

Distr.: General

14 October 2011

English only

**Conference of the States Parties to the United
Nations Convention against Corruption**
Fourth session
Marrakech, Morocco, 24-28 October 2011
Item 2 of the provisional agenda


**Document submitted by Transparency International*, a
non-governmental organization in consultative status
with the Economic and Social Council**

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V.11-86430 (E)



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Chile: Civil Society Report

by Chile Transparente

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

-Executive Summary-

This is the executive summary of a Chile Transparente report¹ that reviews Chile'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 Chile 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), money laundering (Article 23), liability of legal persons (Article 26), witness protection (Article 32), whistleblower protection (Article 33), and mutual legal assistance (Article 46).

The report finds that the Chilean legal framework is largely compliant with the UNCAC articles reviewed, except for sanctions, whistleblower protection and bank secrecy. The report also finds that a legal framework for conflict of interest regulation is lacking. On the enforcement side, there is a lack of capacity to conduct complex financial investigations.

Chile was also recently reviewed by the OECD Working Group on Bribery regarding its compliance with the OECD Anti-Bribery Convention in a Phase 1ter report published in December 2009² and by the Follow-up Mechanism of the Inter-American Convention against Corruption in a Third Round report adopted in September 2010.³

Assessment of the review process

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

Conduct of process

Table 1: Transparency and CSO participation in the review process

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

¹ The full report is available at <http://www.uncaccoalition.org/en/uncac-review/cso-review-reports.html>. Its author is Rocio Noriega, Chile Transparente. A draft of the report was shown to the government and 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.

² OECD Working Group on Bribery, Phase 1ter Report on Chile, adopted 2 December 2009, <http://www.oecd.org/dataoecd/60/12/44254056.pdf>

³ Inter-American Convention Against Corruption Committee of Experts, Report on Implementation in Chile of the Convention provisions selected for review in the Third Round, and on Follow-Up to the Recommendations formulated to that country in previous rounds, adopted 16 September 2010, http://www.oas.org/juridico/english/mesicic_III_rep_chl.pdf

Availability of Information

All of Chile's laws are published on a website (www.leychile.cl), so finding legislation related to the UNCAC was relatively straightforward. However, we encountered a series of problems in finding statistics on the prosecution of UNCAC-related offences in Chile and information on the details of cases. We resorted to requesting the information via the Transparency Law; the results were incomplete.

Findings on implementation and enforcement

Legislative changes in Chile over the past two years have facilitated the implementation of the UNCAC, such as the law of criminal liability of legal entities, the whistleblower protection act for public servants, and the Transparency Law. In addition, Chile was required to pass a series of laws in order to enter the OECD: a new corporate government for the state copper mining firm Codelco, a bill to regulate the corporate government of state-owned companies, improvements in the corporate governance of private companies, and increased bank transparency to fight tax evasion.

However, there are no laws regarding the protection of whistleblowers in the private sector and in state companies. There are, however, some good practices based on the ethics codes that some companies have voluntarily implemented. The law on criminal liability of legal entities only requires companies to have a mechanism to receive reports, but there is no provision related to protection. It is also crucial to enforce the whistleblower law for the public sector, in order to give a real guarantee of protection for public or government employees who report corruption offences.

The Public Prosecutor's Office stated in its 2010 Accountability Report that imprisonment penalties for accused parties in corruption offences are not always proportional to the seriousness of the crime, or to the fiscal damage or loss of confidence in the state. This is a legal obstacle that must be remedied through legislation, given the light penalty called for by the Criminal Code.

The Public Prosecutor's Office requested the Executive to present a bill to strengthen investigations considered to be highly complex of crimes related to money laundering, organised crime and corruption – with the objective of improving results in the prosecution of these crimes.⁴ The criteria for classifying cases as high priority include: taking the fiscal damage into account, the governmental position of the accused party, and the repercussion of the case in the public opinion.

Recommendations for priority actions

1. Speed up the Probity and Transparency Agenda and provide more training for public officials related to these laws.

This applies especially to bills related to conflicts of interest, such as asset and interest declarations. On 3 May 2011, a bill called the Probity Law was presented to Congress to regulate financial and interest disclosures, blind trusts and the sale of certain assets. These issues in the same regulation are going to delay its approval, because it is difficult for Congress to agree on matters such as blind trusts and the obligation to sell assets. But the bill is not sufficient to regulate conflicts of interests regarding public officials. A set of bills in Congress related to transparency should be passed in the near future – for example, the revolving door project that regulates the entry and exit of public officials from and to the private sector, and a bill that would strengthen the institution of the Transparency Council. Proposed bills are being

⁴ This Act regulates the criminal responsibility of legal persons in respect of offences mentioned in Article 27 of Act No. 19,913, Article 8 of Act No. 18,314 and Articles 250 and 251 bis of the Criminal Code, the procedure for the investigation and establishing of such criminal responsibility, the determination of applicable penalties and the enforcement thereof. For an English version of the bill see: OECD, "Chile: Phase 1ter Review of Implementation of the Convention and 1997 Recommendation", available at: www.oecd.org/dataoecd/60/12/44254056.pdf

monitored by Chile Transparente's legislative observatory, www.observa.cl. Unfortunately, these bills are stalled in Congress, with little movement in the commissions that are studying them. Chile Transparente has made recommendations for the probity and transparency bills that have been sent to Congress.

2. Introduce a public complaint mechanism on a government website that guarantees no retaliation against people who report acts of corruption.

We recommend modifications including a complaint system for the reporting of corruption cases, such as hotlines for the anti-corruption divisions of government agencies that are in charge of investigating corruption activities. Developing a complaint system would help enforcement agencies receive more information and investigate potential cases that may not be reported for fear of retaliation. Public officials could also use this mechanism, but unfortunately the public whistleblower's law requires the names of people who report cases.

3. Provide protection for whistleblowers in the private sector and state-owned companies.

It is crucial to introduce legal protection for whistleblowers in the private sector and enforce the whistleblower law for the public sector, in order to give a real guarantee of protection for employees who report corruption offences.

4. Increase resources for Public Prosecutor's Office for corruption cases

The Public Prosecutor's Office needs a special National Unit of High Complexity Cases, with prosecutors, lawyers, analysts and technology information experts, as well as direct and continuous communication with the IRS and Comptroller's Office. This requires the introduction of a bill from the Executive to strengthen investigations considered to be highly complex for crimes related to money laundering, organised crime and corruption, with the objective of improving the results of prosecutions of these crimes. A draft of such a bill was sent to the Ministry of Finance for its approval, in order for it to be sent to Congress.

5. The Public Prosecutor's Office should send a bill through the Executive to Congress to increase the imprisonment penalties in the Criminal Code related to corruption offences.

We recommend that the Public Prosecutor's Office, after its analysis is done, send a bill through the Executive to Congress to increase the imprisonment sanctions in the Criminal Code related to corruption offences.

6. Lift bank secrecy in money laundering investigations.

A bill on money laundering (Bulletin 4426-07) would allow prosecutor's to access to any information from banks related to the accounts and deposits for money laundering with a judicial order. The bill is in its second stage in the Commission of Constitution, Legislation and Justice of the House of Representatives. (The development of this bill can be followed at www.observa.cl)

7. Publish on a website information concerning details of misconduct cases and statistics.

The Specialized Unit of Corruption should publish statistics for each offence and judgement. This is not something that the Transparency Law obliges them to do, but it would be a good practice and will be a worthy tool to investigate the development of corruption in Chile.

8. Support private sector efforts to tackle corruption (awareness, prevention programmes, training).

Private sector efforts should be promoted through seminars, workshops and perhaps a special programme financed by the government and international entities for small businesses, as well as promoting the implementation of prevention programmes. Chile Transparente is working with the private sector on this issue, and we have seen that multinationals, banks and large Chilean companies have taken action by implementing prevention systems. However, much work remains to be done in this regard, particularly with small companies, which do not have economic resources to implement prevention systems. Accordingly, they are more exposed to the offences included in the law of criminal responsibility of legal entities.

The full Chile Transparente review report can be found at
<http://www.uncaccoalition.org/en/uncac-review/cso-review-reports.html>