

Long WORKSHOP REPORT FORM

Number and title of workshop: Finding the Real Cost of Corruption: How to Use the Concept of Social Damage for the Anti Corruption Struggle

Coordinators: Andres Hernandez, Senior Programme Coordinator, Americas Department, Transparency International and Manfredo Marroquin, Transparency International

Date and time: 12.11. 2010, 15h

Moderator (Name and Institution): Delia Ferreira Rubio, Member of the International Board of Transparency International

Rapporteur (Name and Institution): Anja Roth, Basel Institute on Governance

Panellists (Name, institution, title)

Alvarado Gilberth Calderon, Director, Procuraduria de la Etica Publica, Costa Rica
Eckert Joachim, Judge, Regional Court (Landgericht) Muenchen
Feinstein Andrew, Former ANC Member of Parliament in South Africa and activist in the field of corruption and arms trade
Olaya Juanita, Director, Basel Institute on Governance

Summary

The concept of repairing the social damage in corruption cases is relatively new with big potential for dealing with the consequences of corruption. It has gained increasing attention with the Alcatel and Fischel-cases in Costa Rica, in which this concept has been used innovatively.

As introduced by **Delia Ferreira Rubio** the aim of the workshop was to look at the concept of social damage from the legal point of view and also on its potential in the fight against corruption and at discussing its applicability. Ms Rubio made it clear that the existing examples were very interesting and promising, but that the concept remained a new one that still needed further development and testing.

Andres Hernandez explained as background to this workshop that TI has been working for several years in Central America and in that process the issue of victims' compensation was identified especially having observed the work done by the Costa Rican Public Ethics Attorney. Mr Hernandez announced that he was pleased about the fact that the concept of social damage and its potential impacts could now be discussed and used in a bigger forum and outlined that this was also due to the good cooperation with Mr Calderon and the Basel Institute on Governance.

Summary of presentations

Gilberth Calderon began his presentation by outlining the Fischel and the Alcatel cases in which his office sought to apply the concept of social damage for the first time. It was felt that a mechanism was needed that would help to successfully deal with corrupt government officials. The legal basis for the Prosecutor's action was provided by Art. 50 of the Costa Rican Constitution and Art. 38 of the Criminal Procedural Code under which he could claim civil compensation for social damage.

Mr Calderon left no doubt that there were also certain challenges that had to be overcome when using the concept of social damage in corruption cases. One of those challenges he outlined was the question of **how to quantify the social damage**. However, he also showed that there were innovative approaches to answer this question. In the Alcatel-case, surveys outlining the social cost of corruption and oral testimonies, proving that the public felt affected by corruption were admitted and successfully used as evidence.

Mr Calderon made it clear that the fruitful use of the concept of social damage in Costa Rica was promising because it can be a tool to put a stop to corrupt practices in the corporate world, helps to reduce impunity of powerful actors and also because it can make corporations feel the effects of corruption more directly. Mr Calderon suggested creating one single definition of social damage. He proposed the **creation of an experts group at international level** using the UNCAC as umbrella for strengthening international conventions and actions in line with the new concept.

Joachim Eckert started his presentation by making it clear that the fight against corruption cannot be won per se, but that more effective tools need to be developed to lead this fight more effectively. He outlined the different areas in which corruption occurs. He made it clear that he sees victims of corruption suffering damage. In his role as a judge, Mr. Eckert outlined that he always aimed at compensating those damages. However, he also made it clear that Germany had no definition of social damage in its penal code. Judge Eckert concluded by stating that **there is a need for rules on social damage** and he welcomed the fact that this topic had been taken up. It became clear that Judge Eckert would like to use creativity, possibly involving the concept of social damage in his judgments, but that all of this had to happen within the German legal framework.

Andrew Feinstein started by introducing himself as a recovering politician who has felt the negative effects of corruption himself and has investigated a massive corrupt arms deal in South Africa. He used the cases of BAE and Mabey and Johnson to illustrate the fatal consequences of corruption for the population. For example, while money was diverted to the weapons deal, in the same time the South African government did not have enough resources to provide the population most vulnerable with HIV-medication. He made it clear that corruption in those cases had undermined the institutions of democracy and the rule of law. He also explained that in the BAE-case in Tanzania, a settlement was agreed upon and BAE paid a fine of 3 million pounds for accounting irregularities. However, it was not clear where exactly this money would go. Andrew concluded that **the country of the corruptors benefited from the settlement and not the victims in the country where corruption took place**. He also raised the importance of pursuing strategies of debarment of companies that are serious corrupters and of developing an international framework to address reparation. Mr Feinstein concluded by alerting his audience to the fact that the pressure the public exercised on the South African government did eventually change their policies on HIV. Consequently, he encouraged everyone to uphold pressure and even increase it in the future for corruption to decrease and victims' rights to be upheld.

Dr Juanita Olaya started her presentation by emphasizing the potential the concept of social

damage bore for victims' rights. She was pleased about the partnership between the Basel Institute on Governance and TI–Americas on this project. She explained that the partnership had been inspired by the Costa Rican experience and that the aim was to learn from this case and identify where the challenges and the opportunities are in applying this concept in other cases and countries. She also made it clear that the panel on social damage was only to be the start and that much still had to be done to make the concept yield results and impact worldwide. Dr Olaya clarified why it was relevant to focus on the victims and that using the concept of social damage in corruption cases to account for victims' rights could have positive impacts on decreasing corruption. However, she, as other panelists had done before, also made clear that the concept needed further development. However, it could **have a real impact on the life of people that were affected by corruption: a group that has so far been marginalized with international instruments focusing mainly on states and perpetrators**. It became evident that there was a need to show that corruption leads to damage and that as long as corruption continues happening, the consequences need to be addressed.

Dr Olaya summarized the opportunities and challenges around questions of **measuring the damage, providing evidence for it, the legal standing to claim it and the need to adopt a framework that addressed both the national and international dimensions**. She also motivated the participants to think about ways of using the concept of social damage even if there was no obvious legal basis for its use in the national legislation as provided for in the Costa Rican case. She also emphasized that it would be important to develop ways by which **the reparation of social damage translated directly into benefits to the community and the public interest**. Monitoring of the use of damages paid would be one way to ensure that. Dr Olaya made it clear that she did not mean for social damage payments to become lucrative means for civil society organizations, but that they should directly benefit the community as such.

Finally, Dr Olaya **motivated all the participants and panelists to join forces** and work together on making the social damage concept a useful tool in addressing the consequences of corruption. The framework had to be developed further and capacities had to be spread. Most importantly, cases had to be identified where the concept could be further tested and implemented.

Manfredo Marroquin re-emphasised that the next step would be to try out the concept in the field and bring cases and to work on these using informal networks. For this purpose, he **supported the idea of creating and international group of experts and other collective efforts to further explore and use the social damage concept**.

Main Outputs, Recommendations, Follow-up Actions and Highlights

One of the main outputs was the identification of the need for a **clear definition of the concept of social damage**. This was evident also from the questions that were posed to the panellists later, that in order for further steps in the use of the concept of social damage to be successful, a clear definition was needed. Along with this need for a clear definition, another important point made was the necessity to consequently **strengthen the concept further and investigate the legal aspects for its implementation**.

Furthermore, the idea to **set up an international commission of experts to work on the concept** was an important output. This will certainly help strengthen and further manifest the concept and its applicability.

Frank Vogl, Individual Member of Transparency International, asked the question of why there were no examples from US-cases represented in the panel. He asked everyone to keep in mind that in US-corruption cases, there was never any mention of the victims. He concluded that the US system did not understand that there were victims of corruption cases. As a consequence, he saw a duty to also **bring cases in the US**.

Another commentator emphasized **the need for the reparations to go into projects specifically made for the citizens of the affected country** so that the trust that had been lost through corruption would be won back. Judge Eckert, when replying to that comment agreed that the money paid in fines in corruption cases should not only go into the fiscal budget, which is rather abstract for the average citizen, but could potentially be used for concrete social projects in the future. In line with these statements, Mr Calderon re-emphasized the requirement to **think outside the box and apply the concept of social damage as creatively as possible**. Mr Calderon also addressed the issue of the victims' rights in the US. He agreed with Mr. Vogl's statement and explained that Alcatel would pay more than 100 million dollars in fines in the US for having violated the Foreign Corrupt Practices Act (FCPA). He also made it clear that the actual victims, the Costa Rican population, would not get a cent of those damage payments.

Action Points:

- **Further develop the concept of social damage and the legal aspects for its implementation at the national and international levels**
- **Set up an international commission of experts to work on the concept**
- **Develop mechanisms to measure damage**
- **Identify evidence-strategies that can help prove social damage occurred**
- **Define policy implications of the use of the concept**