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Compensating the victims of foreign bribery
UK legislation, practice and recommended reforms

Sam Hickey | February 2025

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About this Working Paper

This paper explores the UK's commitment to compensate the victims of foreign bribery by using the proceeds of deferred prosecution agreements (DPAs) – and why this commitment is not achieving its intended results in practice. It examines the conceptual, practical and political difficulties inherent in this undertaking, shining a light on how victim compensation operates in the UK and analysing recent judicial decisions on this issue. Finally, the paper proposes reform recommendations to strengthen the DPA regime to ensure appropriate compensation is made in foreign bribery settlements.

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Foreword

Foreign bribery is an acutely damaging practice that causes both tangible and intangible harm to some of the world's most vulnerable populations. It hurts public treasuries by inflating the cost of public contracts and facilitating the sale of state assets at undervalued prices. It erodes trust in institutions, corrodes the quality of public services and discourages foreign investment.

A few countries – such as the US and a handful of European jurisdictions – have achieved some success in tackling foreign bribery committed by companies operating in their jurisdictions. This success has come largely through the use of innovative settlement agreements, whereby companies avoid prosecution by cooperating with authorities, giving up their profits and usually paying additional penalties to the enforcing state.

These efforts are commendable, and the penalties have often been staggering. In recent years, multinational companies such as Airbus, Glencore, Ericsson and Odebrecht have all paid billion-dollar-plus amounts to settle legal actions in jurisdictions such as the US, the UK, France and Switzerland.

While these countries have undoubtedly taken a positive step towards achieving justice, it is still necessary to ask whether such settlement agreements deliver a fair result to all who deserve it.

Presently, enforcing states mostly keep the amounts paid through foreign bribery settlements for themselves. Negotiations rarely include the countries in which the bribery has taken place. Compensation for damages caused by relevant bribery schemes is rarely awarded. In fact, compensation is often not considered at all – particularly if there are no easily identifiable victims and a straightforward, calculable amount that can be claimed.

Consequently those most harmed – the populations of the countries in which the bribery took place – are largely overlooked.

This issue is central to the efforts of the Basel Institute's International Centre for Asset Recovery (ICAR) to find better ways for states to work together to ensure that the profits derived from corrupt acts are repurposed to benefit the victims of those acts.

That is why we have worked with Sam Hickey to analyse current practices in the use of proceeds of settlements in foreign bribery cases, and specifically the lack of consideration regarding compensation.

Hickey's paper provides a thorough examination of such cases in one jurisdiction, the UK. While acknowledging the UK's achievements in countering foreign bribery, it also provides a constructive critique of the UK's evolving approach to compensation in this context and offers suggestions for reform.

The recommendations outline an avenue to the UK to ensure that victims of foreign bribery cases are fairly considered in all resolutions. At the same time, they provide an opportunity to the UK to stake its claim as a pioneer and leader in the global anti-corruption fight.

Foreign bribery continues to inflict enormous damage throughout the world. Holding culpable companies to account is an excellent start. But a complete picture of justice will only take shape once all the harm caused by these companies is adequately considered.

It remains to be seen which country around the world will be the first to demonstrate that this can be done in all foreign bribery cases in a way that both acknowledges the totality of the damage and properly seeks to rectify it.

Andrew Dornbierer
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Executive summary

The UK is a global leader in its efforts to target foreign bribery. It is one of the only countries worldwide to use negotiated settlements such as deferred prosecution agreements (DPAs) to resolve cases and extract penalties from corporations that commit corruption abroad.

The UK has also laudably committed to using the proceeds of DPAs in foreign bribery cases to compensate the victims of corruption, particularly in countries that suffer its worst effects. It has executed this policy by making direct payments to foreign governments and injecting capital into infrastructure projects that support vulnerable populations. However, this policy has come under scrutiny because the capital put towards compensation is insignificant compared to what the government retains.

This paper explores why the UK's policy of compensating the victims of foreign bribery is not achieving its intended results and proposes realistic suggestions for improvement to the extant DPA regime. Its aims are threefold.

First, to study how victim compensation operates in the UK. This involves an interpretation of understudied regulatory guidance documents, and a description of the normative dimensions of the applicable international law framework.

Second, this paper analyses recent judicial decisions and develops the argument that, in approaching the task of approving corporate settlement agreements, courts and regulators have attempted to transplant principles regarding compensation orders which have proven inapposite. These orders, designed to assist individual victims following the conviction of a natural person, have proven unsuitable for corporate corruption cases resolved prior to trial. Relatedly, courts have adopted a narrow understanding of compensation that is at odds with the explicit terms of applicable government policy.

Finally, the paper advances six proposals for reform which could collectively ensure that compensation is delivered in a greater number of cases:

1. **Define the responsibilities of relevant government agencies.** The Serious Fraud Office (SFO) should only be responsible for determining whether compensation is appropriate, and then making a recommendation to the Foreign, Commonwealth & Development Office (FCDO) and the Home Office regarding the quantum and means of distributing compensation. The SFO should then seek an undertaking from the FCDO and Home Office to handle the distribution of compensation monies.

   If the Crown Court decides to approve the DPA, it should do so on the basis that the FCDO and Home Office will handle the distribution of compensation monies in due course.

2. **Cease drawing on legal principles pertaining to compensation orders** when deciding whether to include compensation in the terms of a DPA, and **introduce a rebuttable presumption in favour of including compensation** in such agreements. And where compensation is included in the terms of a DPA, it should be tailored to the facts of each case.

   More specifically, agencies should prefer to award compensation to discrete victims who have suffered quantifiable losses. In the event no such victims exist, there should be a preference for compensation monies to be put toward the benefit of the general populace in the victim state (e.g., through infrastructure investments or public asset purchases). In the event that this option is impossible, compensation monies should be put toward the anti-corruption initiatives of governments, NGOs or international organisations as a final resort to ensure that some measure of compensation is paid in every case. Introduce a rebuttable presumption in favour of compensation.

3. **Adopt a range of alternate methods for calculating the quantum of compensation**, including a victim's losses, the value of a bribe, a set percentage of fines and penalties, or the gross profit of a bribe giver. In the event that there are no discrete victims with quantifiable losses, a preference should be given to whichever measure of compensation is the greatest.

4. **Adopt a formal procedure** that victims, states and NGOs could use to request compensation.

5. **Clarify the concepts underlying compensatory practices**, including the kinds of remedies available, the harm that might lead to compensation and the victims that might receive it.

6. As a possible alternative, **incentivise corporations** to pay compensation.

Acronyms and abbreviations

CPS	Crown Prosecution Service
DFID	Department for International Development
DPA	Deferred Prosecution Agreement
FCDO	Foreign, Commonwealth & Development Office
KC	King's Counsel
OECD	Organisation for Economic Co-operation and Development
QBD	Queen's Bench Division
SFO	Serious Fraud Office
UK	United Kingdom
US	United States
UNCAC	United Nations Convention Against Corruption
UNODC	United Nations Office on Drugs and Crime

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1 Introduction

The UK has committed to using the proceeds of corporate settlement agreements in foreign bribery cases to compensate vulnerable populations most affected by corruption.[1]

The commitment is laudable. It is widely recognised that corruption exacerbates poverty, undermines political institutions and facilitates human rights abuses, particularly in lower-income countries.[2] What's more, the settlement agreements negotiated between the Serious Fraud Office (SFO) and Crown Prosecution Service (CPS).[3] with corporations for violations of the UK Bribery Act 2010, known as Deferred Prosecution Agreements (DPAs), hold genuine potential to ameliorate this harm given the capital generated.

Despite government support and the availability of capital, delivering compensation has proven to be a fraught undertaking. The overall harm corruption causes is often difficult for a regulatory agency to calculate as it impacts large numbers of individuals. Further, not only is administering compensation to large numbers of individuals logistically challenging; it entails the risk that capital might be repurposed for corrupt ends, such that the adoption of costly transparency and accountability measures might become necessary in certain cases.[4]

It is therefore unsurprising that the UK's support for compensation has not yielded substantial results. However, as the legal framework surrounding compensation in foreign bribery cases has been in place for over a decade,[5] questions have naturally arisen as to whether suboptimal outcomes are due to incumbent practices and not just the innate difficulty of the task at hand.

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1 This commitment is most clearly evidenced in regulatory instruments and associated press releases. See, for example, Serious Fraud Office, "General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases", https://www.gov.uk/government/publications/general-principles-to-compensate-overseas-victims. The UK Government also committed to pursuing compensation in foreign bribery cases following the 2016 London Anti-Corruption Summit. See United Kingdom Government Publishing Service, 2016, "Anti-Corruption Summit – London 2016 UK Country Statement", https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522749/United_Kingdom.pdf, accessed 20 April 2024.

2 Economists, political scientists and sociologists have shown how corruption undermines development and harms individuals in low-income states. See, respectively, Benjamin A. Olken and Rohini Pande, 2012, "Corruption in Developing Countries", *American Review of Economics* 4: 479, 481-495; A. Cooper Drury et. al., "Corruption, Democracy, and Economic Growth", *International Political Science Review* 27, no. 2 (2006): 121; and John Clammer, 2012, "Corruption, Development, Chaos and Social Disorganisation: Sociological Reflections on Corruption and its Social Basis", in *Corruption: Expanding the Focus*, edited by Manuhuia Barcham, Barry Hindess and Peter Larmour, ANU Press: 113. For an overview of the relationship between corruption and human rights, see International Council on Human Rights Policy, 2009, "Corruption and Human Rights: Making the Connection", https://assets.publishing.service.gov.uk/media/57a08b6540f0b64974000b10/humanrights-corruption.pdf, accessed 29 April 2024.

3 As the CPS has only negotiated one DPA to date, this paper focuses primarily on the SFO. At various points in this paper, references to the "SFO" should be read to include the CPS.

4 Organisation for Economic Co-Operation and Development, 2019, "Resolving Foreign Bribery Cases with Non-Trial Resolutions": 126.

5 See Crime and Courts Act 2013 (Commencement No. 8) Order 2014 s 2 (regarding the introduction of Schedule 17, which provided that DPAs could impose requirements on corporates to "compensate victims for the alleged offence". See further, the 2012 consultation paper preceding the adoption of DPAs in which the government articulated its support for compensatory mechanisms. Ministry of Justice, 2012, "Deferred Prosecution Agreements: Response to Consultation CP(R)18/2012" (23 October 2012): 13, [38], https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/results/deferred-prosecution-agreements-response.pdf.

In a speech made before the House of Lords in February 2024, Lord Edward Garnier KC argued this very point, highlighting that since the introduction of DPAs in 2014, the SFO had fined corporations more than GBP 1.5 billion for violations of the Bribery Act, and yet only 1.4 percent of that sum had been given to the citizens of victim countries who actually suffered the consequences of corruption.[6] This lack of execution was said to invite "charges of hypocrisy", as the government was essentially acting "as the world's policeman", while "keeping all the fines for the Treasury".[7]

Seizing on the immediacy of Lord Garnier's comments, this paper analyses the SFO's use of DPAs to compensate the victims of corruption abroad for violations of the Bribery Act. Treating this subject with appropriate nuance, it recognises the UK as a pioneer in this space, before explaining why the approach taken by the SFO and courts in recent years has dramatically limited the potential of DPAs to serve as vehicles for compensation.

The immediate aims of this piece are threefold: to describe the relevant domestic and international frameworks governing compensation in foreign bribery cases; to analyse the UK's progress and shortcomings in this space; and to offer suggestions for reform.

Given the lack of scholarship and policy discussion relative to this subject's importance, it is hoped this piece will illuminate compensation as an important feature of anti-bribery regulation and contribute to burgeoning law reform efforts. As the UK has taken this subject seriously in the past, and because there have been recent calls within the House of Lords for a government-led inquiry into this issue, the contribution is a timely one.[8]

Further, this paper comes roughly six years after Theresa May's Conservative Government published the UK's most important policy document in this space, the *General Principles to Compensate Overseas Victims (including affected States) in Bribery, Corruption and Economic Crime Cases* (the "Compensation Principles").[9] Accordingly, this paper takes the opportunity to reflect on how, if at all, the Compensation Principles have impacted practice, and to imagine how policy might develop.

The balance of this paper is as follows: Part 2 provides relevant background information, highlighting important features of the UK's anti-bribery regime and outlining the applicable frameworks under domestic and international law. Part 3 then recounts past foreign bribery cases in which compensation was considered, while Part 4 critically analyses these cases.

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6 HL Deb 7 February 2024, vol 835, col 1712.

7 Ibid. The world's largest and most influential anti-corruption NGO, Transparency International, has raised concerns about the UK's failings in this context. See Transparency International, 2020, "Why Don't the Victims of Bribery Share in the Record-Breaking Airbus Settlement?" (6 February 2020), https://www.transparency.org/en/news/why-dont-the-victims-of-bribery-share-in-the-record-breaking-airbus-settlem, accessed 20 April 2024.

8 HL Deb 7 February 2024, vol 835, col 1713.

9 Serious Fraud Office, "General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases."

Two critiques are put forward in Part 4. The first is that courts and regulators have transplanted principles governing post-conviction compensation orders into the approval process for foreign bribery settlements, and that this approach has proven ill-suited to achieving the government's policy agenda. The second is that courts and regulators have approached calculating compensation as if it were a question of determining fixed remedial rights and duties in litigation, as opposed to an exercise in crafting and approving a remedial response through the terms of an out-of-court agreement that can be tailored to the needs of a given case.

Considering these arguments, this paper contends that where the victims in a given case are citizens outside the UK, courts approaching compensation should permit a degree of approximation in measuring compensation and remain guided by the government's overarching policy commitment to compensate those whose vital interests are threatened by corruption.[10] In line with this, Part 5 offers six suggestions for reform.

10 For an account of how corruption impacts the "vital interests" of citizens in Nigeria, and an analysis of the role that the "vital interests" standard might play in foreign bribery enforcement, see Kevin Davis, 2019, *Between Imperialism and Impunity*, Oxford University Press: 217.

2 Legislative framework and international context

Before delving into the application of DPAs in foreign bribery cases in the UK, it is first necessary to provide some contextual explanations. Consequently, this part will briefly outline:

- the relevant offences under the UK Bribery Act;
- the UK's DPA regime;
- the legislative framework governing compensation in the UK;
- the application of any international legal obligations; and
- the international experience regarding the treatment of proceeds of DPAs in this context.

2.1 The UK Bribery Act

Section 6 of the Bribery Act criminalises the offence of foreign bribery. A natural or legal person commits this offence upon offering or paying a financial or other advantage to a foreign public official while intending to influence that official in their political capacity, and thus intending to obtain or retain a business advantage.

Section 7 makes it a criminal offence for a corporation to fail to prevent an "associated" person from offering or paying a bribe (including a bribe to a foreign public official).[11] The "failure to prevent" offence imposes strict liability on corporations for omissions to act. A corporation charged with failing to prevent bribery can, however, raise a defence by showing it had adopted and implemented "adequate procedures" to prevent bribery. Section 7 applies not only to organisations incorporated within the UK, but to those incorporated abroad that "carry on a business, or part of a business, in any part of the United Kingdom."

Section 12(5), meanwhile, provides that an offence is committed under section 7 "irrespective of whether the acts or omissions forming part of the offence take place in the United Kingdom or elsewhere."

Read collectively, these provisions grant the "failure to prevent" offence global reach and place the UK in a small cohort of Western nations that police bribery on a global scale, even when there is only a tenuous connection to the enforcing state.[12]

11 Bribery Act 2010, s 7(3)(a), which provides that a violation of section 7 can be predicated on either a violation of the general anti-bribery offence under section 1 of the Act, or an offence under section 6.

12 Kevin Davis, 2019, *Between Imperialism and Impunity*, Oxford University Press. Davis, focusing on the structural features of the global foreign bribery regime, has coined the phrase "OECD Paradigm" to describe its Western biases.

2.2 The UK's DPA regime

The UK adopted its DPA regime in 2014,[13] and has relied heavily on these tools to resolve corporate foreign bribery cases.[14] As of 2019, most prosecutions brought against corporations under section 7 of the Bribery Act had been resolved through DPAs.[15]

These instruments stipulate that a regulatory agency will not prosecute a corporation provided the corporation satisfies certain conditions for the duration of the agreement.[16] If the corporation violates any term of the DPA, the agency can pursue conviction.

DPAs are desirable from the regulator's perspective, as they enable cost-effective resolutions while incentivising corporations to self-report bribery to avoid conviction.[17] Corporate defendants also have reason to prefer DPAs, as the fines and penalties issued under the terms of these agreements pale in comparison to the consequences of conviction. Additionally, corporations that cooperate with regulators receive deductions in fines and penalties.[18]

A key advantage of DPAs, however, is the creativity afforded to prosecutors. DPAs are premised on consensual undertakings, and it is possible for regulators to impose terms on corporations appropriate to a given case, such as appointing an independent third-party monitor to prevent reoffending;[19] updating policies and retraining staff;[20] cooperating with parallel investigations;[21] and compensating victims.[22]

While cases in which compensation was delivered are discussed below, it suffices to note here that compensation can take numerous forms, including direct payments to victims, the injection of capital into public infrastructure projects, the purchase of assets for the public benefit, and investment in civil society organisations, education initiatives or social welfare programmes.[23]

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13 Crimes and Courts Act 2013, s 45, Sch 17.

14 Organisation for Economic Co-Operation and Development, 2019, "Resolving Foreign Bribery Cases with Non-Trial Resolutions": 13.

15 For an empirical breakdown of the ubiquity of DPAs, see Organisation for Economic Co-Operation and Development, 2019, "Resolving Foreign Bribery Cases with Non-Trial Resolutions". It is also worth noting that the Crown Prosecution Service can also enter into DPAs, and that it has done so once before. See Crown Prosecution Service, 2023, "First ever CPS deferred prosecution agreement for £615 million" (5 December 2023), https://www.cps.gov.uk/cps/news/first-ever-cps-deferred-prosecution-agreement-ps615-million, accessed 20 April 2024.

16 For an overview of DPAs in the UK, see Frederick Davis, 2022, "Judicial Review of Deferred Prosecution Agreements: A Comparative Study", *Columbia Journal of Transnational Law* 60: 751, 756-763, 786-797.

17 Serious Fraud Office, 2014, "Deferred Prosecution Agreements Code of Practice": 5, [2.8.2], https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf, accessed 20 April 2024 ("DPA Code of Practice").

18 DPA Code of Practice: 16, [8.5].

19 Ibid.: 13-15, [7.11]-[7.22].

20 HL Nov 13 2012, vol 740, col 1505.

21 DPA Code of Practice: 13, [7.10].

22 Ibid.: 12, [7.2].

23 For a broader view of the various forms see Samuel J. Hickey, 2021, "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach", *Chicago Journal of International Law*: 401.

There are, of course, criticisms of DPAs. Jed Rakoff, a United States Federal Judge and leading white-collar crime scholar has referred to DPAs as promoting a mere "façade of enforcement" while allowing culpable corporations to escape conviction.[24] In the United States (US), there are also serious questions as to whether DPAs effectively deter corruption,[25] as well as the relationship these agreements encourage between defence firms and government.[26]

As the US has far more experience with DPAs than the UK, these concerns are legitimate and have unsurprisingly taken root with commentators in this jurisdiction.[27] A particular issue in the UK is that the SFO has resolved several foreign bribery cases through DPAs while failing to convict individuals.[28] A problematic picture emerges, one in which deep-pocketed corporations are able to escape criminal conviction for foreign bribery while the individuals responsible remain unpunished.[29]

These criticisms are beyond the scope of this paper. It is, however, worth noting one important difference between DPAs in the US and their UK counterparts which renders the latter less problematic: the involvement of judges. According to the Crime and Courts Act 2013, a DPA does not take effect until granted approval by the Crown Court,30 and that Court is not to grant approval unless satisfied the agreement is in the interests of justice and that its terms are fair, reasonable and proportionate.[31]

2.3 Compensation guidance

The same instruments that enshrine DPAs in the UK also contemplate the compensation of foreign bribery victims. The Crime and Courts Act provides that a DPA "may" oblige corporations to compensate victims,[32] while the SFO has published a DPA Code of Practice which states it is "particularly

24 Jed S. Rakoff, 2019, "The Problematic American Experience with Deferred Corporate Prosecutions", *Law and Financial Markets Review* 13, Issue 1: 1; see also Brandon Garrett, 2016, *Too Big to Jail*, Harvard University Press. Other US Judges have criticised DPAs as well, see the comments of Judge Kaplan in *United States v. U.S. Bancorp*, No. 18-cr-150 (S.D.N.Y. Feb. 22, 2018), ECF No. 9.

25 Jed S. Rakoff, 2019, "The Problematic American Experience with Deferred Corporate Prosecutions", *Law and Financial Markets Review* 13, Issue 1: 1.

26 Larry E. Ribstein, 2011, "Agents Prosecuting Agents", *Journal of Law and Economic Policy* 7: 617.

27 Shahrzad Fouladvand, 2020, "Corruption, regulation and the law: The power not to prosecute under the UK Bribery Act 2010", in *Corruption, Integrity and the Law*, edited by Nicholas Ryder and Lorenzo Pasculli, Routledge: 85.

28 The SFO did not secure its first conviction of a natural person in connection with conduct that was the subject of a DPA until March 2023, eight years after the introduction of DPAs. For more information regarding the conviction of Mr. Roger Dewhirst, see Serious Fraud Office, 2023, "R v Bluu Solutions Limited and Tetris Projects Limited" (2 October 2023), accessed from the SFO website on 20 April 2024 and also discussed in ICLG, 2024, "Corporate Investigations Laws and Regulations Bribery and Corruption: Investigations and Negotiations Across Jurisdictions 2024-2025", https://iclg.com/practice-areas/corporate-investigations-laws-and-regulations/02-bribery-and-corruption-investigations-and-negotiations-across-jurisdictions, accessed 15 January 2025.

29 International Consortium of Investigative Journalists, 2022, "As US-style corporate leniency deals for bribery and corruption go global, repeat offenders are on the rise" (13 December 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 20 April 2024.

30 Crimes and Courts Act 2013, Sch 17, 2(1).

31 Ibid., 8(1).

32 Crime and Courts Act 2013 Schedule 17 5(3).

desirable" that DPAs compensate victims, and that compensation be given priority over financial penalties.[33] Likewise, the Definitive Guideline published by the Sentencing Council in respect of Fraud, Bribery and Money Laundering Offences (Sentencing Guideline) alludes to compensation in foreign bribery cases.[34]

However, to the extent these instruments address compensation, there is little direction as to when and how compensation is to be delivered. Such detail can be found in two additional guidance documents.

The first document is the UK's Compensation Principles, which were published in 2018 and supply a series of non-binding commitments. Although the Principles apply generally to "overseas victims", compensation has only been considered in connection with low- or middle-income countries to date. The substance of the Principles are as follows:

- the SFO, the Crown Prosecution Service and the National Crime Agency (the "Agencies") "will consider the question of compensation in all relevant cases";
- if compensation is appropriate, the Agencies will use "whatever legal means are available" to secure it, including the terms of DPAs;
- the Agencies will "work collaboratively" with certain government offices (including the Home Office, Commonwealth Office and Treasury) to identify victims, assess "the case for compensation", obtain relevant evidence, ensure transparency, fairness and accountability in the payment of compensation and identify suitable means in which to pay compensation without risking that monies paid in compensation become misappropriated for corrupt purposes;
- the Agencies will make guidance available and publish information on concluded cases; and
- the Agencies will, where possible, engage with law enforcement and public officials in affected states.

The second relevant guidance document is the SFO's Guidance for Corporates regarding DPAs, which was published in 2020.[35] That instrument provides more granular detail regarding the mechanics of compensation, setting out 10 factors the SFO might refer to in determining whether compensation should be included in the terms of a DPA. These factors pertain to things such as the identity of victims; the presence of a causal link between bribery and harm; whether the harm at stake is quantifiable; whether civil courts might be a more appropriate forum; whether there is a

33 DPA Code of Practice: [7.2], [8.3]; Serious Fraud Office, 2020, "Operational Guidance for Corporates, Compensation (Deferred Prosecution Agreements)".

34 Definitive Guideline issued by the Sentencing Council in respect of Fraud, Bribery and Money Laundering Offences: 47-52, https://www.sentencingcouncil.org.uk/wp-content/uploads/Fraud_bribery_and_money_laundering_offences_-_Definitive_guideline.pdf, accessed 20 April 2024.

35 Guidance for Corporates.

risk that compensation monies might become vulnerable to corruption, and if so, the extent to which such risk can be mitigated; whether non-financial forms of compensation might be appropriate; and finally, the terms of the Compensation Principles.[36]

The Guidance for Corporates does not, unfortunately, require the regulator to consider whether it would be more appropriate to disperse compensation to discrete entities or to a populace-at-large, and it is not entirely clear on what basis the SFO has decided between these options in the past.

Aside from this, the Compensation Principles and Guidance for Corporates envision a comprehensive, practical and flexible framework for compensation in foreign bribery cases. However, as explored below, the execution of this framework has rarely achieved optimal outcomes.

2.4 International legal obligations

It is also worth contextualising the UK legal frameworks discussed here within the broader landscape of international anti-corruption instruments and briefly examining whether the UK is bound by any international legal obligations to award compensation to victims in foreign bribery cases resolved through DPAs.

The United Kingdom is a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which has long been considered the fulcrum of the international foreign bribery regime.[37] This Convention, however, which initially proliferated the foreign bribery norm during the late 1990s, does not contemplate victim compensation through the proceeds of DPAs.[38]

In the context of wider corruption, the United Kingdom is also a State Party to the United Nations Convention Against Corruption (UNCAC). Like the OECD Convention, this instrument also does not explicitly address the proceeds of DPAs. It does, however, contain provisions related to victim compensation through traditional litigation, sentencing and the return of tainted property (i.e., property that has been acquired through corrupt means or is otherwise the proceeds of corruption). Some commentators have claimed that these existing provisions in the UNCAC require countries to share the proceeds of foreign

36 Ibid.

37 Dec. 17, 1997, S. Treaty Doc. No. 105-43. This instrument was predated by the regional anti-corruption instrument adopted by the Organization of American States in 1996.

38 For a contextual account of how the US was instrumental in bringing the OECD Convention into existence, see Cecily Rose, 2021, "The Origins of International Anti-Corruption Law: The Failed Negotiation of an International Agreement on Illicit Payments", in *Histories of Transnational Criminal Law*, edited by Neil Boister, Sabine Gless and Florian Jeßberger, Oxford University Press: 187. For an account of how the US foreign bribery enforcement took on a distinctly global nature after the Convention came into force, see Rachel Brewster, 2017, "Enforcing the FCPA: International Resonance and Domestic Strategy", Virginia Law Review Vol. 103: 1611.

bribery DPAs.[39] Consequently, it is therefore worth briefly examining if this is the case.

Three provisions of the UNCAC appear, at least facially, relevant to compensation in foreign bribery cases, namely Articles 35, 53 and 57.3(c).

Article 35, promisingly titled "compensation for damage", provides that a state "shall take such measures as may be necessary" to "ensure that entities or persons who have suffered damage as a result of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation." This article requires only that member parties enshrine a private right of action to enable victims to seek compensation, to the extent that such a right is permitted under domestic law.[40] In this sense, the scope of Article 35 is limited to a victim's right to petition for compensation through a State Party's legal system,[41] and does not pertain to the proceeds of DPAs.

Articles 53 and 57, meanwhile, enshrined under Chapter V (titled "Asset recovery") are limited to formal asset return mechanisms and the disposal of confiscated assets. Article 53 concerns measures for the direct recovery of assets,[42] and permits a court to order defendants to pay compensation as part of criminal sentencing.[43] It does not, however, apply to the proceeds of DPAs.[44] Article 57.3(c), requires states to prioritise "compensating the victims" of crimes that generate illicit wealth. However, this article applies only to compensation paid out of the disposal of confiscated assets.[45]

The proceeds of DPAs, however, are not confiscated assets, but instead consist of monies paid in fines and penalties and are distinct from the actual proceeds of crime.[46] Neither the law of tracing in England and Wales, nor the procedures for asset tracing contemplated under the UNCAC, permit

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39 Maud Perdriel-Vaissiere, 2014, "Is there an obligation under the UNCAC to share foreign bribery settlement monies with host countries?", UNCAC Coalition (5 September 2014), https://uncaccoalition.org/is-there-an-obligation-under-the-uncac-to-share-foreign-bribery-settlement-monies-with-host-countries/. See also Transparency International, 2020, "Why Don't the Victims of Bribery Share in the Record-Breaking Airbus Settlement?" (6 February 2020), https://www.transparency.org/en/news/why-dont-the-victims-of-bribery-share-in-the-record-breaking-airbus-settlem, accessed 20 April 2024: "[C]ountries, like France, the UK and US. Authorities there have a duty to facilitate investigations in countries where bribes are paid, and provide them with a share of the penalties, including disgorged profits."

40 UNODC, 2010, "Travaux Préparatoires on the negotiations for the elaboration of the United Nations Convention Against Corruption": 299.

41 Abiola Makinwa, 2019, "Article 35. Compensation for damage", in *The United Nations Convention Against Corruption*, edited by Cecily Rose, Michael Kubiciel and Oliver Landwehr, Oxford University Press: 357-359.

42 Jean Pierre Brun, 2019, "Article 53. Measures for direct recovery of property", in *The United Nations Convention Against Corruption*, edited by Cecily Rose, Michael Kubiciel and Oliver Landwehr, Oxford University Press: 537; UNODC, UNCAC Legislative Guide: 227.

43 Jean Pierre Brun, 2019, "Article 53. Measures for direct recovery of property", in *The United Nations Convention Against Corruption*, edited by Cecily Rose, Michael Kubiciel and Oliver Landwehr, Oxford University Press: 543. See also UNODC, 2009, "Technical Guide to the United Nations Convention against Corruption".

44 Ibid.: 546: "As establishing that there is a prior title or ownership rights in these profits would be extremely challenging or impossible in many jurisdictions, Article 53(c) may not apply."

45 Pinar Olcer, 2019, "Article 57. Return and disposal of assets" in *The United Nations Convention Against Corruption*, edited by Cecily Rose, Michael Kubiciel and Oliver Landwehr, Oxford University Press: 571, 573.

46 Matthew Stephenson, 2014, "UNCAC Does Not Require Sharing of Foreign Bribery Settlement Monies with Host Countries", Global Anti-Corruption Blog (16 September 2014), https://globalanticorruptionblog.com/2014/09/16/uncac-does-not-require-sharing-of-foreign-bribery-settlement-monies-with-host-countries/.

courts to deem monies paid as penalties as tantamount to the proceeds of corruption, simply because those fines and penalties were paid as a result of corrupt conduct.[47]

Therefore, in a strictly legal sense, the UNCAC has no influence on how states should deal with the proceeds of DPAs.

2.5 International comparisons: do other jurisdictions award compensation in foreign bribery settlements?

This paper is not a survey of international best practices.[48] It is, however, useful to put the UK's efforts in context by briefly examining whether other jurisdictions have used DPA regimes to compensate victims of foreign bribery. Doing so is not without difficulty, as so few states actively enforce the foreign bribery offence, let alone use DPAs to compensate the victims of foreign bribery.[49] Focus here is afforded to the US and Canada as these jurisdictions have adopted markedly different approaches to compensation.

Additionally, as with the UK, academics and commentators have already queried whether the use of proceeds of DPAs in these jurisdictions is an issue that should be revisited. In 2024, senior law enforcement officials in Canada questioned whether the government "should continue to 'profit' from the large fines that their treasuries absorb when their own nationals and corporations are prosecuted."[50] In the US, questions of this nature have persisted for many years.[51]

The US resolves more foreign bribery cases than any other state by a considerable margin and accordingly serves as an instructive point of comparison.[52] The US does not use the proceeds of DPAs to compensate the victims of corruption,[53] and has previously ignored requests from overseas non-governmental organisations to share in the proceeds of these agreements.[54]

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47 According to the common law of England and Wales, the doctrine of tracing is based on attribution, rather than causation. See *Foskett v McKeown* [2000] UKHL 29; [2001] 1 AC 102 at 137 (per Lord Millett). Regarding international law, instruments including the UNCAC contemplate tracing as a causative forensic procedure to unravel the layering techniques used to launder capital, but this bears no equivalency to the doctrine of tracing.

48 A brief survey, can, however be found here: Organisation for Economic Co-Operation and Development, 2019, "Resolving Foreign Bribery Cases with Non-Trial Resolutions": 126.

49 Organisation for Economic Co-Operation and Development, 2019, "Resolving Foreign Bribery Cases with Non-Trial Resolutions": 126-129.

50 Kathleen Roussel, Todd Foglesong and Marke Kilkie, 2024, "A Relief Fund for Victims of Corruption", University of Oxford Chandler Paper, March 2024: 6.

51 Luke Balleny, "Foreign Bribery Fines and Settlements: Who Should Get the Money?", *Reuters*, 9 May 2020, https://perma.cc/E8ZR-VWR7; "Is ICE a Victim? And an Open Question!", FCPA Professor, 25 May 2011, https://perma.cc/N3XC-ZWXN.

52 Transparency International, 2022, "Exporting Corruption 2022": 8, https://images.transparencycdn.org/images/2022_Report-Full_Exporting-Corruption_English.pdf.

53 Transparency International has recently recommended that the US implement a framework for compensation in foreign bribery cases. Transparency International, 2022, "Exporting Corruption 2022": 89.

54 Alexander W. Sierck, "African NGO Asks for Distribution of FCPA Recoveries", *The FCPA Blog*, 16 March 2012, https://perma.cc/3LT6-YQD9.

There are federal statutes which, in theory, grant victims the right to seek restitution in the wake of a successful prosecution. However, this legislation has proven ineffective for the citizens affected by corruption.[55]

On the other hand, the US does pursue asset recovery in anti-corruption cases through the Department of Justice's Money Laundering and Asset Recovery Section, which repatriates illicit wealth to foreign governments in corruption cases.[56] To date, the Department of Justice has repatriated over USD 10 billion in illicit finance.[57] Of course, asset recovery is of no use to the victims of corruption where there are no tangible assets to be seized and confiscated.

What's more, the capital received by the US Treasury through foreign bribery enforcement is staggering (the combined value of the ten highest penalties levied through DPAs exceeds USD 7.5 billion).[58] Accordingly, despite US asset recovery efforts, there is still a strong sentiment that not enough is being done to improve the situation of the victims of foreign bribery and states affected by corruption, and there have been attempts to introduce laws that would put foreign bribery penalties to productive use for the benefit of stakeholders in victim countries.[59] However, these reforms have not been passed.

Canada, meanwhile, has been more proactive than the US. In 2018, Canada amended its federal criminal code to introduce a variant of DPAs called remediation agreements.[60] Remediation agreements, much like DPAs in the UK, require court approval. Remediation agreements must also provide compensation to victims, or the agency submitting the agreement for approval must explain why compensation was inappropriate.[61] The Criminal Code explains that such agreements are to "provide reparations for harm done to victims or to the community."[62]

However, these agreements have not been used to provide compensation in practice. Courts and regulators have determined compensation to be inappropriate for a variety of reasons, including civil unrest in the state where compensation would be dispersed, and uncertainty regarding the identity of

55 Shane Frick, 2013, "'Ice' Capades: Restitution Orders and the FCPA", *Richmond Journal of Global Law and Business*, Vol. 12: 433, 437.

56 The most well-known example of the Department of Justice's asset recovery assets is the 1MBD case. Between 2009 and 2015, Malaysian public officials appropriate more than USD 4.5 billion from a development fund and laundered that money through financial institutions across the world, including in the US. The Department of Justice succeeded in repatriating over USD 1 billion. See US Department of Justice, 2021, "Over $1 Billion in Misappropriated 1MDB Funds Now Repatriated to Malaysia" (5 August 2021), https://www.justice.gov/opa/pr/over-1-billion-misappropriated-1mdb-funds-now-repatriated-malaysia.

57 Stolen Asset Recovery Initiative, Asset Recovery Watch Database, https://star.worldbank.org/asset-recovery-watch-database.

58 See "Top Ten Corporate FCPA Settlements", FCPA Professor, 13 February 2024, https://fcpaprofessor.com/top-ten-corporate-fcpa-settlements-2/. This sum includes amounts paid to the US Securities Exchange Commission and excludes amounts paid to non-US enforcement agencies and amounts deducted from the original settlement amount.

59 Senator Roger F. Wicker and Senator Ben Cardin, 2021, "Corruption Is a National Security Threat. The CROOK Act Is a Smart Way to Fight It." *Just Security*, 23 March 2021, https://www.justsecurity.org/75468/corruption-is-a-national-security-threat-the-crook-act-is-a-smart-way-to-fight-it/.

60 R.S.C. 1985, c C-46, § 715.3.

61 § 715.34(1)(g).

62 § 715.31(a)–(f).

victims and harm suffered.[63] The failure of remediation agreements to provide compensation recently prompted senior Canadian prosecutors, including the Director of Public Prosecutions for Ottawa, to call for states to establish an international fund that might be used to compensate victims.[64]

International comparison confirms that issues in this space are not limited to the UK alone, with similar roadblocks regarding calculating compensation, identifying victims and administering compensation hindering the award of compensation in foreign bribery cases worldwide.

63 See Kathleen Roussel, Todd Foglesong and Marke Kilkie, 2024, "A Relief Fund for Victims of Corruption", University of Oxford Chandler Paper, March 2024: 6-7, discussing enforcement actions against SNC Lavalin in 2019 and Ultra Electronics Forensic Technology Inc in 2023.

64 Ibid.

3 Foreign bribery DPAs

This part chronicles UK corporate foreign bribery cases in which compensation was considered. It starts by recounting cases stemming from investigations that pre-date the UK's DPA regime, and then moves to cases resolved between the introduction of that regime in 2014 and the adoption of the Compensation Principles four years later. It then addresses cases resolved since the adoption of the Compensation Principles.

Finally, it offers critical reflections on how law and practice have developed and suggests that practice has become needlessly mired in an impractically strict approach that undercuts the very purpose of DPAs and the policy underlying the Compensation Principles.

3.1 Cases pre-dating DPAs

Compensation was awarded in two foreign corruption cases arising out of investigations brought prior to the introduction of DPAs. The first of these, R v BAE Systems plc, involved a settlement agreement between the SFO and domestic weapons manufacturer BAE Systems. That agreement covered charges of accounting fraud concerning the sale of military equipment to the Tanzanian government,[65] and provided that BAE would make an "ex gratia payment for the benefit of the people of Tanzania" worth GBP 30 million.[66] Eventually, this money was put towards educational supplies for school-aged children.[67] The Department for International Development (DFID), which has since been replaced by the Foreign, Commonwealth & Development Office, was instrumental in dispersing the capital.[68]

The settlement was seen as a weak consolation after Prime Minister Tony Blair forced the SFO to drop investigations into far more serious allegations of corruption regarding BAE's operations in Saudi Arabia.[69] This decision came under intense scrutiny from the OECD,[70] which was accentuated after BAE Systems later pleaded guilty to a swathe of corruption-related offences in the US, for which it paid approximately USD 400 million in fines.[71]

65 Settlement Agreement Between the Serious Fraud Office and BAE Systems Plc, February 2010.

66 Ibid.

67 Serious Fraud Office, 2012, "BAE Systems Will Pay towards Educating Children in Tanzania after Signing an Agreement Brokered by the Serious Fraud Office" (15 March 2012).

68 House of Commons International Development, 2011, "Financial Crime and Development: Eleventh Report of Sessions 2010-12. Vol. I: Report, together with formal minutes, oral and written evidence": 10, https://publications.parliament.uk/pa/cm201012/cmselect/cmintdev/847/847.pdf.

69 David Leigh and Rob Evans, 2006, "'National interest' halts arms corruption inquiry" (15 December 2006), https://www.theguardian.com/uk/2006/dec/15/saudiarabia.armstrade.

70 Matthew Saltmarsh, 2017, "OECD Raises Pressure on Britain Over the Ending of a Bribery Enquiry" (14 March 2017), https://www.nytimes.com/2007/03/14/business/worldbusiness/14iht-oecd.4911396.html.

71 US Department of Justice Press Release, 2010, "BAE Systems PLC Pleaded Guilty and Ordered to Pay $400 Million Criminal Fine" (1 March 2010), https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine.

The terms of the SFO's settlement agreement with BAE Systems, as well its execution, became the subject of a government inquiry. The report published in connection with that inquiry found the settlement agreement provided far too little detail regarding the manner in which compensation would be paid, which led to significant delays in payment.[72] The debacle fuelled calls for the introduction of DPAs.[73] Yet despite these controversies, this settlement marked an important moment for foreign bribery enforcement in the UK. The SFO and DFID displayed the will and aptitude to negotiate an out-of-court resolution that bettered the situations of those who typically bear the brunt of corruption.

The second case, *R v Smith & Ouzman Ltd*, established the UK as a pioneer in using the proceeds of foreign corruption enforcement actions to compensate affected populaces. Domestic printing company Smith and Ouzman had been convicted in relation to bribes paid in return for business contracts in Kenya and Mauritania. Recorder Andrew Mitchell QC stated in his sentencing remarks that he was not inclined to make a compensation order.[74] Nevertheless, the SFO negotiated with Kenyan and Mauritanian officials and agreed that GBP 395,000 (equal to the bribe amount) would be taken from the company's confiscated assets and offered as compensation.[75] Regarding the Kenyan component of the case, the SFO agreed to purchase ambulances for the benefit of the Kenyan people.[76]

These early cases reflect equal measures of ingenuity and perseverance. Despite operating without guiding precedent or overarching mandate, the SFO achieved positive outcomes, mitigating the risk of further corruption by purchasing assets rather than injecting capital, and pursuing compensation despite the absence of any discrete or identifiable victim or quantifiable loss. The SFO's rationale in these cases appeared to be that corruption causes economic and institutional decay in affected countries, and accordingly, where corruption has occurred, some degree of compensation ought to be paid, even if only measured approximately.

Ironically, as higher levels of government endorsed the SFO's initiative, this philosophy faded, and less success has been had in subsequent cases. As depicted below, the UK is yet to recapture the momentum of *BAE Systems and Smith & Ouzman*.

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72 House of Commons International Development, 2011, "Financial Crime and Development: Eleventh Report of Sessions 2010-12. Vol. I: Report, together with formal minutes, oral and written evidence": 3

73 House of Commons International Development, 2011, "Financial Crime and Development: Eleventh Report of Sessions 2010-12", Section "Oral evidence Taken before the International Development Committee on Tuesday 19 July 2011": ev 20, https://publications.parliament.uk/pa/cm201012/cmselect/cmintdev/847/847.pdf.

74 R v Smith et. al., Corporate Sentence and Confiscation Judgment (Southwark Crown Court, 7 January 2016).

75 See RAID, "Compensating Victims for the Harm of Overseas Corruption" (Discussion Paper): 4, https://islp.org/wp-content/uploads/2018/06/compensation-discussion-paper-final-amended.pdf.

76 There are no published sentencing remarks in this case. However, an overview can be gleaned from several online sources. See, for example, Serious Fraud Office Case Information, Smith and Ouzman Ltd (11 September 2014), accessed from the SFO website on 20 April 2024, and Basel Institute on Governance, 2017, "First ever UK conviction of a corporate for foreign bribery in Kenya" (20 March 2017), https://baselgovernance.org/news/first-ever-uk-conviction-corporate-foreign-bribery-kenya, accessed 15 January 2025.

3.2 DPAs: 2014–2018

The first DPA approved in the UK involved domestic bank Standard Bank PLC (now known as ICBC Standard Bank Plc) and its Tanzanian sister company. Standard Bank had been charged with failing to prevent bribery after its sister company orchestrated a kick-back scheme, pursuant to which the government of Tanzania had been deprived of USD 6 million.[77] There was no question as to the identity of the victim or the quantity of the loss; the corruption had occurred in only one jurisdiction; and there was no suggestion that higher tiers of government had been aware of or endorsed the bribes at issue. Accordingly, Sir Brian Leveson (President of the Queen's Bench Division) approved the DPA between Standard Bank and the SFO, which provided for a compensation payment of USD 6 million to the Tanzanian government (the precise amount of which it had been deprived) plus interest of approximately USD 1 million. Standard Bank paid an additional USD 25.2 million in fines and penalties.

The next case, *SFO v Sarclad Ltd*, involved a domestic steel company that admitted to numerous corruption-related offences, including failing to prevent bribery. Calling on a complex web of intermediaries, Sarclad had paid bribes to obtain government contracts across Asia. The SFO determined, and Sir Brian Leveson (President QBD) agreed, that compensation was inappropriate for a multitude of reasons.

Foremost, it was impossible to identify those harmed.[78] Neither the amounts of bribe payments nor the identity of bribe recipients had been confirmed in evidence.[79] Moreover, many of the tainted contracts involved entities based in jurisdictions in which there were no established mechanisms to pay compensation to enforcement authorities and no applicable Mutual Legal Assistance Treaty.[80] Accordingly, a quantifiable amount of compensation could not be paid to a discrete victim as had been the case in *Standard Bank*.

The *Sarclad* DPA, which imposed approximately GBP 6.5 million in penalties, marked a significant departure from *BAE Systems and Smith & Ouzman*. The SFO no longer seemed inclined towards adopting a broad interpretation of harm and victimhood in foreign bribery cases as it had in *BAE Systems and Smith & Ouzman*, and there was no apparent will to deliver compensation through infrastructure investment or public asset purchases.

Sir Brian Leveson (President QBD) approved one other DPA concerning foreign bribery, *SFO v Rolls Royce Plc*, which involved domestic aerospace and defence company Rolls Royce and one of its subsidiaries. The companies admitted to failing to prevent bribery and other corrupt practices across multiple business sectors over the course of three decades and across seven different

77 Serious Fraud Office v Standard Bank Plc (now ICBC Standard Bank Plc) [2015] 11 WLUK 804, [8].

78 Serious Fraud Office v XYZ Ltd [2016] 7 WLUK 211, [41].

79 Ibid.

80 Ibid.

jurisdictions.[81] The DPA covered the conduct of both parent and subsidiary in Nigeria, Indonesia and Russia, and the subsidiary alone in Thailand, India, China and Malaysia.[82]

Sir Brian Leveson (President QBD), citing cases concerning compensation orders, found it would only be appropriate to include compensation in a DPA in "clear and simple cases" in which any victim's losses were ascertainable.[83] His Lordship stated: "[H]ere, the factual complexity of the totality of the allegations in the Statement of Facts, including the use of intermediaries, makes quantifying bribes actually paid impossible."[84] His Lordship was further swayed by the fact that losses arising from the corrupt conduct could not be quantified, as there was "no direct evidence of contracts where there was a rise in the contract price to accommodate a bribe" or "evidence that any of the products or services which Rolls-Royce sold to customers were defective or unwanted."[85] Rolls Royce ultimately paid approximately GBP 500 million to the SFO in penalties.

Had the approach applied in *Sarclad* and *Rolls Royce* been applied in the earlier cases of *BAE Systems or Smith & Ouzman*, it seems unlikely that compensation would have been delivered at all. The approach of Sir Brian Leveson (President QBD) all but precluded compensation in cases in which there was uncertainty regarding the identity of bribe recipients or the amount of bribe payments, or in which bribes were paid through complicated schemes spanning multiple jurisdictions.

The problem here is that foreign bribery schemes, especially when implemented by global companies, are often complicated and transnational in nature, involving multiple agents across a range of jurisdictions. Further to this, section 7 of the Bribery Act does not require the SFO to particularise a predicate charge of bribery, meaning that precise details regarding the identities of bribe recipients, the value of the bribes and the extent of harm will not always be established in evidence, making it even more unlikely that details sufficient to justify compensation will be established.

What is most confusing, however, is that in *Rolls Royce*, although not in *Sarclad*, Sir Brian Leveson (President QBD) derived controlling principles from the law governing compensation orders. Compensation orders are typically made following a criminal conviction against an individual. As discussed below, it is difficult to see why these mechanisms ought to be imported into corporate foreign bribery cases resolved via mutual consent.

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81 Serious Fraud Office v Rolls-Royce Plc [2017] 1 WLUK 189, [1]-[3].

82 Ibid., [1].

83 Ibid., [81] citing *R v Michael Brian Kneeshaw* (1974) 58 Cr App R 439; R v Kenneth Donovan (1981) 3 Cr App R (S) 192; and *R v Stapylton* [2012] EWCA Crim 728. In *Rolls Royce*, Leveson P cited a passage in *Stapylton* which cited *R v Horsham Justices Ex p. Richards* (1985) 7 Cr. App. R. (S.) 158, 993. Horsham concerned an application for GBP 328 in compensation following acts of theft.

84 Serious Fraud Office v Rolls-Royce Plc [2017] 1 WLUK 189, [83].

85 Ibid., [84].

Sarclad, and to a greater extent *Rolls Royce*, altered the trajectory of the UK's approach to compensation, to the detriment of victims.

3.3 DPAs after the introduction of the Compensation Principles: 2018–present

The introduction of the Compensation Principles in 2018 did not lead to improved outcomes. In the first application for DPA approval following the principles' publication, Dame Victoria Sharp (President QBD) approved a DPA between the SFO and French company Airbus SE concerning multiple counts of failing to prevent bribery throughout Asia and Africa.[86] Adopting Sir Brian Leveson (President QBD)'s reasoning in *Sarclad* and *Rolls Royce*, her Ladyship approved the SFO's decision not to pursue compensation.[87]

Having regard to post-conviction compensation orders, her Ladyship stated "the machinery of a compensation order is intended for clear and simple cases[,]"[88] before identifying three reasons why compensation was inappropriate: the SFO could not "easily identify a quantifiable loss arising from the criminal conduct"; there was "no evidence that any of the products or services Airbus sold to customers were defective or unwanted, so as to justify a legal claim for the value of an adequate replacement"; and lastly the DPA did not prevent victims from claiming compensation through civil litigation.[89]

Airbus ultimately paid EUR 3.6 billion as part of a global resolution, with EUR 991 million paid to the UK. In late 2023, it was reported that the Republic of Indonesia intended to file suit against the UK for the SFO's failure to use the terms of the DPA to provide compensation.[90] The Indonesian government had reportedly provided crucial evidence to the SFO as part of its investigation of Airbus and had attempted to liaise with the SFO regarding compensation on multiple occasions. Indonesia claimed that senior officers of state-owned airline Garuda had received kickbacks from Airbus in connection with the purchase of several aircrafts, that had been purchased at inflated prices. If this had indeed occurred, the appropriate measure of compensation would likely be the difference between the market value of the aircraft and the price actually paid.

The final DPA concerned Amec Foster Wheeler Energy Lt., a domestic engineering and construction company that had allegedly paid bribes to public officials in Nigeria, Saudi Arabia, Malaysia, India and Brazil between 1996 and

86 Director of the Serious Fraud Office v Airbus SE [2020] 1 WLUK 435.

87 Ibid., [94].

88 Ibid., [95] citing R v Michael Brian Kneeshaw (1974) 57 Cr.App.R 439; R v Kenneth Donovan (1981) 3 Cr.App.R. (S) 192 and R v Ben Stapylton [2012] EWCA Crim 728.

89 *Director of the Serious Fraud Office v Airbus SE* [2020] 1 WLUK 435, [96]. Although not within the scope of this paper, it is questionable whether this particular factor ought to hold persuasive value. Compensation orders, since their inception, have been justified on the basis that they reduce the need for victims to rely on the costly and time-consuming civil system. See Andrew Ashworth, 1986, "Punishment and Compensation: Victims, Offenders and the State", *Oxford Journal of Legal Studies* Vol. 6, No. 1: pp.86 at page 109.

90 Peggy Hollinger and Sylvia Pfeifer, 2023, "Indonesia vows to sue UK over Airbus corruption probe settlement", *Financial Times*, 26 September 2023, https://www.ft.com/content/dc0720ec-b381-4f5b-8bba-44fb09408522.

2014.[91] These bribes had been paid through third party agents to procure oil and gas-related contracts.

This case was suitable for compensation because the corruption at hand had led to the under-declaration of tax payable to Nigerian authorities. The identity of the victim – the Federal Republic of Nigeria and its citizens – was not in doubt, and neither was the amount of loss – being the value of the foregone tax revenue. The company ultimately paid USD 177 million global settlement with UK, US and Brazilian authorities, including GBP 3.4 million to the SFO. Meanwhile, the compensatory amount of GBP 210,610 was channelled into infrastructure projects approved by the Nigerian government.

The DPA itself was more detailed than the agreement in BAE *Systems* – imposing obligations on the corporation regarding the timing for payment of compensation monies, clarifying that failure to make the payment could violate the DPA, and providing that the money had to be dispersed in an "accountable and transparent" manner.[92]

91 Serious Fraud Office v Amec Foster Wheeler Energy Ltd [2021] 6 WLUK 664, [17].

92 Serious Fraud Office v Amec Foster Wheeler Energy Limited (previously known as Foster Wheler Energy Limited) Deferred Prosecution Agreement, paragraphs 16-20.

4 Reflections and critiques

Has the UK delivered on its policy of compensating the victims of foreign bribery? That question can only be answered in the negative. Since the publication of the Compensation Principles, compensation has only been awarded in *Amec Foster Wheeler*, and the compensatory amount paid in that case paled in comparison to what the SFO collected in penalties.[93]

The most glaring fault with practice, not only since the adoption of the Compensation Principles but also the introduction of DPAs, is that neither the SFO nor the Crown Court has embraced the flexibility inherent in these agreements. Paradoxically, the SFO proved more adept at delivering compensation in those cases resolved before 2014. Once the DPA regime was introduced and the provision of compensation folded into a larger bureaucratic apparatus, the institutional will to achieve positive outcomes for victims apparently subsided.

This is not to say the SFO should pursue compensation at all costs and throw all guard rails to the wayside. It is desirable to have an overarching framework to ensure consistency and accountability. Yet, reflecting on a decade of DPAs, and the six years since the adoption of the Compensation Principles, it is apparent the extant framework is not working. To illustrate this sentiment, this part of the paper advances two criticisms stemming from the cases discussed above.

4.1 Over-reliance on compensation order jurisprudence

The jurisprudence stemming from post-conviction compensation order cases, which judges have transplanted into the field of corporate foreign bribery settlement agreements since *Sarclad*, has proven wholly inapposite for dealing with the victims of foreign bribery. In *Rolls Royce* and *Airbus*, Sir Brian Leveson (President QBD) and Dame Victoria Sharp (President QBD) respectively cited the same three cases as authority for the proposition that compensation would only be appropriate in "clear and simple" cases.[94] Those cases concerned damage incurred through burglary,[95] a man failing to return a rental car on time,[96] and dangerous driving.[97]

93 The Serious Fraud Office did, along with the US Department of Justice, share in the proceeds of the DPA with Brazilian authorities in what the SFO has described as a "global settlement". See Serious Fraud Office, 2021, "SFO enters into £103m DPA with Amec Foster Wheeler Energy Limited" (2 July 2021), accessed from the SFO website on 20 April 2024 and also shown in, for example Gillian Dell and Andrew McDevitt, 2022, "Exporting Corruption 2022: Assessing enforcement of the OECD Anti-Bribery Convention", Transparency International, https://images.transparencycdn.org/images/2022_Report-Full_Exporting-Corruption_EN.pdf, accessed 15 January 2025.

94 Serious Fraud Office v Rolls-Royce Plc [2017] 1 WLUK 189, [81] and Director of the Serious Fraud Office v Airbus SE [2020] 1 WLUK 435, [95] both citing R v Michael Brian Kneeshaw (1974) 57 Cr.App.R 439; R v Kenneth Donovan (1981) 3 Cr.App.R. (S) 192 and R v Ben Stapylton [2012] EWCA Crim 728.

95 *R v Kneeshaw* (1974) 58 Cr. App. R. 439.

96 *R v Donovan* (1981) Cr. App. R. (S.) 192.

97 *R v Stapylton* [2012] EWCA Crim 728.

Each of these decisions predates DPAs, and not one of them involved financial crime, let alone the type of diffuse, institutional and societal damage seen in foreign bribery cases.

As one of the fundamental outcomes of adopting DPAs was to facilitate the resolution of foreign bribery cases without conviction, it is unclear why either the SFO or the Crown Court should rely so heavily on a mechanism designed for cases in which a natural person has been convicted of small-scale criminal offending.[98]

To illustrate the force of this point, it is useful to focus on *R v Kneeshaw*, which was cited in both *Rolls Royce* and *Airbus* as authority for the proposition that the machinery of compensation orders should be reserved for "clear and simple cases."[99] In *Kneeshaw*, Lord Widgery refused to compensate a victim GBP 114.45 for losses incurred through burglary. His Lordship reasoned that the victim before him could rely upon a private right of action to recuperate their losses.[100] What is more, his Honour also added that compensation orders were not appropriate in cases in which "no great amount is at stake."[101]

It is difficult to see why this reasoning should have purchase in a case concerning bribery in abroad. A private right of action in most cases will be unavailable for the citizens of victim states – whether for lack of standing to file a claim,[102] or because the claimed harm will be considered too remote.[103] Moreover, when a domestic corporation has benefited to the tune of millions or tens of millions of pounds while participating in and perpetuating corrupt systems overseas, the loss will almost certainly reflect a "great" amount.

What's more, given the remote institutional and economic effects corruption wreaks, particularly in lower- and middle-income states, neither the harmfulness of the corporation's conduct nor the extent or nature of victims' losses is ever likely to be "simple and clear".

The factual matrix, policy aims and legislative framework undergirding *Kneeshaw* and the other cases cited in *Sarclad*, *Rolls Royce* and *Airbus* are so far removed from the reality of corporate foreign bribery DPAs that these authorities cannot assist in implementing the Compensation Principles. Indeed, compensation orders have historically been used to compel prisoners to make

98 See Suzanne Bailey and David Tucker, 1984, *Remedies for Victims of Crime, Legal Action Group*: 44-49.

99 *R v Kneeshaw* (1975) 1 QB 54, 60.

100 Ibid., 61.

101 Ibid.

102 Federal Republic of Nigeria v SFO and Glencore [2022] EWCR 2, [18].

103 See Felipe Freitas Falconi, José Ugaz, Juanita Olaya Garcia and Yara Esquivel Soto, 2023, "Victims of Corruption: Back for Payback": 45, https://star.worldbank.org/sites/default/files/2023-11/Victims-report-05_0.pdf; and Jeremy Horder, 2011, "Bribery as a Form of Criminal Wrongdoing", *Law Quarterly Review* 127: 37. Although writing about criminal harm, Horder has outlined the subtle and diffuse nature of the loss that bribery causes.

amends for violent crimes and crimes involving property.[104] Moreover, they have also traditionally been territorially bounded to conduct committed within the UK.[105] DPAs, meanwhile, are the product of mutually consensual undertakings negotiated between regulators and corporate offenders resolving foreign bribery charges in place of a conviction, and foreign bribery cases, by their very nature, possess an extraterritorial element. Compensation orders are a fundamentally inapposite point of analogy for approaching compensation in foreign bribery cases.

It must be recalled that when a court is tasked with approving a DPA, the issue at hand is not whether it has the power to make a compensation order under the Sentencing Act 2020. Its task is to approve an out-of-court settlement agreement on the basis that it is in the interests of justice and that its terms are fair, reasonable and proportionate, as required by the Crime and Courts Act. It is entirely feasible that a DPA might provide for compensation even though the grounds for making a compensation order cannot be established, and that such an agreement might still satisfy the statutory criteria.

So seen, the approach taken in *Sarclad*, *Rolls Royce* and *Airbus* fails to seize upon the inherent flexibility of DPAs. Indeed, when the UK adopted DPAs, it chose not to replicate the US model, which makes no allowance for compensation. By imbuing DPAs with a compensatory function, the government effectively endorsed the SFO's prior uses of prosecutorial discretion to craft remedial outcomes suited to the facts of a given case. In so doing, the government made it possible to secure compensation even where a post-conviction compensation order might not be available. Not only are the decisions in *Sarclad*, *Rolls Royce* and *Airbus* arbitrarily strict; these cases also undermine the very purpose of instilling a compensatory function into DPAs.

Finally, courts' adherence to the principles governing compensation orders does not sit comfortably with the SFO's Guidance for Corporates. That Guidance states compensation may be appropriate "[e]ven if an individual victim cannot be identified". It is, however, highly unlikely that a compensation order might be appropriate where a victim cannot be identified if the "simple and clear" standard continues to be applied. The Guidance also suggests "it may be possible in bribery cases to justify compensation on the basis that the citizens of a particular region or state have been affected by the wrongdoing." Likewise, it is difficult to see how a compensation order could ever be made for such ends. There is an obvious incompatibility between the Guidance and the principles governing compensation orders, such that the courts' decision to

104 *R v Miller* (1979) 68 Cr. App. R. 56, 57-58. That a court considering whether to make a compensation order should consider the defendant's means and the extent to which such an order might be oppressive on the defendant reflects how these orders were never a mechanism tailored to the context of corporate crime; *R v Horsham Justices Ex p. Richards* (1986) 82 Cr. App. R. 254, 259-260. Of course, compensation orders have never been limited to any particular type of case as a matter of principle – but their legislative history and decades' worth of practice reflects that they are far better suited to cases involving violent crime and property damage than any other type of offence. See further, See Suzanne Bailey and David Tucker, 1984, *Remedies for Victims of Crime*, Legal Action Group: 44-49 for an overview of the types of cases in which compensation orders are most typically awarded.

105 Alec Samuels, 1967, "Compensation for Criminal Injuries in Britain", *The University of Toronto Law Journal* Vol. 17, No. 1: 20 at page 22.

transplant these principles into the context of foreign bribery settlements has fundamentally undermined the SFO's ability to implement the government's policy of pursuing compensation in international corruption cases.

4.2 Misconstruction of "compensation"

Since *Sarclad*, the approach of the SFO and the Crown Court has been mired in the language of remedies under the general law. This critique is best evidenced with reference to *Rolls Royce* and *Airbus*. In Rolls Royce, Sir Brian Leveson (President QBD) found that the absence of any rise in contract price or defective or unwanted services tended against compensation. In *Airbus*, Dame Victoria Sharp (President QBD) made that same finding. The thrust of the Courts' reasoning is that compensation was not appropriate in those cases because the evidence did not establish the victims' loss. It is unclear, however, why such a finding should be determinative. There is nothing in the UK's policy statements or guidance materials to suggest compensation should be calculated to respond to a victim's loss. The confusion here stems from the meaning of the word "compensation".

In legal theory, compensatory remedies pursue a "corrective justice" rationale,[106] meaning they respond to a victim's loss and thus aim to make the victim "whole".[107] Compensation, in private law, is "loss-responsive". However, the language in SFO press releases and UK guidance documents shows the word "compensation" has never carried the same meaning in the context of foreign bribery DPAs. That word has been used more liberally in this space to refer to any way in which a DPA might remediate the victims of corruption.

Indeed, the SFO has used the word "compensation" to describe asset purchases and infrastructure investment in the past – even where the value of remediation has been calculated to reflect the value of a bribe.[108] The Guidance for Corporates also promotes a broad understanding of compensation, stating that compensation might be provided to the citizens of a particular region or state affected by corruption. It is highly unlikely, if not altogether impossible, that the SFO or Crown Court would be able to calculate the loss incurred by a particular region or state, and accordingly, equally unlikely that the Guidance envisions compensation as responding to a victim's loss.

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106 Ernest Weinrib, 2012, *The Idea of Private Law*: 63. It should also be noted that compensation orders within the UK have also been described as pursuing a corrective justice rationale, see Andrew Ashworth, "Punishment and Compensation: Victims, Offenders and the State", *Oxford Journal of Legal Studies* Vol. 6, No. 1: pp. 86 at page 108. Elsewhere, I have argued that when a foreign bribery DPA provides for charitable donation or infrastructure investment, regulators have pursued a form of remediation underscored by notions of distributive justice. Samuel J. Hickey, 2021, "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach", *Chicago Journal of International Law*: 401.

107 This thinking is closely aligned with the common law principle of restitutio in integrum (restoration to the original state). See *Graham v Egan* 15 La. Ann. 97, 98 (1860).

108 Concomitant with publishing the Compensation Principles in 2018, the SFO published a detailed account of past instances of what it described as "compensation", including the asset purchases in *Smith & Ouzman*, in which compensation had been calculated with respect to the value of bribes. See Serious Fraud Office, 2018, "General Principles to compensate overseas victims (including affected States) in bribery, corruption and economic crime cases" (1 June 2018).

The only instance of a foreign bribery DPA providing for compensation in the loss-responsive sense of the word is *Standard Bank*. It is true that in *Amec Foster Wheeler* the amount of capital injected into infrastructure investment reflected the loss inflicted by the corrupt scheme at issue, but in that case only the government had incurred loss, not the citizens of the region who ultimately benefited.

Ultimately, compensation in the context of DPAs is not loss-responsive, and there is no reason why such a narrow view of compensation should prevail when a court is deciding whether to grant or withhold DPA-approval. The fact that a court does not have before it the type of evidence that could prove determinative in a claim for damages for tortious wrongdoing or a breach of contract should not be fatal. Courts are tasked only with deciding whether to grant approval to an out-of-court settlement agreement, contingent on whether the terms of that agreement promote the interests of justice and are fair, reasonable and proportionate.[109]

Courts should therefore be hesitant to import prerequisites from other fields of law that have no principled basis in the DPA-approval process and that needlessly restrict the remedial potential of these agreements. There are, as discussed below, a range of other measures that might be incorporated into a DPA's terms while satisfying the requirements of the Crown and Courts Act.

4.3 Institutional limitations

There are other factors contributing to the UK having taken a backward step over the past decade. One might claim that the regulatory agencies like the SFO and CPS are primarily staffed with prosecutors and investigators rather than foreign aid professionals and should therefore not receive criticism for failing to put the Compensation Principles into effect.

This view holds little persuasive value. Through the terms of the Compensation Principles, the government has indicated that, to plan and distribute compensation, regulatory agencies should cooperate with other public bodies that do possess the requisite competences.[110] The institutional limitations of the SFO are therefore no excuse, as it has express licence to coordinate with other government agencies better suited to organising compensation in foreign bribery cases, such as the FCDO and the Home Office.

What's more, if the limited capacities of certain agencies create barriers to implementing the Compensation Principles, the correct response, as a matter of principle, should be to ensure the those agencies are adequately resourced.

It is nonetheless conceded that, as a practical matter, the FCDO, Home Office and other government agencies are better positioned than prosecutorial agencies to approach the issue of compensation. Indeed, the FCDO and Home Office, in particular, have personnel "on the ground" in many foreign countries,

109 Crimes and Courts Act 2013, Sch 17, 8(1).

110 Compensation Principles.

and this has proven effective for executing asset recovery initiatives in the past.[111] For this reason, Recommendation 1 suggests the applicable guidance make clear the FCDO and the Home Office, rather than the SFO, handle the distribution of compensation monies.

111 Personal communication from current and former personnel of the CPS and DFID.

5 Suggestions for reform

The balance of this paper submits six recommendations for reform.

5.1 Recommendation 1: Define the responsibilities of the government agencies regarding compensation

The DPA Code of Practice should be amended to clearly establish the responsibilities of the SFO, the Home Office, and the FCDO regarding compensation.

It is submitted that the SFO should only be responsible for determining whether compensation is appropriate, and then making a recommendation to the FCDO and the Home Office regarding the quantum of, and means of distributing, compensation (c.f. Recommendations 2 and 3).

The SFO should also request an undertaking from the FCDO and the Home Office as to whether those agencies would be willing to distribute compensatory monies. The SFO should then include proof of this undertaking in its application for DPA approval.

If the Court decides to approve the DPA, it ought to do so on the basis that the SFO has deemed compensation appropriate and has made a recommendation to the FCDO and Home Office regarding the appropriate quantum and means of distribution, and that the FCDO and the Home Office have undertaken to distribute that amount.

It would then be for the FCDO and the Home Office to handle the distribution of compensation in due course, exercising appropriate discretion with respect to whether to deviate from, or follow, the SFO's recommendation.

5.2 Recommendation 2: Introduce a rebuttable presumption in favour of compensation

The second recommendation for reform is to amend either the Crime and Courts Act or the DPA Code of Practice to prevent reliance on the "clear and simple" standard and compensation order jurisprudence more generally. This could be achieved by introducing a rebuttable presumption that compensation will always be appropriate, unless a party to the DPA approval process adduces evidence to the contrary.

Compensation should then be awarded in one of three ways.

- First, to any discrete individual that has suffered ascertainable loss (as occurred in *Standard Bank*).

- Secondly, failing the availability of an ascertainable loss or identifiable victim, compensation should be distributed to an affected populace *en masse* through infrastructure investment or charitable donation (as occurred in *BAE Systems* and *Smith & Ouzman*). In particularly difficult cases where large amounts of capital are at stake or there is a risk of capital being repurposed for corrupt ends, practice suggests it can be advantageous to involve an international organisation or third party to either identify appropriate infrastructure projects or fulfil an auditing function.[112] It is noted that the CPS has already engaged in such measures.[113]
- Finally, in the event that providing compensation in either of the two preceding ways is impossible, the third alternative would be for the corporate offender to provide an agreed amount of funding to anti-corruption initiatives, such as civil society organisations, international organisations or government programmes, as occurred in the USD 8 billion DPA negotiated between the US Department of Justice and German multinational technology conglomerate Siemens AG.[114]

The threshold required to rebut the presumption referred to here should be a high one, such that compensation should only be deemed inappropriate where there is an unacceptably high likelihood that compensation monies will be repurposed for corrupt ends. Moreover, complexity of the bribe scheme should not preclude compensation, as it did in *Sarclad* and *Rolls Royce*. If such an approach were adopted, compensation would almost always be provided.

Indeed, while compensation through direct payment or infrastructure investment might not be possible in certain cases, it is difficult to imagine a case in which the third option – funding anti-corruption initiatives – would not be tenable.

In line with Recommendation 1, it is submitted that the FCDO and the Home Office should distribute compensation monies, and that the SFO should simply recommend the appropriate quantum and means of distribution to those agencies. For example, if the SFO's investigations have revealed the existence of an identifiable victim or victims that had suffered quantifiable loss, as there had been in the Standard Bank case, the SFO should be able to recommend to the FCDO and Home Office that the first approach to distribution outlined above be followed, and that compensation be paid directly to the identified victim or victims.

112 The best example of dispersing capital through transparent and accountable means can be found in the example of the "BOTA Foundation case". World Bank, 2015, "Attachment B. Final Supervision Report of the BOTA Foundation" (March 2015), https://perma.cc/E2AH-FZQU.

113 See, for example, the Memorandum of Understanding reached between the UK Government and the Federal Government of Nigeria, and in particular, Schedules 1 and 2 of that agreement which identifies infrastructure initiatives designated to receive the proceeds of asset recovery efforts. https://www.gov.uk/government/publications/return-of-stolen-assets-confiscated-by-the-uk-agreement-between-the-uk-and-nigeria/mou-between-uk-and-nigeria-on-the-modalities-for-return-of-stolen-assets-confiscated-by-the-uk-annex-1#schedule-1-project-descriptions.

114 World Bank, 2009, "Siemens to Pay $100 Million to Fight Fraud and Corruption as Part of World Bank Group Settlement" (2 July 2009), https://perma.cc/D8UU-MUWQ.

Meanwhile, the SFO might equally recommend that compensation monies be paid into infrastructure initiatives, in line with the second means of distribution outlined above, or failing that approach, that compensation be paid to anti-corruption initiatives in line with the third means of distribution outlined above.

5.3 Recommendation 3: Adopt alternate means of calculating compensatory amounts

The third recommendation is that the Sentencing Guidelines recognise alternate measures for calculating compensation. These should include a victim's loss; a corporation's gross profit; the value of bribes paid; or a fixed percentage of the total fines and penalties paid by a corporation. The sum ultimately selected as compensation could then be whichever of these four amounts is the greatest.

The DPA approval judgments discussed here suggest that a significant hurdle to pursuing compensation has been the difficulty inherent in ascertaining a victim's identity and quantifying their loss. As noted already, corruption causes diffuse harms throughout a populace that manifest through diminished economic development outcomes and the erosion of social and political institutions. It is difficult to see how a court sitting in London might discern the precise harm a bribery scheme has caused in a foreign country. The difficulty seems especially pronounced when one considers that the harmfulness of any given bribe scheme will be determined by whatever extant culture of corruption already existed within a state before that scheme was put into effect.

Aside from ascertaining loss, identifying victims is equally difficult. Take, for example, a British company that pays a bribe to rig bidding processes for a government contract to build a hospital in a low-income country. Do the victims include every citizen in that state whose outcomes are affected by corruption, or only those who use medical services at the hospital in question? What if the hospital is built poorly and collapses? Would the victims be only those harmed in the collapse, to the exclusion of all those who might otherwise use public medical services? And alternatively, how is harm to be conceptualised if the hospital is built without fault and provides an acceptable standard of medical services?

It is because of these difficulties that the importation of general law principles regarding compensation orders and compensatory damages is wholly inappropriate. Equally, it is because of these difficulties the victims of foreign corruption are often only able to receive compensation through out-of-court settlement agreements premised upon prosecutorial discretion and abstract standards regarding fairness and the interests of justice, as opposed to traditional legal remedies.

As argued above, there is no reason the remedial potential of DPAs should be confined by loss-responsive standards derived from common law damages or compensation orders. Indeed, when one reflects upon the nature of the harm corruption causes to the citizens of victim countries, it becomes apparent that

compensating the victims of foreign bribery is far from a juridical science. As *BAE Systems* and *Smith & Ouzman* reflect, compensating victims will at times require an institutional willingness to approximate compensatory amounts and to deliver compensation in a manner bearing little nexus to the bribe scheme at issue.

5.4 Recommendation 4: Adopt a formal procedure for requesting compensation

In *Sarclad*, the Crown Court stated that one factor counting against compensation was that no state had approached the SFO to request it. It is difficult to cavil with the Court's reasoning in this regard. As DPAs are products of mutual consent, the state receiving compensation should display an interest in, and a capacity to responsibly receive, whatever form of capital compensation might assume. Yet, on at least two occasions (Indonesia and Nigeria), victim states have complained that the SFO refused to liaise on the issue of compensation.[115] Neither scenario is ideal.

To enhance the transparency surrounding the provision of compensation, and to minimise potential for diplomatic fallout and allegations of unfair dealing,[116] the Code of Practice should be amended to reflect a formal procedure for requesting compensation. Such a procedure might, at the very least, account for the manner in which states might request compensation; the appropriate timeframe for requesting compensation (for example, before a draft DPA has been submitted for judicial approval); the type of evidence or materials a state pursuing compensation should adduce; and a deadline by which the SFO must provide a written response to such a request.

It is important to make two further points regarding this recommendation. First, it is not suggested that compensation should only be awarded in cases in which a victim has filed a formal petition. It is conceivable that the same public officials responsible for making such a request might have been complicit in the corrupt conduct at hand or dispute that corruption ever took place. In such cases, relying on those officials to request compensation would likely prejudice the interests of victims.

Moreover, where victims are themselves the citizens of a country suffering the effects of corruption, it would be unrealistic to expect them to file requests for compensation. As such, filing a request should not be a precondition to receiving compensation. Nonetheless, establishing a formal procedure for requesting compensation and for handling such requests might obviate the type of issues that have arisen in the past, where states have claimed their requests have been ignored.

115 See *Federal Republic of Nigeria v Serious Fraud Office, Glencore Energy UK Ltd* [2022] EQCR 2, [11]; and "Indonesia threatens to sue UK over Airbus bribery probe deal", Al Mayadeen, 26 September 2023, https://english.almayadeen.net/news/miscellaneous/indonesia-threatens-to-sue-uk-over-airbus-bribery-probe-deal.

116 See, for example, "Indonesia threatens to sue UK over Airbus bribery probe deal", Al Mayadeen, 26 September 2023.

Secondly, civil society organisations should be permitted to file requests for compensation on behalf of an affected populace. Indeed, the materials adduced in connection with such requests might prove useful to UK agencies assessing the appropriateness of compensation.

5.5 Recommendation 5: Articulate the conceptual underpinnings of available remedies, harm and victimhood

While the Compensation Principles and the Guidance for Corporates supply an overarching policy rationale and framework for considering when to award compensation, several important practical and conceptual issues remain unaddressed. These include the nature of the remedies available through DPAs, the harm corruption causes and who ought to be considered a victim. The fifth suggested reform is that the Sentencing Guidelines be amended to reflect a more comprehensive and nuanced vocabulary for articulating these concepts.

To begin, language should be inserted to specify the type of remedies available through DPAs, and thereby allow regulatory agencies and courts to distinguish between (i) payments that respond to an identifiable victim's ascertainable losses, (ii) payments made for the benefit of a general populace dispersed through charitable donations, infrastructure investments or contributions to anti-corruption initiatives, and (iii) payments that reflect an alternate measure, such as a corporation's gross profits or the value of a bribe payment.

Elsewhere, the author has suggested that the terms "compensation", "reparations" and "restitution" be employed to describe each form of remediation.[117] The precise terminology adopted is not presently important, however. The point made here is that the UK should embrace language that would allow policy-makers, courts and regulators to distinguish between different remedial responses with clarity and purpose.

Likewise, greater precision regarding harm and victimhood would also prove beneficial. A distinction should be drawn between direct harms (that which a victim would not have suffered but for an act of corruption) and indirect harm (the diffuse and remote effects corruption has on an economy and on political institutions over time). Similarly, distinguishing between those who have suffered direct and indirect harm as direct and indirect victims would expand the vocabulary and conceptual framework employed by regulators and courts.[118]

Regulators and courts considering DPA approval have already used terms such as "direct loss"[119] and "indirect victims"[120] despite these terms not having any

117 Samuel J. Hickey, 2021, "Remediation in Foreign Bribery Settlements: The Foundations of a New Approach", *Chicago Journal of International Law*: 401.

118 Ibid.

119 International Bar Association, 2024, "Podcast: Compensation for overseas victims of corruption" (17 April 2024), https://www.ibanet.org/Podcast-compensation-for-overseas-victims-of-corruption, accessed 6 December 2024.

120 Federal Republic of Nigeria v SFO and Glencore (n 91) [27].

established meaning in the relevant legislative materials and regulatory guidance. There is, accordingly, an obvious need to articulate the differences between the various types of harm, victimhood, and remedial action. Indeed, the conflation of all forms of remediation as "compensation" and the entire spectrum of direct and indirect harms and victims has stifled judicial deliberation.

5.6 Recommendation 6 (alternative): Incentivise corporations to pay compensation

The sixth recommendation, presented as an alternative to the preceding five, is based on reforms to the *Victims and Prisoners Bill* 2023 suggested by Lord Garnier KC. His Lordship called for the Secretary of State to conduct a review into the victims of fraud, bribery and money laundering offences, and suggested that one appropriate path forward would be to enable corporations to pay compensatory amounts that would count towards the total penalty levied through a DPA.[121] Additionally, the SFO could also offer discounts on penalties where corporate offenders have made redress, and likewise deem it an aggravating factor if a corporation fails to do so.[122]

Lord Garnier KC explained the logic of the proposed reform as follows:

> "The required changes are straightforward and ought to cost the taxpayer nothing. It would create a standard measure of compensation, which would ensure consistency and transparency, as well as avoiding the difficulty of calculating a specific amount of loss or damage in each case. The compensation figure could equal whichever is the higher of the profit made by the company from its corrupt conduct or the amount of the bribes it paid to obtain the profits. This already happens where companies are sentenced, so that the money goes to the Treasury. The defendant company would pay nothing more, but at least some of the money would benefit the victim state."[123]

Lord Garnier KC's proposal would standardise the manner in which compensation is measured and provided, and remove the need for courts to consider the law regarding compensation orders and the difficulty in calculating a victim's losses. The suggested reform would prove both a simple and effective means of achieving compensation in a great number of cases. What's more, it is hardly a radical suggestion – the Proceeds of Crime Act 2002 permits compensation orders to be paid out of property forfeited to the Crown pursuant to a confiscation order. Lord Garnier KC's proposed reform proceeds on a similar footing.

The proposed reforms may be a pragmatic solution in some cases but would benefit from further discussion. At present, the proposal appears to envision compensation as a payment that offsets a penalty amount. It is conceivable, however, that the appropriate amount of compensation might exceed the value

121 HL Deb 7 February 2024, vol 835, col 1713.

122 Ibid.

123 HL Deb 7 February 2024, vol 835, col 1713.

of a penalty. If such a case were to come about, the proposed scheme would prove inapposite and unhelpful to victims.

Additionally, the proposed reforms do not contemplate when and whether payment should be made to discrete individuals or entities as opposed to the public at large through asset purchases or infrastructure investments. There is also no framework for navigating the risk of funds being repurposed for corrupt ends.

What is more, it appears that under the proposed scheme, the scope for judicial input would be limited. If this is indeed the case, then the suggested reforms risk diminishing the transparency of the compensation process generally, and making it more difficult to hold the Government to account for decisions made in relation to this process.

For these reasons, Recommendations 1 through 5 are preferred to Recommendation 6. It is noted, however, that Recommendation 6 remains attractive for its simplicity, and that discussion and reflections on its improvement and implementation would be a welcome addition to ongoing debates.

5.7 Other approaches

It is beyond the scope of this paper to outline the entire universe of possible reforms or best practices. However, there are other pathways to compensating the victims of foreign bribery that do not involve DPAs.

One example might be to follow the US lead and focus more on asset repatriation. This could be achieved through the introduction of legislation deeming all fines paid pursuant to a disgorgement rationale to constitute the proceeds of criminal activity, and to then return that capital through traditional asset recovery procedures. Focusing on asset repatriation to the exclusion of compensation through DPAs altogether, as is done in the US, is not recommended, as such an approach would ignore the remedial potential of DPAs.

Presently, monies paid pursuant to the terms of a DPA are placed into a statutory fund, and there is no scope for courts or regulators to treat such money as if it were available for repatriation efforts to benefit the victims of relevant corrupt activity.[124] This idea is not far-fetched. In 2018, a senior SFO official expressed support for disgorgement penalties for compensatory

124 Crime and Courts Act, Sch 17 [14].

purposes.[125] Moreover, the Australian federal Parliament has already passed forfeiture laws that operate in a similar manner to what is proposed here – deeming "amounts paid to the Commonwealth in settlement" to be "the proceeds of confiscated assets".[126]

Others have suggested that the best way forward would be to establish an international fund for the victims of corruption to which states might contribute.[127] The strength of this approach is twofold. First, it obviates the need for reliance on DPAs. And second, it does not put enforcing states in a position in which they judge the ability of victim states to receive and administer compensation monies – a state of affairs which some have described as paternalistic.[128] This type of solution would of course require international coordination, and it is worth noting that the UK has called for the UN and the OECD to investigate such avenues for compensating the victims of foreign bribery.[129]

A third alternative, which has been called for in the US, is a private right of action for those that have suffered harm as a consequence of foreign bribery.[130] This approach would, of course, only favour those with the resources to bring such a claim, such as corporate competitors of bribe-paying companies and foreign governments. As this paper has focused on compensating vulnerable communities in affected states, the introduction of a private right of action is beyond scope. Nonetheless, each of the three alternatives discussed here offer promising avenues for further research and policy deliberation.

125 See Elizabeth Baker, "All Economic Crimes has Victims", speech delivered on 6 September 2018: "[C]orporates subject to Deferred Prosecution Agreements must disgorge the profit made from their crime as part of the financial settlement that can also include compensation and costs in addition to the financial penalty itself. This in turn can mean more money for victims."

126 Australia has employed a comparable mechanism under s 296(3)(i) of the *Proceeds of Crime Act* 2002 (Cth), which provides that "amounts paid to the Commonwealth in settlement of proceedings under this Act" constitute the "proceeds of confiscated assets." Section 296(3)(i) has no relation to foreign bribery enforcement, but does provide an example of how the legislature might deem the disgorged proceeds of foreign bribery as tantamount to tainted property, amenable to asset return.

127 Kathleen Roussel, Todd Foglesong and Marke Kilkie, 2024, "A Relief Fund for Victims of Corruption", University of Oxford Chandler Paper, March 2024.

128 Ibid.: 10.

129 United Kingdom Government Publishing Service, Communiqué to the 2016 Anti-Corruption Summit (London, 2016), https://assets.publishing.service.gov.uk/media/5a80f4cf40f0b62305b8e1a1/FINAL_-_AC_Summit_Communique_-_May_2016.pdf.

130 Gideon Mark, 2012, "Private FCPA Enforcement", American Business Law Journal Vol. 49: 419.

6 Conclusion

The UK's commitment to compensating the victims of foreign bribery through DPAs is commendable given the conceptual, practical and political difficulties inherent in this undertaking. However, this commitment has faltered in practice. The aspirations regarding compensation that have been espoused in the Compensation Principles and Guidance for Corporates have been rendered almost redundant by the application of the principles governing compensation orders under the Sentencing Act.

This failure to live up to the ideals of multiple policy pronouncements has left the UK open to serious criticism – including that the UK treasury is currently profiting from the corrupt actions of UK companies abroad, to the detriment of the populations in these states.

There are, however, a number of steps which can be taken to strengthen the DPA regime and ensure appropriate compensation is made in foreign bribery settlements. Moreover, fulfilling the commitment to compensate victims will provide a template for other countries with DPA regimes to follow, such that the provision of compensation to the victims of foreign bribery might become the global norm.

The UK has the opportunity to lead, to reinstate itself as a pioneer in this space, and to take positive steps toward ameliorating the harmful consequences of corruption in victim countries. By following the recommendations outlined in this paper, the UK can seize upon this opportunity.