

## **Behind the Smoke: A Look at the Tobacco Industry in Chile, its Networks and Limits to Regulation and Transparency in the 2009 Presidential Election**

*Despite important advances, Chile is not yet winning the battle to curb smoking and the power of the tobacco industry. Chiletobacos, the transnational company that dominates the local market, is an outstanding example of monopolistic practices and influential networks that exercise unexamined power in the public decision-making process concerning health policies.*

*In the run-up to Chile's 2009 Presidential election, EPES sought to know the candidates' proposals on tobacco control and regulation of the tobacco industry. EPES conducted a survey (\*) among the candidates' to determine and publicize their tobacco control policy platforms.*

*This report aims to contextualize the candidates' proposals in regards to the one actor who did not respond to our survey: the tobacco industry. It reviews, in the context of the election, links to political power and limits on regulation and transparency that constitute a curtain of smoke to be dispelled.*

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(\*) "Clearing the Air on Tobacco Control Policies" (\*). Both the survey and this report received support from the Framework Convention Alliance.

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**Report Prepared by Fundación EPES**

December 2009

Fundación EPES (Educación Popular en Salud / Popular Education in Health) is a non-profit foundation created in 1982 to improve the health and quality of life of the poor in Chile.

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NOTE TO THE ENGLISH VERSION: The first round of the Chilean Presidential election was held in December 2009. A run-off election was held in January 2010. The Spanish version of this report -- "*Detrás del humo: Una mirada a la industria tabacalera en Chile, sus redes y los límites de la regulación y la transparencia frente a las elecciones Presidenciales 2009*" -- was prepared prior to the run-off election.

## **Executive Summary**

“Behind the Smoke: A Look at the Tobacco Industry in Chile, its Networks and the Limits to Regulation and Transparency in the 2009 Presidential Election,” examines the power of the tobacco industry in Chile and, specifically, Chiletabacos, the British America Tobacco (BAT) affiliate that controls over 95% of the market. While Chile has made important advances in tobacco control since it ratified the Framework Convention on Tobacco Control (FCTC) and new legislation (Tobacco Control Law 20.105) in 2006, it has not yet made a dent in smoking prevalence rates that are among the highest in Latin America. Chilean legislation falls short of several key FCTC commitments, including comprehensive smoke-free legislation and tax increases. Both of these positions are strongly opposed by the tobacco industry.

Chiletabacos' Board of Directors comes from the highest ranks of Chile's industrial, financial and political elite, including a former Minister of Economy and a former Constitutional Tribunal member who were both in office during the discussion of the 2006 Tobacco Control law. Another director, a former Minister of Mining, is the board president of an NGO — partially financed by Chiletabacos — dedicated to monitoring government accountability and transparency. Chile's new law for Transparency in Public Administration was enacted without provisions to regulate lobbying or the revolving door between regulated industries and government regulators. The Electoral Spending Controls Law does not mandate full disclosure of corporate contributions to political campaigns, as recommended by Art. 5.3 guidelines adopted by the FCTC in 2008.

Where regulation does appear to be working, albeit slowly, is in regards to Chiletabacos' monopoly practices. Chile's National Economic Regulator (FNE) has decreed its maximum fine (US\$17 million) against Chiletabacos for reiterated abuse of anti-monopoly laws. Rival transnational Philip Morris International is seeking US\$137.5 million from Chiletabacos as compensation for its lost share of the Chilean market.

This report was released in tandem with a survey (“Clearing the Air on Policies to Control Tobacco and the Tobacco industry”) of the tobacco control proposals from the candidates running for President in the 2009 election. Both reports received support from the Framework Convention Alliance and are posted on the Fundación EPES website.

**BEHIND THE SMOKE: A LOOK AT THE TOBACCO INDUSTRY IN CHILE, ITS NETWORKS AND LIMITS TO REGULATION AND TRANSPARENCY IN THE 2009 PRESIDENTIAL ELECTION**

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## 1. WHY A REPORT ON THE TOBACCO INDUSTRY IN CHILE?

The Framework Convention on Tobacco Control (1), ratified by Chile in 2005, states that there is a “fundamental and irreconcilable conflict between the tobacco industry’s interests and public health policy interests.”

In Chile, the “economic and political strength of the tobacco industry” is the main obstacle identified by the Health Ministry (in its May 2008 report to the World Health Organization) to the application of this international treaty to curb tobacco consumption (2).

In the context of Chile’s 2009 Presidential election, whose outcome will determine the direction of future national public health policies, Fundación EPES sought to understand and expose the tobacco industry’s links to national political and economic circles.

We first asked the Presidential candidates to detail their positions and proposals on tobacco control through a questionnaire and Declaration of Interests to disclose any links -- of the candidates themselves, their campaign teams or their political parties -- to the tobacco industry.

This survey, titled “*Clearing the Air on Tobacco Control Policies and the Tobacco Industry*” (3), was completed in October 2009 by the four Presidential candidates. It presents the objectives and intentions of their health policy teams on tobacco, a legal product whose use has reached epidemic levels in Chile and constitutes one of its greatest public health problems.

We sought to verify whether current regulations are sufficient to neutralize links between the local tobacco industry and the political world, impede financing of electoral campaigns, and prevent industry influence on public health.

We sought to identify the corporate (and personal) connections of Chiletabacos board members and gauge the dimensions of its political influence.

We looked at Chiletabacos’ activities and “Corporate Social Responsibility” policies and sponsorships following prohibitions decreed in Chile’s 2006 Tobacco Control law.

This report details recent developments in suits filed against the tobacco industry and fines solicited for monopoly practices and unfair competition, and take a look at new tobacco products being introduced in the Chilean market. In closing, this report identifies regulatory issues that will likely surface when Chile’s new President and Congress take office in March 2010.

## TOBACCO AND TOBACCO COMPANIES IN CHILE: GENERAL OVERVIEW

### Consumption

- Chile leads the region in cigarette consumption with a *per capita* expenditure of US\$91.40 annually (4).
- Chile leads the region in women and adolescent smokers (5). Among the general population, 45% of men and 35% of women smoke (6).
- Consumption is estimated at a daily average of 8 cigarettes *per capita*, and the total number of smokers over age 18 is estimated at 4,500,000 (7).

### Impact

- Smoking-related deaths in Chile exceed 16,000 per year, and the economic impact on the medical system of tobacco-related death and disease is estimated to exceed US\$1.1 billion annually (8, 9).

### Regulatory Framework

- 1995: Law 19.419 on Matters Related to Tobacco Advertising and Consumption
- 2003: Law 19.884 on Electoral Spending
- 2005: Chile ratifies the Framework Convention on Tobacco Control
- 2006: Law 20.105 (modifies Law 19.419)
- 2008: FCTC Guidelines Art. 5.3.
- 2009: Law 20.285 on Public Transparency and Access to Information

### Taxes

- Tobacco is the top contributor to government tax revenues over the past ten years, contributing an estimated average of US\$800 million annually (10).
- Taxes on tobacco historically provide from 4% to 5% of the total income received by the government from taxes (11).

### Industry

- Market Distribution (12):
  - Chiletabacos 96%. Brands: Kent, Lucky Strike, Viceroy, Pall Mall, Belmont and Derby, in over 40 versions
  - Philip Morris: 1.5%. Brands: Marlboro and L&M
  - Tanasa: 2%
  - Others: 0.5%

### Trade

Chiletabacos faces a fine of US\$17 million by the *Fiscalía Nacional Económica* (FNE, National Economic Regulator) for offenses against free trade and failure to comply with a 2005 ruling by the *Tribunal de Defensa de la Libre Competencia* (TDLC, Free Trade Defense Court) concerning monopoly practices. Philip Morris has filed a US\$137.5 million suit against Chiletabacos seeking compensation for damages (13).

## **CHILETABACOS: 100 YEARS IN THE MARKET**

- Founded in 1909. In November 2009, as part of its marketing and repositioning strategy, Chiletobacos changed its name to British American Tobacco Chile.
- 96.53% is owned by British American Tobacco (BAT) (14). Between 2005 and 2007, Chiletobacos paid approximately US\$5 billion in taxes (15).
- Income after taxes, 2008: \$48 billion Chilean pesos, an increase of 3.8% over 2007 (16)
- Exports have increased by 40% over the last five years, especially to Peru, Colombia, Central America and Japan (17).

### **Chiletobacos' response to the question: "How can you be dedicated to the business of selling a product that damages people's health?" (18)**

"Cigarettes are a product whose consumption is legal and enjoyed by billions of adults worldwide. Our business is to provide high quality brands for our consumers.

"We believe in the individual's right to freedom of choice, and we support the right of adults who are informed of the health risks associated with smoking to choose to smoke or not. We believe that an informed adult's decision to enjoy the pleasures of smoking, balancing pleasures and the risks, deserves no more criticism than many other lifestyle decisions we all make.

"We understand the concerns regarding the products we manufacture and are working to conduct our business in the most responsible manner in an industry that is perceived by many as controversial.

"We share the community's desire to reduce the impact of smoking on health, and we are committed to working with governments and organizations to achieve this."

## CHILETABACOS BOARD OF DIRECTORS: WHO'S WHO

Chiletabacos Board of Directors is composed of business leaders and former government authorities from both the military regime and civilian administrations. Its political connections are wide-ranging and powerful, easily capable of access to regulatory and legislative bodies and even La Moneda (the Presidential offices). Its current members are:

- **Carlos Cáceres**, Board President

Businessman with graduate degrees from Cornell and Harvard universities. Member of the “Chicago Boys” advisory circle that designed the economic model adopted by Gen. Augusto Pinochet. Held the posts of State Council member, Central Bank President (1982), Finance Minister (1983-84) and Interior Minister (1988-1990) under the military government. Currently heads the *Instituto Libertad y Desarrollo*, think-tank of the *Unión Demócrata Independiente* (UDI) political party and policy home to Presidential candidate Sebastián Piñera. Cáceres is on the Board of Directors of the Pinochet Foundation, created in memory of the ex-dictator.

- **Roberto Guerrero del Río**, Vice President

Attorney. Senior partner in the Guerrero, Olivos, Novoa, Errázuriz law firm. Held numerous posts in the military government, including Legal Advisor to the Central Bank (1975 to 1979), Legal Advisor to the Monetary Council and Ministers of Finance and Economy, General Coordinator in charge of Chile's external debt restructuring and Acting Executive Secretary of the Foreign Investment Committee. Former Dean of Universidad Finis Terrae. Guerrero del Río has sat on the Boards of Directors of the Automóvil Club de Chile, Sociedad de Bibliófilos de Chile, North American-Chilean Chamber of Commerce (Amcham Chile), Icare, the Chilean Bar Association, and the International Bar Association.

- **Jorge Rodríguez Grossi**, Director

A member of the Christian Democrat party, he was appointed Acting President of Codelco following the market futures scandal in February 1994, at the end of the Patricio Aylwin administration, where he also held the posts of Deputy Minister of Housing and of Regional Development. Appointed Minister of Economy, Energy and Mining by President Ricardo Lagos in 2001. This appointment was considered controversial at the time, as Rodríguez Grossi had been recruited from a management position in a private entity (Guacolda Power) he had been responsible for regulating (19).

During his tenure as Economy Minister, the Ministry reviewed the 2006 Tobacco Control law. Immediately after leaving the Cabinet, at the close of the Lagos administration, Rodríguez Grossi joined the Board of Directors of Chiletobacos.

In 2007, President Michelle Bachelet appointed Rodríguez Grossi to the Board of Directors of the National Railroads Administration (EFE). He is Dean of the Economics and Business School of Universidad Alberto Hurtado.

• **Teodoro Ribera Neumann**, Director

Attorney. Member of the governing body of the *Renovación Nacional* political party. Former Congressional deputy (1990-1994 and 1994-1998) from Nueva Imperial and Puerto Saavedra; former Vice President of the Chamber of Deputies. Appointed to the Board of Directors of *Televisión Nacional* (TVN) by President Ricardo Lagos. Member, in 2005 and 2006, of the Constitutional Court, the court responsible for reviewing the text of the Tobacco Law prior to its decree. Appointed by President Michelle Bachelet to the Advisory Council of the Minister of Foreign Affairs. He also coordinates the Foreign Affairs Commission of *Grupos Tantauco*, the think-tank associated with Presidential candidate Sebastián Piñera.

• **Karen Poniachik**, Director

Former Minister of Mining, she is the most recent board member, joining in May 2009. Three months later, she became President of Chile Transparente, the Chilean chapter of Transparency International. Poniachik is Chile's special representative to the OCED, in charge of negotiating Chile's entry into that international institution. She sits on the Board of Terpel-Chile and is an advisor to the World Economic Forum.

## 2. NATIONAL LAWS AND FCTC NON-COMPLIANCE

In Chile, as elsewhere, the tobacco industry has had to adapt to new restrictions regulating the advertising, sale and use of its principal product: cigarettes.

The first legislative response to the increase in smokers and new information on the dangers of smoking was Law 19.419, adopted in 1995. Its provisions were weak, as it faced opposition from a powerful industry with enormous clout and engaged in covert actions (the Latin Project) to undermine greater controls and validate its position.

Years went by, and the numbers of smokers grew.

Once Chile signed the Framework Convention on Tobacco Control in 2003, the need to reform its 1995 law became imperative.

The subsequent debate over tobacco control began with an internal clash between the Ministries of Economy and Health and an impasse to Executive Branch approval of the FCTC for presentation to Congress. Commitments stipulated by the FCTC would establish precedents not only for the tobacco industry but for other industries producing products whose consumption is linked to health.

Several Congressmen played a key role in breaking this impasse by threatening to file a Constitutional demand against the Health Ministry for these delays. Once the treaty was presented to Congress, ratification took place in 2005. The Health Ministry immediately took advantage of the momentum to introduce a proposal for new national legislation to update the 1995 Law.

Ratification of the FCTC was the first advance in tobacco control in Chile over many years. Attempts in 1999 to persuade the Chilean government to sue U.S. tobacco companies had not succeeded. This was proposed by former Congressional deputy (Jorge Schaulsohn, currently linked to the campaign of Presidential candidate Sebastián Piñera) and a Health Minister (Alex Figueroa member of the health policy team of candidate, and former President, Eduardo Frei). The proposal collapsed under opposition within the Frei administration and the lobbying efforts of Enrique Correa, head of the consulting firm *Imaginación* and a former Cabinet minister. The idea of Chile taking legal action against the tobacco industry evaporated entirely once President Ricardo Lagos was elected.

The legislative process to enact a new tobacco law proceeded relatively quickly, despite the active role of Chiletabacos to curb the initiative and weaken its contents. Chiletabacos was up front about its Congressional lobbying efforts — with many Congressional representatives advocating the industry positions — and its support of allies like ACHIGA, (the Chilean Association of Restaurant Owners), which opposed the creation of smoke-free areas in restaurants and

hotels. The lobbying efforts were successful, as the new law contains confusing and partial mix regulations (partitioned areas for smokers in restaurants larger than 100 meters; smaller establishments can opt out of restrictions) that make enforcement difficult.

Law 20.105 was approved in 2005 and enacted in 2006 by President Michelle Bachelet.

A new legal skirmish over the law occurred in late 2008, when Chiletabacos and the Small Retailers Association sought clarification of the Health Ministry decree banning cigarette sales within a 100-meter radius of schools. The Health Ministry argued that the ban covers all school entrances, not only the main entrance. The Comptroller's Office ruled in favor of Chiletabacos and the cigarette retailers (20).

In September 2009, Senator Guido Girardi (who presides over the Senate Health Commission) proposed to "toughen up the current law" in three areas: increase the price of cigarettes by raising tobacco taxes; increase enforcement of the existing law; and ban cigarette "placement" and other forms of covert advertising and promotion. The legislative motion did not receive backing from the Executive Branch.

Several other proposals to amend the law have been proposed. One was an unsuccessful motion that would have circumvented efforts to enforce 100% smoke-free areas in restaurants and bars by allowing smoking during set hours. Another sought (and failed) to increase the number of health warnings on cigarette packs from the current single warning per year to six.

In May 2009, two initiatives were presented to the House of Representatives. One would increase the size of the health warnings on cigarette packs. The second would modify the Labor Code to protect employees working in establishments where tobacco is consumed.

Chile has gone from being one of the first countries in the region to modernize its tobacco control legislation to falling behind countries – including Uruguay, Panama, Guatemala and Colombia – that have declared themselves 100% Smoke Free.

In August 2009, the Health Ministry presented the media with its assessment of the impact of tobacco control law and policies since 2000 (21). According to the Ministry, smoking among teens had dropped from 42% to 35% – the only age group where smoking had decreased. The rest of the population showed no changes in smoking prevalence. Smoking among adult men remained at 40% and smoking among women had increased from 41% to 42% since 2005. Cigarette sales, at 14 billion per year, had not decreased.

These results highlight the fact that Chile is not in full compliance with its FCTC commitments, especially 100% smoke-free areas, smoking prevention efforts and regulation of tobacco industry interference. Chile has not met its own national goals to reduce its smoking prevalence rates, which are among the highest in the region.

### **3. FCTC ARTICLE 5.3: HOW TO REGULATE THE INDUSTRY**

FCTC Article 5.3 requires ratifying countries to protect health policies from interference by the tobacco industry. In November 2008, FCTC signatories unanimously adopted new guidelines with recommendations for governments. Principle 1 of these guidelines stressed the “fundamental and irreconcilable conflict between the tobacco industry’s interests and public health policy interests.” (22)

The guidelines stipulate the following measures, among others, for transparency:

- Interactions between government and tobacco industry must include public hearings, public announcements about interactions and disclosure of records.
- Full disclosure of tobacco industry activities (including production, manufacturing, market participation, earnings, advertising expenditure, philanthropy) subject to fines for false or deceptive information.
- Disclosure or registration of entities affiliated with the tobacco industry, including political pressure groups.
- Applicants to public health-related government posts must present a statement detailing all current or previous posts or jobs held in tobacco industry. Former public health officials must disclose any plans to work in the tobacco industry.

The guidelines stipulate the following recommendations:

- No alliances or non-binding/non-obligatory agreements between the tobacco industry and government.
- No tobacco industry contributions to government.
- No laws or policies written by the tobacco industry, and no voluntary tobacco industry codes to replace legally binding measures.
- No tobacco industry representation on the public bodies that regulate tobacco or on national delegations to the FCTC.

#### **4. NATIONAL REGULATORY FRAMEWORK**

In recent years, Chile has enacted regulations to make public administration more transparent and to regulate financial contributions that could influence the electoral process. But important legislative initiatives are still pending in the areas of lobbying and the practice known as the “revolving door.” While the current electoral campaign associates the term “revolving door” with the ease with which criminals leave jail, it also describes the situation in which government officials or regulators leave office and are hired by the private companies previously under their regulatory jurisdictions (23).

##### **•Financing of political campaigns: Law 19.884 on Electoral Spending (2003)**

One reason to regulate electoral spending is the risk that contributions from individuals and companies could influence public policies and produce special privileges for those who finance campaigns.

According to “Political Financing in Chile,” a report by Chile Transparente (the Chilean chapter of Transparency International), the law aims to “generate equality of opportunities in elections; protect levels of transparency and accountability regarding the origin and allocation of public and private funds; prevent influence-trafficking and political corruption; prevent the entry of monies from organized crime, and particularly drug trafficking, into the political arena.” (24)

Nonetheless, the law allows for contributions of millions of pesos that cannot be traced. More than guaranteeing the transparency of donations, the law hides the provenance of financial contributions from the electorate and, to a certain degree, from the candidate.

The decision to contribute money to an election is not always made solely by the company owner. Companies may decide to contribute to one or several campaigns under instructions from governing boards. The most common mechanism is the “collection officer” who meets with campaign teams to discuss financing agreements. Some companies spread political contributions among opposing candidates, proportionate to votes obtained in past elections.

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**CHILETABACOS: BAT ALLOWS IT, BUT WE DON'T DO IT**

Chiletabacos "Public Contributions Policy" states that the standards of parent company British American Tobacco establish "strict controls, transparency policies and the exceptional conditions in which contributions can be made to political parties and organizations, their representatives, elected politicians and candidates." (25)

BAT affiliates "can make contributions to political parties and organizations, their elected political representatives and candidates as long as these payments are made solely with the purpose of influencing the debate on topics affecting the company or Group, and not to achieve improper commercial or other advantages (i.e. securing a government contract) or the personal benefit of the recipient, family, friends, associates or acquaintances, as permitted by law." (26)

Standards also establish that donations must be authorized by the Board of Directors, documented and publicly registered, if required by law.

The policy for Chile, however, differs from BAT's global policy: "In Chile, however, the internal policy of our company, permanently ratified by the Board of Directors, is not to make donations or contributions under any circumstances to entities and/or political parties and/or their representatives." (27)

Chiletabacos advises its officials not to become involved in political activities that might be construed as company decisions. In the event that Chiletabacos officials do participate in political activities, these must take place on their own time and with their own resources.

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**Verification**

Diverse mechanisms make it difficult to trace the source of monies financing electoral campaigns. Contributions are deposited to an account maintained by the Electoral Service (SERVEL). Once the deposit is credited, SERVEL issues an electronic certificate that shows only the amount of the contribution, not the identity of the contributor. The donor can distribute funds to one or more candidates using a system of electronic passwords.

Existing norms do not preclude donors from making contact with candidates or reaching agreements before contributing funds.

A look at the financing of previous electoral campaigns illustrates how the law works. Recent articles by *CIPER Chile* (28) and *El Mercurio* (29) examine \$1.5 billion pesos in "confidential contributions" to President Michelle Bachelet, the largest recipient of political contributions in the 2005/2006 elections (first and

second rounds). SERVEL indicates a total of 237 distributions, but the total number of contributors could be fewer, since each contributor can make numerous donations.

In contrast to Chile's system, other countries have rules that allow contributions to be traced to the last detail. One example is the Open Secrets website (30) on US electoral contributions. The level of transparency reveals robust tobacco industry support for the Republican Party, reaching US\$10 million in campaign contributions in 1996 but dropping to US\$4 million in 2008 elections. Details revealed include the names of donating companies, amounts and recipients, and whether funds have been donated from companies or employees (31).

## WHAT THE LAW SAYS

Article 8 of Law 19.884 defines private financing of electoral campaigns as “all contributions of money or its equivalent made to a candidate or political party, either as *mutuo*, donation, *commodato* or free act or contract for the purpose of financing electoral spending.” (32)

The maximum allowable individual donation is determined by the type of candidacy: 1,000 *Unidades de Fomento* (UF, a fixed monetary unit adjusted to inflation) for the post of mayor; 1,250 UF for Congressional deputy or senator; and 2,000 UF for President. The maximum amount an individual or institution can donate is 10,000 UF. (As of Nov. 8, 2009, 1000 UF was equivalent to CHP\$20,997,000)

Article 16 details the mechanisms that make it extremely difficult to determine the source of campaign donations by creating three categories of donations: anonymous, confidential and public.

- “Anonymous” donations cannot exceed 20 UF. Article 17 leaves it to the discretion of the donor whether or not to disclose his/her identity and the amount of the contribution, stating: “any contributor may request the identity and sum of the contribution be provided.” During the campaign periods, anonymous contributions cannot exceed 20% of the total electoral spending defined by law.
- “Confidential” contributions range from 20 UF to 1,500 UF if given directly to a candidate, and up to 3,000 UF if given to a political party or slate of candidates. Article 18 allows businesses to make untraceable donations to Presidential candidates, leaving “provision of the identity and the amount of the contribution” to donor discretion.
- “Public” contributions are monthly sums donated to political parties outside the electoral period, in amounts equal to or greater than 100 UF per donor. Contributions between 20 UF and 100 UF are confidential. Political parties must report these donations on a monthly basis.

## **Secret Procedure**

Campaign donations go to an account maintained by SERVEL. Once a deposit is credited, SERVEL issues a certificate specifying the amount of the deposit but not the identity of the donor. The donor distributes the contribution to one or more candidates using a system of electronic transfers.

Donors can create a special power of attorney authorizing a third party to carry out the transfer to SERVEL, making it even more difficult to trace donor identity. This mechanism is the only one open to certain types of legal entities.

The system of electronic transfers created by SERVEL “must ensure both the confidentiality of donor identity and guarantee that the donor receive no document whatsoever that would permit identification of the donation to the recipient or third parties.”

### **•Law 20.285: Public Transparency and Access to Information (2009)**

The Law of Public Transparency and Access to Information went into effect in April 2009. It requires the State to make public disclosure of all information concerning the salaries, contracts and benefits received by public employees, and the details of public purchases, goods and services. All public entities must maintain updated information on their websites on administrative structure, payroll, salaries, powers and duties.

The public can request information through websites or a written request. All queries to public entities must be answered within 20 working days, which can be extended in justifiable cases for an additional 20 working days.

The law creates the Transparency Council to guarantee compliance (33). This Council examines unresolved requests to public entities and complaints arising from the procedure.

The Board of the Transparency Council is made up of four counselors appointed by the President of the Republic. Current sitting on the Board of the Transparency Council are: Alejandro Ferreiro, Juan Pablo Olmedo, Raúl Urrutia and Roberto Guerrero Valenzuela. The latter is a member of the Guerrero, Olivos, Novoa, Errázuriz law firm, along with Roberto Guerrero del Río, who is Vice President of Chiletobacos Board of Directors (34).

### **• Transparency in Lobbying: Unfinished Business**

One issue not covered by Law 20.285 on Public Transparency and Access to Information is regulation of the practice known as lobbying.

A proposal to regulate lobbying was submitted to Congress on November 5, 2003 during the administration of President Ricardo Lagos.

After working its way slowly through the legislative process, in 2008 the lobbying law – which involves the new Transparency Council – was placed on standby by President Bachelet, pending enactment of Law 20.285 creating the new transparency institution. (As noted above, this occurred in 2009).

The proposal stipulates creation of a registry of lobbyists to be monitored by the Transparency Council (and not by the Ministry of Justice, as initially proposed). It prohibits government officials holding “positions of trust” to the President from acting as lobbyists. Statements or information provided to Congress by these officials will not be considered lobbying but must be registered.

In short, Chile still lacks a law regulating lobbying or the registration of lobbyists. No standards regulate the “revolving door” between government regulator and regulated private enterprise.

Many lobbyists now working for the tobacco industry in Chile were once high-ranking government officials. The most well-known is Enrique Correa, a former Cabinet minister whose clients include Chiletabacos, pharmaceutical companies, the Luksic Group and mining interests.

One example of the speed of the “revolving door” between government and industry is that of Jorge Rodríguez Grossi. In 2006, Rodríguez Grossi went directly from his post as the head of a ministry involved in the discussion of the 2006 Tobacco Control law to the Board of Directors of Chiletabacos.

## 5. MONOPOLY PRACTICES TRIGGER A DISPUTE BETWEEN GIANTS

Where the regulatory framework does appear to be functioning, albeit late, is in regards to anti-monopoly practices and defense of unfettered competition.

Chiletabacos has dominated the national tobacco market with little competition for 100 years. Attempts by Philip Morris International (PMI) to garner a bigger share of the market sparked a legal battle and a tough ruling by Chile's anti-trust bodies.

In November 2009, the *Fiscalía Nacional Económica* (FNE) requested the maximum fine permitted by law (some US\$17 million) against Chiletabacos for violation of anti-monopoly regulations. The FNE cites the company's repeated failures to comply with a 2005 ruling by the *Tribunal de Defensa de la Libre Competencia* (TDLC, Free Competition Defense Court), a ruling that was upheld by the Supreme Court in 2006.

In July 2009, Philip Morris sued Chiletabacos in the 10th Civil Court of Santiago, seeking US\$127.5 million in compensation for damages. Philip Morris claims that Chiletabacos' monopoly practices have deprived it of earnings similar to this amount by obstructing its access to the local market. Chiletabacos states that its rival is "opportunistically" seeking to enrich itself, arguing that Philip Morris' share of the market has hovered between 1.4% and 3.3% between 2002 and 2009, and could never have reached the 25% share that Phillip Morris claims (35).

PMI claims that Chiletabacos employs extremely restrictive policies with retail distributors, limiting their access to credit and refusing to supply cigarettes if they sell Philip Morris brands. (36).

According to the TDLC ruling, Chiletabacos was successful in getting retailers to withdraw Philip Morris' products and marketing materials in exchange for its own. Chiletabacos also established exclusive sales contracts and paid incentives to retailers for not selling or displaying Philip Morris products (37).

In January 2006, the Supreme Court confirmed the TDLC ruling of August 5, 2005, admitting Philip Morris' complaints on imposition of barriers to the entry of a new competitor (38).

The FNE ruling states that, although Chiletabacos has made some progress in complying with 2005 TDLC ruling, serious offenses continue to occur. The FNE provided the TDLC with confidential statements from two witnesses and 49 sworn statements in which retailers agreed to exclusive sales and advertising contracts with Chiletabacos, including the banning of competitor brands and publicity, in exchange for monetary compensation (39).

## **6. TRANSPARENCY AND CORPORATE SOCIAL RESPONSIBILITY**

“Companies are social agents that face complex (situations) and also make mistakes. Society is interested in our disclosures about our contributions, which we must improve and communicate openly so that society can judge.” This explanation of how to manage the public image of a company that sells a “controversial” product comes from Carlos López, Chiletabacos corporate affairs manager (40).

### **Chile Transparente and Chiletabacos**

It should come as no surprise that Chiletabacos is a Collaborating Member of Chile Transparente -- one of eight such collaborators whose contributions range from 600 to 2,500 UF. (41)

Chile Transparente, an NGO created in 2003, is the Chilean chapter of Transparency International. According to its website, its mission is to “fight corruption from a comprehensive perspective, create awareness of the benefits of transparency in public and private organizations, and disclose the economic and social costs of corruption. (It) develops projects to position the values of transparency and probity and creates tools and practices to foster improved levels of integrity and citizens access to information.” (42)

President of the Chile Transparente Board of Directors is Karen Poniachik, who accepted this position in August 2009, four months after joining the Board of Directors of Chiletabacos.

Two former Chiletabacos’ board members are also associated of Chile Transparente: Alberto Etchegary and Carlos Hurtado Ruiz-Tagle. The latter is a former Cabinet member (of Housing and of Public Works, in the Aylwin administration). Hurtado was replaced on the Chiletabacos board by Poniachik.

Chile Transparente’s work “is an important benchmark for Chiletabacos,” tobacco company spokesman López stated when announcing Chiletabacos’ incorporation as a Collaborating Member. “We deal in a controversial product with a series of associated risks. Our relationship with society must take place in a context of total transparency, dialogue and openness. Transparency is a central focus of our company’s actions and business model,” he stated.

### **Corporate Social Responsibility: Actions and Sponsorships**

Following the guidelines of parent company British American Tobacco (whose global policy of corporate social responsibility has been widely questioned) (43), Chiletabacos has perfected its own corporate social responsibility (CSR) discourse. The company presents itself as a model firm, committed to the environment, its employees and the community – and unconnected to the

dangerous product it sells. In 2007 Chiletabacos received the *RSE Acción* (CSR Action) prize for its “Dialogue with Stakeholders” and sustainability report. In September 2008, Chiletabacos was a Platinum Sponsor of the 8th International Corporate Social Responsibility Meeting.

Many of Chiletabacos’ philanthropic and sponsorship activities were eliminated by the ban on advertising, promotion and sponsorship in the 2006 Tobacco Control law. However, several organizations still enjoy this relationship.

In June 2009, Chiletabacos collaborated with students from the Universidad Federico Santa María in their “*Tú manejas tu carrete*” (“Take the Wheel Over Partying”) campaign. The idea came from engineering students concerned about drinking and driving and set up a designated driver plan with local bars. It is ironic that the tobacco company – whose product will eventually kill many of its users – would sponsor a public safety campaign against another product (alcohol) with similarly fatal consequences (44).

Another example of the tobacco company’s erstwhile defense of the health of consumers whom their product is actually harming comes from another favorite target of cigarette marketing: women. Employing the same astuteness with which its advertising campaigns interpreted modern women's yearning for autonomy, Chiletabacos sponsors the *ComunidadMujer* Mentoring Program for women entrepreneurs (45).

The activities of rival Philip Morris deserve a special mention in this regard. In Costa Rica and the Dominican Republic, where PMI seeks to increase its market share and avoid greater regulation, Philip Morris finances shelters for battered women and victims of domestic violence (46).

Another example of the Chiletabacos’ strategic use of sponsorships is its support of Chile’s Economic Forum of the Association of Economic and Financial Journalists (AIPEF) (47). AIPEF held its annual forum in September 2009 with tobacco company sponsorship. The main speaker was the head of the Economy Ministry’s Economic Development Division, who spoke on “Regulation and Transparency: Effects on the Free Market.”

The goal of these actions is to position Chiletabacos as a valid spokesman for all issues that concern its product. The company deals with controversy by transferring this controversy to the product it produces and thus absolving from criticism the company that produces and markets the product. With considerable subtlety, Chiletabacos has positioned itself as a responsible corporate citizen, open to dialogue and open to seek solutions to any concern.

A recent example of this strategy comes from a survey of company reputations published in 2008 in *¿Qué Pasa?* magazine. Conducted by the Reputation Institute and the Universidad Católica School of Communications, the survey

commends Chiletabacos for improving its reputation after the "punished position" it found itself in 2006 following implementation of the Tobacco Control Law. According to William Pullen, Director of the Reputation Institute, Chiletabacos' reputation experienced this singular recovery during 2007 and 2008 when "the Tobacco Law and subsequent public awareness on the subject of cigarettes produced changes in user perceptions and habits ... People have adapted and a kind of positive accommodation between smokers and non-smokers has taken place. This is a *change in behaviors fostered by the company* [Editor's Note: emphasis added] that has harmonized relations between them." (48)

## 7. MEDIA: TAKE ANOTHER LOOK

The media played a key role during the FCTC ratification process and passage of the 2006 Tobacco Control law. The first detailed analysis of Chiletabacos' strategies to avoid regulation was prepared in 2004 for the Pan American Health Organization's "Channeling Indignation" program. (49) The report disclosed Chiletabacos' links within the local business-political elite and its succulent donations to academic centers, cultural groups and other strategic actors in its pursuit of favorable public opinion and support.

This material was the basis of a TV documentary entitled "Curtain of Smoke" (*Contacto*, Channel 13) that revealed previously unreported Latino Project initiatives with local scientists to alter studies on the impact of second-hand tobacco smoke. The segment on former President (and current Presidential candidate) Eduardo Frei, who vetoed an increase in tobacco taxes that would have financed health sector reforms, led Frei to threaten the reporter with legal action (which never materialized).

Throughout 2005 and 2006, media contributed to debates on the proposed tobacco law by reporting on Chiletabacos' actions, allies and campaigns to minimize regulations it could no longer hope to avoid. The media was decisive in providing objective information required to build public support. But this reporting effort was met by Chiletabacos with unfounded accusations, veiled threats and maneuvers that culminated in the firing of a respected journalist on the tobacco control beat.

Since then, interest in the tobacco industry and its impact on public health policy has faded. Headlines covering Chiletabacos legal battles and the rulings of the nation's economic authorities fail to transcend the financial pages. Coverage of the disappointing impacts of 2006 Tobacco Control law and high smoking prevalence rates do not reflect on the economic side of these issues. Participation by Chilean journalists and researchers in national and international training workshops on smoke-free environments, cigarette smuggling and the tobacco industry should spark greater attention to these issues. This report aims to contribute to their efforts.

## 8. COMING UP: NEW PRODUCTS

New alternatives to conventional cigarettes — electronic cigarettes, snus (a form of chewing tobacco), nicotine gum and lozenges — challenge the effectiveness of Chile's tobacco control legislation to protect consumer health. These non-combustible products produce the same sensation as smoking by delivering nicotine, a highly addictive drug, in a smokeless form.

These products fall into a grey area of Chile's tobacco law. The law regulates products made with tobacco, understood as “any product that contains or is prepared totally or in part by using tobacco leaves as raw material.” Products without tobacco leaves (but containing nicotine, such as nicotine lozenges) may not be subject to existing advertising bans and could eventually be available to minors under the existing law. Smokeless tobacco products also skirt bans on second-hand tobacco smoke, despite the possible health risks they may present.

The tobacco industry's two most promising products for the Chilean market are electronic cigarettes and snus.

### •Electronic Cigarettes

The electronic cigarette called Free Smoke is now available in Chile. On September 25, distributors opened a stand in the Parque Arauco shopping mall to offer sample smokes, kits and rechargeable cartridges. The device, marketed with and without nicotine cartridges, is promoted as a smokeless device free of carcinogenic agents with no risk to health. The company is offering franchise opportunities in Viña del Mar, La Serena, Concepción and Calama (50).

### •Snus

In an extensive interview from London published in *El Mercurio* on November 16, Paul Adams, Chief Executive Officer of British American Tobacco, announced the company's next big wager for Chile: snus, a small paper bag of tobacco placed under the upper lip. “We're already doing market testing in Canada, South Africa and Sweden, where snus are well-accepted,” said Adams, “although I must be cautious on this point, because, when all is said and done, tobacco is tobacco.” The company sees these “less harmful” cigarettes and smokeless products as business opportunities that authorities and consumers will accept (51).

Snus are not yet available for purchase in Chile (except via internet). But everything indicates that they will not be long in coming. In May, academics and representatives of various health-related institutions received the following invitation to meeting at the trade offices of the Swedish Embassy:

*“Eugenio Astete Guzmán, Dean of the School of Government, Universidad del Desarrollo, and Carlos López Arancet, Manager of Chiletobacos Corporate Affairs, are pleased to greet you and invite you to a breakfast meeting of academic analysis with two important international researchers, Carl V. Phillips, MPP, PhD. and Brad K. Rodu, DDS, who will present the latest advances in non-combustible tobacco products, with special emphasis on the Swedish experience. Our objective in this private meeting is to share this information with a select group of representatives of the national medical, scientific and public policy communities in order to conduct a critical and open analysis of these new products.”*

What are these “important international researchers” promoting? Carl Phillips has a website in which he claims that the health dangers of tobacco are produced not by nicotine but by cigarette smoke (52). Researcher Brad Rodu has studied the decrease in tobacco use among Swedish students who have taken up snus (53).

## 9. CONCLUSIONS AND RECOMMENDATIONS

Chile's continued high smoking prevalence rates, failure to implement existing legislation, and inadequate compliance with FCTC commitments will generate debate in 2010.

EPES' survey "Clearing the Air on Tobacco Control Policies and the Tobacco Industry" outlines the tobacco control proposals of the Presidential candidates whose platforms will shape future policies.

Political will in the health policy, legislative and regulatory arenas are required if Chile is to achieve the health goals it seeks. The incoming Congress, President and Ministerial Cabinet must take decisions on the multiple dimensions of this tobacco epidemic and the corporate interests behind it. Issues to be addressed include:

### **Reforms to Law No. 20.105 and other relevant regulations:**

- Legislate 100% smoke-free areas to protect against second-hand smoke, especially in public spaces and work environments.
- Enforce total bans on tobacco advertising, promotion and sponsorship.
- Increase the number of health warnings on cigarette packages and implement additional information measures, especially prevention campaigns and programs aimed at students and women.
- Update legislation on smoke free tobacco and nicotine products.
- Monitor tobacco industry of compliance of anti-monopoly rulings issued by the economic authorities.

### **FCTC Implementation:**

- Regulate the lobbying activities of the tobacco industry:
  - Make the system of financial contributions to electoral campaigns, political parties and candidates more transparent, especially in regards to the tobacco industry Art. 5.3).
  - Register the lobbyists, affiliates and pressure groups that represent or act on behalf of the tobacco industry (Art. 5.3).
  - Regulate the "revolving door" between tobacco industry representatives and the government (where former government officials take posts in private industries previously under their regulatory oversight) (Art. 5.3).

- Increase tobacco taxes (Art. 6).
- Support the development of the FCTC Protocol on Illicit Trade in Tobacco Products and its eventual adoption and ratification by Chile (Art. 15).
- Offer cessation programs to all smokers (Art. 14).

## **A FINAL WORD**

When the current tobacco law went into force in 2006, President Michelle Bachelet said: "this law is much more than a list of prohibitions. It seeks to promote respect amongst us all."

Experience has proven her right regarding the basic role that respect plays in the lives of smokers and non-smokers living together. But when it comes to dealing with one of the country's most powerful companies, representative of one of the world's most discredited industries, neither respect nor prohibitions are sufficient. To protect Chile and Chileans from the harm caused by tobacco consumption and the interests of the tobacco industry, it is necessary to look beyond the smoke, expose the ties that tarnish transparency, and establish effective and verifiable limits that will safeguard public health and public health policies.

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