PARTICIPANTS' PAPERS

PETROBRAS: SETTLEMENT OF A FOREIGN BRIBERY CASE AND IMPLICATIONS FOR ASSET RECOVERY

*Aldo de Campos Costa**

I. CONTEXT

Petróleo Brasileiro SA, better known as Petrobras, is a Brazilian state-controlled energy company headquartered in Rio de Janeiro, Brazil, that operates to refine, produce and distribute oil, oil products, gas, biofuels and energy. The Brazilian government owns more than 50 per cent of Petrobras's common shares with voting rights.

From 2003 to April 2012, the company was embroiled in one of the largest corruption schemes ever investigated and prosecuted by Parties to the OECD Anti-Bribery Convention.[1] The corruption scandal erupted in 2014 and involved corrupt dealings among companies and officials from Brazil as well as those from other countries.

Petrobras engaged in a large-scale expansion of its infrastructure for producing oil and gas, a matter of significant interest to investors. During this period, certain former senior executives of the company colluded with its largest contractors and suppliers to inflate the cost of its infrastructure projects.

In return, the companies executing those projects paid billions of dollars in kickbacks that typically amounted to one to three per cent of the contract cost on a cartel-like rotating basis. Petrobras' senior managers received these illegal payments and shared them with their political sponsors, who assisted them in securing their management positions within the company.[2]

The overcharges caused by the kickbacks resulted in an inflation of property, plant and equipment, resulting in an overstatement of assets. Members of Petrobras Executive Board and Board of Directors also engaged in other bribery plots with companies that sought to win contracts with Petrobras or obtain better terms.

Billions of dollars were embezzled in this manner for the personal gain of the corrupt executives, as well as to finance the electoral campaigns of high-level figures. Bribes paid by Petrobras executives moved through bank accounts in the United States, Britain, Sweden, Switzerland and Uruguay.[3] The extensive investigation into the plot, known as operation "Car Wash", has given rise to many separate and coordinated foreign bribery enforcement actions.

* Assistant Prosecutor to the Prosecutor General, Brazil's Federal Prosecution Service. The opinions expressed herein are the author's and do not necessarily reflect the views of Brazil's Federal Prosecution Service.

[1] OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (2019), http://www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm>, accessed Jan. 16, 2023.

[2] Securities and Exchange Commission press release 2018-215, *Petrobras Reaches Settlement with SEC for Misleading Investors* (Sept. 27, 2018), <https://www.sec.gov/news/press-release/2018-215>, accessed Jan. 21, 2023.

[3] Pedro Fonseca and Marcelo Rochabrun, *World's biggest oil traders paid bribes in Brazil scandal*, Reuters (Dez. 5, 2018), <https://www.reuters.com/article/us-brazil-corruption-petrobras-idUSKBN1O41EC>, accessed Jan. 16, 2023.

II. BACKGROUND

A. Petrobras Securities Class Action Settlement

As a result of the corrupt executives' failure to implement Petrobras's internal controls, their exploitation of deficiencies in those controls, and their submission of false certifications in connection with Petrobras's internal process for preparing its filings, the company made material misstatements and omissions in financial statements that concealed from investors and regulators the massive bribery and bid-rigging scheme. The ensuing scandal decreased Petrobras's share price by more than 80 per cent and its American Depository Shares (ADS) by 78 per cent.[4]

As of December 2014, just months after the appearance of some of the first confessions, Petrobras ADS investors on the New York Stock Exchange brought a class action against the company's executives, its auditor and security underwriter before the United States District Court for the Southern District of New York[5] under the Securities Exchange Act of 1934 and the Securities Act of 1933.[6]

According to the complaints, Petrobras had fabricated public statements and regulatory documents, distorting the company's financial picture by unlawfully capitalizing payments to cartel members.[7] It was alleged that the plaintiffs misrepresented the company's financial controls and ethical practices concerning its business and management.[8]

As of June 2018, the court approved the settlement for close to $2.95 billion that was reached in December 2017.[9] In terms of class action settlements involving foreign issuers, it was the largest in a decade.[10] Also, it was the fifth largest settlement ever reached in a United States class action.[11]

B. Non-Prosecution Agreement with the SEC

The United States Department of Justice (DOJ) concluded an investigation into Petrobras's violation of the Books and Records Provision of the Foreign Corrupt Practices Act (FCPA) on 27 September 2018, after Petrobras accepted a non-prosecution agreement. The DOJ announced that Petrobras had agreed to pay $853,000,000 in penalties. Based on the company's full cooperation and remediation, the fine was reduced by 25 per cent off the lowest end of the applicable United States Sentencing Guidelines range.[12]

Under the non-prosecution agreement, the company's obligations to the United States would be complete upon paying $85,320,000, equal to 10 per cent of the total criminal penalty, to the DOJ. The deal also stipulated that Petrobras should pay another $85,320,000 to the Securities and Exchange Commission ("SEC") as a civil penalty and the remaining 80 per cent of the total criminal penalty, equal to $682,560,000, to Brazil under their respective agreements. If the company did not pay to Brazil any part of the $682,560,000 in the timeframe specified in the "agreement between Brazilian authorities and the company," Petrobras would be required to pay that amount to the United States Treasury, except that the DOJ would credit up to 50 per

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[4] Javier El-Hage, *Shaking the Latin American Equilibrium: The Petrobras & Odebrecht Corruption Scandals* (Nov. 4, 2019), https://news.law.fordham.edu/jcfl/2019/11/04/shaking-the-latin-american-equilibrium-the-petrobras-odebrecht-corruption-scandals/#_edn27>, accessed Jan. 16, 2023. See also: Kevin M. LaCroix, *Petrobras Securities Suit: Judge Rakoff Rejects Company's 'Adverse Interest' Argument; Rules Brazilian Investors Must Arbitrate Brazilian Securities Law Claims*, The D&O Diary (Aug. 2, 2015), <https://www.dandodiary.com/2015/08/articles/securities-litigation/petrobras-securities-suit-judge-rakoff-rejects-companys-adverse-interest-argument-rules-brazilian-investors-must-arbitrate-brazilian-securities-law-claims/>, accessed Jan. 16, 2023.

[5] El-Hage, *supra*, note 4.

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] Cleary Gottlieb, *Petrobras Granted Final Approval of Class Action Settlement* (Jun. 25, 2018), <https://www.clearygottlieb.com/news-and-insights/news-listing/petrobras-granted-final-approval-of-class-action-settlement>, accessed Jan. 16, 2023

[10] Bloomberg, *Pomerantz Recovery on Behalf of Petrobras Investors Reaches $3 Billion* (Feb. 2, 2018), <https://www.bloomberg.com/press-releases/2018-02-02/pomerantz-recovery-on-behalf-of-petrobras-investors-reaches-3-billion>, accessed Jan. 16, 2023.

[11] Ibid.

[12] El-Hage, *supra*, note 4.

cent of that amount paid to the SEC.

A non-prosecution agreement with the DOJ under which Petrobras accepts responsibility under United States criminal law for the acts of certain former Petrobras executives and officers that gave rise to violations of books and records and internal controls provisions under Title 15 of the United States Code, Section 78m. None of those individuals remain employed by or associated with the company. The agreement acknowledges that, in addition to the misconduct described by the DOJ, the company was "victimized" by an embezzlement scheme that included the participation of former executives and officers of Petrobras.

Still within the framework of the agreement, Petrobras would continue to cooperate with the DOJ in any ongoing investigations and prosecutions relating to the conduct, including of individuals, to enhance its compliance programme and to report to the DOJ on the implementation of its enhanced compliance programme. The DOJ said it reached this resolution based on several unique factors presented by this case, including that Petrobras is a Brazilian-owned company that "entered into a resolution with Brazilian authorities" and is subject to oversight by Brazilian authorities, and that, in addition to the significant misconduct engaged in by Petrobras, a few executives of the company engaged in the embezzlement scheme that victimized the company and its shareholders.

According to the DOJ, while Petrobras did not voluntarily disclose the conduct, it notified the government of its intent to cooperate fully and took all necessary corrective measures after being made aware of the misconduct allegations. Petrobras's cooperation included, for example, conducting a thorough internal investigation, proactively sharing in real-time facts discovered during the internal investigation and sharing information that would not have been otherwise available to law enforcement authorities, making regular factual presentations, facilitating interviews of and information from foreign witnesses, and voluntarily collecting, analysing and organizing voluminous evidence and information in response to requests, including translating key documents.

In addition, Petrobras reportedly took significant corrective measures, including replacing the company's top executives and implementing governance reforms, as well as disciplining employees and ensuring that the company no longer employs or is affiliated with any of the individuals known to the company to be implicated in the conduct at issue in the case.

C. Cease and Desist Order with the SEC

The same day the DOJ announced the non-prosecution agreement, the SEC also made public it had both charged and settled with Petrobras for misleading United States investors by overstating by $2.5 billion, the value of assets that were spent on bribes.[13] Disgorgement and prejudgment interest totalling $933,473,797 were to be paid by the company to the SEC after approval by the United States District Court for the Southern District of New York, offset by any payments made to the class action settlement fund of $2.95 billion.[14]

As reported by the SEC, Petrobras raised billions of dollars through its United States shares traded on the New York Stock Exchange. At the same time, the members of its executive board and board of directors cooked the books to conceal the massive, undisclosed bribery and corruption scheme from investors and regulators. Shortly, Petrobras's financial statements failed to disclose truthful information about its operations, misguiding American investors.[15]

The agreement with the SEC resolved allegations that former Petrobras executives committed violations of specific provisions of the Securities Act of 1933, as well as of the books and records and internal controls and false filings provisions of the Securities Exchange Act of 1934. The company admitted making misstatements and omissions in SEC filings and documents related to a 2010 global IPO of equity securities, none of which involved intent. SEC agreement limited company admissions to details related to DOJ settlement.

[13] SEC press release 2018-215, *supra*, note 2.
[14] El-Hage, *supra*, note 4.
[15] SEC press release 2018-215, *supra*, note 2.

Nevertheless, in a file submitted to the SEC on 27 September 2018, the company presented itself as a victim of the embezzlement scheme. It announced that it had already recovered approximately $449 million in restitution. Petrobras further stated that the settlement did not constitute an admission of wrongdoing and would "continue to pursue all available legal remedies from culpable companies and individuals."[16]

D. Consent Agreement with Brazilian Prosecutors

Petrobras said it would sign a "consent agreement" with the Brazilian Federal Prosecution Service in the same file submitted to the SEC.[17] This deal should provide that the sum of $682,560,000 of the non-prosecution agreement signed with the DOJ had to be deposited by Petrobras into a "special fund" in Brazil to be used in "strict accordance with the terms and conditions of the consent agreement, including for "various social and educational programs to promote transparency, citizenship and compliance in the public sector."

This consent agreement was signed on 23 January 2019, with federal prosecutors involved in the Car Wash operation in Curitiba, Brazil.[18] Petrobras assumed the following obligations in the agreement: (a) to maintain a compliance programme, as well as periodically review them in order to attest to their effectiveness; and (b) to transfer the amount of $682,560,000 to an account linked to a Federal Court in Curitiba within 30 days from the date of ratification of the agreement.

Section 2.4 of the consent agreement stated that 50 per cent of the $682,560,000 would be used to set up an endowment fund, so the proceeds would be used for "projects, initiatives and institutional development of entities and networks of reputable entities [...] that strengthen the Brazilian society's fight against corruption." The administration of this fund would be provided by an entity to be constituted within a maximum period of 18 months after the ratification of the agreement as a private foundation, and it would have representatives of the operation "Car Wash" in its decision-making body.

The other 50 per cent, per Section 2.5 of the agreement, would satisfy eventual convictions or agreements with shareholders who invested in the Brazilian stock market and filed a class action until 8 October 2017. The amount would remain deposited in an interest-bearing judicial account. After two years, monetary additions and interest would be used to establish the private foundation referred to in Section 2.4.

The federal judge who ratified the deal on January 25 said that it was essential to put some of the money into a foundation in the form of an "endowment" intended to "foster the implementation of an anti-corruption program" since "public investment in the implementation of anti-corruption measures is notoriously scarce and is generally subject to budgetary constraints."

E. Outcome

The content of the consent agreement signed between Petrobras and the prosecutors in charge of the Car Wash corruption investigation was harshly criticized for misrepresenting the non-prosecution agreement between the oil company and the DOJ, which only provided the credit of the penalty in favour of Brazil, without conditioning the creation of a legal entity under private law and without allocating this amount to specific activities.

It was also promptly questioned by the Prosecutor General,[19] who stated that the ratification of the agreement conferred upon federal prosecutors a function and obligations that were beyond the constitutional limits of their assignments,[20] involving a concentration of authority between the activity of investigation and litigation and the execution of a billionaire budget, with revenues derived from an international agreement

[16] Petrobras press release, *Petrobras Reaches Coordinated Resolutions with Authorities in the United States and Agreement to Remit Bulk of Associated Payments to Brazil* (Sept. 27, 2018), <https://petrobras.com.br/en/news/petrobras-reaches-coordinated-resolutions-with-authorities-in-the-united-states-and-agreement-to-remit-bulk-of-associated-payments-to-brazil.htm>, accessed Jan. 16, 2023.

[17] Ibid.

[18] "Consent agreement" available at <https://www.mpf.mp.br/pr/sala-de-imprensa/docs/acordo-fundo-petrobras/view>, accessed Jan. 16, 2023.

[19] Docket available at <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5650140>, accessed Jan. 16, 2023.

[20] Prosecutor General's motion available at <https://www.conjur.com.br/dl/dodge-vista-acao-stf-fundo-bilionario.pdf>, accessed Jan. 16, 2023.

to which they are neither party nor interested.

As mentioned by the Prosecutor General, the clauses of the agreement revealed how certain members of the task force assumed administrative and financial commitments and spoke for the institution without the power to do so, only to undertake all steps in the process of establishing a private foundation, and managing its resources.

The House of Representatives and a few political parties also expressed concern about the consent agreement, but from a different perspective. A more in-depth review of what is set out in the non-prosecution agreement shows that at no point was it determined that the $682,560,000 should be processed by prosecutors on the Car Wash team. The agreements require that the amount be handed over to Brazilian authorities.

According to the DOJ agreement, the expression "amount the Company pays to Brazil" implies, at the level of the Brazilian political-administrative organization, necessarily, the Federal Union. It is, therefore, evident that only in favour of the Brazilian National Treasury could the deposit of the amount corresponding to 80 per cent of the total criminal penalty stipulated in the non-prosecution agreement have been validly made.

It was also pointed out that the Federal Court in Curitiba did not have jurisdiction over the use of public funds. Only the Federal Union, through the constitutional body – the National Congress – could define how government revenues are to be applied following budgetary principles. To avoid them coming into play, the Petrobras agreement with federal prosecutors has used an instrument defined in Brazilian law as an exception to the regulation, which states that revenue earned by the Federal Union must be collected in a single treasury account: a fund. However, the attempt to outlaw Congress failed because the funds made available for the constitution of the private foundation could only be constituted by legal authorization under Brazilian law, which did not happen.

Based on these reasons, on 19 March 2019, the Brazilian Supreme Court granted a stay that did not allow the entry into force of the consent agreement.[21] A few months later, on 17 September 2019, the court declared the deal void. At first, the assets were supposed to be used to protect the Amazon Rainforest and for primary education, but in 2020, most went towards fighting the Covid-19 pandemic.

The provision to set aside half of the amount deposited by Petrobras for potential payments to the minority shareholders of the company itself was also deemed unlawful, as follows: (a) the funds would belong to the Federal Union rather than to Petrobras; (b) the satisfaction of Petrobras's liabilities would have been "explicitly prohibited" in the agreements signed by the company with the U. S. authorities; (c) the minority shareholders are to "consort with Petrobras in enjoying the burdens and bonuses of the business activity," otherwise the company would suffer excessive damage, either because the transit of values could "characterize a co-mingling of assets," either because Petrobras "had also fallen victim to offenses investigated in Brazil and abroad."[22]

III. CHALLENGES

One of the most controversial developments regarding the recovered assets in Operation "Car Wash" is the consent agreement held between the Federal Prosecution Service and Petrobras, according to which a large sum of the recovered money that stemmed from agreements with American authorities regarding FCPA violations would be destined to an anti-corruption private foundation to be administered by federal prosecutors.[23] It is a study case that presents intriguing challenges to investigators, prosecutors, and courts,

[21] Ruling available at <https://www.migalhas.com.br/quentes/340190/stf-proibe-que-mp-defina-destino-de-valores-de-condenacoes-e-acordos>, accessed 16 Jan. 2023.
[22] Ruling available at <https://www.migalhas.com.br/quentes/326997/moraes-destina-recursos-recuperados-da-lava-jato-para-combate-a-covid-19>, accessed 16 Jan. 2023.
[23] João Daniel Rassi, Emerson Soares Mendes and Pedro Luís de Almeida Camargo, *The Asset Tracing and Recovery Review: Brazil*. The Laws Review (Oct. 17, 2021), <https://thelawreviews.co.uk/title/the-asset-tracing-and-recovery-review/brazil>,

as summarized below.

A. Defining "Legitimate Owners" and "Victims"

The question of who is or should be considered a victim of transnational corruption is not only essential but also complex. The international framework provided by the United Nations Convention against Corruption (UNCAC) encourages countries to seek restitution for losses (Art. 35), proactively share information (Art. 56), and repatriate proceeds of corruption offenses (Art. 57), returning such property to its prior "legitimate owners" or compensating the "victims" of the crime, but do not define these terms. Petrobras is a mixed joint stock corporation whose majority shareholder is the Brazilian state. It provides an example of a company associated with a settlement of a foreign bribery case where the money was not returned to its stakeholders, who were the most directly impacted by the practice.

B. Legal Framework

Three aspects should be taken into consideration in discussing legal frameworks of settlements: whether the offender can be held liable under criminal, civil, or administrative law or some combination of the above (form of the liability); whether the court is involved and to what extent the court will review and approve the settlement (judicial oversight) and whether and to what extent the content and terms of the settlements are public (transparency of the settlement).[24] The Petrobras case failed to anticipate the relevant authorities who should play a role in the "agreement between Brazilian authorities and the company," as well as the extent of judicial involvement in this settlement. The competent authorities also only learned of the agreement once it was concluded.

C. Binding on Third Parties

A foreign bribe settlement should have legal effects only between its parties (*inter partes*). While the parties may agree for the benefit of a third party, they may never provide for stipulations to the detriment of a third party that is not a party to the agreement (*res inter alios acta alteri non nocet*). For such stipulations to be binding on that third party, that party must become a party to the agreement which contains these stipulations. As seen in the Petrobras case, the obligations set out in the non-prosecution agreement were binding on a foreign prosecuting authority that was not a party to the agreement.

D. Excessive Discretionary Power of Prosecutors

Despite their potential appeal, settlements in foreign bribery cases raise specific questions. For example, the power of the prosecutors in the Petrobras case was largely unchecked.[25] For example, the agreements concluded with Petrobras gave the DOJ, and indirectly the Brazilian prosecution authorities, a broader discretionary power to choose the form of redress they would have if the case proceeded to a fair trial. Their monetary sanctions choices, for example, had a direct impact on the designation of the beneficiary of the assets.[26] Confiscated or disgorged assets representing crime proceeds could more directly fit UNCAC's description of recoverable assets than other forms of monetary sanctions.[27]

E. Reparation to Third Parties

Several countries have used settlements to conclude transnational corruption cases. In some cases, such as the Alstom affair and the Mercator/James Giffen case,[28] the settlement has included fines and reparations to be paid to a charitable or a developmental institution. The Petrobras case raises an interesting issue: in which circumstances an endowment to a nongovernmental organization whose purpose is to fight corruption may be identified as an appropriate vehicle through which a corrupt company can make amends to countries whose officials it bribed?

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accessed Jan. 16, 2023.

[24] Jacinta Anyango Oduor, Francisca M. U. Fernando, Agustin Flah, Dorothee Gottwald, Jeanne M. Hauch, Marianne Mathias, Ji Won Park and Oliver Stolpe. *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (Washington, DC: World Bank, 2014), p. 21.

[25] Ibid., p. 48.

[26] See Oduor, *supra*, p. 85.

[27] Ibid., p. 85.

[28] See Oduor, *supra*, p. 95.

F. Implications for Asset Recovery

In the context of settlements, the nature of various monetary sanctions may determine who has a legitimate claim under UNCAC. Depending on the legal system under which sanctions are imposed, sanctions may be "paid" through various methods, including compensation, confiscation, disgorgement, fines, reparations, and restitution. In the Petrobras case, the United States allowed 80 per cent of the money associated with the DOJ agreement to be remitted to Brazil. In other words, reparations, in the form of *ex gratia* payment, made up nearly all the monetary sanctions. While Brazil was ultimately not awarded any damages upon the statement of facts of the agreement,[29] one could argue that since the crime of corruption was committed against Petrobras or the "collective interest" rather than specifically against the Brazilian state, Brazil could not contend that it had suffered damage as a result of a crime and could not thus make a legitimate claim for restitution.[30]

IV. CONCLUSION

Although the money associated with the agreements that Petrobras concluded with the DOJ and the SEC was not returned to its stakeholders, there is a clear tendency in all jurisdictions, regardless of their common law or civil law traditions, as well as in developed and developing countries, to resolve many foreign bribery cases through settlements.

Nevertheless, there is a limited understanding of how these settlements are agreed upon and implemented, which may create specific challenges for asset recovery. Most agreements fail to demonstrate a consistent approach to remediation, and law enforcement agencies need more of a conceptual or practical framework to guide the provision of corrective measures.[31]

The Petrobras case not only marks the beginning of a new front of concern and litigation for international corporations and individuals implicated in allegations of corruption but also provides several lessons for the international community to consider, as follows:

A. Allocation of Settlement Amounts

As far-reaching settlements become more common, the question of who should receive the proceeds has come to the forefront. In order to allocate the various settlement amounts, negotiators need to learn to differentiate the primary forms of monetary sanctions that can be part of an agreement. Some of them, such as restitution and reparations, will usually be paid to aggrieved parties (or "victims"), and others, such as fines, will usually be paid to the state.[32]

B. Limit of Authority

The involvement of several authorities often gives rise to conflicting and competing demands. Responding to requests from one authority may be perceived by another as a threat to its investigation or even a breach of its laws. Thus, where more than one authority may be involved, negotiators should know each authority's power to settle the case. It is important to keep expectations and negotiations within this authority limit.[33]

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[29] Many Brazilians view Petrobras and the Brazilian people as victims of the systematic embezzlement and graft scheme. See Megan Zwiebel, *State-Owned Entity, Victim and Perpetrator: The Special Case of Petrobras*. Anti-Corruption Report (Oct. 31, 2018), < https://www.anti-corruption.com/2629686/stateowned-entity-victim-and-perpetrator-the-special-case-of-petrobras.thtml>, accessed Jan. 16, 2023. See also Roger Hamilton-Martin, *Petrobras: Perpetrator or victim of corruption?* (Feb. 12, 2016), <https://globalinvestigationsreview.com/just-anti-corruption/article/petrobras-perpetrator-or-victim-of-corruption>, accessed Jan. 16, 2023.

[30] Ibid., p. 89.

[31] Sam Hickey, *Remediation in Foreign Bribery Settlements: The Foundations of a New* Approach, Chicago Journal of International Law, Vol. 21, No. 2 (2021), <https://chicagounbound.uchicago.edu/cjil/vol21/iss2/5>, accessed Jan. 16, 2023.

[32] Rebecca Hughes Parker, *The View from a Brazilian Prosecutor*. Anti-Corruption Report (Jan. 10, 2018), < https://www.anti-corruption.com/2567211/the-view-from-a-brazilian-prosecutor.thtml >, accessed Jan. 16, 2023.

[33] Ephraim Wernick and Pete Thomas, *How Companies Can Respond to the Boom in FCPA Enforcement Fueled by International Cooperation*, Anti-Corruption Report (Oct. 30, 2019), <https://www.anti-corruption.com/4129106/how-companies-can-respond-to-the-boom-in-fcpa-enforcement-fueled-by-international-cooperation.thtml>, accessed Jan. 16, 2023.

C. Overlapping Authorities

This increased international cooperation complicates how companies self-report, and various overlapping authorities make navigating settlement even more difficult.[34] Therefore, coordination with foreign and national authorities is critical to minimizing the likelihood of receiving duplicate sanctions before entering a globally coordinated resolution. The same conduct can lead to different penalties in different jurisdictions.[35]

D. Negotiation Preparedness

Negotiating as a government representative requires a great deal of work prior to negotiation to ensure that negotiators have the support of all interested parties. It is possible for a third party with an actual or potential interest in the transaction to intervene in the process of negotiation or to protect its interests later on.

E. Agreement Language

The language used in international settlement cases may be inapplicable to local conditions or situations being discussed. Hence, an inflexible insistence on their terms may lead to unsatisfactory results for both parties. To avoid future disputes, negotiators should carefully review agreements to ensure they are consistent with the agreement they seek.[36]

F. Need for Mandate

To negotiate on behalf of other individuals or organizations, agents need a mandate from these individuals and authorization to act on their behalf. That mandate might include the legal authority to sign an agreement. However, in most cases, this will consist of negotiating instructions regarding the kinds of agreements that can be considered and tentatively accepted during a negotiation.[37]

G. Fulfilment of UNCAC's Requirements

Settlement-based enforcement provides flexibility to reward offenders' self-reporting and cooperation and to reach more timely findings in complex cases.[38] However, this should not represent an acceptable cost of corrupt business dealings or encourage recidivism.[39] UNCAC demands that sanctions be commensurate with the seriousness of the corruption offence to avoid potentially adverse side effects,[40] such as society receiving less information about the wrongdoing, little opportunity to assess the sanction, and less reason to expect sanctions to deter corruption.[41]

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[34] Ibid.
[35] Ibid.
[36] Jeswald W. Salacuse, *Seven Secrets for Negotiating with Government: How to Deal with Local, State, National, or Foreign Governments--and Come out Ahead* (New York: AMACOM/American Management Association, 2008), p. 130.
[37] Ibid., p. 49.
[38] Tina Søreide and Kasper Vagle, *Settlements in corporate bribery cases: an illusion of choice?* European Journal of Law and Economics 53, 261–287 (2022), <https://doi.org/10.1007/s10657-022-09726>, accessed Jan. 16, 2023.
[39] See Gillian Dell, *Making Sure Settlements Deter Corruption*. UNCA Coalition (Nov. 8, 2013), <https://uncaccoalition.org/making-sure-settlements-deter-corruption/>, accessed Jan. 16, 2023. Regarding recidivism, see Sydney P. Freedberg, Karrie Kehoe and Agustin Armendariz, "*As US-style corporate leniency deals for bribery and corruption go global, repeat offenders are on the rise*," ICIJ (Dec. 13, 2022), <https://www.icij.org/investigations/ericsson-list/as-us-style-corporate-leniency-deals-for-bribery-and-corruption-go-global-repeat-offenders-are-on-the-rise/>, accessed Jan. 16, 2023.
[40] See Elly Proudlock and Christopher David, *Bribery and corruption: negotiated settlements in a global enforcement environment*, Practical Law (Oct. 1, 2014), <https://content.next.westlaw.com/practical-law/document/I0422c5f1611d11e498db8b09b4f043e0/Bribery-and-corruption-negotiated-settlements-in-a-global-enforcement-environment/>, accessed Jan. 16, 2023.
[41] See Søreide and Vagle, *supra*, p. 261.