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BRIDGING THE GAP BETWEEN SFO AND DOJ PRACTICE IN REMEDIATING THE VICTIMS OF FOREIGN BRIBERY

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Abstract

It is constantly recognized by governments and enforcement agencies that foreign bribery causes widespread economic harm, which has an incredibly negative impact on citizens and governments in the global south. However, asset recovery and receipt-side enforcement has not been effectively utilized in repairing this harm. The literature has therefore shifted toward considering ways in which supply-side enforcement mechanisms, and in particular the enforcement of the *Foreign Corrupt Practice Act*, might be used a remedial tool. However, there a several obvious ripostes to the argument that the United States should adopt these kinds of remedial efforts. For example, (i) there is no legal obligation which mandates that it ought to do so, (ii) it would be against the economic interests of the United States to use the proceeds of settlement agreements to remediate the victims of foreign bribery, and (iii) the Department of Justice is not a foreign aid body and is not equipped to approach issues of remediation. This paper, which is part of an ongoing project into issues surrounding the remediation of foreign bribery's victims, grapples with these issues. The primary contribution of this paper is an analysis of the practices of the Serious Fraud Office, and an attempt to construe from these practices a set of guiding principles that could be used to elucidate the basis upon which the Serious Fraud Office currently pursues remediation, and to potentially simplify the adoption of remedial practices for other enforcement agencies.

1. Introduction

This paper is part of an ongoing project into examining solutions to issues that are often characterized as impediments to remediating those who have been harmed by foreign bribery. This paper is primarily concerned with proposing a framework of salient considerations that can be used to guide enforcement bodies in deciding whether to include terms providing for remediation under the terms of guilty plea agreements, deferred prosecution agreements and non-prosecution agreements (**collectively, 'settlement agreements'**).[1] In its completed form, the ongoing project will also consider techniques to ensure that remediation monies can be distributed in such a way that minimizes the risk of those monies being injected back into corrupt schemes, embezzled or put toward other illicit activities ('**repeat corruption**'). For the purposes of the conference, this paper focuses on the United States context and settlement agreements negotiated by the Department of Justice ('**DOJ**') following alleged breaches of the *Foreign Corrupt Practices Act* ('**FCPA**').[2] However, much of the analysis below will be relevant to the practices of all enforcement agencies considering whether to pursue remediation in response to supply-side bribery.[3]

To describe the practice of remediation through settlement agreements, this paper employs the term 'remedial settlement distribution'. This paper does not make the argument that the DOJ should do more to remediate the victims of foreign bribery in its enforcement efforts, that argument has been made elsewhere.[4] Instead, this project is geared toward addressing practical issues that the DOJ, and other enforcement agencies, are likely to face in attempting to employ remedial settlement distribution. To this end, particular regard is had to the efforts of the United Kingdom's Serious Fraud Office ('**SFO**'), which has made considerable progress in this field to date.

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[1] For a discussion of the operation of each of these agreements in practice, see Mike Koehler, *The Foreign Corrupt Practices Act in a New Era* 60-66 (2014).

[2] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)–(h), 78dd(1)–(3), 78ff (2006)), amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (codified as amended at 15 U.S.C. §§ 78dd(1)–(3), 78ff); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (1998) (codified as amended at 15 U.S.C. §§ 78dd(1)–(3), 78ff)

[3] For a definition of supply-side bribery, see Organization for Economic Development, *Foreign Bribery Enforcement: What Happens to the Public Officials on the Receiving End*? 3 (2018):"The supply side of foreign bribery relates to what bribers do – it involves offering, promising or giving a bribe to a foreign public official to obtain an improper advantage in international business. In contrast, the demand side of foreign bribery refers to the offence committed by public officials who are bribed by foreign persons."

[4] Andrew B. Spalding, Corruption, Corporations, and the New Human Right, 91 Wash. U. L. Rev. 1365 (2014) (hereafter, 'Spalding, Corruption, Corporations, New Human Right'), Andrew B. Spalding, *Restorative Justice for Multinational Corporations*, 76 Ohio St. L.J. 357 (2015) (hereafter 'Spalding, Restorative Justice'), Elisabeth Danon, 2017 OECD Global Anti-Corruption & Integrity Forum, *Levelling the business playing field and improving victims' compensation, the case for a multilateral resolution of foreign bribery allegations* (2017), *available at* https://www.oecd.org/cleangovbiz/Integrity-Forum-2017-Danon-foreign-bribery.pdf, Margaux Hall, Vivek Maru, *From Bribery to Empowerment*, Project Syndicate (Nov. 2, 2012) *available at* https://www.project-syndicate.org/commentary/using-foreign-bribery-fines-to-fund-legal-empowerment-by-margaux-hall-and-vivek-maru. See generally, Jacinta Anyango Oduor, at al., *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (2014) (hereafter 'Left out of the bargain').

The literature establishes that bribery is capable of harming individuals, companies, institutions, and governments, and yet in many cases, that there is little recourse for the victims of this harm.[5] It is worth recounting that this harm can be expressed in terms of both the direct impact that bribery has on specific entities[6] as well as the indirect impact it has on society at large.[7] The latter kind of harm occurs when decisions of government spending are made pursuant to the interests of bribe-receiving government officials rather than the interests of that government's citizens, which in turn leads to the disenfranchisement of those citizens.[8] As such, the harm caused by pervasive government corruption to a general populace or a society at large is usually expressed in terms of its trickle-down effects.[9]

While there is little doubt that bribery is capable of causing harm, the topic of remedying this harm is vexed. A growing number of commentators, recognizing that, in the current international anti-bribery landscape, settlement agreements provide the ideal platform for remediating the victims of foreign bribery, have begun to criticize the fact that settlement agreements are rarely utilized in such a way that benefits those harmed by bribery.[10] The issue is of course complicated by the international character of the United States' foreign bribery enforcement strategy, with one prominent commentator remarking: "I am not sure where criminal fines should go when a French company bribes Costa Rican "foreign officials," but I am pretty sure that the answer should not be 100% to the U.S. Treasury."[11]

2. Foundational Concepts

2.1 Distinguishing compensation from reparations

Much of the commentary on remediating the victims of bribery employs the term 'compensation' to describe the transfer of wealth to victims.[12] This term is unhelpful. It conflates the two very different

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[5] Elizabeth David-Barrett, *Are Some Bribes More Harmful than Others? Exploring the Ethics Behind Anti-bribery Laws*, 26 (1-2) Journal of Interdisciplinary Economics 119 (2014). Delphia Lim, et al., *Access to Remedies for Transnational Public Bribery: A Governance Gap*, 28 (3) Criminal Justice Magazine 35 (2013) (Hereafter, 'A Governance Gap').

[6] An illustrative example appears in the United Kingdom case of *FHR European Ventures LLP v. Cedar Capital Partners LLC* [2014] UKSC 45. See also the Standard Bank case discussed below.

[5] *Collar Crime* 96 (2010); David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach*, 33 Corn. Int'l L.J. 593, 594, 596–97 (2000).

[8] See United States Department of Justice, Press Release, *Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations* (2008) *available at* https://www.justice.gov/archive/opa/pr/2008/December/08-opa-1112.html.

[9] Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. Int'l L. & Com. Reg. 83, 87 (2007). See also Johann Graf Lambsdorf, Transparency International, *How Corruption Affects Economic Development, in Global Corruption Report* (2004).

[10] Spalding, Corruption, Corporations, and the New Human Right. Maud Perdriel-Vaissiere, UNCAC Coalition Blog, *Is there an obligation under the UNCAC to share foreign briber settlement monies with host countries* (Sept. 5, 2014): https://uncaccoalition.org/en_US/is-there-an-obligation-under-the-uncac-to-share-foreign-bribery-settlement-monies-with-host-countries. See also the attempt of a Nigerian NGO to convince the Securities Exchange Commission to divest a portion of settlement proceeds to assist the citizens of Nigeria: Alexander W. Sierck, *African NGO Asks For Distribution Of FCPA Recoveries*, FCPA Blog (Mar. 16, 2012): www.fcpablog.com/blog/2012/3/16/african-ngo-asks-for-distribution-of-fcpa-recoveries.html.

[11] Mike Koehler, *Is ICE a Victim? And an Open Question!*, FCPA Professor (May 25, 2011), http://www.fcpaprofessor.com/is-ice-a-victim-and-an-open-question.

[12] This is most prominent in the United Kingdom context, see, for example: Susan Hawley, *The UK's Compensation Principles in Overseas Corruption Cases–A New Standard for Aiding Victims of Corruption?*, Global Anti-Corruption Blog (Jul. 5, 2018): https://globalanticorruptionblog.com/2018/07/05/guest-post-the-uks-compensation-principles-in-overseas-corruption-cases-a-new-standard-for-aiding-victims-of-corruption/ and the

phenomena which occur when attempting to remediate what this paper describes as first and second order victims. First order victim are identifiable persons, companies, institutions and governments that have suffered harm which directly correlates to a particular act of bribery (such as a principal whose funds have been appropriated by an agent for the purpose of paying a bribe). Second order victims are those who have suffered harm as a result of the wide-spread or trickle-down consequences of bribery (such as citizens harmed by inequality or poverty occasioned by the distortion of public spending). As shown below, practice shows that the appropriate remedy for first order victims is the advancement of monies equivalent to the loss occasioned by the bribery. To describe this form of remediation, this paper employs the term 'compensation'. For the remediation of second order victims through charitable endeavors or some other publicly accessible means, this paper uses the term 'reparations'. The umbrella term 'remediation' is used to refer to both compensation and reparations.

The pairing of the term compensation with the harm suffered by first order victims is best understood in light of traditional notions of damages at common law, and for want of space, little is said about the theoretical underpinnings of compensation here.[13] It is however important to note that compensation (as this term is used in this paper) typically involves the inclusion of a provision in a settlement agreement which posits that an individual or entity investigated for foreign bribery or that has pleaded guilty to foreign bribery advance monies directly to the affected individual, institution, corporate entity or state.[14]

On the other hand, the theoretical underpinnings of the distribution of reparations to second order victims merits consideration. Reparations are best understood in light of traditional notions of distributive justice. Distributive justice provides that an appropriate response to a particular wrong with widespread consequences is for the remedy to be divided among the populace that suffered the wrong.[15] In situations where citizens have been victimized through a bribe scheme, the remedy does not take the form of a direct transfer of wealth from the wrong-doer to the wronged, but rather, through a distribution of wealth through a charitable organization or some other attempt to disseminate the remedy to the

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United Kingdom's anti-corruption policy and its discussion of 'compensation principles': HM Government, *United Kingdom Anti-Corruption Strategy 2017-2022: Year 1 Update* (2018) *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/769403/6.5128 _Anti-Corruption_Strategy_Year1_Update_v7_WEB.PDF. See also Autor Invitado, *U.S. Settlements for Overseas Bribes – Should foreign Bribe Victims Get Any?*, Inter-American Development Bank Blog (Dec. 16, 2013): https://blogs.iadb.org/seguridad-ciudadana/en/u-s-settlements-for-overseas-bribes-should-foreign-bribe-victims-get-any/.

[13] See Ernest Weinrib, *The Idea of Private Law* 57-83 (2012) for an example of the substructures which underlie common law damages.

[14] The delivery of compensation in this way is to an extent necessitated by the Miscellaneous Receipts Act, Pub. L. No. 97-258, 96 Stat. 948 (1982) (codified as amended at 31 U.S.C. § 3302 (2012)). This statute effectively prevents United States law enforcement agencies from dealing with monies extracted through fines and penalties, but there is no prohibition on a settlement agreement negotiated by an enforcement agency and another entity stipulating that that entity divest wealth toward a charitable purpose related to that entity's misconduct. See the discussion in Spalding, Restorative Justice 393, 394.
Furthermore, the DOJ has already taken this approach in its policing of receipt-side foreign bribery. See, for example, the settlement agreement reached between Nguema Obiang, the Vice President of Equatorial Guinea who engaged in pervasive acts of embezzlement, and the DOJ. See the settlement agreement between the DOJ and Teodoro Nguema Obiang Mangue available at https://www.justice.gov/sites/default/files/press-releases/attachments/2014/10/10/obiang_settlement_agreement.pdf.

[15] Ernest Weinrib, *The Idea of Private Law* (2012).

public.[16]

3. Constructing a Framework to Determine whether Remediation if Appropriate

3.1 Compensation Cases

3.1.1   Standard Bank

In 2012, the Tanzanian Government sought proposals from financial service providers to assist in raising revenue to fund public infrastructure projects. Standard Bank Plc (a UK regulated bank now known as ICBC Standard Bank Plc, '**Standard Bank**') and Stanbic Bank Tanzania Ltd ('**Stanbic**'), both subsidiaries of Standard Bank Group, proposed to raise funds by acting as lead managers in a sovereign note private placement. Stanbic and Standard Bank were successful in their joint bid and agreed with the Tanzanian Government to liaise with foreign investors in the debt capital market to raise funds.[17] However, the project did not progress with the Tanzanian Government until Stanbic entered into an agreement with Tanzanian company Enterprise Growth Market Advisors Limited ('**EGMA**'). The terms of this agreement stipulated that EGMA would provide consultancy services to Stanbic in connection with the underwriting process, and ascribed to EGMA a 1% commission of the funds raised.[18] EGMA had three shareholders, including the Commissioner of the Tanzania Revenue Authority. To its disservice, Standard Bank, despite knowing the potential for corruption in a consultancy arrangement with a local service provider in a developing nation, did not make any enquiries about EGMA, nor did Standard Bank have any procedures to guard against such risks.[19]

Standard Bank and Stanbic succeeded in raising US$600 million for the Tanzanian Government and thereafter advanced to EGMA its commission of US$6 million.[20] The bulk of that sum was withdrawn in cash from EGMA's account with Stanbic, which in turn prompted concerned Stanbic staff to refer the matter to Standard Bank Group, who reported the matter to the SFO.[21] The SFO launched an investigation on the basis that there was a reasonable suspicion that the prohibition on failing to prevent bribery had been breached by Standard Bank failing to prevent Stanbic from entering into its agreement with EGMA.[22] The SFO alleged that, as there was no evidence that EGMA had provided any services in underwriting the note placement, the 1% commission was a bribe paid to ensure that Standard Bank and Stanbic were shown favor in their bid.[23] The investigation concluded in a DPA.

The DPA mandated, among other things, that Standard Bank disgorge to the SFO the US$8.4 million in profit that it had made on the note issue, pay to the SFO a financial penalty of $US16.8 million and compensate the Tanzanian Government $US6 million plus interest of approximately $US 1 million.[24]

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[16] Examples of this approach can be found in both Left out of the Bargain and A Governance Gap.
[17] *Serious Fraud Office v. Standard Bank PLC*, U20150854 [5] (Nov. 30 2015): https://www.judiciary.uk/wp-content/uploads/2015/11/sfo-v-standard-bank_Final_1.pdf ('Standard Bank DPA Approval Judgment').
[18] Ibid [7].
[19] Ibid.
[20] Ibid [8].
[21] Ibid.
[22] *Bribery Act 2010* (UK), s 7.
[23] Standard Bank DPA Approval Judgment, [10].
[24] Ibid [13].

The sum of $US6 million reflected money that would have gone to the Tanzanian Government had it not been for bribes paid to EGMA. The SFO then applied in November 2015 to the Crown Court for approval of the DPA between itself and Standard Bank, which was eventually granted.[25]

3.1.2   Rolls Royce

The Rolls Royce DPA centered around bribes paid by two entities owned by Rolls Royce Holdings Plc: Rolls Royce Plc ('**Rolls-Royce**') and its subsidiary Rolls-Royce Energy Systems Inc. The initial investigation was born out of internet postings in 2012 regarding Rolls Royce's activities in East Asia which prompted the SFO to request information from Rolls Royce. Rolls Royce then commenced its own internal investigation which led to a range of findings relating to a global scheme of bribery.

The agreed statement of facts, upon which the DPA was based, referred to corrupt conduct throughout Nigeria, Indonesia, Russia, Thailand, India, China and Malaysia between 1989 and 2013. This conduct spanned several industries: civil aircraft engine manufacturing, defense aircraft manufacturing, gas turbine and compressor manufacturing, oil and gas transport, and electricity generation. In sum, the agreed statement of facts revealed that Rolls Royce had agreed to make payments to intermediaries in connection with the sale of aircraft engines civil aircraft in Indonesia and Thailand between 1989 and 2006, concealed the use of illegal relationships with intermediaries in its defense business in India between 2005 and 2009, agreed to make a corrupt payment to recover a list of intermediaries that had been taken by a tax inspector in India, agreed to make unlawful payments to agents in connection with the supply of gas compression equipment in Russia between 2008 and 2009, failed to prevent bribery in its energy business in Nigeria between 2010 and 2013, failed to prevent bribery in both its energy and civil aircraft businesses between 2010 and 2013 in Indonesia, and finally, failed to prevent the provision of inducements in China and Malaysia between 2010 and 2013.[26] Collectively, the contracts won as a result of Rolls Royce's and related entities conduct had resulted in over £250 million in gross profit.[27]

An application was thereafter made by the SFO for DPA approval in December 2016. In the course of considering whether to approve the DPA, Sir Brian Leveson took into account whether any order for compensation should be made. His Lordship ultimately found that case law mandated that the victims of foreign bribery were only to receive compensation in "clear and simple cases",[28] and noted that there was "no jurisdiction to make an order where there are real issues as to whether those to benefit have suffered any, and if so, what loss".[29] His Lordship then referred to a previous foreign-bribery DPA

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[25] Ibid [5].

[26] *Serious Fraud Office v. Rolls Royce,* U20170036 [4]-[5] (Jan. 17 2017): https://www.judiciary.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf ('Rolls Royce DPA Approval Judgment').

[27] Ibid, [35].

[28] Ibid, [81], quoting R v. Michael Brian Kneeshaw (1974) 58 Cr App R 439), (R v Kenneth Donovan (1981) 3 Cr App R (S) 192).

[29] Ibid, quoting *R. v Horsham Justices Ex p. Richards* (1985) 7 Cr. App. R. (S.) 158, 993.

approval judgment, *SFO v. XYZ Ltd*[30] (the latter named party could not be named due to concurrent criminal proceedings), in which several factors combined to make it impossible to identify any entities or individuals as victims who might be compensated. Those factors related to there being a lack of any request for mutual legal assistance ('**MLA**') and appropriate mechanisms for distributing remediation, uncertainty regarding the amounts paid in bribes, the identity of those who paid bribes, and any evidence that the bribes had caused ascertainable loss.[31] Moreover, the factual complexity of the totality of the allegations, including the use of intermediaries, ultimately made the quantification of the bribes impossible. As such, the SFO had not been able to identify any quantifiable loss arising from the criminal conduct it was proposing to resolve. This finding was influenced by the fact that there was neither evidence of a rise in contract price to accommodate a bribe nor evidence that any of the products or services Rolls-Royce sold were in any way defective or unwanted.[32]

In sum, the use of intermediaries and lack of evidence surrounding Rolls Royce's corrupt conduct made remediation impossible.

3.1.3   Guiding Compensation

Standard Bank and Rolls Royce show that two factors in particular are determinative in deciding whether compensation should be awarded to a first-order victim: that such a victim can be identified, and that their loss can be ascertained.

With respect to the identifiability of the victim, it is axiomatic that compensation will not be appropriate when a victim cannot be identified. Standard Bank and Rolls Royce reflect polarized extremes of the application of this factor. In Standard Bank, it had been clear that the Tanzanian Government alone had been deprived of a specific sum of money, and there was no doubt as to the identity of the victim who was entitled to receive compensation. In Rolls Royce, there was no indication that any individual had been harmed by the bribery, and there was therefore no scope to award compensation. It is instructive to reproduce Sir Brian Leveson's remarks in *XYZ* that were cited in the Rolls Royce DPA approval judgment, to the extent that they outline why compensation was not appropriate on the facts of those cases. While his Lordship was not purporting to set out requisite elements that need to be satisfied before compensation should be considered, his comments do provide a useful point of analysis in determining how to conceptualize the task of identifying a victim.

> 17 of the 28 implicated contracts were with entities based in a country in Asia with which there is neither a request for mutual legal assistance nor an established mechanism or practice in place for payments of compensation orders to the authorities. Other bribes XYZ agreed to offer involved agents based in or working in relation to other countries in Asia and elsewhere in respect of which the same difficulties arise. Further, the amounts of the bribe payment are not

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[30] *SFO v. XYZ,* U20150856 (Jul. 11 2016): https://www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/ ('XYZ').
[31] Rolls Royce DPA Approval Judgment, [82], citing XYZ, [41].
[32] Ibid, [83]-[84].

always confirmed in the evidence and neither is any rise in the contract price to accommodate it (which would generate the loss). Finally, the SFO is not able to demonstrate whether and, if so, in what sum, the various XYZ agents actually paid bribes to named or unknown individuals. Taken together, these factors amount to it not being possible to positively identify any entities as victims who may be compensated.[33]

This excerpt indicates three salient considerations: (i) whether a victim state had made a request for MLA and whether there was a victim state with established mechanisms or practices for payments of remediation, (ii) whether the amounts of the bribes paid were confirmed in evidence and whether any other evidence indicated loss and (iii) whether it could actually be shown that bribes of a specific amount had been paid by particular agents to particular individuals.

The first of these three considerations pertains to the practicality of awarding compensation. In certain cases, a victim may only be identified if their identity is put forward by a foreign agency, and they might only receive compensation if there is a suitable entity to which compensation can first be paid. In this respect, the existence of MLA and receipt-centered mechanisms tends toward the practicality of identifying and compensating victims. However, it would be wrong to assume that in all cases compensation will only be appropriate when these features are present. For example, it was apparent from the nature of the bribe scheme in Standard Bank that the Tanzanian Government had suffered loss, and it is difficult to see why MLA might have been necessary to show that the Tanzanian Government had suffered that loss. It can then be said that the necessity of MLA or the existence of mechanisms for the receipt of compensation will of course depend on the facts, in cases such as Standard Bank, their existence need not be seen as a precondition to compensation because the identity of the victim is already known.

The second of Sir Brian Leveson's considerations focuses on whether there is evidence to prove the victim's loss, such as evidence showing the value of the bribes. It is again uncontentious that compensation should only be awarded where it is possible to measure to some degree the loss which that compensation is intended to remedy. However, neither the value of the bribe payments nor the existence of loss tend toward the identifiability of the victim *per se*. It is entirely feasible that an identifiable entity might suffer loss due to an act of bribery although the value of that bribe is unknown. As is shown below, the better view is that the value of the bribe and evidence of loss incurred is more relevant to the issue of ascertaining loss (considered below).

Finally, Sir Brian Leveson indicated that victims could not be identified because there was a sparsity of evidence showing whether particular bribes had been paid by agents to foreign officials. This is to say that, while the investigations of the SFO and the Rolls Royce indicated a wide-reaching and pervasive culture of bribery, a lack of internal records and documentation made it impossible to verify the type of granular detail that would be needed to show that a particular entity was due compensation. This finding

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[33] Rolls Royce DPA Approval Judgment, [82], citing XYZ, [41].

is important, as it suggests that compensation requires some kind of nexus, by which an act of bribery can be linked to a particular loss. Indeed, if compensation is to be awarded for a particular act of bribery, it needs to be shown that that bribe in some way pertained to the loss suffered. This is not to say that enforcement agencies should set about undertaking causal analysis, but rather that it must be possible to show at least how the relevant act of bribery resulted in a victim's loss.

With respect of the second factor that indicates whether compensation is appropriate, the ascertainability of the loss, Standard Bank and Rolls Royce again reflect opposite extremes. The extent of loss in Standard Bank was facially evident. The Tanzanian Government had been deprived of that which had been given to EGMA. In Rolls Royce, Sir Brian Leveson found that factual complexity meant that no loss could be ascertained. The fact that the value of the bribes was unknown assumed particular weight in this finding. His Lordship also took into account that there had been no evidence of price rises in any of the implicated contracts to reflect the accommodation of a bribe, or of any defective or unwanted services delivered in wake of Rolls Royce being awarded contracts on the basis of the bribes it had paid, as evidence of either of these occurrences could have been used to ascertain loss.

It may be incorrect to assume that it will in all cases be necessary to gauge the value of a bribe in order to ascertain the loss caused by that bribe. It is not difficult to conceive of circumstances in which the value of a bribe and extent of harm suffered bear no correlation. For example, the loss of an unsuccessful bidder in a tender for a government contract will manifest in foregone earnings. Where a service-provider has won a tender bid by successfully bribing a rogue government employee or employees, and the government thus selects the services of the bribing entity which are inferior to the entity that would have been successful in its bid but-for the corrupt conduct,[34] then that government may have suffered a loss equivalent to the difference between value of the service they would have received had the superior service provider won the bid, and the value of the bribe-paying service provider. As such, Sir Brian Leveson's fixation on the value of the bribe in Rolls Royce may be misplaced.

However, as a practical matter, enforcement agencies are not likely to expend significant resources in seeking to ascertain loss, and it is therefore likely that only those cases where the harm can be easily ascertained, such as where there is an obvious correlation between the value of the bribe and loss incurred, or an increase in contract prices or devaluation of services, that compensation will be awarded. In many cases, ascertaining the value of the bribe will be necessary before an award of compensation can be made.

Sir Brian Leveson's reasoning should not be taken to suggest that it will in all cases be necessary to ascertain loss with absolute certainty before compensation can awarded. Enforcement agencies may simply be content to simply estimate the difference in between the price and quality of goods and services provided by the bribe offeror, and the price and quality to which the customer was entitled, if

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[34] This could be shown if there was a clear and objective criteria in place for the award of the relevant contract.

its agent had not taken the bribe.[35] Such is an advantage of the discretionary nature of the settlement process, and a natural by-product of the fact that settlement negotiations are not bound by the same rigid guidelines in calculating loss as courts. Instead, the most that can be said about the ascertainability of loss is that it tends toward the appropriateness of compensation but cannot mandate one way or another that compensation be paid.

3.2 Reparation Cases

3.2.1   BAE Systems

BAE Systems ('**BAE**') was the subject of investigations commenced by the SFO in 2004 that pertained to its retention of various consultants who assisted with the procurement of military hardware contracts. These investigations focused primarily on alleged bribery in the sale of fighter jets to the Saudi Arabian government, but also pertained to what was considered to be global bribery scheme spanning countries in Africa, Europe, South America and the Middle East.[36] These investigations encountered political opposition, and were even ceased at one point (the executive decision to force the SFO to cease its investigations was subject to considerable public scrutiny and criticism, and even challenged, ultimately unsuccessfully, via judicial review).[37]

The SFO's investigations eventually resumed however and in early 2010, BAE entered into settlements with the DOJ and the SFO. The agreement between BAE and the DOJ covered a much broader range of conduct: BAE pleaded guilty to one count of conspiracy in relation to conduct in Saudi Arabia and Eastern Europe. The particulars of this conspiracy included a design to defraud the United States, make false statements about BAE's anti-corruption compliance procedures, and violate arms trading regulations.[38] BAE was also fined $US400 million.[39]

The agreement between the SFO and BAE Systems was far more limited in its scope, concerning only conduct involving the sale of a radar system to the Tanzanian Government. The SFO's settlement agreement was severely limited due to what the SFO described as evidentiary difficulties and a substantial degree overlap with the DOJ's settlement (although some hold the view that there is little merit to this position).[40] It was also considered contrary to the public interest to pursue criminal corruption charges that would have barred BAE from bidding for public contracts throughout the EU.[41]

The conduct in Tanzania that was the subject of the SFO's DPA was born out of a commercial relationship between Siemens Plessey Electronic Systems and a third party marketing adviser, Shailesh

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[35] CAC/COSP/WG.2/2016/CRP.1

[36] Tim Jarrett and Claire Taylor, United Kingdom Parliament Research Briefing Files, *Bribery allegations and BAE Systems* (Mar. 2, 2010) *available at* researchbriefings.files.parliament.uk/documents/SN05367/SN05367.pdf.

[37] Ibid. Mike Koehler, *BAE. Inside the SFO*, FCPA Professor (Apr. 30, 2010): fcpaprofessor.com/bae-inside-the-sfo/.

[38] Ibid.

[39] Ibid.

[40] Mike Koehler, BAE. Inside the SFO (2010): fcpaprofessor.com/bae-inside-the-sfo/

[41] Ibid.

Vithlani in the early 1990s. BAE Systems in 1998 acquired Siemens Plessey Electronic Systems and renewed Vithlani's engagement as a marketing adviser. Payments of approximately $US12.4 million were made to Vithlani's companies over the course of his dealings with BAE in Tanzania. These payments were recorded as payments for the provision of 'technical services by Vithlani'.[42] The settlement agreement noted that, "[a]lthough it is not alleged that BAE Plc was party to an agreement to corrupt, there was a high probability that part of the $12.4 million would be used in the negotiation process to favour [BAE]." The settlement agreement went on to note that the payments were not "stated with reasonable accuracy" such that it was "not possible for any person considering the accounts to investigate and determine whether the payments were properly accounted for and lawful", this in turn amounted to an accounting offence under United Kingdom company law.[43] The settlement noted that BAE knew such inaccurate accounting records were in existence and that it failed to scrutinize them adequately to ensure they were reasonably accurate.[44]

Justice Bean, in considering the appropriate sentence to follow from BAE's guilty plea, lamented the fact that the SFO had not charged BAE Systems with a seemingly available more serious corruption offence. This would have been appropriate to mark the fact that the true victims of BAE's conduct had been the people of Tanzania.[45]

Clause 5 of the agreement is particularly relevant. It provided for reparations to be paid by BAE. Specifically, BAE was to "…make an ex gratia payment for the benefit of the people of Tanzania in a manner to be agreed between the SFO and [BAE]. The amount of the payment shall be £30 million less any financial orders imposed by the court".[46]

In September 2011, BAE committed to paying funds directly to the Tanzanian Treasury.[47] It was later reported that the government of Tanzania, BAE Systems, and the United Kingdom's Department for International Development had signed a joint memorandum of understanding enabling the payment of £29.5 million (plus accrued interest) by BAE Systems for educational projects in Tanzania.[48] That

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[42] Settlement Agreement between the Serioius Fraud Office and BAE Systems plc, Draft Basis of Plea, (dated February 2010): www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/bae%20-%20settlement%20agreement%20and%20basis%20of%20plea.pdf.
http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/bae%20-%20settlement%20agreement%20and%20basis%20of%20plea.pdf
[43] Companies Act 1985 (UK) s 221(1)(a).
[44] http://fcpaprofessor.com/bae-inside-the-sfo/
[45] *R v. Bae Systems Plc*, S2010565 (Dec. 12, 2010): https://www.caat.org.uk/resources/.../bae-systems/r-v-bae-sentencing-remarks.pdf.
[46] BAE Settlement agreement: http://www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/bae%20-%20settlement%20agreement%20and%20basis%20of%20plea.pdf.
[47] U.K. Parliament, "BAE Bows to Pressure to Pay People of Tanzania After Delay," news release (London: U.K. Parliament, September 9, 2011); House of Commons IDC, Financial Crime and Development: Eleventh Report of Session 2010–12, Vol. I, Report, Together with Formal Minutes, Oral and Written Evidence (London: 30 November 2011), 40–41, http://www.publications.parliament.uk/pa/cm201012 /cmselect/cmintdev/847/847.pdf.
[48] Serious Fraud Office, Press Release, *BAE Systems will pay towards educating children in Tanzania after signing an agreement brokered by the Serious Fraud Office* (Mar. 15, 2012) *available at* https://webarchive.nationalarchives.gov.uk/20130304050800/http://www.sfo.gov.uk//press-room/latest-press-releases/press-releases-2012/bae-systems-will-pay-towards-educating-children-in-tanzania-after-signing-an-agreement-brokered-by-the-serious-fraud-office.aspx

memorandum has not been published, however the SFO has indicated that the reparations monies will be put toward the purchase of textbooks for each of the 16,000 primary schools in Tanzania, and syllabi and syllabi guides purchased to assist 175,000 primary school teachers improve their teaching skills. Finally, up to £5 million will be spent on the purchase of desks to benefit primary school children living in nine districts where the need for investment in education is considered greatest.[49]

3.2.2   Guiding Reparations

It is difficult to discern any kind of guiding framework from the BAE case that might be applied to indicate whether reparations will be appropriate in future cases. This uncertainty can be traced to the fact that there was no apparent nexus between the bribery that was the subject of the settlement agreement, and the reparations utilized to respond to the harm caused by that bribery. This lack of connection is apparent in two ways. First, there was no connection between the corrupt conduct and the recipients of the reparations. Second, there was no connection between the harm caused by the corrupt conduct and the value of the reparations.

In BAE, the settlement agreement referred to only one accounting offences under United Kingdom company law. Nothing on the facts of that case or the settlement agreement indicate why that accounting offence warranted a remedy valued at £30 million, or why that remedy was directed toward improving the station of the nation's school-aged youth. Arguably, it is implicit that the money paid by BAE in reparations was done to recognize the kind of corrupt conduct that fell beyond the scope of the settlement agreement negotiated between the BAE and the SFO. If one takes this view, then one can make sense of the value of the reparations in this case as being a just response to the trickle-down effects caused by the kind of pervasive culture of bribery that fell within the scope of the settlement agreement negotiated between the DOJ and BAE. However, even after looking to the broader factual matrix surrounding the DPA to make sense of it, it is still unclear why the appropriate response to BAE's corrupt conduct would be to invest in the education of Tanzania's school-aged children.

There appears to be no methodology used in arriving at the amount paid in reparations, and no analysis seems to have been undertaken in determining to whom reparations should be paid.

By way of comparison, the United States already recognizes the kind of 'nexus requirement' being referred to here in its enforcement of violations of environmental law and use of remediation through settlement agreements. It is an established practice for the DOJ to set the terms of a settlement agreement mandating that a party who allegedly committed a violation of environmental law invest in a 'supplemental environmental project' that remedies the harm that was caused by the violation.[50] These

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[49] Serious Fraud Office, Press Release, *BAE Systems will pay towards educating children in Tanzania after signing an agreement brokered by the Serious Fraud Office* (Mar. 15, 2012) *available at* https://webarchive.nationalarchives.gov.uk/20130304050800/http://www.sfo.gov.uk//press-room/latest-press-releases/press-releases-2012/bae-systems-will-pay-towards-educating-children-in-tanzania-after-signing-an-agreement-brokered-by-the-serious-fraud-office.aspx

[50] The nexus requirement is seen as necessary to keep the settlement agreement within executive power. Without such a nexus, a settlement agreement stipulating that an entity attempt to remedy environmental crimes through the payment of reparations would run afoul of the Constitutionally enshrined power which Congress has

projects, which largely resemble reparations as they have been described in this paper, sound in a reduction of the fines or penalties which would have otherwise been levied[51] and are paid for with money that would have otherwise gone to the United States Treasury in the form of penalties.[52]

In the context of enforcing environmental law and regulations, the 'nexus' is understood as referring to "the relationship between the violation and the proposed project,"[53] and its purpose "is to ensure that any harm or threatened harm to victims or the environment is actually addressed."[54] In a memorandum from the Director of the Office of Regulatory enforcement written in 2002, it was explained that a nexus between a violation of environmental law and a supplemental environmental project can be established where the project satisfied one of three criteria, which are as follows: (i) the project is designed to reduce the likelihood of similar violations, (ii) the project reduces the adverse impacts to which the violation contributed, or (iii) the project reduces the overall risk potentially affected by the violation at issue.[55] It is unfortunately beyond the scope of this paper to discern what carriage these criteria might have into the FCPA context. It is however apparent that, if the United States were to pursue reparations, the same nexus requirement might be applied to a potential award of reparations.[56]

The question which lingers is then whether the SFO's current practices, or the approach which emerges from United States environmental regulation, is preferable.

If one takes the view that the allocation of reparations should follow a process of identifying victims, ascertaining loss, and then articulating an appropriately tailored remedy, then the lack of any apparent nexus requirement in SFO practice is indeed problematic. The shortcomings of this process derive from a lack of transparency, consistency and predictability. On the other hand, there may be strong justifications in favor of adopting an unstructured approach to reparations. It may be difficult if not impossible to calculate the social harms created by a particular bribe scheme, and so insisting on a strict nexus may in many cases do nothing but diminish the amount that citizens of developing nations would receive as remediation. Indeed, if enforcement bodies had to insist on strict correlation between acts of bribery and harm caused in rewarding remediation, it is possible that the number of cases in which second-order victims would receive remediation would be drastically reduced if not eliminated entirely. In this light, the implementation of the DOJ's policy of supplemental environmental programs may not be appropriate in the anti-bribery space where it might be difficult to ascertain the societal harm

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over the disbursement of certain public monies. See Spalding, Restorative Justice, and Memorandum from Ronald Tenpas Assistance Attorney General to the Environmental Crimes Section Attorneys (Jan. 16, 2009) *available at* https://www.justice.gov/file/1046141/download ('Tenpas Memorandum').

[51] U.S. Envtl. Prot. Agency, B-247155.2, 1993 WL 798227 (Comp. Gen. Mar. 1, 1993), Tenpas Memorandum. See also Spalding 395.

[52] See Spalding, Restorative Justice, 393.

[53] B-15 n.49.

[54] Ibid.

[55] Tenpas Memorandum.

[56] Spalding Ohio p 401 also thinks a nexus would be required as in his discussion of the application of supplemental environmental methodology to the foreign bribery contexts he notes that such a nexus would likely be an indicia.

wrought by a particular bribe scheme.[57] Indeed, it is difficult to see why an award of £30 million to the citizenry of a developing nation that has been hindered by corruption in the past should be characterized as undesirable, especially when one takes into account that enforcement agencies will have neither the time, inclination or resources to associate how the collective corrupt actions of a particular actor have harmed a society.

If it is indeed the case that the insistence on a nexus requirement would in many instances preclude reparations from being included in a settlement agreement, then the decisive factor here may simply be that ad-hoc and unpredictable reparations are better than none at all, and SFO practice for all its faults is to be preferred. However, this does not mean that there will not be some instances in which enforcement agencies may wish to take into account certain factors to guide the provision of reparations and to ensure that they respond to a particular type of harm. Indeed, it may be necessary to tailor reparations so that their impact is confined to the geographic location in which the corrupt conduct caused harm, or to confine the their impact to the specific portion of the population that were harmed. However, a granular approach of this nature may not be appropriate in all cases. Even if a particular sector was injured, it may still make sense to redirect that money into another sector based on need. For example, a bribe scheme may have only caused harm in the education sector, but that state is in specific need of investment in health. It would seem odd that, in attempting to remediate harm caused to that state, reparations are directed to an area of outlay where investment is not necessarily needed.

It is on one hand undesirable that there be no nexus between corrupt conduct and reparations, because then the remedy is stripped of consistency, transparency and predictability. On the other hand, insisting upon internal consistency may lead to undesirable outcomes, such as an underwhelming amount paid in reparations or the apportionment of reparations where that wealth isn't needed while overlooking an area in which a transfer of wealth could achieve greater economic benefit for the victim state. Unfortunately, the resolution of these tensions is beyond the scope of this paper.

Before moving it, it important reflect on the fact that, supplemental environmental projects do not stem from legislative mandate. Instead, they arose solely out of DOJ practice. Regardless of their applicability to the foreign bribery context, their existence is important as it reflects that the DOJ itself can, through adapting its own practices, create the change necessary to achieve remediation for societies harmed by violations of United States law.[58]

3.3 Constructing a Framework

SFO practice reveals that compensation might be appropriate in cases where a victim can be identified and their harm can be ascertained. Naturally, the assuredness with which a victim can be identified and the extent to which their loss can be ascertained will tend either toward or against the inclusion of

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[57] Professor Spalding addresses this fact in Spalding, Restorative Justice.
[58] See Andrew Spalding, Wal-Mart's Victims, Part XIII: Learning from Environmental Law, FCPA Blog (Jun. 6, 2013): www.fcpablog.com/blog/2013/6/6/wal-marts-victims-part-xiii-learning-from-environmental-law.html.

compensation in the terms of a settlement agreement. The Standard Bank case reveals that MLA may make it may be easier to identify a victim. And that loss might be easier ascertained where it correlates directly to the bribe. Of course, the relevance of these considerations will in all cases be fact dependent.

SFO reparations cases do not present as subject to any similarly palpable criteria. As there need not be any nexus between the harm and the recipients of reparations, it cannot be said that there is any focus on the identity of the victim. And as there is no correlation between the harm suffered and the value of reparations, it seems that no value is afforded to the ascertainability of harm either. However, these two factors do not exhaust what ought to be taken into account by enforcement agencies weighing up whether to pursue remedial settlement distribution. Two more considerations should be given relevance in both compensation and reparations cases: first, the risk of repeat corruption, and secondly, whether the victim might be able to rely on some other means to pursue remediation. The third factor alone is considered briefly due to word limitations.

3.3.1 Repeat Corruption

It is highly unlikely that agencies will pursue compensation in settlement agreements if there is any risk that those monies will be diverted into the pockets of kleptocrats, or back into schemes that can be used to extract further bribes. If an enforcement agency cannot assure itself that the monies in question will actually be used to remediate those harmed, then there is little reason why it would seek to redistribute that money in a settlement agreement. In many cases, it is likely that this factor would be highly influential in deciding whether to pursue remediation, if not entirely dispositive. It should be noted however that the fact that a Government cannot be trusted as the recipient of compensation or reparation should not necessary be absolutely determinative. As will be explored in later variations of this project, money can be distributed to charities that the enforcement body is satisfied are legitimate after a process of due diligence, or charities can be created, in order to deliver reparations in cases where the risk of repeat corrupt precludes the advancement of monies to a discrete entity.

Curiously, there is very little available from SFO practice on the risk of repeat corruption. The materials available on the Standard Bank case are particularly notworthy however, as they leave several questions unanswered. For instance, the DPA approval decisions and the agreed statement of facts simply indicate that the relationship between Standard Bank, Stanbic and the Tanzanian Government remained at a complete standstill until EGMA was retained.[59] It is therefore odd that neither the SFO nor Sir Brian Leveson questioned whether this reflected a more concerted effort from other public officials to extract bribes or to at least allow the bribery to occur, or alternatively, whether the small number of public officials with an interest with EGMA were able to stall the entire infrastructure project discretely. Presumably, the Tanzanian public officials with an interest in EGMA were 'rouge agents'. Otherwise, it would have made little sense to allow members of the Tanzanian Government to extract bribes and to then compensate that government on the basis that it incurred loss due to those bribes.

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[59] Standard Bank DPA Approval Judgment.

Nonetheless, it is concerning that there are no available deliberations from the SFO or the judges involved in the DPA approval process on how the risk of repeat corruption can be managed.

It is difficult to discern the weight afford to repeat corruption in the context of reparations. As the memorandum of understanding between the SFO, BAE and the Tanzanian Government has not been published, it is impossible to see what measures were put in place to minimize the risk of repeat corruption. Presumably, the reason for the extended delay between the BAE settlement agreement and the memorandum of understanding is that the involved parties expended considerable time and effort into finding a suitable way of remediating citizens.

Finally, it is noted that there is no reason why compensation and reparations should be mutually exclusive, although they have thus far been so in all cases. Although, a risk of repeat corruption in pursuing compensation could serve as a rational justification for an enforcement agency pursuing reparations instead, as enforcement bodies have shown considerable creativity in limiting the risk of repeat corruption when remediation has been disbursed through charities.[60]

4. Conclusion

In compensation cases, enforcement agencies should take into account the following: (i) whether a victim can be identified, (ii) whether their loss can be ascertained, (iii) whether there is any risk of repeat corruption, and finally, (iv) whether remediation will be redundant in light of other means of redress available to those who stand to benefit from remediation. Save for the application of a nexus requirement, only the latter two factors will have weight in deciding whether reparations are appropriate.

In continuing this project, the author intends to, first, conduct further analysis into the potential factors that may tend toward or against the appropriateness of remediation, and second, research techniques and methods of distribution compensation and reparations while minimizing the risk of repeat corruption.

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[60] See, for example, the settlement agreement reached between Nguema Obiang, the Vice President of Equatorial Guinea who engaged in pervasive acts of embezzlement, and the DOJ. See the settlement agreement between the DOJ and Teodoro Nguema Obiang Mangue available at https://www.justice.gov/sites/default/files/press-releases/attachments/2014/10/10/obiang_settlement_agreement.pdf. See also the series by Aaron Bornstein, The BOTA Foundation explained, FCPA Blog, available at www.fcpablog.com/blog/author/abornstein