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Argentina – Civil Society Report

by Asociación Civil por la Igualdad y la Justicia (ACIJ)

An input to the UNCAC Implementation Review Mechanism: First year of review of UNCAC chapters III and IV

This is the executive summary of an ACIJ report¹ that reviews Argentina's implementation and enforcement of selected articles in UN Convention against Corruption (UNCAC) Chapters III (Criminalization and Law Enforcement) and IV (International Cooperation). The report is intended as a contribution to the UNCAC peer review process of Argentina covering those two chapters.

The UNCAC articles that receive particular attention in the report are those covering bribery (Article 15), foreign bribery (Article 16), embezzlement (Article 17), illicit enrichment (Article 20), money laundering (Article 23), liability of legal persons (Article 26), statute of limitations (Article 29), freezing, seizure and confiscation (Article 31), witness protection (Article 32), whistleblower protection (Article 33), compensation for damages (Article 35), bank secrecy (Article 40), jurisdiction (Article 42) and mutual legal assistance (Article 46).

The research for the report included a survey of the legal framework and an analysis of law enforcement statistics. Based on the findings, ACIJ identified and commented on reasons that the Argentine system has failed to fully adopt the applicable UNCAC standards.

Assessment of the review process

Conduct of process

The following table provides an overall assessment of transparency, country visits and civil society participation in the UNCAC review of Argentina.

Did the government make public the contact details for the country focal point?	No
Was civil society consulted in preparation for the self-assessment?	No
Was the self-assessment published online or provided to CSOs?	Provided
Did the government agree to a country visit?	Yes
Was a country visit undertaken?	No
Was civil society invited to provide information to the official reviewers?	No
Has the government committed to publishing the full country report?	No

OA (Oficina Anticorrupción) is the Argentine focal point but this information is not published by the government and was obtained upon request. Although OA invited ACIJ and other NGOs to a meeting to provide information about the different steps in the self-assessment and review process, civil society was not given an opportunity to provide information to or otherwise be in contact with the reviewers. OA had said that the Argentine Government agreed to have a country visit by the review team, but it did not take place because in the end both parties preferred to have meetings in Vienna. The reason is that they did not have time to organize the visit and there were reportedly timetable difficulties.

¹ The full report is available at <http://www.uncaccoalition.org/en/uncac-review/cso-review-reports.html>. Its authors are Ezequiel Nino, co-director of ACIJ, and the team involved was Luis Villanueva, María de la Paz Herrera, Patricia Bustamante Quintero and Inés Herrera. A draft of the report was shared with the government. The final report will be used for continuing the dialogue and engagement with the stakeholders including the Government beyond the first round country review process.

On the other hand, even though the Government did not commit to publishing the full report, the OA authorities stated that it would not be a problem to make it public.

Availability of information

Securing information for the report was relatively complex because it is scattered and generally not published on the official OA website. To access it, it was in some cases necessary to make formal requests to public offices. Here the OA's cooperation should be highlighted; it responded quickly and effectively to ACIJ's requests. In some cases, however, information was incomplete or outdated, especially with regard to statistics and information on judicial and administrative cases. In contrast, information on certain policies and legislative reform projects could be accessed easily and quickly.

Implementation and enforcement

The following summarises the report's findings as to implementation and enforcement in Argentina.

1. Legal framework

With respect to the criminalization of conduct enumerated in the UNCAC, Argentina generally satisfies its obligations to criminalize corruption offences. So, from the point of view of the legal framework, our country meets UNCAC requirements.

However, ACIJ found serious shortcomings in Argentina's implementation of the following UNCAC provisions:

- a. Anti-money laundering legislation (UNCAC Article 23): The Financial Intelligence Unit (FIU) does not conduct sufficient analysis of suspicious transactions reports about money laundering. This is because the FIU has several problems regarding resources and access to information.
- b. Liability of legal persons (UNCAC Article 26): With regard to codification of the liability of legal entities, the Argentine Penal Code (APC) does not impose criminal liability on companies, civil associations, and/or foundations for wrongful acts they may commit. However, the law system does contemplate civil and administrative punishments for these bodies. Civil penalties include monetary fines, suspension, or cancellation of their capacity for action if they violate exchange rules, customs, supply, or competition laws.
- c. Freezing seizure and confiscation (Article 31): The APC does not live up to UNCAC standards, such as providing for forfeiture of substitute goods as the proceeds of crime. Nor does it provide for expanded possibilities, such as confiscation or civil forfeiture.
- d. Protection of witnesses and whistleblowers (UNCAC Articles 32 and 33): There is no specific protection of witnesses, experts, and whistle-blowers in relation to crimes of corruption. Current practice regarding witness protection is embodied in the "National Program for Protection of Witnesses and Persons". Although primarily aimed at witness protection in cases of drug trafficking, terrorism and kidnapping for ransom. Only in exceptional circumstances can a person who has reported or witnessed acts of corruption benefit from protection under this law. The program does not meet the standard of protection required by the UNCAC since the law conditions protection on danger to the physical integrity of the person but do not involve other areas of life. Also, the possibility of protection is not considered while the investigation is in the hands of non-judicial agencies.
- e. Bank secrecy (Article 40): According to Argentine law, bank secrecy cannot be used as a justification to deny information to judges during a criminal investigation. However it does pose a serious obstacle during preliminary investigations by OA, the internal and external audit offices (SIGEN/AGN), and public prosecutors. It also makes it more difficult to preventively freeze assets obtained illegally.

2. Enforcement system

Almost all the provisions of the UNCAC that ACIJ was asked to analyze have been adopted into national law, but the problem lies in the effective enforcement of these provisions in individual cases. Thus, attention should be focused especially on efforts by the judiciary and public prosecutors to create incentives to investigate. This calls for elimination or reduction of all sorts of delaying tactics; ensuring the necessary legal tools; and providing adequate human and material resources, or order that corruption cases are given greater priority. It also calls for eliminating, to the extent possible, opportunities for discretion that conspire against effective investigation and prosecution of these cases; and providing better training for employees and officers so that they can make better decisions and undertake more effective criminal investigations. The complexity of investigations and difficulties of obtaining evidence are not addressed under the current system.

- a. Role of OA: The OA is responsible for compliance with all international anti-corruption standards ratified by Argentina and for the development and coordination of programs combating corruption in the national public sector. During its early years, it enjoyed outstanding success, driving and taking an active part in cases involving public officials suspected of corruption. However, it has recently been criticized for failure to selection system for its authorities and its low performance in prosecution.² Nor is it guaranteed independence³, as outlined in UNCAC Article 36, because it is subordinate to the national executive⁴.
- b. Low rate of prosecution and sentencing: The most important and serious deficiencies were found in the investigation and prosecution of corruption cases. At the federal level, the rate at which cases are brought to public trial is low, and consequently, there is not much effective and few convictions.
- c. The role of judges in corruption investigations: In many cases there is inconsistent handling of investigations, which sometimes seems to be politicized and self-interested.⁵
- d. Lack of specialized training, expertise, research tools and investigative techniques: There is insufficient training of judicial officers on how to approach an investigation and deal with the complexity of corruption crimes. There is no court-mandated program for organized training activities or program updates.
- e. Lack of adequate recruitment process and training for experts: There are special concerns that delays in the work of Supreme Court's corps of accounting experts are linked to recruitment and training issues.⁶
- f. Lack of resources and congestion in courts: The courts are overcrowded with minor cases straining their capacity. They are also burdened by the number of cases that involve the use of procedural tools such as requests for annulments and/or appeals.
- g. Weaknesses in the area of anti-money laundering: The FATF – GAFI (Financial Action Task Force) issued a report in which Argentina's capacity to prevent money laundering is questioned.⁷ It notes the lack of investigations, controls to which certain societies and exchange houses are subject; the informal registration of certain

²Articles about the project to amend the law about the Anti-corruption Office as regards to the selection system of its officials: <http://sincorrupcion.wordpress.com/2011/03/31/proyecto-para-reformar-la-oficina-anticorrupcion/>; <http://sincorrupcion.files.wordpress.com/2011/03/proyecto-oa.pdf>

Articles published in La Nación newspaper regarding the low performance in prosecutions.

<http://www.lanacion.com.ar/1356425-un-sistema-perfecto-de-impunidad>

<http://www.lanacion.com.ar/1373662-hay-desinteres-por-vigilar-al-poder>

³ <http://www.lanacion.com.ar/1092926-designan-a-los-titulares-de-la-oficina-anticorrupcion-y-de-la-sigen>

⁴ Idem; "Reform and strengthen oversight bodies through measures such as public and transparent selection mechanisms, appointment, promotion and removal of civil servants, continuous evaluation and monitoring of their actions, political and social support, greater autonomy of internal audit units and independence of the Anticorruption Office" from the Final Report of the Follow-Up Mechanism of the Inter-american Convention Against Corruption, approved in September 19, 2009, page 31. It can be found here: http://www.oas.org/juridico/spanish/mesicic_III_inf_arg.pdf

⁵ Report "The judicial paralysis on the corruption cases" made by ACIJ, published in http://www.elhardin.com.ar/paneles/acij/v2/programas/adjuntos/La_paralisis_de_la_Justicia_frente_a_los_casos_de_corrupcion.pdf

⁶ Report "The corruption cases in the view of the accounting proof" made by ACIJ, published in http://www.elhardin.com.ar/paneles/acij/v2/programas/adjuntos/INFORME_PERITOS.pdf

⁷ The report can be found in this web site <http://www.fatf-gafi.org/dataoecd/51/5/46336120.pdf>

operations that should pass through the banking system; the lack of effective regulation of money deliveries; the lack of efficiency in reporting suspicious operations that financial bodies should submit to the Financial Intelligence Unit (FIU); the lack of effective FIU powers to analyse and process the information it receives and translate it into preliminary investigations and legal decisions; and the difficulties in obtaining timely judicial orders to access tax information and the secret annexes of disclosures of assets.

- h. Lack of action by and coordination with other agencies: There is limited action by other relevant offices, notably specialized bodies for the detection and investigation of possible acts of corruption such as the FIA⁸ in the prosecutor's office or the FIU. There is also little coordination between public and private agencies in the collection, exchange and analysis of tax, property and banking information regarding people suspected in corruption cases.
- i. Mutual legal assistance: Most requests are rejected or not answered, in many cases because of basic errors in the procedure governing applications, ignorance of the law, or lack of detail in the order. It is important to note that other countries do not collaborate with the Argentine authorities; in many cases, the justification is that laws prohibiting disclosure of tax and bank information prevent answering such requests.
- j. Lack of accountability measures and monitoring systems to evaluate the work of officials and make recommendations to improve processes and transparency in decision-making (in public procurement, for example), monitor the judicial system regarding the progress of investigations into alleged corruption, etc.
- k. Lack of statistics: Another deficiency in the corruption prosecution system is the lack of updated and complete statistics detailing the number of administrative, civil and criminal cases.

Recommendations for priority actions

ACIJ considers it a priority for all branches of government to introduce effective measures, within the scope of the authority granted them by the Constitution, to overcome the shortcomings in the application of the rules related to corrupt practices. To this end, it may be of interest to work in the following areas:

1. **Legal framework:** While the laws of Argentina in very large measure are well adapted to the provisions of the UNCAC, there are still some areas where it is necessary for the legislature to take action.
 - a. Liability of legal persons: The national legislature should pass legislation to introduce criminal liability of legal persons for wrongful acts committed in their name by managers and businessmen. While criminal, civil or administrative liability are alternatives provided by UNCAC, only criminal liability is likely to provide a sufficient deterrent and ensure effective international cooperation with respect to offences for which legal persons should be held responsible. Moreover, Argentina currently has no effective liability of legal persons at all.
 - b. Witness and whistleblower protection: It is important to expand the witness protection program so as to give wide coverage to the complainants, witnesses, whistleblowers, and experts involved in investigations or prosecutions for acts of corruption.
 - c. Criminal procedure reform: The rules of criminal procedure should provide that the Attorney General, as head of prosecution, should be able to decide within the framework specified by law which facts should be considered and which should be set aside, so that human and material resources would be directed towards socially important cases.

⁸ Article published in La Nación newspaper about the limited action of the FIA <http://www.lanacion.com.ar/1373661-el-kirchnerismo-debilita-varios-puestos-clave> ; Report "The judicial paralysis on the corruption cases" made by ACIJ; article published in Clarin newspaper regarding the order given by the General Attorney about the impossibility for the FIA to participate in some types of judicial cases (the ones that it does not promote) <http://edant.clarin.com/diario/2008/11/17/opinion/o-01804294.htm>

2. **Enforcement system:** The judiciary and the Public Prosecutor Against Corruption should take a leading role in the fight against corruption supported by other agencies and entities. To that end, the following reforms are recommended⁹:

- d. Role of OA: Revitalize the role of the OA, ensuring its independence and expertise and redefining its functions to emphasize its role in prevention and monitoring, including gathering data and statistics and coordinating data processing.
- e. Speedier appointment of judges: Make a strong political decision to expedite the activities of the Council of Judges. It is also important to implement transparent criteria for evaluating qualifications and make prompt decisions about the candidates who qualify. It is also crucial that the Ministry of Justice and the Executive Branch and the Senate coordinate their work in order to streamline the appointment process.
- f. Training and resources: Train the judiciary and Public Prosecutor and facilitate their closer work with professional and specialist advisers. Provide adequate resources for expert bodies assisting the judiciary and law enforcement authorities as well as transparent and impartial selection mechanisms for the experts.
- g. Additional systemic reform: Ensure rapid responses to judicial requests for information from public institutions and strengthen internal audits by prosecution services and the judiciary.
- h. Strengthen transparency and accountability. Civil society monitoring of the courts is desirable to ensure increased accountability and for that purpose it is important that the judicial process is made more transparent by prosecutors and judges.
- i. Coordinated strategy: It would also be appropriate for the judicial authorities and prosecutors to develop a coordinated strategy for the prosecution and punishment of crimes related to corruption and judicial recovery of assets lost by the state because of these crimes, in accordance with UNCAC Article 39.
- j. Anti-money laundering: It is fundamental to empower the FIU as a vital body to prevent, conduct preliminary investigations and analyze suspicious transactions reports. It is also necessary to improve control systems for economic organizations and the informal registration of certain operations that should pass through the banking system. Finally, it is essential that the FIU, the judiciary and public prosecutors work in coordination in this field.
- k. Judicial and administrative statistics: To understand the real situation in corruption matters it is crucial to have updated and complete statistics detailing the number of administrative, civil and criminal cases, broken down into different categories, such as type of crime or stage of progress.
- l. Bank secrecy: It is necessary to amend the law in order to allow OA, the internal and external audit offices (SIGEN/AGN), and public prosecutors to access to bank information during preliminary investigations.
- m. Freezing seizure and confiscation: it is essential to amend the APC to make it according to UNCAC standards, such as providing for forfeiture of substitute goods as the proceeds of crime.

The full ACIJ review report can be found at

<http://www.uncaccoalition.org/en/uncac-review/cso-review-reports.html>

⁹ In 2009, Clarin newspaper published an article about steps that should be taken regarding the judiciary to tackle corruption in Argentina. The article was entitled "The changes suggested by judges and specialist" and can be founded here: <http://edant.clarin.com/suplementos/zona/2009/11/29/z-02051135.htm>