

Expert Analysis

Victim or Villain? A Costa Rican State Entity's Claim for Restitution From Alcatel

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In speeches, U.S. Department of Justice officials have stressed how foreign bribery victimizes, among others, "international democratic institutions, the worldwide marketplace, and American business."¹ However, the issue of who is entitled to receive proceeds of U.S. government recoveries in Foreign Corrupt Practices Act cases is a recurring one that has become salient in the last two months as a result of litigation arising from the DOJ's plea agreements and deferred prosecution agreement with French communications company Alcatel-Lucent S.A. and several of its subsidiaries.

In the end, the state-owned enterprise with employees who were caught up in one aspect of the Alcatel matter lost in its effort to obtain a part of the revenues generated by the settlement. However, it remains possible, if not likely, that other foreign entities and governments may seek benefits from FCPA enforcement, potentially complicating future negotiation of FCPA cases with the DOJ.

In the latest round in the Alcatel litigation, the 11th U.S. Circuit Court of Appeals denied a petition for a writ of *mandamus* June 17 by Costa Rican power and electric company Instituto Costarricense de Electricidad, which had asked the appeals court to instruct a federal district court to recognize ICE as a crime victim and to award it substantial restitution pursuant to U.S. federal victims statutes.²

As a result, with a Florida federal judge's June 1 approval of the long-negotiated plea agreements with Alcatel, the Alcatel DPA became effective.³ The plea agreements and DPA detail widespread FCPA violations, including in Costa Rica, and will lead to payment by Alcatel of \$92 million to the U.S. Treasury.⁴ Separately, Alcatel agreed to pay \$45 million to resolve a parallel civil investigation by the U.S. Securities and Exchange Commission.

Although unsuccessful, ICE's litigation has raised questions about who are properly deemed "victims" of FCPA violations and the extent to which state-owned enterprises whose employees or former employees allegedly received bribes will seek to affect

resolutions of FCPA cases between the U.S. government and a corporate defendant in the future.

ICE's attempt to do so failed as a result of a pervasive history of corruption at ICE, including active involvement of senior personnel in soliciting bribes from Alcatel, and the inherent complexity of calculating a non-speculative loss. Although there certainly is an incentive in this era of ever-increasing FCPA enforcement for a more sympathetic state-owned enterprise to follow ICE's lead, it remains to be seen whether restitution under victims' rights statutes will become a part of the FCPA settlement process.

FACTUAL BACKGROUND

In early May, just weeks before the agreements were to be court-approved, ICE, a state-owned entity at the time of the alleged conduct, petitioned the U.S. District Court for the Southern District of Florida to reject the plea agreements and DPA.⁵ ICE's reason for doing so was that it had not received recognition as a victim under the Crime Victims Rights Act, 18 U.S.C. § 3771, and the Mandatory Victim Restitution Act, 18 U.S.C. § 3663(A).

The CVRA and MVRA are federal laws designed to provide procedural rights and restitution to certain crime victims. ICE argued it had suffered a pecuniary loss from Alcatel's conspiracy to bribe several ICE officials and that the anticipated settlement had not adequately considered its interests.⁶

At the time of the alleged bribery, ICE was governed by a board of directors acting on behalf of the nation of Costa Rica. Among other duties, the board was responsible for evaluating and approving telecommunications bid proposals.⁷

According to the DPA, one of Alcatel's subsidiaries paid \$18 million to consultants on the basis of vaguely described marketing agreements and fictitious invoices. The funds were intended, at least in part, for six now-former high-ranking officials at ICE. According to the DPA, the value of contracts ICE awarded to Alcatel exceeded \$300 million, and the company earned a profit of \$23.6 million.

ICE'S FEDERAL CLAIM

In its petition for relief, ICE characterized itself as a victim of Alcatel's bribery conspiracy and thus sought recognition as a crime victim under the CVRA and restitution for the loss it had suffered pursuant to the MVRA. Both statutes define a victim as "a person directly and proximately harmed as a result of the commission" of the federal offense in question.⁸

The CVRA grants victims with certain procedural guarantees, such as "the right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing or any parole proceeding" and the "right to full and timely restitution as provided in law."⁹

In claiming its right to restitution, ICE argued that the bribes paid by Alcatel to several of its former directors and executives deprived ICE of their honest services. ICE also contended that its attempts to rectify the damages resulting from Alcatel's poor delivery of services occurring after the collapse of the corrupt scheme led to losses in excess of \$100 million.¹⁰

To support its claim, ICE invoked several federal cases for the proposition that “[i]t is universally recognized, in a scheme for bribery, that an entity whose employees accept improper benefits to affect corporate decisions is a victim.”¹¹

The cases cited by ICE were distinguishable from its own case and did not directly involve restitution to a state-owned enterprise, employees of which took bribes. Rather, the cases awarded restitution to the foreign government on the basis of a clearly identifiable and calculable loss.¹²

In the FCPA context, several unpublished opinions cited by ICE similarly granted restitution to foreign governments, but not to state-owned entities.¹³

DOJ'S RESPONSE TO ICE'S PETITION

The Justice Department opposed ICE's petition, arguing that the company should not be designated a victim under the CVRA because the facts discovered during a multi-year-long investigation “reflect profound and pervasive corruption at the highest levels of ICE.”¹⁴

The DOJ emphasized that nearly half of ICE's executive board at the time received bribes from Alcatel and that corruption was so pervasive at ICE that it became a vehicle of complicity in the solicitation of bribery. Accordingly, recognition of ICE as a victim would contradict the purpose behind the victim rights statutes.

The DOJ supported its position by citing to various federal appellate court holdings that generally preclude a participant in an offense from being considered a victim under the CVRA and the MVRA.¹⁵

The DOJ emphasized statements by a former Alcatel executive, Christian Sapsizian, who provided extensive testimony about the long-standing culture of corruption at ICE. Sapsizian himself was convicted of FCPA violations and sentenced in September 2008 by the federal court in Miami to 30 months' imprisonment and forfeiture of \$261,000 for his involvement in the bribery of ICE officials. The plea deal required Sapsizian to cooperate with U.S. and foreign law-enforcement authorities during its investigations.

The DOJ also cited in its response to ICE's petition to the testimony of Jose Antonio Lobo, a former director of ICE who pleaded guilty in Costa Rica to accepting bribes.

In addition to essentially characterizing ICE as a co-conspirator, the DOJ suggested that ICE had been accorded all relevant procedural rights reserved for victims under the CVRA but that it would be difficult, if not impossible, for the court to calculate the amount of loss purportedly suffered by ICE. Thus, the DOJ argued that restitution should be denied on the separate ground that determination of ICE's purported actual loss resulting from Alcatel's bribery would be entirely speculative.

According to the DOJ, not only was the entire tender process for the contract award soaked with corruption, but there was also no obvious measure to identify whether the bribes paid by Alcatel had monetarily harmed ICE.

The MVRA contains an exception that permits a district court to decline to award restitution if “determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree

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that the need to provide restitution to any victim is outweighed by the burden on the sentencing process."¹⁶

The DOJ predicted that the court's attempt to calculate ICE's purported losses would take months and thus significantly delay the fully negotiated plea agreement and DPA. To support this point, the DOJ pointed out that ICE had sought for years to sue Alcatel for claimed contract damages of \$73 million and that ICE also filed a civil suit under the Racketeer Influenced and Corrupt Organizations Act in Florida state court in April 2010; this suit was dismissed on *forum non conveniens* grounds.

In its original petition and in reply to the DOJ's arguments, ICE invoked principles of agency law. ICE argued that the criminal conduct of six now-former ICE employees could not be imputed to the entity consisting of more than 15,000 employees because the people who solicited the bribes acted for their own benefit and adversely to ICE's best interests.¹⁷ ICE stated that it promptly terminated the relevant employees and supported prosecutorial efforts as soon as it learned of the criminal acts in 2004.

In reply to the DOJ's arguments, ICE also submitted a sworn affidavit of the former head of Alcatel's Costa Rican subsidiary declaring that no one at ICE, other than the recipients of funds, knew of Alcatel's bribery.¹⁸

DENIAL OF THE PETITIONS

The District Court ruled in the DOJ's favor June 1, holding that ICE was not a victim under the CVRA because the entity served effectively as a co-conspirator in Alcatel's bribery scheme. Moreover, the court agreed that even if it were to recognize ICE as a victim, no restitution would be in order because of the enormous complexity in calculating ICE's actual loss and the adverse impact on the Alcatel settlement. Accordingly, the court approved Alcatel's \$92 million settlement.

In response, ICE filed a petition for a *writ of mandamus* under the CVRA with the 11th Circuit, requesting the appellate court to instruct the District Court to recognize ICE as a victim and to award restitution. ICE repeated the basic agency arguments it had made to the District Court as to why it should be considered a victim, rather than, essentially, a co-conspirator.

ICE also argued that the District Court gave inappropriate weight to hearsay statements, on which the DOJ had relied in its description of a pervasive culture of corruption at ICE. For example, ICE disputed the DOJ's characterization of the testimony of one of the recipients of the bribes, stating that the testimony did not demonstrate a culture of corruption at ICE but instead expressed a perception that companies had generally developed policies to bribe senior officials at businesses that were potential customers.

ICE also challenged the District Court's characterization of ICE as a co-conspirator, pointing out that nowhere in the government's criminal information against Alcatel was ICE described as such. Finally, ICE posited that even if ICE were to have acted as a co-conspirator, the CVRA does not contain an exemption pursuant to which such party would be barred from recovery as a victim.

Not surprisingly, in light of the deference shown to a district court's findings in *mandamus* proceedings, the 11th Circuit dismissed ICE's petition, holding that the District Court did not commit clear error in finding that ICE acted as a co-conspirator

The Justice Department said ICE should not be designated a victim because the facts discovered during a multi-year long investigation "reflect profound and pervasive corruption at the highest levels of ICE."

because of the “pervasive, constant, and consistent illegal conduct by the ‘principals’ (i.e., members of the board of directors and management) of ICE.”¹⁹

Nor did the two-judge panel find clear error in the District Court’s finding that ICE had failed to establish direct and proximate harm by Alcatel’s conduct, noting the general rule that participants in a crime are not eligible to recover restitution.

CONCLUSION

The denial of ICE’s petition to be designated a victim of Alcatel’s bribery scheme and to obtain restitution was not unexpected. The DOJ’s allegations relating to the extensive participation of senior personnel in the bribery scheme and the apparently engrained culture of corruption created a factual hurdle that would have been difficult to overcome and that strengthened the DOJ’s argument that calculating a restitution amount would have been too complex.

The briefing and rulings in the ICE case raise the question of whether and when a more sympathetic state-owned enterprise might be a victim under the CVRA and MVRA. In response to ICE’s petition, the DOJ left open the possibility that SOEs whose employees accepted bribes could be considered victims.²⁰ However, neither the DOJ’s briefs nor the courts’ decisions provide guidance as to when such circumstance might be present. Given the increasingly higher fines and penalties arising from FCPA settlements, other SOEs may have an incentive to explore potential opportunities for restitution.

Even in a factually more sympathetic context, the calculation of an appropriate restitution award may nevertheless constitute a considerable practical hurdle for prospective victims. According to the DOJ and the District Court, even if ICE had been a victim, the complexity of the case would have made calculation of the restitution extraordinarily difficult, constituting an undue burden on the sentencing process.

Similar challenges in calculating a non-speculative loss would probably exist in other, even less complex, bribery scenarios. Intricate questions of fact associated with loss calculation and the nature of FCPA cases mean that relevant evidence and witnesses are typically found outside the United States; this suggests a heavy burden for a putative victim seeking restitution. It thus remains uncertain whether the CVRA or MVRA will become an effective tool for foreign-government instrumentalities in the FCPA context.

Finally, the ICE petition raises intriguing normative questions about the identity of real victims in corruption cases. In his blog, the “FCPA professor” Mike Koehler commented about the ICE case: “I am not sure where criminal fines should go when a French company bribes Costa Rican ‘foreign officials,’ but I am pretty sure tha[t] the answer should not be 100 percent to the U.S. Treasury.”²¹

Notwithstanding a certain underlying logic that the principal victims of bribery most deserving of restitution are located in the country where the bribes were paid, the ICE matter also illustrates that the entity that — knowingly or unknowingly — tolerated its principals pocketing bribes probably will need to seek recompense by means other than restitution in U.S. court proceedings.

Indeed, even in the instant case, the U.S. courts’ refusal to recognize ICE as a victim did not mean that Costa Rica was left without an opportunity to seek reparations

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from Alcatel for harm its bribery may have caused. In January 2010, Alcatel-Lucent France S.A. agreed to a settlement of \$10 million in “moral damages” to Costa Rica, which constituted the first instance of a foreign corporation paying reparations for corruption to the Costa Rican government.

NOTES

- ¹ See, e.g., Dep’t of Justice, DOJ Justice News, Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.
- ² See *In re Instituto Costarricense de Electricidad*, No. 11-12707-G, petition for writ of mandamus filed (11th Cir. June 15, 2011); *In re Instituto Costarricense de Electricidad*, No. 11-12707-G, order denying writ of mandamus issued (11th Cir. June 17, 2011).
- ³ Joe Palazzolo, *Costa Rican Telecom Is Denied Victim Status*, WALL ST. J., June 2, 2011, available at <http://blogs.wsj.com/corruption-currents/2011/06/02/costa-rican-telecom-is-denied-victim-status/>.
- ⁴ See Press Release, Dep’t of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay \$92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), available at <http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html>.
- ⁵ *In re ICE*, mandamus petition at 1-2.
- ⁶ *Id.* at 3. Alcatel-Lucent S.A., the parent company, agreed to admit violations of the FCPA’s books-and-records and internal-controls provisions. As part of the company’s resolution with the Department of Justice, three subsidiaries, including Alcatel Centroamerica S.A. and Alcatel-Lucent France S.A., were also charged and agreed to plead guilty to conspiring to violate the anti-bribery, books-and-records and internal-controls provisions of the FCPA. See Press Release, *supra* note 4.
- ⁷ *United States v. Alcatel-Lucent S.A.*, No. 10-CR-20907-COOKE, deferred prosecution agreement at A-6 (S.D. Fla. 2010).
- ⁸ 18 U.S.C. § 3663A(a)(2); 18 U.S.C. § 3771(e) (2006). See *In re Fisher et al.*, No. 11-10452, writ denied (5th Cir. May 9, 2011) (holding that restitution under the CVRA requires a showing of direct and proximate harm to the victim, i.e., that defendant’s criminal offense was but-for cause of harm and harm was a reasonably foreseeable consequence of defendant’s criminal conduct).
- ⁹ 18 U.S.C. § 3771(a)(4), (6) (2006).
- ¹⁰ See *United States v. Alcatel-Lucent S.A.*, No. 10-CR-20907-COOKE, victim Instituto Costarricense de Electricidad’s memorandum of law in support of petition for relief pursuant to 18 U.S.C. § 3771(d)(3) and objection to plea agreements and deferred prosecution agreement filed (S.D. Fla. May 3, 2011), at 6-8, 14.
- ¹¹ See *id.* at 5; *United States v. Martin*, 128 F.3d 1188 (7th Cir. 1997) (finding in a conspiracy to defraud the U.S. government that there was no reason that a U.S. government agency could not receive restitution under a victims rights statute).
- ¹² See *Pasquantino v. United States*, 544 U.S. 349 (2005) (holding that Canada possessed a property interest to uncollected excise taxes on illegally imported liquor and thus was permitted restitution in amount of evaded taxes); see also *United States v. Bengis*, 631 F.3d 33 (2d Cir. 2011) (holding that defendants who had pleaded guilty to Lacey Act conspiracy had to make restitution to government of South Africa for lost property interest in over-harvested lobsters).
- ¹³ See *United States v. F.G. Mason Eng’g*, Cr. No. B-90-29 (D. Conn. 1990) (ordering defendant to make restitution to German government because of artificially inflated prices and services emanating from corrupt arrangement with West German military intelligence service official); see also *United States v. Kenny Int’l Corp.*, Cr. No. 79-372 (D.D.C. 1979) (ordering restitution to the government of Cook Island in the amount of funds paid to benefit the then-prime minister and his political party to secure renewal of stamp distribution agreement); see also *United States v. Diaz*, No. 20346-CR-JEM, Transcript of Sentencing Hearing at 22-23 (S.D. Fla. Aug. 5, 2009) (finding that government of Haiti was victim of improper payments to Haitian telecommunication company and ordering restitution).
- ¹⁴ *United States v. Alcatel-Lucent S.A.*, No. 10-CR-20906/07-COOKE, government’s response to ICE’s petition for victim status and restitution filed (S.D. Fla. May 23, 2011), at 1.
- ¹⁵ See *id.* at 22-23; *United States v. Ojeikere*, 545 F.3d 220, 222-23 (2d Cir. 2008) (denying restitution of co-conspirators); see also *United States v. Reifler*, 446 F.3d 65, 127 (2d Cir. 2006) (holding that treating co-conspirators as victims “contains an error so fundamental” that it “reflect[s] on the

public reputation of judicial proceedings"); *United States v. Lazarenko*, 624 F.3d 1247, 1250-52 (9th Cir. 2010) (holding that victim and participant of money-laundering scheme could not qualify as a victim eligible for restitution).

¹⁶ 18 U.S.C. § 3663A(c)(3)(A)-(B).

¹⁷ *In re ICE*, mandamus petition at 19-20; ICE memo of law, 19-21.

¹⁸ *United States v. Alcatel-Lucent S.A.*, No. 10-CR-20907-COOKE, sworn statement of Edgar Valverde Acosta filed (S.D. Fla. May 31, 2011), ¶ 3.

¹⁹ See *In re ICE*, order denying writ at 2.

²⁰ *In re ICE*, government's response at 7 ("This is not to say that in each instance in which a foreign official has solicited and been paid bribes the ministry or state owned entity for which he or she worked could never be considered a victim.").

²¹ Is ICE a Victim? And an Open Question!, <http://fcppapofessor.blogspot.com/search/label/Alcatel-Lucent> (May 25, 2011) (emphasis in original).



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