

# Repairing social damage out of corruption cases: opportunities and challenges as illustrated in the Alcatel Case in Costa Rica

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In January 2010 the Costa Rican Treasury received US\$10 million in payment of a settlement agreement signed within the civil proceedings initiated by the Costa Rican Attorney General's Office for Public Ethics<sup>1</sup> against Alcatel to repair the social

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<sup>1</sup> We refer to this office here simply as Attorney General's office. The special Attorney General's Office for Public Ethics is a specialized unit within the Costa Rican Attorney General's Office

damage emerging from a corruption case involving Alcatel management and staff and Costa Rican government officials. The news of the settlement came for many as an important milestone in the fight against corruption and to some as a surprise: does corruption cause social damage? What is social damage and how can it be repaired?

In this paper we look into the history of the Alcatel case in Costa Rica and the use of the concept of social damage. Some proceedings in this case are still ongoing and the intention of this document is not to draw judgment on them or the facts of the case but rather to look at the public policy aspects of this case to identify the opportunities and challenges posed by the idea of repairing social damage out of corruption cases and to identify open questions. In this sense, this paper seeks to contribute to the increasing interest in the idea of limiting the damage that corruption causes.

## 1. The Victims of Corruption and the idea of repairing damage arising from corruption

### a. Corruption: a Victim's perspective

The fight against corruption has been so far too focused on the perpetrators. The main point of academic, activist and reformist attention view has been: whether it is the supply or the demand side of corruption; whether the offender is at home or abroad (or both); whether the method used was a bribe or a kickback; whether we are dealing with petty or grand corruption; if and how we can ensure that not only individuals but also that legal entities be responsible for acts of corruption, and so on.. In fact this is the main focus of international legal instruments (with some exceptions as the next section will show). National legal instruments, if we do not only consider the specific anti-corruption laws, are more encompassing as they incorporate general reparation systems and mechanisms to stabilize (at least in the ideal) situations when in fact harm has been caused.

Do no harm is a basic principle of the rule of law. The concept of harm (or damage) is related to subjective rights and legitimate interests of the individuals as protected by the legal system: be it monetary or non-monetary interests; contractual or non-contractual rights; individual, collective and diffuse rights; and the most basic of all, that is the human rights. In this sense an action is harmful if it affects any of these rights or legally protected interests. This is also close to one of the most basic principles in law, which is the principle of good faith, the actual glue of trust and one of the few things that keeps societies together.

The idea that a corruption is a “victimless crime” is somehow a *cliché*. It sounds as if corruption was (only) a matter of morals, an individuals` decision. If that was the case, there would be no reason to treat corruption as a crime. The confusion may well have “historical” grounds as corruption, when criminalized, is taken as a crime of conduct and therefore no actual material damage is required to be eligible for punishment. A different matter is that the damage caused by corruption is both material (human and financial loss for example) but also immaterial (lost in trust and credibility for example); it can also affect at the same time individuals (bidders who

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created by Law 8242 of 2002, with specialized functions to prevent, detect and eradicate corruption.

lost in a procurement process tainted by corruption), identifiable groups of people (children of a specific school) and also members of a community (like the citizens of a country).

The last financial crisis is yet another demonstration of how tangible trust is, and how equally important are collective rights in comparison to individual rights. Modern times and the ideas about good governance have also brought about an enhanced sense of the relevance and priority of public interest and of collective rights that have also changed the perspective; a view with the eyes of good governance treats nation-states as responsible (right-bearing and obligation-bearing) entities, as part of (and not despite) their sovereignty; good governance also sees societies, legal entities and individuals all as bearers of both rights and responsibilities, and the primacy of the public interest over the individual one. The rule of law in good governance times brings about a renewed sense of collective, where the individual also counts and the state has responsibilities.<sup>2</sup>

But the focus of the international and national anti-corruption frameworks on the perpetrators may also have to do with the focus on the causes of corruption that has occupied many scholars and activists during the initial times of the awareness raising stage of the anti-corruption campaign at the beginning of the nineties. The concern was legitimate, if anything, to understand and to support preventive efforts, another concept that at that time was innovative.

Nowadays, as more clarity and awareness exists on the problems, costs and consequences associated with corruption, and as prosecution cases increase, the victims take a more salient role. Preventing corruption was a novel concept some years ago, and is a necessary attitude; but preventing corruption alone has not worked and will not work. Corruption is to some extent inevitable, and enforcement is also necessary. In this scheme of things, it is even more important to address the consequences of corruption and to take a closer look at its victims.

## b. The International Framework for Repairing Social Damage

The international legal framework to curb corruption has been steadily improving during the last 15 years. A number of regional and global treaties entered into force sealing consensus against corruption and promoting transparency. Additionally, aspects of transparency and corruption restraint started to appear in Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs) with investment components.<sup>3</sup> The **Foreign Corrupt Practices Act (FCPA)** enacted in the United States in 1977 was the first national legislation to forbid bribery of foreign public officials. This was followed in 1996, with the **OAS Anti-Corruption Convention**

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<sup>2</sup> In this sense see Olaya, Juanita, Good Governance and International Investment Law: The Challenges of Lack of Transparency and Corruption (6 July 2010). Society of International Economic Law (SIEL), Second Biennial Global Conference, University of Barcelona, 8-10 July 2010. Available at SSRN: <http://ssrn.com/abstract=1635437> (last accessed on 30 November 2010)

<sup>3</sup> Olaya, Juanita, Good Governance and International Investment Law: The Challenges of Lack of Transparency and Corruption (6 July 2010). Society of International Economic Law (SIEL), Second Biennial Global Conference, University of Barcelona, 8-10 July 2010. Available at SSRN: <http://ssrn.com/abstract=1635437> (last accessed on 30 November 2010).

**(OAS Convention)**<sup>4</sup> which was the first step to create international standards against corruption, binding signatories to general anti-corruption measures basically aimed at the public sector.

Still until 1997, costs derived from bribery abroad were being covered by Export Credit Agencies' insurance and were even tax exempt in some countries. The **OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions** signed on 17 December 1997 established the obligation for its signatories to eliminate this possibility and required that the bribery of foreign officials be sanctioned under domestic law.<sup>5</sup> The OECD Revised Recommendation of the Council on Combating Bribery in International Business Transactions adopted also in 1997 added some details to the Convention in areas like accounting, auditing and public procurement; international co-operation; the non-tax deductibility of bribes; and measures to deter, prevent and combat bribery.<sup>6</sup> The OECD Convention also gave a strict mandate to member's **Export Credit Agencies (ECAs)** to take measures against bribery, which translated into the enactment of the **2000 Action Statement** agreed by the OECD Working Party on Export Credits and Credit Guarantees (ECG).

In Europe, steps were taken through the **Council of Europe Criminal Law Convention (CoE Criminal Law Convention)** opened for signature to all states in 1999, and entered into force on 1 July 2002;<sup>7</sup> and the **Council of Europe Civil Law Convention (CoE Civil Law Convention)** opened to signature to all countries in 1999, and entered into force on 1 November 2003.<sup>8</sup>

In 1995, the European Council issued the European Union Convention on the Protection of the Communities' Financial Interests and the Fight against Corruption and two Protocols. The First Protocol to this Convention which was adopted in 1997 and entered into force in 2002 focused on bribery and its criminalisation. In addition, Resolution (97) 24 of the Committee of Ministers of the Council of Europe adopted the "Twenty Guiding Principles for the Fight against Corruption", a series of guidelines for countries to adopt to prevent corruption, coordinate action and undertake national reform as necessary. Two years later, through the Resolution (99)

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<sup>4</sup> The OAS Convention was signed in 1996 and entered into force on 6 March 1997. It has been ratified by 33 countries. See the official website under <http://www.oas.org/juridico/english/fightcur.html> (last accessed on 30 November 2010).

<sup>5</sup> The OECD Convention entered into force on 15 February 1999 and was signed by the OECD members and five other countries: Argentina, Brazil, Bulgaria, Chile and the Slovak Republic. Today, after Estonia and South Africa also adhered to the Convention it has become mandatory in a total of 38 countries. This includes Israel that joined on 11 March 2009. See [http://www.oecd.org/document/20/0,3343,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/20/0,3343,en_2649_34859_2017813_1_1_1_1,00.html) (last accessed on 30 November 2010).

<sup>6</sup> On the basis of the description given by the OECD secretariat, available under [http://www.kpk-rs.si/fileadmin/kpk.gov.si/pageuploads/pdf/mednarodni\\_akti/drugo/Revised\\_OECD\\_R\\_CBIBT\\_01.pdf](http://www.kpk-rs.si/fileadmin/kpk.gov.si/pageuploads/pdf/mednarodni_akti/drugo/Revised_OECD_R_CBIBT_01.pdf) (accessed 2 December 2010).

<sup>7</sup> Ratified by 42 member countries and Belarus. Status as of 30 November 2010. Status can be found under <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=173&CM=8&DF=&CL=ENG> (last accessed on 30 November 2010).

<sup>8</sup> Signed by 42 states, ratified by 34 including Belarus, a non CoE member state. Status as of 30 November 2010. The official text and the status can be found under <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=174&CM=8&DF=&CL=ENG> (last accessed on 30 November 2010).

5, the Committee of Ministers of the Council of Europe enacted the Agreement Establishing the Group of States against Corruption (GRECO) on 1 May 1999. GRECO is actually in charge of monitoring the implementation of the CoE Criminal Law and Civil Law Conventions.

On 26 May 1997, the EU Commission issued the European Union Convention on the Fight against Corruption involving officials of the European Communities or officials of Member States that entered into force in 2005.<sup>9</sup>

With a broader scope on terrorism and organized crime, the **United Nations Convention against Transnational Organized Crime and its Protocols (UNTOC)** also contains prescriptions on corruption and its criminalization and the recognition that corruption is one of the ways of engagement of transnational organized crime. This Convention was adopted by resolution A/RES/55/25 of 15 November 2000 of the General Assembly of the United Nations and entered into force on 29 September 2003 and currently counts with 147 signatory parties.<sup>10</sup>

The **Southern African Development Community**<sup>11</sup> subscribed in 2001 a **Protocol Against Corruption (SADC Protocol)** that entered into force in July 2005.<sup>12</sup> A similar document was issued by the Economic Community of West African States (ECOWAS) in 2001, but having been ratified only by one country, it has not entered into force. The African Union Convention against Corruption has for the most part replaced these agreements.

In fact, with the signature of the **African Union Convention on Preventing and Combating Corruption (AUC)** adopted in 2003 and the adoption in 2003 of the **United Nations Convention Against Corruption (UNCAC)**<sup>13</sup> the introduction of international anti-corruption law covering all regions of the world is consolidated.

This increased effort on developing an international framework is positive and was necessary. However, it has two specific weaknesses relevant to the topic of this paper. On the one hand, it is a framework that focuses on the perpetrators. On the other it is focused on nation states, and creates an emphasis on legal reform, leaving implementation up to national instruments that should be up to the standards set by the Convention.

In particular, this whole set of international instruments place little attention on reparation schemes for victims or on the consequences of corruption. Most saliently only the following references appear:<sup>14</sup>

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<sup>9</sup> See official information under [http://europa.eu/legislation\\_summaries/fight\\_against\\_fraud/fight\\_against\\_corruption/l33027\\_en.htm](http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33027_en.htm) (last accessed on 30 November 2010).

<sup>10</sup> Status as of 6 April 2009. The official text of the convention and its ratification status can be found under <http://www.unodc.org/unodc/en/treaties/CTOC/index.html> (last accessed on 30 November 2010).

<sup>11</sup> Established in Namibia in 1992. Its member states are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

<sup>12</sup> The official text of the protocol can be found under <http://www.sadc.int/> (last accessed on 30 November 2010).

<sup>13</sup> The United Nations Convention Against Corruption (UNCAC) was adopted by the UN General Assembly by Resolution 58/4 of 31 October 2003 and entered into force on 14 December 2005.

<sup>14</sup> Ibid. Olaya, Juanita.

1. The CoE Civil Law Convention established agreements on certain aspects of civil law consequences of corruption, particularly the need to ensure adequate compensation for the victims.

In particular, the Council of Europe Civil Law Convention on Corruption states in article 1 that:

*“Each Party shall provide in its internal law for effective remedies for persons who have suffered damage as a result of acts of corruption, to enable them to defend their rights and interests, including the possibility of obtaining compensation for damage”.*

Article 3 goes into more detail as far as damage compensation is concerned stating that

*“Each Party shall provide in its internal law for persons who have suffered damage as a result of corruption to have the right to initiate an action in order to obtain full compensation for such damage. Such compensation may cover material damage, loss of profits and non-pecuniary loss.”*

This article therefore sets out “the main purpose of the Convention which is to provide the right to compensation for damage resulting from an act of corruption.”<sup>15</sup> This provision explicitly mentions the possibility to also claim non-pecuniary damages, an important tool for social damage reparation. Furthermore, the same convention also offers possibilities to make a state responsible for its actions. This means that if a citizen suffers damage because of the corruption acts of a state official he or she can claim damages from the state.<sup>16</sup> At the moment, there are 34 countries that have ratified the Civil Law Convention (Costa Rica not being one of them).

The Council of Europe Criminal Law Conventions complements the Civil Law Convention as it entails an article on corporate liability. This article emphasises the importance of the possibility to hold legal persons liable for criminal offences like “active bribery, trading in influence and money laundering”.<sup>17</sup>

It is unclear however at this point how these regulations have been implemented within the signatory countries, if at all. In Germany, for example, the issue of compensation in corruption cases faces certain restrictions.<sup>18</sup>

2. Article 34 of the UNCAC requires parties to take measures on the consequences of corruption according to their national laws and require Parties to “consider corruption a relevant factor in legal proceedings to annul

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<sup>15</sup> Council of Europe Civil Law Convention on Corruption, Explanatory Report, para 35.

<sup>16</sup> Council of Europe Civil Law Convention on Corruption, Art. 5.

<sup>17</sup> Council of Europe Criminal Law Convention, Art. 18.

<sup>18</sup> See O. Meyer (ed) *The Civil Law Consequences of Corruption* (Nomos, 2009).  
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*or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action”.*<sup>19</sup>

Up to now, there has not been really much attention given to the practical implementation of these provisions under the UNAC Reviews and self-assessments undertaken by countries that have ratified the Convention. However, the UNCAC implementation monitoring mechanisms offer here an interesting to identify best practices and to encourage countries to adopt regimes that enable reparation.

Other international legal frameworks have more “experience” with reparation schemes, particularly the environmental and the human rights frameworks. This is an issue that requires further exploration and particularly it needs to be carefully considered whether and how existing reparation schemes from other fields can be used in corruption cases, and how the effectiveness and implementation of such reparation schemes can be replicable to corruption cases.

For example, the 1993 Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Article 2 defines damage in an environmental context as:

- a. *loss of life or personal injury;*
- b. *loss of or damage to property other than to the installation itself or property held under the control of the operator, at the site of the dangerous activity;*
- c. *loss or damage by impairment of the environment in so far as this is not considered to be damage within the meaning of sub-paragraphs a or b above provided that compensation for impairment of the environment, other than for loss of profit from such impairment, shall be limited to the costs of measures of reinstatement actually undertaken or to be undertaken;*
- d. *the costs of preventive measures and any loss or damage caused by preventive measures, to the extent that the loss or damage referred to in sub-paragraphs a to c of this paragraph arises out of or results from the hazardous properties of the dangerous substances, genetically modified organisms or micro-organisms or arises or results from waste.*<sup>20</sup>

Another necessary reference is found in Human Rights reparation schemes, that contain the right of victims and their families to reparation of crimes under international law, allowing citizens to obtain reparations, for example, for torture

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<sup>19</sup> United Nations Convention Against Corruption (UNCAC) (2003), Article 34 states: “Consequences of acts of corruption. With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.”.

<sup>20</sup> Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.

committed abroad. These instruments<sup>21</sup> are of universal application (without geographical restrictions, or the need to submit to state membership or approval).<sup>22</sup>

In the context of the developments concerning the international framework for reparation of social damages the enactment of the UK Anti-Bribery Act in 2010 becomes particularly relevant. A strong anti-corruption law that, with even more far reaching powers than the US FCPA, gives UK prosecutors the ability to punish criminal acts committed all over the world. In both cases, these laws with “extra territorial” effects bring enormous benefits for increased prosecution, but also raise the questions of how to handle reparation schemes when the victims are also citizens of a foreign country. In particular, currently systems of Mutual Legal Assistance for asset recovery enable and are so implemented in practice that the results of the proceedings are shared between requesting and recipient countries. Similar facilities, however, do not exist for cases of reparation.

## 2. The Alcatel Case in Costa Rica: an overview

For the purposes of this paper, we are less interested in how corruption may have played out in this case than how it has been dealt with during the legal proceedings, particularly in regard to the social damage concept. This section therefore summarizes the facts surrounding the Alcatel case as described in available reports and legal proceedings both in Costa Rica and abroad and their current standing to the date of writing. This will be helpful in understanding the analysis of the sections thereafter.

### a. The facts of the case and the legal proceedings

Alcatel is a company that provides hardware, software, and services to telecommunications service providers and enterprises all over the globe. Until 1 December 2006 when it merged with its US competitor, Lucent Technologies, the Company was incorporated in France with American depository receipts traded on the New York Stock Exchange. It's now called Alcatel-Lucent.<sup>23</sup>

Alcatel was accused of having transferred US\$15 million to a consulting firm between 2000 and 2003 to obtain cellular networks contracts with the *Instituto Costarricense de Electricidad* (ICE).<sup>24</sup> The case was initially brought to light by investigative journalists of the Costa Rican newspaper *La Nación*.<sup>25</sup> Following these allegations, investigations and prosecutions were initiated against Alcatel in three countries, namely in Costa Rica, the United States and France.

Costa Rican prosecutors alleged that some of this money was used to pay bribes to politicians in Costa Rica 'right and left' while Alcatel was negotiating a US\$149 million

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<sup>21</sup> Particularly Article 14 of the Convention Against Torture.

<sup>22</sup> In this sense see Amnesty International . Universal jurisdiction. The scope of Universal Civil Jurisdiction. July 2007.

<sup>23</sup> Search.Com Reference, *Alcatel-Lucent*, available at <http://www.search.com/reference/Alcatel-Lucent> (last accessed on 30 November 2010).

<sup>24</sup> The ICE is the state-run telecommunications authority in Costa Rica, responsible for awarding all telecommunications contracts. Ibid.

<sup>25</sup> Instituto Prensa y Sociedad, available at <http://www.ipys.org/premio7.shtml> (last accessed on 14 December 2010).

cellular phone contract in 2001 (for 400,000 GSM cellular telephone lines), and another US\$109 million fixed telephone line contract in 2002<sup>26</sup>. The former Costa Rican president Miguel Angel Rodriguez would have received from the consultants on behalf of Alcatel a US\$2.4 million bribe in 2001. Another ex-President, Jose Maria Figueres, allegedly confessed to taking US\$900,000 in “consulting fees” from Alcatel between 2000 and 2003.<sup>27</sup>

According to the information contained in the plea documents<sup>28</sup>, the payments were made to a board director for the ICE, which was responsible for awarding all telecommunications contracts. Former Alcatel executive, Christian Sapsizian<sup>29</sup> also admitted that the ICE official was an advisor to a senior Costa Rican government official and that the payments were shared with that senior official. The payments, funnelled through one of the consulting firms working for Alcatel,<sup>30</sup> were intended to cause the ICE official and the senior government official to exercise their influence to initiate a bid process, which favoured Alcatel’s technology, and to vote to award Alcatel the mobile telephone contract. The payment to the official was made through his wife’s bank accounts in the amount of US\$2.56 million as traced by the FBI. These alleged bribes were routed through a Costa Rican consulting firm hired to help Alcatel win the contracts, using wire transfers from accounts at banks in New York, the Bahamas and Miami.<sup>31</sup>

Alcatel-Lucent has expressed that it expects to generate approximately EUR6 million in revenue from Costa Rican contracts in 2010.<sup>32</sup> It is said that based on the amount of revenue expected from these contracts, Alcatel-Lucent does not believe a loss of business in Costa Rica would have a material adverse effect on the Alcatel-Lucent group as a whole.<sup>33</sup> However, these events may have a negative impact on the reputation of Alcatel-Lucent in Latin America. The company has recognized a

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<sup>26</sup> Unicorn, *Alcatel Accused of Paying Bribes in Costa Rica, Taiwan and Africa*, available at <http://www.againstcorruption.org/bribery.case.asp?id=807> (last accessed on 30 November 2010).

<sup>27</sup> *Ticotimes, Costa Rican parties in crisis a year away from elections*, available at [http://www.ticotimes.net/dailyarchive/2005\\_01/daily\\_01\\_31\\_05.htm#story1](http://www.ticotimes.net/dailyarchive/2005_01/daily_01_31_05.htm#story1) (last accessed on 3 December 2010) and Council on Hemispheric Affairs, *Costa Rica’s Continued Fall from Grace*, available at <http://www.coha.org/costa-rica%E2%80%99s-continued-fall-from-grace/> (last accessed on 3 December 2010).

<sup>28</sup> See plea documents : <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/06-06-07sapsizian-factualbasis.pdf> (last accessed on 30 November 2010).

<sup>29</sup> According to plea documents, Sapsizian was employed by Alcatel or one of its subsidiaries for more than 20 years and at the time the corrupt payments were made, was the assistant to the vice president of the Latin American region for Alcatel.

<sup>30</sup> *Ibid.* One of Alcatel’s existing consultants in Costa Rica, Servicios Notariales, was used to funnel the payments to ICE officials. Also more info about the consultations firms available at <http://www.sec.gov/litigation/complaints/2010/comp21795.pdf> (*Chp. V, A. The Costa Rica Bribery Scheme*)

<sup>31</sup> <http://www.justice.gov/criminal/fraud/fcpa/cases/docs/06-06-07sapsizian-factualbasis.pdf>.

<sup>32</sup> Alcatel-Lucent condensed consolidated financial statements at 31 March 2010, p. 48, available at [http://www1.alcatel-lucent.com/1q2010/pdf/consolidated\\_financial\\_statements\\_6may2010\\_EN.pdf](http://www1.alcatel-lucent.com/1q2010/pdf/consolidated_financial_statements_6may2010_EN.pdf);jsessionid=RWCA DS0ML0LOZLAWFRSHJHNMICYWGQTNS.

<sup>33</sup> *Ibid.*

provision in connection with the various ongoing proceedings in Costa Rica when reliable estimates of the probable future outflow were available.<sup>34</sup>

The proceedings pursued in the United States indicate that there are also corruption allegations against Alcatel for facts in Taiwan<sup>35</sup> and Kenya.<sup>36</sup>

#### • *The Criminal and Civil Proceedings in Costa Rica*

Criminal and civil proceedings were initiated in Costa Rica in October and November 2004, against Alcatel and 11 individuals including former President Rodriguez.<sup>37</sup> Having denied the charges, Rodriguez was jailed in October 2004 and released on bail in 2005 after serving one year's imprisonment. On 27 July 2007, in connection with these allegations, the Costa Rican Prosecutor's Office indicted eleven individuals, including the former president of Alcatel de Costa Rica<sup>38</sup>, on charges of aggravated corruption, unlawful enrichment, simulation, fraud and others. Three of those individuals have since pled guilty. (See annex 1 and 2 for a Table with more details on these proceedings).

The Costa Rican Attorney General's Office and ICE, acting as victims of this criminal case, each filed civil claims in 2004 (and subsequently amended in them in 2006 and 2008) against the eleven criminal defendants, as well as five additional civil defendants (one individual and four corporations, including Alcatel-Lucent) seeking compensation for damages in the amounts of US\$52 million (in the case of the Attorney General's Office) and US\$20 million (in the case of ICE).

The civil claim initiated by the Costa Rican Attorney General's Office on 25 November 2004 was based on the social damage caused by the alleged corrupt behavior to the people and the Treasury of Costa Rica, and for the loss of prestige suffered by the Nation of Costa Rica. Alcatel-Lucent entered into discussions with the Attorney General's Office aimed at a negotiated resolution of the Attorney General's social damages claims. Those discussions resulted in a settlement contained in a signed agreement enacted on 20 January 2010 by which the Attorney General's social damages claims were dismissed in return for a payment by Alcatel of approximately US\$10 million. These funds have been paid and were incorporated in to the government budget; they have been partly allocated by the Government to the Anti-Corruption police's budget and funding a State Police Information Platform of the

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<sup>34</sup> It seems that the amount of the provision in connection with Costa Rica's proceedings is included into Provisions for litigation for the year 2010. See note 18 and note 22 paragraph g of Alcatel-Lucent condensed consolidated financial statements at 31 March 2010 and also see p. 48.

<sup>35</sup> In the Taiwan case executives from Alcatel's Taiwanese subsidiary (along with Siemens AG's) are being probed into whether they bribed officials in US\$27.4 million worth of railway contracts awarded in 2003, according to an Alcatel filing with the SEC in November (2004). Alcatel's Taiwan Chief Executive Jean-Philippe Benoist was arrested in June 2008 as part of the probe ('Unicorn' *Alcatel Accused of Paying Bribes in Costa Rica, Taiwan and Africa*, retrieved 29 October 2010, ><http://www.againstcorruption.org/briberycase.asp?id=807>>).

<sup>36</sup> It is also alleged that Alcatel funneled EUR10 million of bribes in Kenya, Tanzania, Nigeria and Sudan through the Swiss company Telliac SA. Paris magistrate Philippe Courroye is investigating two alleged payments made by Alcatel to Swiss financial vehicle Telliac SA as part of a probe into the Swiss company's transfers (<http://www.againstcorruption.org/briberycase.asp?id=807>).

<sup>37</sup> [http://www.alcatel-lucent.com/csr/htm/en/pdf/Controversies\\_Costa\\_Rica.pdf](http://www.alcatel-lucent.com/csr/htm/en/pdf/Controversies_Costa_Rica.pdf)

<sup>38</sup> In October 2004 Alcatel terminated the employment of the then President of Alcatel in Costa Rica and of its Vice president for Latin America.

Organization for Judicial Investigation.<sup>39</sup> The settlement only covers the civil claim against Alcatel-Lucent and leaves untouched the criminal and civil proceedings against the 11 individuals which continue to this date of writing.

The ICE civil claim seeks pecuniary compensation for the damage caused by the alleged corrupt behaviour to ICE and its customers, for the harm to the reputation of ICE resulting from these events (moral damages), and for damages resulting from defective quality of the service, and an alleged overpricing it was forced to pay under its contract with Alcatel.<sup>40</sup> During preliminary court hearings held in San José during September 2008, ICE filed a report in which the damages allegedly caused by Alcatel are valued at US\$71.6 million. ICE has not yet agreed to any settlement.

Costa Rican authorities are also investigating whether Alcatel violated a ban on foreign contributions to political campaigns, including that of the former President Abel Pacheco<sup>41</sup>.

- *The administrative proceedings in Costa Rica*

- i. Regarding the termination of the contract

In August 2007, ICE initiated an administrative proceeding to terminate the 2001 mobile phone lines contract with Alcatel (the “400KL GSM Contract”) and claimed compensation of US\$59.8 million for damages and loss of income.

By March 2008, Alcatel-Lucent and ICE concluded negotiations of a draft settlement agreement for the implementation of a “Get Well Plan”, in full and final settlement of the claim to terminate this contract. This settlement agreement was not approved by ICE’s Board of Directors that resolved instead to resume the administrative proceedings to terminate the operations and maintenance portion of the 400KL GSM Contract, claim penalties and damages in the amount of US\$59.8 million and call the performance bond. ICE has made additional damages claims and penalty assessments related to the 400KL GSM Contract that bring the overall exposure under the contract to US\$78.1 million in the aggregate, of which ICE has collected US\$5.9 million.<sup>42</sup>

In June 2008, Alcatel-Lucent filed an appeal against the resolution of ICE’s Board. ICE called the performance bond in August 2008, and on 16 September 2008 Alcatel-Lucent was served notice of ICE’s request for payment of the remainder amount of damages claimed, this is US\$44.7 million.<sup>43</sup> On 17 September 2008, the Costa Rican Supreme Court ruled on the appeal filed by Alcatel stating that: (i) the US\$15.1 million performance bond amount is to be reimbursed to Alcatel-Lucent and (ii) the US\$44.7 million claim is to remain suspended until final resolution by the competent court of the case. Following a clarification request filed by ICE, the Court finally decided that the US\$15.1 million corresponding to the performance bond is to

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<sup>39</sup> Interview with Evelyn Villareal. See also ‘La Nacion’ *Indemnización de Alcatel al Estado financiará el OI*, retrieved 2 December 2010, available at <http://www.nacion.com/2010-04-23/ElPais/NotasSecundarias/ElPais2345448.aspx>

<sup>40</sup> Alcatel, *Alcatel-Lucent – September 2010 – A responsible behaviour – Controversies*, September 2010, p. 1, available at [http://www.alcatel-lucent.com/csr/htm/en/pdf/Controversies\\_Costa\\_Rica.pdf](http://www.alcatel-lucent.com/csr/htm/en/pdf/Controversies_Costa_Rica.pdf)

<sup>41</sup> [http://www.businessweek.com/magazine/content/04\\_49/b3911066\\_mz054.htm](http://www.businessweek.com/magazine/content/04_49/b3911066_mz054.htm)

<sup>42</sup> See note 40, p.2.

<sup>43</sup> Ibid.

remain deposited in an escrow account held by the Court, until final resolution of the case<sup>44</sup>.

On 8 October 2008, Alcatel-Lucent filed a claim against ICE requesting the court to overrule ICE's contractual resolution regarding the 400KL GSM Contract and claiming compensation for the damages caused to Alcatel. In January 2009, ICE filed its response to Alcatel's claim. At a court hearing on 25 March 2009, ICE ruled out entering into settlement discussions with Alcatel.

On 20 April 2009, Alcatel-Lucent filed a petition to the Court to recover the US\$15.1 million performance bond amount and offered the replacement of such bond with a new bond that will guarantee the results of the final decision of the Court. The Court rejected such petition, and Alcatel-Lucent's appeal of it was resolved on 18 March 2010 in their favor. As a consequence Alcatel-Lucent is to collect the aforementioned US\$15.1 million amount upon submission to the Court of a bank guarantee for an equivalent amount. A hearing originally scheduled for 1 June 2009 was suspended due to ICE's decision not to present to the Court the complete administrative file wherein ICE decided the contractual resolution of the 400KL GSM Contract. The preliminary court hearing commenced on 6 October 2009, and was expected to conclude towards the end of April 2010.

ii. Concerning the debarment of Alcatel-Lucent<sup>45</sup>

On 14 October 2008, the Costa Rican authorities notified Alcatel of the initiation of an administrative proceeding to ban Alcatel from government procurement contracts in Costa Rica for up to 5 years. The administrative proceeding was suspended on 8 December 2009 pending the resolution of the criminal proceeding.

In March 2010, Alcatel was notified of a new administrative proceeding whereby ICE seeks to ban Alcatel-Lucent from procurement contracts, as a consequence of alleged material breaches under the 400KL GSM Contract (in particular, in connection with failures related to road coverage and quality levels).

• *Proceedings abroad*

i. The United States federal criminal proceedings against Alcatel-Lucent

The United States Securities and Exchange Commission ("SEC") and the United States Department of Justice ("DOJ") conducted an investigation into possible violations of the Foreign Corrupt Practices Act ("FCPA") and the federal securities laws.<sup>46</sup> In connection with that investigation, the DOJ and the SEC also requested information regarding Alcatel-Lucent's operations in other countries.

On 19 December 2006, in connection with the Costa Rican's bribe allegations, the DOJ indicted former Alcatel executive, Christian Sapsizian<sup>47</sup>, one of the two former

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<sup>44</sup> See note 41.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> According to plea documents, Mr. Sapsizian was employed by Alcatel or one of its subsidiaries for more than 20 years and at the time the corrupt payments were made. He was assistant to the

employees of Alcatel on charges of violations of the FCPA, money laundering, and conspiracy.

On 20 March 2007, a grand jury returned a superseding indictment against Christian Sapsizian and the former president of Alcatel de Costa Rica, based on the same allegations contained in the previous indictment. By June 2007, he had entered into a plea agreement in the US District Court for the Southern District of Florida and pleaded guilty to violations of the FCPA.

On 23 September 2008, former Alcatel executive, Christian Sapsizian was sentenced to 30 months in prison for engaging in the elaborate bribery scheme by making more than US\$2.5 million in corrupt payments to Costa Rican officials, in violation of the FCPA.<sup>48</sup> He admitted that between February 2000 and September 2004, he conspired with Edgar Valverde Acosta, a Costa Rican citizen who was Alcatel's senior country officer in Costa Rica, and others to make more than US\$2.5 million in bribe payments to Costa Rican officials to obtain a telecommunications contracts on behalf of Alcatel.<sup>49</sup>

According to media information,<sup>50</sup> Alcatel-Lucent has engaged in settlement discussions with the DOJ and the SEC with regard to the ongoing FCPA investigations. Although there are indications of agreements in principle reached around December 2009, there appear to be no assurances, however, that final agreements will be reached with the agencies or accepted in court. If finalized, the agreements would relate to alleged violations of the FCPA involving several countries, including Costa Rica, Taiwan, and Kenya.

Under the agreement reached in principle with the SEC, Alcatel-Lucent would enter into a consent decree under which Alcatel-Lucent would neither admit nor deny violations of the anti-bribery, internal controls and books and records provisions of the FCPA and would be enjoined from future violations of US securities laws, pay US\$45.4 million in disgorgement of profits and prejudgment interest and agree to a three-year French anti-corruption compliance monitor to evaluate in accordance with the provisions of the consent decree (unless any specific provision therein is expressly determined by the French Ministry of Justice to violate French law) the effectiveness of Alcatel-Lucent's internal controls, record-keeping and financial reporting policies and procedures.<sup>51</sup>

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vice president of the Latin American region .

(<http://www.justice.gov/opa/pr/2008/September/08-crm-848.html>) see also The FCPA Blog "The Hard Timers", available at <http://www.fcpablog.com/blog/tag/christian-sapsizian>. ( Other sources indicate he was Deputy Vice President for Latin America and some others that he was Adjunct Vice President see <http://www.fcpablog.com/blog/tag/christian-sapsizian> <http://www.nacion.com/2010-02-20/ElPais/NotasSecundarias/ElPais2275417.aspx> 48 'US Department of Justice', *Former Alcatel CIT Executive Sentenced for Paying \$2.5 Million in Bribes to Senior Costa Rican Officials*, , available at <http://www.justice.gov/opa/pr/2008/September/08-crm-848.html> (last accessed on 30 November 2010).

<sup>49</sup> *ibid*.

<sup>50</sup> Bloomberg Business Week, *Alcatel to Pay \$137 Million to Avoid U.S. Prosecution* available at <http://www.businessweek.com/news/2010-02-19/alcatel-to-pay-137-million-to-avoid-u-s-prosecution-for-graft.html> (last accessed on 30 November 2010).

<sup>51</sup> The FCPA Blog "The Hard Timers", available at <http://www.fcpablog.com/blog/2010/2/19/alcatel-lucent-headed-for-settlement.html>

Also under the agreement reached in principle with the DOJ, Alcatel-Lucent would enter into a three-year deferred prosecution agreement (DPA), charging Alcatel-Lucent with violations of the internal controls and books and records provisions of the FCPA, and Alcatel-Lucent would pay a total criminal fine of US\$92 million – payable in four instalments over the course of three years. In addition, three Alcatel-Lucent subsidiaries – Alcatel-Lucent France, Alcatel-Lucent Trade International AG and Alcatel Centroamerica – would each plead guilty to violations of the FCPA’s anti-bribery, books and records and internal accounting controls provisions. The agreement with the DOJ would also contain provisions relating to the engagement of a three-year French anti-corruption compliance monitor. If Alcatel-Lucent fully complies with the terms of the DPA, the DOJ would dismiss the charges upon conclusion of the three-year term.<sup>52</sup>

Alcatel-Lucent has recognized a provision of EUR 110 million in connection with these FCPA investigations, which is equivalent to the sum of US\$45.4 million as agreed upon in the agreement in principle with the SEC and US\$92 million as agreed upon in the agreement in principle with the DOJ, discounted back to net present value and converted into Euros.<sup>53</sup>

ii. Proceedings initiated by ICE (Costa Rica) against Alcatel-Lucent in the District Court of Florida

In May 2010, ICE filed a complaint in Miami, Florida, against Alcatel-Lucent asserting claims for violations of civil racketeering and other laws of Florida in connection with Alcatel Lucent's bribery and corruption cases in Costa Rica. In this proceeding, ICE seeks compensation for damages in the amount of US\$75 million. If successful, the lawsuit will allow ICE to recover three times the amount of its damages.<sup>54</sup>

The complaint alleges that Alcatel-Lucent's bribery and corruption in Costa Rica was partially directed from Miami, Florida, and was part of a broader worldwide scheme. "*Alcatel Lucent's unlawful conduct significantly impacted ICE and affected Costa Rica's telecommunications system, and has caused a tremendous amount of damage to both the company and the system,*" said ICE's executive director, Don Pedro Pablo Quieros. "*Alcatel Lucent acted criminally, tried to take advantage of ICE and Costa Rica, and although it has taken a step in the right direction by admitting its criminal behaviour, it must pay for the significant damages it has caused to ICE.*"<sup>55</sup>

At the time of writing the Circuit Court of the 11<sup>th</sup> Judicial Circuit in Florida has dismissed the claim on the argument of "*forum non conveniens*"<sup>56</sup>, among others, because the plaintiff is a foreign public entity and the damage occurred abroad.

iii. Proceedings in France

Reports indicate that in September 2004, Alcatel top managers in Paris first learned of the situation through reports in the Costa Rican press.<sup>57</sup> According to these

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<sup>52</sup> *ibid.*

<sup>53</sup> Alcatel, *Alcatel-Lucent – September 2010 – A responsible behaviour – Controversies*, September 2010, p. 3, available at [http://www.alcatel-lucent.com/csr/htm/en/pdf/Controversies\\_Costa\\_Rica.pdf](http://www.alcatel-lucent.com/csr/htm/en/pdf/Controversies_Costa_Rica.pdf)

<sup>54</sup> 'Cellular News', *Costa Rica's ICE Moves Alcatel-Lucent Bribery Allegations to the USA*, retrieved 28 October 2010, < <http://www.cellular-news.com/story/43223.php>>

<sup>55</sup> *Ibid.*

<sup>56</sup> This is a concept that relates to the appropriateness of the jurisdiction.

sources, after conducting internal investigations Alcatel determined that the accused persons, the Vice President for Latin America, Christian Sapsizian and Edgar Valverde Acosta, Alcatel's senior country officer in Costa Rica had also used company funds to benefit themselves and their families. The two were fired in October 2004, and Alcatel says it is cooperating with authorities and has asked that criminal charges be filed against both men. "*Alcatel had rules and procedures in place, and these employees did not respect them,*" say the Company representative. "*The company has reacted, is cooperating with the justice system, and being open with the media.*"<sup>58</sup>

To our understanding, French authorities are also conducting an investigation of Alcatel's bribe allegations in the case of Costa Rica and would also be investigating allegations against Alcatel in Kenya, Nigeria, French Polynesia, Sudan and Tanzania.<sup>59</sup> However, to the date of writing we don't have information on the status of the investigation pending in France.

### 3. The social damage concept used in Costa Rica

#### a. The legal instruments used in this case and their applicability in other jurisdictions (i.e. Central America).

The legal basis for the social damage claim filed by the Attorney General of Costa Rica is to be found in Article 38 of the Costa Rican Criminal Procedural Code (CPC), that states the following:

*Article 38. Civil action for social harm civil action may be brought by the Attorney General's Office, in the case of offenses involving collective or diffuse interests.*<sup>60</sup>

The norm thus bases the entitlement of the civil action on the grounds of any situation punishable by criminal law (crime) that entails a violation of "collective or diffuse interests". In its claim, the Attorney General's office resorted to the definitions of what the Costa Rican Constitutional Court has defined as collective and diffuse interests, which included among others, the citizen's collective interest in good public finance management; the Court had then clarified a couple of relevant points in regard to this particular "collective" interest:

- Good public financial management is in the interest of all inhabitants of Costa Rica and not just a group of them; it is therefore beyond being simply a

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<sup>57</sup> 'Bloomberg Business Week', *Cracking Down On Corporate Bribery*, retrieved 2 December 2010, available at [http://www.businessweek.com/magazine/content/04\\_49/b3911066\\_mz054.htm](http://www.businessweek.com/magazine/content/04_49/b3911066_mz054.htm).

<sup>58</sup> *Ibid*

<sup>59</sup> See Transparency International. 'Organization for Co-Operation and Development', *Progress Report 2010*.

<sup>60</sup> Unofficial translation. Original text in Spanish reads as follows: ARTICULO 38.- Acción civil por daño social La acción civil podrá ser ejercida por la Procuraduría General de la República, cuando se trate de hechos punibles que afecten intereses colectivos o difusos.

“diffuse” interest.<sup>61</sup>

- Not all diffuse interests are protected by the law and it has been the Constitutional Court’s decisions that have defined which are those diffuse interests that are under constitutional protection; and this includes good public financial management.<sup>62</sup>

With these arguments the office of the Attorney General claimed sufficient standing (legitimacy) to submit the social damages claim in this case.

In terms of standing it is important to note that according to the Costa Rican legislation, only the Attorney general is entitled to bring such civil claims to the criminal courts.

However the article 70 of the CPC recognizes the character of victims to organizations (foundations, associations and other non-profit organizations) in crimes committed against collective or diffuse interests as long as the purpose of such organization is related directly with such interests.

*Article 70:*

*d) The associations, foundations and other entities that are subject to registration, in crimes involving collective or diffuse interests, provided that the purpose of the group is linked directly to those interests<sup>63</sup>.*

It is however not clear whether civil society organizations would have autonomous standing on the basis of this Article 70, and the issue is subject to interpretation. Currently two reforms are being discussed to modify the CPC, one of them addressing this issue.<sup>64</sup> The concept of social damage as used in the claim filed by the Attorney General is as follows:

*“From this law [referring to the Article 38 of the CPC] it is taken that the nature of the Social Damage caused with the crime is the injury that as a consequence from a particular event or circumstance, is suffered by groups of people, sections of the community or associations; ultimately it is a grievance to the collective in its vital natural goods, property, assets or fundamental rights as a result of which the reparation of the damage caused results mandatory. The damage is immediate, caused by the crime to all individuals, affecting them not in their particular rights but as members of a community, of a Nation-State The injury constitutes a damaging rupture to a conglomerate or a collective.”<sup>65</sup>*

It is therefore here dealt as a concrete injury not restricted to fundamental collective

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61 Res: 2001-8239. Sala Constitucional de la Corte Suprema de Justicia, de las 16:07 horas del 14 de agosto del 2001.

62 Res. Nº 2006-15960 SALA CONSTITUCIONAL DE LA CORTE SUPREMA DE JUSTICIA. San José, a las 14:53horas del 1 de noviembre de 2006.

63 Unofficial translation. Original text in Spanish reads as follows: Artículo 70:

d) Las asociaciones, fundaciones y otros entes que tengan carácter registral, en los delitos que afecten intereses colectivos o difusos, siempre que el objeto de la agrupación se vincule directamente con esos intereses.

64 See Fernandez, Evelyn Villarreal, Accountability System’s Performance and Political Corruption: Beyond the 2004 Political Scandals in Costa Rica (2006). University of Oxford Latin American Centre.

65 Original in Spanish. This is a free translation. Text extracted from the civil claim for social damage.

rights but to more diffuse interests that affect both the individual but more importantly the community, and affect therefore all of its members.

The General Attorney's Office structured in this case the claim on the basis of two anchors:

- The damage resulting from poor public financial management.
- The violation of the inhabitant's right to a "healthy environment" contained in Article 50 of the Costa Rican Constitution and interpreted to include the right to a corrupt-free environment.<sup>66</sup>

To measure the social damages that would be used as a reference in the claim the office of the Attorney General with the help of an external consultant undertook an estimation of damages using an innovative methodology (Table 1 below reproduces the results of the study commissioned by the Attorney General's Office). The methodology combines the following elements (arguments):

- Its effect on the national economy by reducing the investor's trust in the Costa Rican Government
- Its effect on the political system by reducing the credibility of politicians and political parties and thus affecting (increasing) the levels of abstentions in the elections processes of 2006

Therefore the projected damage includes an estimation of these two items in addition to the amount of the funds allegedly involved in bribes and kickbacks in this case.

**Table 1. The estimation of social damage in the Alcatel Case<sup>67</sup>**

**Costo Total del Daño Social causado por el caso de corrupción ICE-ALCATEL**

<b>Rubro</b>	<b>Monto (US\$)</b>
Implicaciones a la economía nacional <sup>1</sup>	30,895,613
Implicaciones en el abstencionismo electoral – 2006 <sup>2</sup>	3,626,492
<b>Total de costos indirectos</b>	<b>34,522,105</b>
Dinero destinado por ALCATEL para distribuir en "Premios" <sup>3</sup>	<b>17,657,406</b>
<b>Monto total del daño ocasionado por el caso de corrupción ICE-ALCATEL</b>	<b>52,179,511</b>

Fuente:

1. Cuadro 33
2. Cuadro 28

Corresponden a todos los dineros que se distribuyeron entre funcionarios públicos y privados

This approach and methodology had already been used and tried in a previous case known as the Fischel-CCSS case. In this case bribery and kickbacks would have been involved in the purchase of medical equipment for the Social Security System in Costa Rica. In this case, the estimated damages were claimed to be around US\$89 million. The court in this case accepted the concept of social damage but dismissed the estimation and the evidence and awarded damages only for US\$600.000. An appeal to this decision is currently pending.

<sup>66</sup> This doesn't refer (only) to a natural environment but also to a social and institutional environment.

<sup>67</sup> This corresponds to the Table 34 of the report prepared by Gerardo Barrantes Moreno. Barrantes Moreno, Gerardo. Informe. Evaluación del Daño Social por Casos de Corrupción en Costa Rica: Caso Alcatel-ICE. Costa Rica, Febrero 2007. Page 62.

## b. What worked and what didn't work in this case and why. Mapping opportunities and obstacles

The perspective of a legal proceeding is always different in hindsight. The assessment and the use of tools available, challenges and opportunities in real time are different. The purpose of this section is therefore not to evaluate the case and its proceedings but to reflect on aspects that are relevant in thinking about the idea of repairing social damage from a policy perspective and thus serve the main purpose of this document. Moreover, many of the proceedings are still pending to the date of writing and many developments can still change the course of this case.

The following are some interesting aspects that appear as opportunities and obstacles to the reparation of social damage in this case.

### Opportunities

- The legal tool. The explicit existence of a legal tool in the criminal procedural code (art. 38) facilitates the process, clarifies entitlement and procedure.<sup>68</sup> However it is not that the possibility of claiming social damages is restricted to this particular legal tool as it can be argued that it could be possible to ground a civil claim using the same basis for class actions, non-contractual liability or tort law. These mechanisms would operate separate from the criminal procedures and would be different from the one used but it may be conceivable.
- The involvement of the media. There are different ways in which civil society can play a role and the media is a relevant one. In this case the journalists played an important role in alerting to the existence of the case and creating awareness and momentum for this. This, in turn, may have provided support for the authorities investigating the case and the Attorney General's office to pursue the social damage claim.
- The precedent. While the legal tool is relatively new, the reparation of social damage had already been pursued before in other cases (the Fischel –CCSS case). This had a learning effect both on the Attorney General's office and most likely among the judges. A similar effect can be envisaged by improving the dissemination of this and other similar cases to other countries and by promoting debate and discussion about this issue.
- The determination of the Attorney General's Office. Unfortunately such a determination to actively pursue the reparation of social damage can't be taken for granted. The "Procuradores" have been investing a lot of commitment and energy to make this happen and to use a tool they have in their hands. It is clear that without this determination this and other cases wouldn't have occurred, even if the tools existed explicitly in the laws.
- The expertise. The Attorney General's office had the right support and expertise that provided help in the task of quantifying the social damage. This is a factor somewhat related to the learning effect as the same methodology had been pursued in previous cases.

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<sup>68</sup> We haven't conducted a thorough search of the existence of similar existing tools elsewhere, but we have indications of the existence of similar tools in Brazil.

## Obstacles/Difficulties

- The judge's reluctance. The learning effect was positive in that it increased the strategic options for the actors, for example in how to argue the damages, and in increasing the advantages of settling. However, there were difficulties encountered in the reluctance of judges to accept evidence of social damage. The judges are used to deal with the concept of moral damages and the claimants were also strategic in relating the concept of social damages to the individual moral damages.
- The entitlement. The Costa Rican law provides directly the Attorney General's Office with entitlement to launch civil action against those directly responsible of causing social damage; this is damage that affects collective or diffuse rights and entitlements. It is however worth noticing that the Costa Rican advantage of having an explicit tool that mentions social damage, has not eased the difficulties arising from measurement and evidence management.

The law also identifies as victims those organisations whose main purpose is the defence of such rights (Art 70 CPC), and yet it is unclear whether they are also entitled to launch an action based on social damages. This poses challenges to the development and the implementation of this tool: on the one hand the standing is limited to (or has been interpreted to be limiting to) the Attorney General's Office, excluding civil society organisations (by interpretation) and individual citizens who could nevertheless be affected. On the other hand, the mechanism is accessory to the criminal claim; this is, it can only be launched in the context of criminal proceedings. In this case it worked well, but there is no need for the social damage claim to be dependent on the criminal procedures, and this creates a weakness into the tool by making it dependent on the criminal proceedings, which can prosper or not out of many different reasons, some of them not relevant to the establishment of civil responsibility.

- The evidence difficulties. It is intrinsically difficult to prove and measure the social damage. The evidence is in itself argumentative, this is, it is the argument that corruption harms the social trust, the credibility of the state and the legitimacy of the institutions. However, neither of these aspects is necessarily tangible nor measurable although it is still certain.
- The role of civil society. What role could civil society have played during the process and to help the process? It is clear that the momentum created by the media was determinant for the prosecutions. In addition, the citizen's opinion was a central element of the methodology to measure the damage, and it was canvassed through a survey. However, there was no direct involvement in the social damage proceedings themselves.
- The geo-politics of justice. The claims and proceedings abroad had no impact in terms of reparations in Costa Rica, at least not from a social damage perspective. The ICE is still seeking reparation in the US Courts and "local damage" in the US at the basis of the SEC investigations has been considered. Is there a need to consider the social damage of the Costa Rican in the proceedings taking place in the US and France? If yes, how?

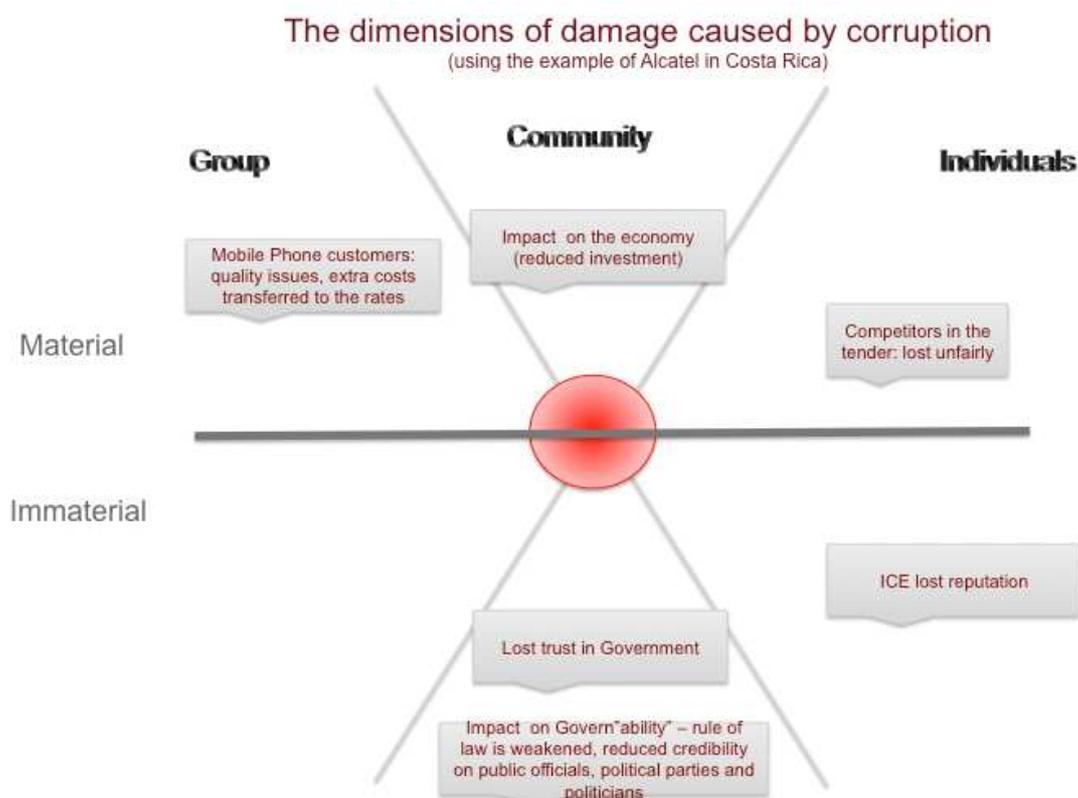
## 4. Policy recommendations and lessons

### a. What is meant by social damage and can it be repaired?

Corruption can cause individual damage (like the damage experienced by competing bidders who didn't bribe and that had not been a bribe could have won the bid); collective damage (like the damage to mobile phone customers due to the loss in quality of service or higher tariffs resulting from corruption involved in a mobile phone contract). In addition, there is social damage.

Social damage is the loss experienced in aspects and dimensions of the collective or the community relevant to the law (thus legally protected). In a similar way to the concept used in Costa Rica, it is a type of damage that falls upon individuals, as members of a community but not on an individual in particular. This includes therefore the environment, social trust, the trust and credibility of the institutions, collective fundamental rights like health, security, peace, education and good governance and good public financial management among others. It is different from damages to collective rights in that collective rights belong to a restricted and identifiable group of individuals or legal entities. Social damage can be pecuniary and non-pecuniary. This only makes measurement and restoration more complicated but not less necessary.

**Graph.1**



Like individual and collective damage, social damage can also be material or immaterial, depending whether it can be directly measured in monetary terms or related to a specific object. There is material social damage, for example when a bridge procured with corrupt means collapses due to defects in quality; social damage is also material when the opportunity cost of public money is wasted or lost

due to corruption, and those are funds that could otherwise have been used in productive, socially relevant activities (health, education, justice, etc). Social damage is immaterial as it, for example, affects the public trust with which governments should be vested with, damaging the effectiveness of the Institutions.

Social damage therefore doesn't exclude individual or collective damage, and is different than the concept of punishment. The goal here is to repair actual damage caused and not to sanction or to pre-empt more corruption from happening. This distinction is relevant in order to manage the consequences of corruption. Where can reparation lose its character and become punitive? How does social damage relate to individual damages or the basic principle that corruption can't pay off?

## Graph 2 Managing the Consequences of Corruption



These questions are captured here in Graph 2. Different forms of reparation (getting the situation back to the state where it was before the crime) are needed and are different from the punishment the perpetrators should be subject to under the domestic criminal law. However, these reparations also accumulate, particularly if they take place in different jurisdictions and there is no case for "*res judicata*"<sup>69</sup> to apply. From the perspective of the perpetrator, accumulated reparations can become punishment.

In order to be able to better understand the concept of social damage, one might want to look at similarities with other areas of law that have used a similar concept. One that is rather close and is often called the "ancestor" of the concept of social damage related to corruption is the concept of damage in environmental law. In environmental law, there is a distinction made between damage and *compensable* damage. This is basically the distinction between damage to the environment itself, and damage to property.<sup>70</sup> Damage to the latter can in most cases be compensated for, whereas damage to the environment is often irreparable. This concept could also be transferred to corruption cases. Usually in such cases, on the one hand one deals with damage that is hard to measure and cannot be compensated effectively, namely damage to a country's reputation after a corruption scandal was discovered (*non-pecuniary loss*), and on the other hand with the damage to competing companies (*loss of profits*) as a result of disturbed competition, that can be estimated more easily and that can also be compensated.<sup>71</sup> The damage that a population of a corrupt country suffers very much depends on each case. However, usually this damage can also be considered indirect or non-pecuniary damage, since it is often harder to estimate. This damage includes the deterioration in public services for example, because monies that could have gone into the health system instead went into private pockets.

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<sup>69</sup> Facts already trialed elsewhere (another Court or another jurisdiction) and thus not subject to a second trial.

<sup>70</sup> Larsson, M.L., *The law of Environmental Damage: Liability and Reparation*, Kluwer Law International, Stockholm, 1999, p. 125.

<sup>71</sup> Council of Europe Civil Law Convention on Corruption, Explanatory Report, para 38.

It is possible and necessary to repair social damage originated in cases of corruption. Fighting corruption is not an objective per se, and if corruption can't be prevented or avoided, its consequences at least need to be repaired.

The duty of repairing the damage caused is a basic principle of law. This translates into an effort to restore the situation to its standing as it was before the damage. This is not a new concept, and hardly depends on the existence of explicit instruments to proceed for it. However, as the Costa Rican experience suggests, the existence of such explicit instruments helps to avoid legal discussions, but does not rule out discrepancies due to interpretation.

There is no question therefore on the concept of social damage and the possibility of its reparation. The question is rather on its feasibility: how to pursue such reparation and how to confront the challenges of measuring, demonstrating the damage and issuing its reparation. These are the issues discussed in the next section.

#### **b. What are the main questions and challenges the idea of repairing damage caused by corruption creates and how can they be addressed?**

In the case of the settlement reached between the Attorney General's Office and Alcatel-Lucent in Costa Rica the total amount of estimated damages was US\$57 million and the settlement granted an agreement on US\$10.3 million. It would be too superficial to judge the agreement solely on the basis of its amount. In fact the reasoning and circumstances surrounding the settlement need to be considered not only to magnify the settlement in its appropriate proportions, but also to think generally about the challenges of repairing social damages. In this section we discuss some of these issues.

- Measuring the damage

One of the difficulties faced by the office of the Costa Rican Attorney General was that of quantifying the social damage. In this case, the arguments relied on the effects on the economy and the political system and used a creative methodology using a combination of quantitative analysis and survey data on citizen's perception to explain and measure the impact.<sup>72</sup>

Establishing causality presents difficulties both for measuring and providing evidence to social damage. First, it is difficult to have a baseline: what would be of this community had there not been corruption? How can you quantify the loss of trust in the Government? Is that loss of trust and credibility a result solely of this corrupt act?

In fact, this problem affects both the restoration of the damage and a possible sanction. Courts tend to resolve this issue by issuing fines, settlements or damages close to the amount of the bribe (see Graph 3 for an illustration from selected cases). However it is clear that the extent of the damage goes beyond the bribe. In addition, here are other more subtle forms of corruption (kickbacks, fraud, or abuse resulting from conflicts of interest etc.), which will make it difficult to use the "weapon" as a reference.

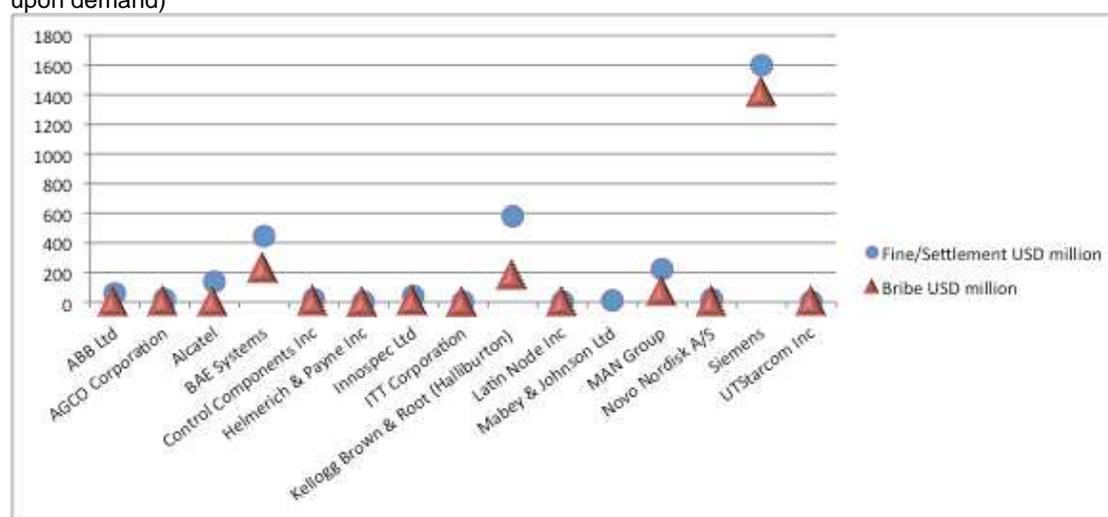
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<sup>72</sup> Moreno, G B *Evaluación del Daño Social por Casos de Corrupción en Costa Rica: Caso Alcatel-ICE* (February 2007).

An additional difficulty lies in the fact that we understand collective and diffuse interests more easily at the intellectual level; they are ultimately immaterial after all. But measuring requires establishing monetary values to issues that don't have such character. Again, this is similar to the problems associated with moral injuries: take the case of a homicide; how much worth is the loss of a friend or a parent or a child? How much worth is a life that can't be recovered? Judges in some jurisdictions have found solutions to these difficulties and have created rules to estimate moral damages. Perhaps a similar approach can be developed for social damages, which would mean taking corruption cases seriously. An additional problem arises because of its collective nature: these are interests that affect the community as a whole irrespective of the individual's occupation, life expectancy, experience and current situation. It is difficult to assess the "state of the Nation" before and after occurrences of corruption, particularly as there are no concrete references or numerical or monetary values that can be assigned to it.

### Graph 3. Fines, settlements and bribes in selected cases

( Source: publicly available information on various news papers and media. Available from the authors upon demand)



Another problem related to the causality is the certainty of the damage. The problem with the corrupt act is that it is very likely that it takes place in a corrupt environment. How can one establish the dimensions of the damage caused by actual corruption when the conditions were already set for it? What is the state of the situation to which it needs to be restored? How to restore trust of the citizens in its public officials when there was already no ground to trust them?

Another issue to bear in mind is that what is most damaged is an "Institutional goal", this is the aspiration (often of not always constitutionally expressed) to the rule of law and good governance standards. What is damaged is the possibility of achieving them.

- Proving the damage

The proof and the measurement of the damage are closely linked. Social damage has similarities to moral damage (and other damages to immaterial rights like name, honour and reputation) in the cases of individuals, a concept judges are more familiar and sometimes also more comfortable with. However, because it is immaterial, it

poses difficulties in providing evidence to its existence and magnitude. It is not only immaterial but it belongs to the community.

Part of these difficulties prompted the office of the Attorney General to settle the social damages. It had been foreseen that the Court would have difficulties accepting the existing evidence, despite the clear-cut arguments supporting the existence of the damage. A similar and somewhat recent case had established a form of precedent. This was the case Fischel-CCSS, under which bribery and kickbacks would have been involved in the purchase of medical equipment for the Social Security System in Costa Rica. In this case, the estimated damages were claimed to be around US\$89 million, but the court in this case dismissed the evidence.

- Standing (entitlement)

Legal standing is essential to the feasibility of social damage reparation schemes. The Costa Rican model gives explicit entitlement to the Attorney General's Office and leaves an option up to interpretation on whether non-profit organisations, recognized as victims, could also have legal standing for such a claim. The model in this case works because of the initiative and leadership exercised by the Attorney General's Office, but is not necessarily practical in all contexts, nor is it consistent with the concept of the need and duty to repair social damage.<sup>73</sup>

Different countries face different realities and procedural laws are often a reflection of such local practices and realities. It is therefore not necessarily feasible to speak of an ideal model of overarching application. The discussion is also different whether we are talking about national or international jurisdictions, between trials at home (home for offender and/or victim) or abroad (abroad for offender and/or victim). This issue needs to be further examined. An ideal national model would provide entitlement to the Attorney General's Office (or its equivalent) and also to the citizens (individually or as organisations) to claim social damage reparation, and provide for process accumulation schemes that would enable coordination. It should also be ensured what can be done with the reparation should it be determined as an amount of money, as this belongs to the public and not to any of the claimants. Indeed reparation payments should not be made to cause enrichment; otherwise the purpose of the reparation is not accomplished.

- Issuing reparation

Social damage can have pecuniary and non-pecuniary forms. The first can be more clearly determined in monetary values, while the second pose difficulties. Think for example of a corruption case involving bribery to obtain a contract for the construction of a bridge, which indeed is awarded, overpriced and built under sub-quality standards and eventually breaks apart. In this case the social damage associated to a non-functioning bridge can be identified; the same with the value resulting from the overprice and the waste of public funds involved. It is more difficult

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<sup>73</sup> See Fernandez, Evelyn Villarreal, *Accountability System's Performance and Political Corruption: Beyond the 2004 Political Scandals in Costa Rica* (2006). University of Oxford Latin American Centre.

to establish however the impact of the trust lost in government officials in charge of infrastructure facilities and in the officials in charge of supervising them. This poses an interesting question to be addressed. How to estimate and issue reparation of the non-pecuniary aspects of social damage?<sup>74</sup> What can be used here from the civil law experience issuing reparation for moral damages? And above all, what other creative avenues to repair social damage can be used?

In fact, alternative methods of reparation can be more effective than simply a monetary exchange or payment. Monetary retribution, even in the form of public funds will not necessarily be felt directly by the public or translate in its well-being. The problem with funds coming back to the public budget is that they may, again, be subject to malfeasance. A creative method of reparation could include the direct involvement of the public, or could involve settings in which trust is built back (if not re-built) where enhanced accountability is required on a specific project, or civil society monitors are set in place, or the value of a contract is reduced back to its real amount.

There is also the issue of proportionality. While the magnitude of the reparation needs to be proportional to the damage caused, it can become punitive if it entails that companies run out of business and absurd (and in some jurisdictions even impossible) if individuals don't have the means to repay them. This is also why alternative forms of reparation need to be thought through and implemented. It may well also be the case that full reparation is not feasible.

- International and national frameworks

The need for international tools and frameworks for addressing social damage is clear. They could compensate for lack of action or difficulties at the national level, and could enable claims across countries to proceed. This is easier said than done however; and the question is how to go about such framework? Is it feasible within any of the existing international structures?

One quick avenue is offered by countries who have open entitlement rules (like Spain) enabling national and perhaps international victims to address individual and social damage claims. However, tools and approaches need to be designed to address also the cases of countries with laws that have extra-territorial application, in order to maximize their potential and positive impact.

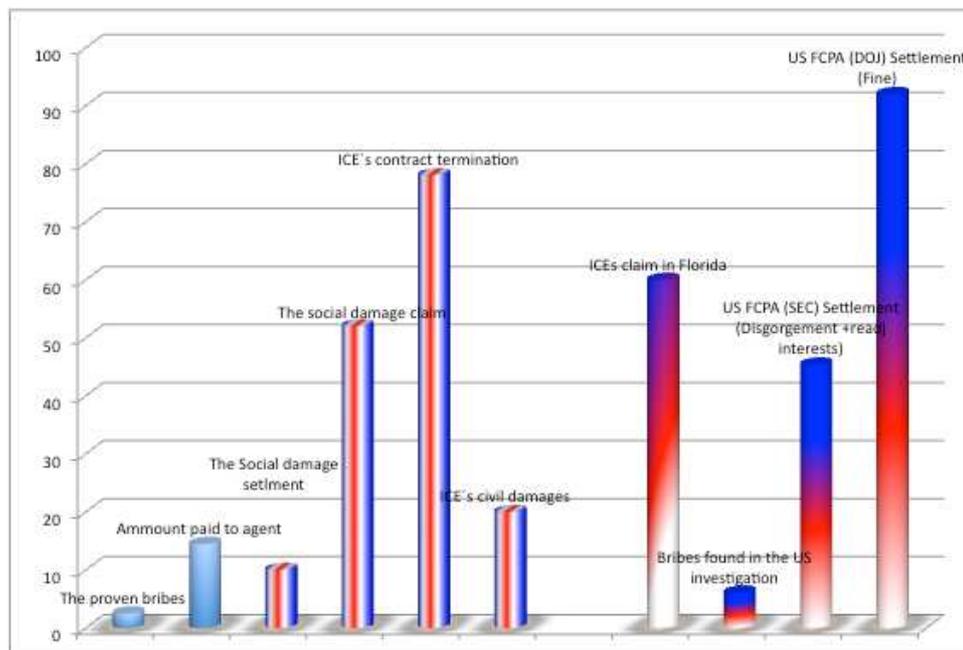
The international framework is crucial for coordinating national and international issues and for regulating global ones. Graph 4 below, for example, illustrates the differences in amounts of claims, sanctions and compensation in different jurisdictions. There are arguments that could explain and justify different measurements (and reparations) of damage in different jurisdictions; for example those arguments based on settlement or sentencing guidelines or the actual dimension of the damage and its measurability as it could be for example in the case of the SEC regulations. However, the difference between the settlement in Costa Rica and the reparation discussed in the US for example raise other questions that remain, like for example, to what extent the differences in valuation correspond to differences in judicial capacity rather than to actual damage valuations? The Graph 4

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<sup>74</sup> Different countries have different experiences and traditions regarding this question. For example under German tort law it is not possible to compensate immaterial loss as a general rule (§253(1) BGB). See Meyer *ibid.* p 162.

illustrates also the challenges of an international framework: could it be possible and desirable to coordinate legal proceedings in different jurisdictions and to address damage both “at home” and “abroad”? What would this mean for the victims? What would this mean for the perpetrators?

**Graph 4. The Alcatel Case in Numbers**



- The possible use of different civil law instruments

It is some times thought that the civil law litigation offers mechanisms that may be more expedite to deal with corruption situations, that the burden of proof is lower or that they may enable to issue claims directly against both companies and individuals responsible, particularly in cases when criminal liability of legal entities is not possible. There is much truth to these arguments, however, it is not always the case that evidence requirements diminish in complexity, particularly for social damage claims; furthermore it is important to keep in mind the true reparatory nature (as opposed to punishing nature) of civil law.

In general, legal mechanisms available or for potential use may be varied. General tort law may offer mechanisms based on pre-contractual or extra-contractual liability even in cases where there is no specific legal tool made explicitly to claim social damages out of corruption cases. Furthermore in certain instances, claims to nullify contracts secured through corruption or corrupt contracts can include such damage (although the question of entitlement may be restricted in certain instances). Also, many commercial and foreign investment international arbitration procedures to enforce or nullify contracts could consider social damage concepts; here the problem is the lack of entitlement in these procedures for third parties to raise claims and the reduced transparency of such procedures, which makes third party participation also difficult. In certain countries there can also be sets of specialized legal tools (based for example on special statutes like the civil racketeering case in Florida, or on Constitutional protection mechanisms) that would enable such claims. In any case, this is an issue to be considered and studied, and the implications of using one or each avenue for the different reparation schemes need to be better understood and

mapped as to establish clear and usable mechanisms, and possibly encourage and support claims using them.

- The capacity of the judges, prosecutors and justice administrators

The following sentence of a Federal Court of Justice illustrates well the main message of this section:

*“It is the experience of the Senate that, in a number of important criminal proceedings in commercial matters, it is not possible to impose sentences that reflect the severity of illegal acts relating to corruption and tax evasion because the relevant law enforcement bodies simply do not have the resources to investigate such complex cases..”[...] “...It is the impression of the Senate that the [...] legislator’s concern to protect public trust in the integrity of the law which could be compromised by inappropriately mild punishments, can only be answered, in relation to the factually and legally difficult area of the law relating to commercial and tax offences, by significantly reinforcing the administration of justice in this area.”<sup>75</sup>*

This quote would not be at all surprising for those active in the field of law enforcement, if it was not from the Federal Court of Justice in Germany. The complexity of corruption cases is not specific to the issues of reparation of social damage, but adds to the obstacles such reparation faces. The burden on judges, prosecutors, lawyers and others is additional if one thinks that social damages claims are not common and the conceptual and evidentiary difficulties they entail.

Capacity here therefore not only refers to enough resources but also to awareness about these issues, the implications of corruption and the avenues to handle its consequences. It is therefore also an issue to keep in the agenda.

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<sup>75</sup> Excerpt from the translated text quoted by Olaf Meyer, “Combating Corruption by means of private Law. The German Experience”, p 150. Original in BGH, *Neue Zeitschrift für Strafrecht* (NStZ) 2006, 210 (212).

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