus preventing the public officials involved from being prosecuted.

In terms of the international framework, UNCAC chapter V clearly establishes the principle of recovery and return of assets to prior legitimate owners and those harmed. Article 57 encourages states parties to return the proceeds of corruption offences. Article 53(c) further provides that states parties should allow their courts and other competent authorities to recognise another state party's claim of ownership or damages when deciding on a confiscation or other monetary sanction. The provisions cover settlements, since most monetary sanctions are ordered in the context of settlements.³²

3.5.1 Restitution under the US FCPA

Under the FCPA, US courts have ordered restitution to (or paid for the benefit of) a country in various cases, although these are a minority compared to the total number of cases (Oduor et al. 2013, 91–92). In practice, regardless of how an FCPA case concludes, very little, if any, money is returned to the country in which the underlying misconduct took place (Frick 2013).

As noted, prosecutors in the United States have considerable discretion and freedom to shape settlements, especially the form of monetary sanctions. The implication is that prosecutors can also influence greatly the ability of affected countries to claim and recover assets. The choices made by the prosecutors on the form(s) of monetary sanctions have direct implications for the designation of beneficiary and for the recoverability of assets.

In common law countries a party may ask for restitution if the party can show itself to have suffered direct and proximate damage as a result of a crime. US federal law provides that a crime victim is a person “directly or proximately harmed” as a result of the commission of a federal crime.³³ In the case of financial crimes, parties must furnish the prosecution with proof of such damage (e.g., records or receipts showing the economic loss or expenses resulting from the crime). The federal Crime Victims Fund provides restitution to crime victims by compensating them for crime-related expenses such as medical costs, funeral costs, mental health counselling, and lost wages.³⁴ Under the Mandatory Victims Restitution Act of 1996,³⁵ US courts must order restitution in certain cases. In 2010, in *United States v. Green*, a court ordered restitution in connection with bribes paid in Thailand. The defendants appealed on the basis that there was no jury finding that an identifiable victim had suffered a pecuniary loss, but the decision was affirmed on appeal.³⁶ In *United States v. Diaz*, the court ordered an individual defendant to pay restitution to the Haitian government after discovery of a telephone rate conspiracy (Box 6).³⁷

BOX 6. THE HAITI TELECO CASE

US courts awarded restitution to Haiti in connection with the Haiti Teleco case, which involved a broad network of corrupt transactions involving various individuals, including public officials employed by Haiti's state-owned telecommunications company. Among numerous individuals found guilty was Juan Diaz, the president of J. D. Locator Services, one of the companies involved in the case, which was set up specifically to facilitate the laundering of bribe money. In 2009, Diaz pleaded guilty to violating the FCPA as well as to money laundering charges. During sentencing, the judge referred explicitly to the Haitian government as the "victim" of the bribery scheme and ordered Diaz to pay restitution to Haiti in the amount of US\$73,824. This is one of the few US FCPA cases in which restitution has been ordered to the victim country.

In *United States v. Alcatel-Lucent*, on the other hand, the district court denied victim status to Instituto Costarricense de Electricidad, a Costa Rican power company, on the grounds that it was involved in the crimes and thus the MVRA prevented its recovery. The district court also denied recovery based on the MVRA's complexity exception (Box 7).

In March 2012, the Socio-Economic Rights and Accountability Project (SERAP), a Nigerian nongovernmental organisation (NGO), recommended to the SEC a plan for broader victim compensation. Under the proposal, a victim foreign government or an NGO involved in that foreign state would have 60 days after the end of an FCPA enforcement action to file a claim with the US court adjudicating the case for part or all of the settlement proceeds. The foreign government or NGO would have to show that it had adequate safeguards in place to protect against further misuse of the funds. The SEC would then evaluate on a case-by-case basis, outside of the court system, to determine the best use of the funds received through the FCPA enforcement (Sierck 2012; see also Frick 2013, 451–52). The SEC said it would take the idea under consideration; however, SERAP's recommendations would require legislation (Frick 2013, 452).

3.5.2 Restitution under the UK Bribery Act

Under UK law, an injured party must file a declaration with the court. If an injured party does not register properly, the court will lack the authority to grant it an order of compensation. To qualify, the party must establish standing, that is, the right to be a party to the lawsuit. A foreign government seeking restitution, unless notified of the case and of its right to be a party, will not have knowledge of the potential settlement and may not act quickly enough to seek restitution. Ultimately, the judge can reject the confiscation as part of the settlement agreement. This happened in *Regina v. Innospec Ltd.*, when the judge objected to the confiscation as part of the settlement agreement and ordered the entire financial penalty be forfeited as a criminal fine payable to the British Crown, rather than making reparations to Iraq.³⁸

In the *Mabey & Johnson* case, Mabey agreed to pay reparations to the Development Fund for Iraq, to Ghana, and to Jamaica in amounts the judge ultimately determined (UKSFO 2009). In February 2010, BAE, as part of its plea to record-keeping violations, agreed to make an ex gratia payment "for the benefit of the people of Tanzania in a manner to be agreed upon between the SFO" and BAE (see Box 9).

In another case, Zambia provided a witness statement in the Frederick Chiluba case resulting in the UK court issuing an order freezing millions of dollars of his assets.³⁹

BOX 7. THE ALCATEL-LUCENT CASE

U Alcatel-Lucent, a global telecommunications equipment company, repeatedly violated the FCPA from the 1990s through the end of 2006. The most notable of these transgressions occurred in Costa Rica. In conjunction with the award of three contracts worth over US\$300 million, Alcatel-Lucent wired over US\$18 million to Costa Rican consultants, who in turn disbursed about half of that to Costa Rican government officials (Frick 2013). In 2010, Alcatel-Lucent and its subsidiaries reached a settlement agreement with the US Department of Justice and the SEC for approximately US\$137 million (Oduor et al. 2013, 103).

Among the Costa Rican officials bribed by Alcatel and its associates were those who worked for the state-owned telecommunications agency, the Instituto Costarricense de Electricidad SA (ICE). ICE petitioned the US District Court for the Southern District of Florida to protect its rights under the Crime Victims' Rights Act, which expressly guarantees victims the right to "full and timely restitution."¹ Under the act, DOJ personnel are required to ensure that crime victims receive notification of, and are accorded, this right to restitution.²

In its petition, ICE claimed to have suffered massive losses as a result of the corruption of its employees. The district court denied the petition, finding that ICE was involved in the crimes because its officials directly engaged in the bribery, and suggesting that it may have been a co-conspirator with Alcatel-Lucent (Frick 2013, 443). The court further cited a complexity exception in the Mandatory Victims Restitution Act (MVRA) whereby courts have the discretion to implement the act when "determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process."³ This discretion allowed by the MVRA statute gives courts the authority to find that the effort to provide restitution will overburden the sentencing process (Frick 2013, 439). ICE appealed the district court's ruling to the Eleventh Circuit, but to no avail.⁴

According to ICE's district court petition for relief, the Department of Justice allegedly cited a policy stating that foreign governments were not victims (Frick 2013). While there is no evidence of an express policy to that effect, it appears that Justice Department officials have taken a different approach to victim restitution in foreign bribery cases than has, for example, the UK Serious Fraud Office.⁵

¹ 18 US Code § 3771(a)(6).

² 18 US Code § 3771(c)(1).

³ *In re: Instituto Costarricense de Electricidad*, No. 11-12708-G (11th Cir. 2011), p. 15, <http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-etal/2011-06-17-US-Response-to-Petitions-for-Writs-of-Mandamus.pdf>; 18 US Code § 3663A(c)(3).

⁴ *United States v. Alcatel-Lucent France, SA*, 688 F.3d 1301 (11th Cir. 2012).

⁵ *Petition for Relief Pursuant to 18 US Code § 3771(d)(3) and Objection to Plea Agreements and Deferred Prosecution Agreement*, p. 11, n. 16, *United States v. Alcatel-Lucent*, No. CR-20907-CR-COOKE (S.D. Fla. 2011), <http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-etal/2011-05-02-ICE-Petition-for-Relief.pdf>.

3.5.3 Impact of restitution in settled cases

The UK and US legal systems may provide tools that would allow for restitution of the proceeds of foreign bribery to developing countries in some circumstances, although these tools have yet to be widely applied in practice.

In its review of foreign bribery settlements, the StAR Initiative finds cases of assets returned to other countries in the form of reparations, restitution, and voluntary payments and even a memorandum of understanding. It also finds cases in which funds were not returned directly to countries but rather were channelled through “special funds administered by government or nongovernmental organisations for the benefit of the people of the affected countries” (Oduor et al. 2013, 3). However, the same study also finds that in practice, restitution only takes place in a minority of cases (some examples have been mentioned in the previous sections). Drawing on its database of 395 settled cases, the StAR study finds that a total of about US\$6.9 billion has been imposed in monetary sanctions. Of this amount, only about US\$197 million, or 3.3%, has been returned (or ordered returned) to the countries whose officials were bribed.⁴⁰

What are the reasons that such a low percentage of funds is ordered returned? The StAR findings suggest that the fact that a case is settled rather than litigated in court does not in itself hinder restitution. Rather, the problem seems to be a mix of legal and bureaucratic impediments, as well as, more broadly, reluctance to return funds to developing countries due to concerns about corruption (an argument with many flaws, as discussed above); the perception (or in some cases evidence) that governments may have endorsed corrupt payments; and, perhaps most importantly, a lack of initiative on the part of developing countries in claiming victim status. But these obstacles are likely to surface regardless of whether a case is litigated or settled.

What is the impact of this failure to return the proceeds of foreign bribery to developing countries? Once again, the existing evidence base is too weak for a thorough assessment. However, anecdotal evidence and research in the area of asset recovery suggests that this failure may erode support for institutions in developing countries and for the fight against corruption (K. Stephenson et al. 2011). It also prevents developing countries governments from recovering funds that could be used in a number of activities, including anti-corruption and development programmes. Finally, it can erode the deterrent effect of foreign and domestic bribery policies. Undoubtedly, more research is needed in this area. However, preliminary findings strongly suggest that restitution to developing countries in foreign bribery cases would be desirable and should be done more frequently.

3.6 Tentative conclusions

What can be concluded from the preceding analysis? Clearly, the review conducted is partial: more and better data are needed on, for example, the number of foreign bribery cases or MLA requests that result in prosecutions in other countries, and on replies to MLAs and their quality. There is also a need for data to track how returned funds are used. Some questions, such as how many investigations are started in developing countries after a foreign bribery case is launched in a developed country, cannot be thoroughly answered with a desk-based review and require in-country research, digging into case databases. Ongoing work in this area, such as that by Davis, may eventually shed some light on these issues. In the meantime, the StAR report provides a good snapshot of existing evidence and practices (Oduor et al. 2013).

The StAR study suggests that the number of cases in which a foreign bribery investigation (more precisely, a settlement) results in a domestic investigation in the developing country in which the bribe was paid is very low. The study also finds that only a minority of developing countries have taken enforcement action against foreign companies or individuals who have bribed their public officials (see also Box 4). This seems to confirm the concern, common among corporations as well as countries enforcing FBLs, that the demand side of bribery is rarely prosecuted. Furthermore, developing countries have largely been excluded from settlements, and restitution has happened in only a minority of cases.

The StAR study suggests that settlements per se do not impede the flow of information, MLA, or restitution. Rather, the problems seem to be broader and related to structural issues that prevent the benefits of FBLs from materialising. These include, in developing countries, lack of capacity (e.g., to claim victim status in foreign bribery cases or to conduct investigations domestically) and lack of political will (reflected in political interference in corruption investigations). Both issues are further complicated by the weak flows of information between investigators and prosecutors in developing and developed countries, as discussed above in the sections on transparency and MLA. Information-related problems may be due to a number of factors, including lack of trust between jurisdictions (e.g., fear that the investigated company or individual may be tipped off if information is shared), the scarcity of publicly available information, and, again, lack of capacity in developing countries to submit and respond to MLA requests. Restitution is one of the few areas where data are available, and they show that only a very small portion of funds recovered through settlements are returned to the country where the bribe was paid. Again, while the legal tools allowing for restitution seem to be in place, there are persistent obstacles, apparently related to the reluctance to return any funds to countries that may be perceived to be complicit in the case and to developing countries' lack of capacity to claim victim status in foreign courts.

In summary, the information available is insufficient to reach any definitive conclusions regarding the impact of FBLs on developing countries. However, available information, and particularly the analysis of settled cases, which are a good proxy for all foreign bribery cases, clearly points to a number of problems that can prevent the positive effects of FBLs from materialising, most notably:

- Lack of capacity in a number of areas related to the investigation and prosecution of FBL cases in developing countries;
- Weak flows of information between prosecutors in developing and developed countries;
- Lack of political will to investigate and political interference in developing countries;
- Concerns hindering restitution, including concerns about how returned funds may be used;
- Lack of empirical data and research in this area.

The following section looks at the role donor agencies can play in helping countries overcome some of these obstacles.

4 The role of donor countries and agencies

Donor agencies can help mitigate some of the negative externalities of foreign bribery legislation and increase the chances that the positive effects will materialise in developing countries. As more donor countries adopt foreign bribery laws and step up enforcement, in an effort to comply with the OECD Anti-Bribery Convention and with UNCAC, foreign bribery issues are likely to become even more relevant for donor agencies (OECD 2013).

There are several key reasons for donor agencies to become involved in this area. First, because of their role in connecting developing and developed countries, the agencies are uniquely positioned to provide support to foreign bribery investigations, which require close interaction and communication between different types of institutions in the donors' home and host countries. Similarly, donor agencies can also act as bridges and mediators between domestic companies in the countries where they are based and developing countries' governments, which are on the supply and demand side respectively of foreign bribery. Both the foreign company and the host government would benefit from an environment that is transparent and free of corruption, and donor agencies have traditionally played a role in contributing to create such an environment.

Second, donor agencies have the tools to understand the contextual conditions of many developing countries in a way that other institutions may not. For instance, prosecutors in an OECD country may struggle to identify the right interlocutors among their counterparts in a given developing country, while donor agencies working on the ground may already have knowledge of the local context and a network of contacts that allows them to readily identify the best resources. Donor agencies can thus facilitate flows of information on bribery cases.

Finally, foreign bribery affects foreign investments, and thus economic growth and development; it also affects the distribution of income, and thus the possibility of reducing inequality and poverty. To the extent that it diminishes people's trust in institutions, it undermines democratic governance. In essence, foreign bribery is a development problem, and one that many developing countries may struggle to tackle without external support. As such, it is at the heart of the mission of donor agencies.

Some of the suggestions presented in the following sections are related to work donor agencies can do directly in developing countries. However, several of the issues identified are equally related to policies and practices in developed countries. Donor agencies also have a role to play at home, working with other government agencies. This is a challenging proposition, as in general donor agencies have rarely attempted such domestic activism, particularly on anti-corruption, though there are a few exceptions (Fontana 2011 and Box 9). And yet this cooperation is key to ensuring policy coherence, that is, ensuring that donor countries' domestic policies are consistent with their development policies. While donor agencies may have limited ability to influence domestic policy in these areas, they can, at a minimum, raise awareness of the problems and seek cooperation with other government agencies on these issues.

The following sections examine the role that donor agencies can play in providing technical assistance, facilitating information flows, building political will, facilitating restitution, monitoring and managing returned funds, working with the private sector, and supporting further research. Suggested donor objectives and activities in each of these areas are summarised in Table 3.

Table 3: Donor agency role in supporting foreign bribery investigations and prosecutions

Area	Total cases (no.)	Total cases (%)
Technical assistance	Build developing countries' capacity in the area of domestic and foreign bribery	<p>Donor agencies can provide technical assistance in the following areas:</p> <ul style="list-style-type: none"> • Investigating bribery cases. • Conducting complex, multi-jurisdiction investigations involving foreign companies and nationals. • Submitting and responding to MLA requests effectively. • Protecting the confidentiality of information received via MLA. • Protecting the personal safety and rights of individuals implicated in corruption cases, including witnesses and whistleblowers. • Claiming victim status or otherwise formally participating in the prosecution of foreign bribery cases in foreign countries with the objective of obtaining restitution.
Facilitating the flow of information	Facilitate the flow of information on bribery cases between donor agencies' home jurisdictions and developing countries	<p>Donor agencies can:</p> <ul style="list-style-type: none"> • Continue supporting and making better use of existing focal points and groupings active in the area of foreign bribery, asset recovery, and IFFs (UNCAC, StAR, Interpol, CARIN, Egmont Group). • Facilitate the connection between investigators in countries involved in foreign bribery cases. • Bring cases investigated in their home countries to the attention of their local counterparts in developing countries. • Actively disseminate legal information on FBLs and on ways in which other countries can claim victim status or otherwise participate in court proceedings and settlement processes.
Building political will	Build political will to investigate and prosecute foreign bribery cases in developing countries	<p>Donor agencies can:</p> <ul style="list-style-type: none"> • Advocate for the investigation and prosecution of bribery cases in the host countries. • Support media and civil society organizations engaged in anti-corruption.
Restitution	Promote and facilitate restitution to developing countries of funds recovered in foreign bribery cases	<p>In host countries, donor agencies can:</p> <ul style="list-style-type: none"> • Provide technical assistance and build developing countries' capacity to claim victim status in court cases taking place in foreign countries. <p>In their home countries, donor agencies can:</p> <ul style="list-style-type: none"> • Raise awareness of issues related to restitution in foreign bribery cases (e.g., restitution of disgorged profits versus fines), and particularly of obstacles that hinder foreign countries in claiming victim status. • Encourage enforcing institutions to recognize a foreign country's claim of ownership or damages in bribery cases. • Raise awareness of need to reform legislation to allow for the inclusion of third parties in settlements. • Advocate with justice departments for the use of restitution as leverage to encourage prosecution of public officials in developing countries. • Encourage their home jurisdictions to use restitution as leverage.

Monitoring and managing returned funds	Facilitate restitution and counter concerns related to the potential loss of returned funds	Donor agencies can: <ul style="list-style-type: none"> • Support developing countries' governments in designing proposals for the management of returned funds. • Help co-manage returned funds. • Monitor the use of returned funds.
Work with the private sector	Prevent companies, particularly companies based in their home jurisdictions, from bribing public officials in developing countries	Donor agencies can: <ul style="list-style-type: none"> • Raise awareness with the private sector of specific corruption risks in the country where the donor agency operates. • Raise awareness with corporations of their obligations under foreign bribery laws, local laws, and international agreements. • Raise awareness and help build capacity on compliance programs, particularly with small and medium enterprises operating abroad.
Future research agenda	Further develop knowledge on the impact of FBLs in developing countries	Donor agencies can support research in the following areas: <ul style="list-style-type: none"> • Understanding the overall effects of FBLs and their enforcement on corruption and anti-corruption in developing countries. • Analysing systematically the number of FBL cases, including settlements, that result in investigations and prosecutions in developing countries, and identifying patterns, obstacles, and enabling factors. These would include the ability of developing countries to successfully prosecute cases and the types and severity of sanctions. • Analysing settlement documents to assess the degree of precision of the information related to the developing countries where the bribery happened.

4.1 Providing technical assistance

A first and more traditional role for donor agencies is related to capacity building and technical assistance. As the analysis has shown, some of the obstacles that prevent developing countries from investigating foreign bribery cases, and from reaping the benefits of foreign bribery investigations conducted in other jurisdictions, are related to lack of capacity to:

- Investigate bribery cases domestically;
- Conduct complex multi-jurisdiction investigations of foreign companies and nationals;
- Submit and respond to MLA requests effectively;
- Protect the confidentiality of information received via MLA;
- Protect the personal safety and rights of individuals implicated in corruption cases, including witnesses and whistleblowers;
- Access and analyse information in a timely manner;
- Claim victim status or otherwise participate formally in the prosecution of foreign bribery cases in foreign countries with the objective of obtaining restitution.

Donor agencies already have a long history of providing technical assistance and capacity building to developing countries, including in anti-corruption and asset recovery and in the justice sector more generally. Technical assistance in these areas is often funded by donors but provided through other specialised organisations. These include, for instance, the United Nations Office on Drugs and Crime

(UNODC), through its Thematic Programme on Crime Prevention and Criminal Justice Reform and its Global Programme against Money-Laundering, Proceeds of Crime and the Financing of Terrorism; the International Centre for Asset Recovery (ICAR), through its legal and case advice programme and its training programmes on asset recovery, MLA, investigation of international cases, and other related issues; and StAR, a joint initiative of the UNODC and World Bank, through its capacity building and case assistance programmes.

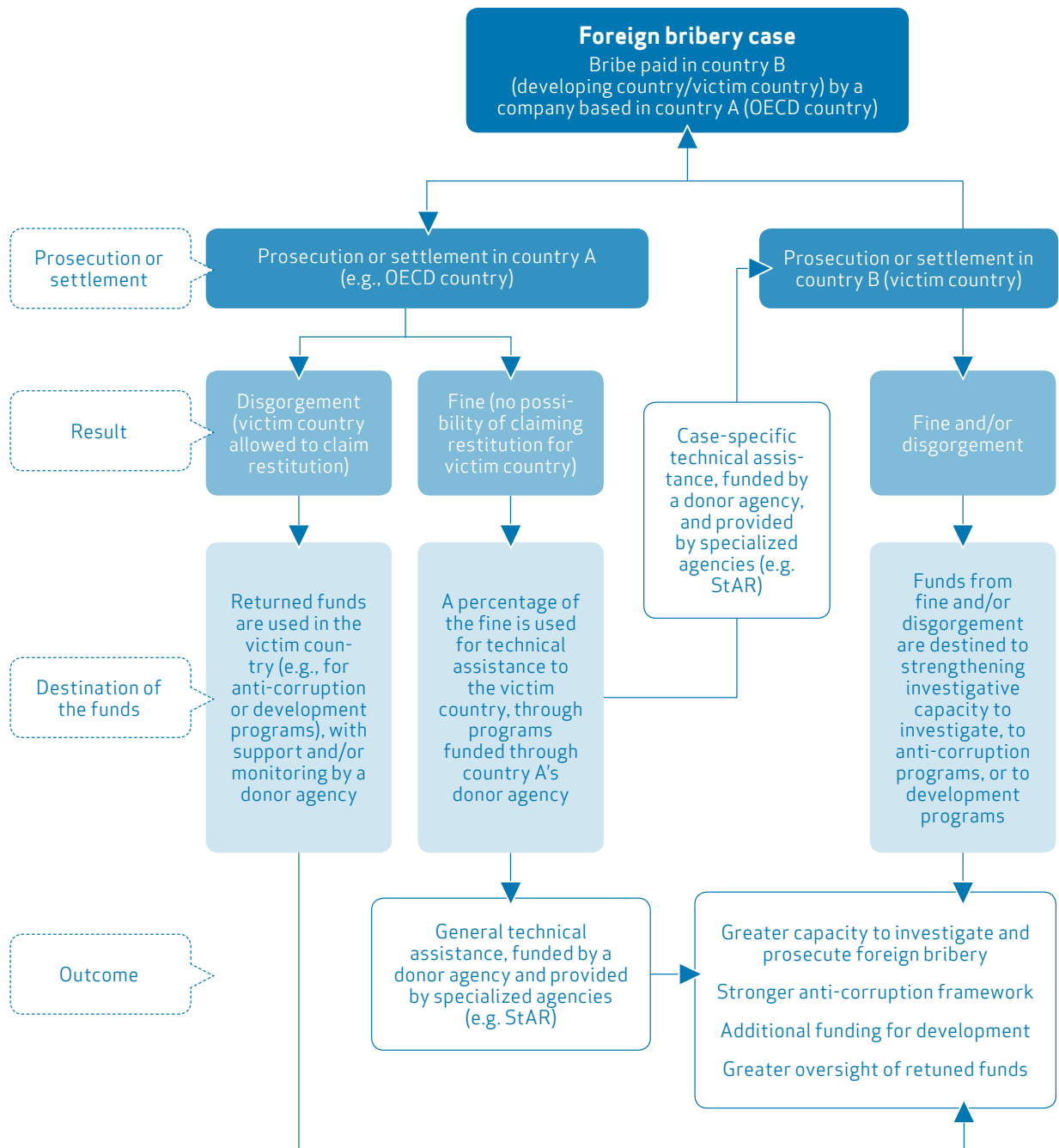
The analysis above suggests that such initiatives should be continued and, where possible, expanded, particularly to include countries that have not yet been involved. One way to mobilise more resources for these types of technical assistance would be to use the fines, disgorgements, and funds otherwise recovered or confiscated in foreign bribery proceedings. Given the large amounts involved in settlements alone, even a small percentage could provide a substantial funding base. Although restitution is still the preferable option, programmes of this type could be an interesting alternative in cases where restitution may be difficult, but the prosecuting country still intends to use some of the monetary sanctions (e.g., from fines, for which restitution to the victim country may be harder to justify) to benefit the victim country (see Figure 1).

The results of capacity-building programmes can be hard to show, particularly in cases where there is constant and significant rotation of personnel, as is often the case in developing countries. To make an even more compelling case and to show greater results from their funding in this area, donors could direct a larger portion of funds to initiatives that aim to assist countries directly in the recovery of funds, such as StAR's Case Assistance programme and ICAR's Legal and Case Advice programme. In addition to facilitating successful recovery of assets, this would have the added benefit of providing "on-the-job" training for local staff such as prosecutors and investigators (see Figure 1).

An alternative strategy could be for donor agencies to facilitate or fund a joint investigation that involves authorities of different countries (developing and developed) in the same case, as a way to build capacity in the weakest jurisdiction while the case is being investigated. A successful example of this type of cooperation is the recent joint investigation conducted by US and Guinean authorities of corruption in the mining sector (Banerjee 2014). The investigation also served to indirectly build the capacity of Guinean investigators. Another example is the joint investigations conducted by various jurisdictions in connection with the TSKJ consortium case in Nigeria (Oduor et al. 2013, 136).

In some countries, especially in sub-Saharan Africa, technical assistance programmes aimed at building the capacity of prosecutors and investigators may fail because of other, more basic, capacity constraints, such as the lack of Internet access, computerised systems, or English proficiency. Such needs may need to be accommodated in donors' efforts. Donors should not ignore them when considering technical inputs, which can often be highly specialised at the expense of more elemental requirements.

**Figure 1: Flow of funds recovered in foreign bribery prosecutions:
An ideal scenario**



4.2 Facilitating the flow of information

As noted in sections 3.3 and 3.4, various obstacles, related to both transparency and MLA, can impede the flow of information between different jurisdictions about pending foreign bribery investigations and settlement negotiations and about the terms of settlements once concluded. An example is the lack of collaboration between authorities in Yemen and the United States in the Latin Node case (Box 8).

An enhanced flow of information could increase the likelihood that developing countries will take actions such as:

- Initiating law enforcement proceedings within their own jurisdiction against the payers and recipients of bribes;
- Seeking mutual legal assistance from other countries;
- Pursuing the recovery of assets;
- Participating in the initiating jurisdiction's investigation and/or prosecution, to pursue compensation for damages suffered;
- Annuling or rescinding any public contracts or permits that were concluded in the context of bribery cases;
- Starting actions to debar companies.

Donor agencies' country offices can play a role in facilitating the flow of information on foreign bribery cases by:

- Facilitating connections between investigators in all countries involved;
- Bringing cases investigated in the donors' home countries to the attention of their local counterparts;
- Providing technical assistance to countries in submitting MLA requests;
- Actively disseminating legal information on FBLs in the agencies' home countries, particularly information on ways in which other countries can become involved in foreign bribery investigations, claim damages suffered as a result of corruption, and participate in the asset recovery process.
- Making better use of the multiple focal points and groupings in the area of anti-corruption and IFFs, such as the UNCAC asset recovery focal points, the StAR/Interpol Global Focal Point Initiative, the Egmont Group focal points, and the Camden Asset Recovery Inter-Agency Network (CARIN);

These initiatives may be taken proactively or in conjunction with the emergence of specific cases. They may also require a donor agency to cooperate more closely with other actors, such as embassies' legal attachés and investigators and prosecutors in the home country. This type of cooperation can also be

achieved indirectly by funding and supporting initiatives that are already working in this direction, such as StAR.

Domestically, donor agencies should encourage authorities in their home countries to be more proactive in sharing information on investigation of foreign bribery cases; on settled cases, in accordance with articles 46 (para. 4) and 56 of UNCAC; and on the avenues for countries to pursue victim status in foreign bribery proceedings.

4.3 Building political will

When a foreign bribery case implicates public officials, the lack of political will to investigate the case can also be an obstacle. As noted, a common concern of companies based in countries that enforce FBLs is that the demand side of the bribe, the public official, is hardly ever prosecuted, while companies face stiff penalties. Lack of political will can be especially challenging to overcome in contexts where the judiciary or the anti-corruption agency is not independent, or where the public officials in question are connected to the party or individuals in power. And yet the prosecution of public officials in developing countries is an essential deterrent against international corporate bribery and demonstrates the government's commitment to fight corruption. What, if anything, can donor agencies do in these contexts?

In some documented cases, donor agencies have spoken out against corruption and advocated in favour of the prosecution of specific cases, sometimes using the withdrawal of aid as leverage. Research shows, however, that attempts to impose anti-corruption initiatives from outside by threatening the withdrawal of funds are only partly effective in the short term; donors should instead pursue long-term strategies (de Vibe et al. 2013).

In principle, some of the initiatives highlighted in sections 4.1 and 4.2 may contribute indirectly to building political will. If a country is provided with all the technical tools, resources, and relevant information necessary to prosecute a case, it may become increasingly difficult for the government and the judiciary to ignore the case and refuse to act. Often, however, this will not be sufficient. Even if provided with all the relevant information on a case, authorities may still hesitate to prosecute bribe takers – as, for example, in the Honduran investigation of the Latin Node case (Box 8).

While building political will to counter corruption has traditionally proven extremely difficult, one of the steps that has been effective is to encourage the general public and the media to put pressure on governments. Public pressure and media coverage of specific foreign bribery cases creates incentives for the authorities to investigate and prosecute those cases, even when they implicate local public officials. Research shows a strong positive correlation between increased press freedom and lower levels of corruption (Johnsøn, Taxell, and Zaum 2012). Donor agencies already play a significant role in this area, as they have traditionally supported initiatives aimed at building capacity among journalists and civil society actors. Donors should expand programmes aimed at strengthening freedom of the press and the capacity for investigative journalism.

4.4 Facilitating restitution

As discussed in section 3.5, restitution is important for various reasons. The main obstacles to restitution are related to legal and policy issues arising in both the (developed) countries investigating foreign bribery cases and the (developing) countries where the bribe took place.

In developing countries, the main obstacle is lack of capacity to participate in legal proceedings in foreign jurisdictions and claim restitution in specific cases. Donor agencies can provide technical assistance to fill this gap, as discussed in section 4.1.

BOX 8. THE LATIN NODE CASE

In 2009, Latin Node, a US-based company, pleaded guilty of violating the FCPA and agreed to pay a US\$2 million fine in connection with bribes paid in Honduras and Yemen for securing contracts in the telecommunication sector.¹ Four of the company's former principals also pleaded guilty and were sentenced to prison terms (Cassin 2012). The case surfaced following due diligence conducted by another US company that had acquired Latin Node. The US investigation and prosecution resulted, in both Yemen and Honduras, in parallel investigations of the public officials who, according to US court documents, had been at the receiving end of the bribes. The case illustrates some of the factors that can make investigations and prosecutions in developing countries difficult: weak flows of information between jurisdictions, and the lack of political will to fully prosecute the bribe receiver.

Obstacles to information sharing. In Yemen, the Supreme National Authority for Combating Corruption (SNACC) conducted a four-month investigation of the case following information received from the Telecommunication Ministry.² Twenty-two public officials were investigated and preliminary measures were adopted to suspend them from their positions and prohibit them from travelling abroad. Eventually the case was passed to prosecutors with the recommendation to press charges against 17 individuals (no update is available on whether those individuals were further prosecuted). SNACC reported that difficulties in the investigation of the case were related to (a) lack of an agreement between law enforcement authorities in Yemen and the US to share information regarding corruption cases, and (b) lack of a framework for the two countries to share the funds collected from the seizure and recovery of proceeds of the corrupt activities.

Lack of political will. The Honduran government also launched its own investigation of the case. One of the key defendants, Marcelo Chimirri, former managing director of Honduran Telecom, was acquitted in 2013 by the Supreme Court. The Honduran court refused to admit as evidence documents sent by the US State Department, which included a check that provided compelling evidence of Chimirri's involvement in the bribe. The court refused to admit the documents on technical grounds for failing to meet the country's "requirements for international assistance" in legal matters (Hernandez 2013). Some commentators pointed to Chimirri's family ties with Honduras's former president, Manuel Zelaya, as one of the factors leading to the acquittal – an apparent failure of political will (Proceso Digital 2013).

¹ See *United States v. Latin Node Inc.*, US District Court for the Southern District of Florida, No. 09-20239. For a summary of the case see Cassin (2009).

² For a summary of the case provided by the Yemen anti-corruption agency, see <http://www.aauthorities.org/successstory/case-no-09-20239cr-houck-0-50-wvan-against-latin-no-de-inc-company>.

Source DfID

In their home countries, meanwhile, donor agencies can raise awareness of issues related to restitution with the domestic agencies in charge of enforcing foreign bribery legislation. In particular, they can encourage enforcers to recognise another country's claim to ownership or damages when deciding on monetary sanctions relating to a corruption case, consistent with article 53(c) of UNCAC.⁴¹ As discussed in section 3.5, one of the challenges is to identify exactly which types of monetary sanctions should be

imposed: it may be easier to argue in favour of returning disgorged profits rather than fines, as disgorged profits are a direct reflection of the damages suffered by the victim country. The legal debate on this aspect of restitution is just beginning. Donor countries can play a role in pushing it forward, for example by requiring the OECD Working Group on Bribery and other relevant bodies to seek a common approach, or at least some basic common principles among countries enforcing FBLs.

Donor agencies could also raise awareness with their governments of the need to reform legislation to allow for the formal inclusion of third parties in settlement agreements in foreign bribery cases. The changes to allow foreign governments to participate in recovery seem to be within the spirit of article 53(b) of UNCAC, which requires a state party, in accordance with its domestic laws, to “take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences.”

Finally, the argument that public officials in developing countries are complicit rather than victims in bribery cases is likely to remain an obstacle to restitution of funds. As shown (see Box 7), courts have denied the status of victim, and thus restitution, in cases where the public officials of the country were actively involved in the bribery. It may be hard to prove whether such cases are due to a “rogue” public official or to a broader corruption scheme endorsed by the highest levels of government. Yet this is a crucial distinction. Donor agencies could advocate with their justice departments in favour of using restitution as leverage to encourage prosecution of public officials in developing countries. Prosecution could be a way for the developing country’s government to express its reprobation and to distance itself from the public officials involved in the case, as in the Lesotho case (Box 5). For courts in donor countries, the adoption of administrative or legal remedies (such as prosecution, removal, destitution) against the public official could be one of the elements to consider before granting victim status, and thus the possibility of obtaining restitution, to developing countries.

4.5 Monitoring and managing returned funds

As noted, one of the arguments against the restitution of funds recovered in foreign bribery cases is the concern that these may end up in the pockets of corrupt public officials and politicians in the countries where they originated. This argument is not limited to foreign bribery cases, but has also surfaced in connection with asset recovery cases in general and with the recovery of stolen donor funds (K. Stephenson et al. 2011; Fenner Zinkernagel and Attisso 2013; de Vibe et al. 2013). The argument has weaknesses, however, and is one that donor agencies can help counter. Two case studies show that donor agencies can facilitate restitution by supporting government in designing proposals, helping to manage returned funds, and monitoring their use.

British company BAE settled allegations with the UK Serious Fraud Office in connection with a bribe paid in Tanzania for the sale of military radar. The company pleaded guilty to failing to keep adequate accounting records and agreed to make a payment of £30 million (less fines) to the people of Tanzania, as the court judged the country to have been adversely affected by BAE’s actions. The funds paid in restitution to Tanzania by BAE were managed by the government of Tanzania through an arrangement facilitated by the UK Department for International Development (DFID), following a memorandum of understanding signed in 2011 with all interested parties. The arrangement included monitoring and evaluation provisions, and after restitution DFID played a crucial role in monitoring use of the funds, which were allocated to the education sector (Box 9).

A similar case was triggered by a US FCPA investigation. A US citizen agreed to transfer to the World Bank US\$84 million to be used in development activities taking place in Kazakhstan. The funds had been recovered following his indictment by US authorities for bribes paid in Kazakhstan in connection with contracts in the oil and gas sector. The pool of funds was managed by the BOTA Foundation, which was expressly created in May 2008 as an independent nonprofit organisation following an agreement among the governments of Kazakhstan, Switzerland, and the United States, with the assistance of the World Bank. The funds were directed to programmes for children and youth and were managed in cooperation with civil society representatives (World Bank 2008; Fenner Zinkernagel and Attisso 2013).

Both cases show that donor agency involvement in restitution issues can be very beneficial and that donors can play different roles in ensuring that returned funds are used effectively. The participation of donor agencies may be crucial to addressing corruption concerns, whether these are justified or not. Further research is needed to understand how these initiatives have worked in practice, but preliminary findings indicate that the experiences have been positive overall.

4.6 Working with the private sector

Because of their connection with companies investing in developing countries, donor agencies and the embassies in which they are often based also have a role to play in raising awareness among private sector actors about foreign bribery and corruption. This may include making companies aware of the risks connected with doing business in certain countries, but also, and perhaps more importantly, reminding them of obligations under foreign bribery laws in their home countries, anti-corruption laws in the host country, and international agreements. While large multinational corporations increasingly are implementing comprehensive corporate compliance programmes, medium and small firms may be more vulnerable to requests for bribes and easily tempted to offer illicit payments to obtain certain advantages. Use of intermediaries, the design of supply chain management systems, the definition of what constitutes a public official, and local business practices and behaviours are likely to be among the most sensitive topics. The body of knowledge on corporate compliance programmes and the number of institutions of different types that offer training in this area is increasing rapidly, and donor agencies and embassies can draw on these resources to build the awareness and capacity of foreign companies operating in developing countries.

4.7 Supporting further research

There are still considerable gaps in knowledge that prevent a comprehensive understanding of the positive and negative impact of FBLs on developing countries. Some recent publications have helped shed light on the issue, especially the comprehensive StAR report (Oduor et al. 2013). Work is underway to fill the gap further, particularly with respect to qualitative information (such as the forthcoming work by Davis). Donor agencies already support institutions conducting research in this area – including StAR, ICAR, UNODC, and U4 – and should continue doing so.

One of the key challenges is to compile data on foreign bribery cases in demand-side (developing) countries, whether or not these cases are connected with those in other countries. Researchers have struggled to access information on such cases, and the analysis above suggests that improving the database is a necessary next step in the effort to better understand issues related to the impact of FBLs on developing countries. Specific areas where more research is needed, as highlighted throughout the paper, include:

- Understanding the overall effects of FBLs and their enforcement on corruption and anti-corruption in developing countries.
- Analysing systematically the number of FBL cases, including settlements, that result in investigations and prosecutions in developing countries, and identifying patterns, obstacles, and enabling factors. These include the capacity of developing countries to successfully prosecute cases and the types and severity of sanctions.
- Analysing settlement documents to assess the degree of precision of the information related to the developing countries where the bribery happened.

BOX 9. DFID'S ROLE IN THE TANZANIA BAE CASE

British company BAE settled allegations with the UK Serious Fraud Office in connection with a bribe allegedly paid in Tanzania for the sale of military radar. No corruption charges were brought by the SFO, but in a plea bargain BAE agreed to make a payment of £30 million (less fines imposed by the court) "for the benefit of the people of Tanzania."

Initial indications were that BAE wished to return the funds by channelling them through local NGOs, but the government of Tanzania (GoT) did not agree. At the request of the SFO, DFID provided advice, based on discussions with the GoT on several points:

- How to ensure that the restituted funds were used consistently with the GoT's development strategy;
- The GoT's argument that the payment should be made directly to the GoT (rather than to NGOs), because it had been overcharged by BAE in the sale and had thus suffered a direct loss;
- That it was not appropriate to channel private funds through DFID for disbursement, but that DFID was well positioned to offer technical advice on strategic areas where the funds might be allocated.

Following discussions with the SFO, DFID's Tanzania office and the GoT agreed to collaborate in preparing a proposal for how the funds might be used. DFID suggested allocating the funds to the achievement of specific and measurable development objectives. The GoT selected the education sector (at the time, DFID coordinated donors' work in this area). During this phase, DFID facilitated exchanges between all parties in order to reach agreement on the proposal.

The final document was formally presented by the GoT to the SFO in November 2010. It proposed using the money to boost the resources available to schools to buy essential teaching materials and improve classroom facilities and teachers' accommodations. The money would be allocated to the GoT's Non-salary Education Block Grant. The GoT had struggled to fund this budget line in previous years, and channelling funds there would directly benefit millions of children. The proposal also set out arrangements for monitoring use of the funds and subjecting it to an independent evaluation and audit, consistent with international standards.

After some delays, BAE agreed to the proposal in late 2011.¹ The DFID Tanzania office continues to assist the GoT in monitoring the expenditure of funds. This has been a time-consuming and difficult process, but no corruption-related problems have surfaced.

¹ On the delays, see *UK House of Commons (2011)*.

<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmintdev/c847-i/c84701.htm>

Source: DFID

¹ Some FBLs afford extraterritorial jurisdiction. For example, the US Foreign Corrupt Practices Act allows prosecution of a company located outside the United States, for acts committed outside the United States, as long as the company is listed on the New York Stock Exchange. In other countries such as France, prosecutors still need a territorial component (for example, the company headquarters is located in the jurisdiction) to open a case.

² It is worth pointing out that neither settlements nor actual prosecutions accurately reflect the prevalence of bribery by a country's nationals abroad, as a significant number of corrupt transactions typically go undetected.

³ A valid question is how to define developed and developing countries. For the purposes of this paper, "developed countries" are OECD members, as most of them are donors and have also signed the OECD Anti-Bribery Convention, which means they should have laws in place prohibiting foreign bribery. There is obviously a certain level of imprecision in this definition, as some OECD members provide little aid or are themselves aid recipients. The definition of "developing country" can be even more elusive, but for our purposes the term refers to major beneficiaries of development aid. Both definitions exclude "emerging economies," several of which are signatories to the OECD convention (Russia and South Africa). Multinational corporations based in such countries are increasingly active in international markets and in foreign direct investment, particularly in developing countries. The Transparency International Bribe Payers Index ranks companies from Russia, China, Indonesia, Argentina, India, and South Africa among those perceived to be most likely to pay bribes when doing business abroad. This raises important questions which are, however, outside of the scope of this paper.

⁴ This can be seen in a quick review of cases summarised on the website of the US Securities and Exchange Commission (<https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>).

⁵ For example, Siemens, a German company, has been investigated for paying bribes in a number of countries, including Australia, Greece, and Italy (Oduor et al. 2013, 131–34).

⁶ Both the US and the UK are common law jurisdictions, and thus their FBLs differ in some key aspects from those of civil law countries such as Germany, France, and Italy. The following sections contain some brief reflections on the characteristics of common law systems. For a more thorough discussion of differences between the two systems, see Oduor et al. (2013).

⁷ See the Omnibus Trade and Competitiveness Act of 1988 § 5003(d), <http://www.justice.gov/criminal/fraud/fcpa/history/1988/houserpt-100-418.pdf>. This was also discussed by the US Senate (1998).

⁸ Transparency International also conducts independent reviews of the enforcement of the convention. See Heimann et al. (2013).

⁹ The status of implementation of the OECD Anti-Bribery Convention and the related recommendations made by the working group are different in different countries. See OECD Working Group on Bribery (2013).

¹⁰ The number of cases initiated under the act by the US Department of Justice and the Securities and Exchange Commission in 2013 was slightly over the number in the preceding year, reflecting the agencies' continued commitment to aggressive pursuit of cases under the FCPA (see Altman, Sinicrope, and Lovells 2014).

¹¹ The OECD convention also has an MLA provision, but this only applies to interaction between states that are members of the Working Group on Bribery.

¹² In 2006 the UK Serious Fraud Office dropped an investigation into bribes paid by BAE, a defence company, in Saudi Arabia, following an intervention by the British prime minister and concerns about Britain's national security and strategic-economic ties with Saudi Arabia (BBC News 2006).

¹³ Bribery Act, 2010, c.23, § 7(5).

¹⁴ These include the Johnson & Johnson/DePuy case, a Kellogg/TSKJ Consortium case, and the Balfour Beatty case (Oduor et al. 2013).

¹⁵ Oduor et al. (2013), referring to OECD (2012), citing *R. v. Underwood* (2004); EWCA Crim, 1 Cr. App. R. 13, para. 6; *Consolidated Criminal Practice Direction*, para. IV.45.254; Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud, paras. C10, D9-311, and E5; *R. v. Newton*, 7 Cr. App. R. 13 (1983); *R. v. Innospec*; *R. v. Dougall*.

¹⁶ In February 2014, deferred prosecution agreements were introduced under the 2010 UK Bribery Act. These are not examined further in this paper, as they have yet to be applied. See Roberts (2014).

¹⁷ For a discussion of plea agreements from a federal prosecutor's perspective, see the *United States Attorneys' Manual* (USDOJ 1997), §§ 9-27.330–520.

¹⁸ See, e.g., the Johnson & Johnson case (Oduor et al. 2013), which includes a non-prosecution agreement by which Johnson & Johnson agreed to help foreign authorities under direction of the US authorities with whom they settled. This term is in accord with UNCAC, which encourages a mitigated punishment for cooperating defendants. Under UNCAC article 37(2), each state party "shall consider providing for the possibility . . . of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence."

¹⁹ See *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (USDOJ/SEC 2012, 75), and OECD Working Group on Bribery (2010, 32).

²⁰ For a discussion of the principles that federal prosecutors must follow with respect to NPAs, see the *United States Attorneys' Manual* (USDOJ 1997), §§ 9-27.600, 9-27.620, 9-27.640, 9-27.641, and 9-27-650.

²¹ See, e.g., guidance issued on 7 March 2008 by then acting deputy attorney general Craig S. Morford relating to the use of independent corporate monitors in connection with DPAs and NPAs (USDOJ 2010).

²² See "Principles of Federal Prosecution of Business Organizations" (USDOJ 2008), especially 9-28.900, "Restitution and Remediation." A prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so.

²³ Other benefits of transparency in settlements include holding prosecutors and judges accountable, avoiding excessive concentrations of power, reducing the perception that companies may simply be buying their way out of sanctions, and providing precedents for defence counsel to use in future cases.

²⁴ OECD Working Group on Bribery (2012). An exception is the BAE case, where the plea agreement was released (<http://www.caat.org.uk/issues/bae/bae-settlement-basis-of-plea.pdf>). See also Oduor et al. (2013), chap. 6, case 3.

²⁵ The most important settlements are often announced in the media when negotiation or self-investigation starts, or in any case ahead of the completion of the process. Media reports may contain some information that other jurisdictions can use to at least start an investigation, although the quality and level of detail of such information varies.

²⁶ A separate but related issue, which is not addressed here, is the availability of information on bribery cases to officials in the countries where the proceeds of bribery are hidden or laundered, such as tax havens.

²⁷ Authors' interview with Marianne Lassus Mathias, senior integrity officer, Inter-American Development Bank, 21 March 2014.

²⁸ *People of the State of New York v. Paulo Maluf*, Supreme Court of the State of New York, County of New York, Criminal term. See Zagaris (2013).

²⁹ *United States v. All Assets Held at Bank Julius Baer & Company, Ltd.*, US District Court for the District of Columbia, C.A. No. 0409798 PLF/DAR, memorandum order and opinion (20 September 2011); see also Scarcella (2011).

³⁰ There are other, related reasons why authorities may be reluctant to file MLAs and thus provide authorities in other countries with confidential or sensitive information on corruption cases. For instance, they may fear that witnesses will not be adequately protected by the local police force if information about their involvement gets out. They may fear that defendants will not receive adequate civil rights protections or will be unfairly punished by local courts. Finally, there may be reciprocity issues. Generally, bilateral agreements to share MLA (whether formal treaties or informal understandings) operate on the basis of reciprocity. If one party has not provided information in the past, the other party may not be willing to provide information in the current case.

³¹ Instances of the first scenario are usually not addressed under FBL cases but are treated as part of the broader asset recovery agenda; thus they are not directly addressed in this paper.

³² The StAR report (Oduor et al. 2013) has triggered a lively debate on how to interpret the UNCAC provisions on restitution of stolen assets. A key question is whether these provisions apply also to the profits made by corporations that obtained contracts (or other benefits) by paying bribes abroad (the position supported in this paper) or whether they apply only to funds embezzled by public officials. See, for example, M. Stephenson (2014).

³³ 18 US Code § 3771(e).

³⁴ Office for Victims of Crime, Crime Victims Fund,
<http://www.ojp.usdoj.gov/ovc/pubs/crimevictimsfundfs/intro.html>.

³⁵ 18 US Code § 3663A.

³⁶ *United States v. Green*, U.S. Ct. of App. for the 9th Cir., No. 10-50519, Opinion (11 July 2013),
<http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/11/10-50519.pdf>.

³⁷ *United States v. Diaz*, No. 1:09-20346-CR-MARTINEZ-1 (S.D. Fla. 2012); see also Maglich (2011).

³⁸ Judgment, *Regina v. Innospec Ltd.*, 2010, paras. 31 and 47; see also Oduor et al. (2013, 115–17).

³⁹ See *Attorney General of Zambia v. Meer Care & Desai (A Firm) & Ors* (2007) EWHC 952 (2008) EWCA Civ 1007 (31 July 2008).

⁴⁰ These figures may overstate the problem. While FBLs have been around for some time (the US FCPA since 1977), the debate, practice, and legal framework for restitution in foreign bribery cases has emerged only recently.

⁴¹ Article 53(c) directs that each state party shall “take such measures as may be necessary to permit its courts or competent authorities . . . to recognize another State Party’s claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.”

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INDEXING TERMS:

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Legislation prohibiting foreign bribery has been enacted and enforced by several countries, notably the United States and the United Kingdom, but its impact on developing countries is poorly understood. An analysis of literature and practice provides insights into factors that may help developing countries benefit from foreign bribery laws and minimize negative externalities. Lack of capacity, lack of political will, and weak flows of information emerge as key obstacles. Although donor agencies have been scarcely involved in this area, they are ideally positioned to play an important role in supporting developing countries by providing technical assistance, facilitating information flows, building political will, facilitating restitution, monitoring and managing returned funds, working with the private sector, and supporting further research.