



# PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN ARGENTINA

December 2014

This Phase 3 Report on Argentina by the OECD Working Group on Bribery evaluates and makes recommendations on Argentina's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 11 December 2014.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

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## EXECUTIVE SUMMARY

The Phase 3 report on Argentina by the OECD Working Group on Bribery evaluates and makes recommendations to Argentina on its implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report considers country-specific (vertical) issues arising from changes in Argentina's legislative and institutional framework, as well as progress made since Argentina's Phase 2 evaluation in June 2008. The report also focuses on key Group-wide (horizontal) issues, particularly enforcement. The report concludes that Argentina is seriously non-compliant with key articles the Convention. Moreover, judges and prosecutors in charge of actual foreign bribery cases did not attend the on-site visit. The Working Group therefore could not fully assess Argentina's foreign bribery enforcement efforts. Argentina is accordingly required to undergo a supplemental Phase 3*bis* evaluation by the end of 2016. The Working Group will also conduct a high-level mission to Argentina in early 2016.

The Working Group is gravely concerned about Argentina's commitment to fight foreign bribery and how little progress Argentina has made since previous evaluations. Argentina has not implemented the Working Group's longstanding Recommendations since 2001 to introduce corporate liability for foreign bribery, provide nationality jurisdiction to prosecute this crime, and rectify several shortcomings in its foreign bribery offence. Systemic deficiencies in Argentina's criminal justice system identified in Phase 2 persist. Widespread delays in economic crime cases continue to plague the criminal justice system. Judicial investigations were opened in several of the ten foreign bribery allegations concerning Argentine individuals and companies. However, these investigations have progressed very slowly. In several instances, Argentine authorities did not proactively investigate or seek the co-operation of foreign authorities.

The Working Group is also concerned about judicial independence and Argentina's ability to detect and report foreign bribery. As in Phase 2, there have been examples of executive contact with judges and prosecutors in specific cases, and the use of disciplinary processes to pressure judges and prosecutors. The number of judicial vacancies and surrogate judges remains extraordinarily high. Argentine law enforcement authorities have not reacted promptly to foreign bribery allegations reported in the media. Inconsistent and convoluted rules hinder and delay the reporting of crime by public officials. Few Argentine companies have anti-foreign bribery measures beyond limited codes of ethics. Argentina has not adopted appropriate measures to protect whistleblowers in both the public and private sectors from discriminatory or disciplinary action. The government has not made sufficient efforts to raise awareness of the foreign bribery offence.

The Working Group acknowledges some efforts made by Argentina. Just before the adoption of this report, a new Criminal Procedure Code was enacted though it has yet to be implemented or evaluated by the Working Group. Steps have been taken to amend the Penal Code and Income Tax Law. The timeframe for completion is uncertain, however. Specialised prosecutorial units were recently created to support investigative judges and prosecutors in economic crime cases and asset recovery. The courts recently decided to establish a group of experts to support corruption cases. Further specialisation and additional resources would nevertheless be beneficial. Improvements have been made to the reporting of suspicious money laundering transactions and with the adoption of IFRS and ISA, especially for listed companies.

The report and its recommendations reflect findings of experts from Spain and the Slovak Republic and were adopted by the Working Group on 12 December 2014. The report is based on legislation and other materials provided by Argentina, and research conducted by the evaluation team. It is also based on information obtained by the evaluation team during its on-site visit to Buenos Aires on 10-12 June 2014, during which the team met with representatives of Argentina's public and private sectors, legislature, judiciary, civil society, and media. Within six months and one year of the Working Group's approval of

this report, Argentina will make an oral follow-up report on its implementation of certain recommendations. It will further submit a written report on the implementation of all recommendations within two years. The written report will form part of Argentina's Phase *3bis* evaluation.

## A. INTRODUCTION

### 1. The On-Site Visit

1. On 10-12 June 2014, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (Working Group) visited Buenos Aires as part of the Phase 3 evaluation of Argentina's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention); 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation); and 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

2. The evaluation team was composed of lead examiners (Spain and Slovak Republic) and the OECD Secretariat.<sup>1</sup> Before the on-site visit, Argentina responded to the Phase 3 Questionnaire and supplementary questions, and provided relevant legislation and documents. The evaluation team also referred to publicly available information. During the on-site visit, the evaluation team met representatives of the Argentine public and private sectors, judiciary, parliamentarians, civil society, and media. (See Annex 2 for a list of participants.) Argentine officials absented themselves from panels with the private sector, civil society, lawyers and academics.<sup>2</sup> The evaluation team expresses its appreciation to all participants for their openness during the discussions and to Argentina for its co-operation throughout the evaluation.

3. The evaluation team requested but unfortunately did not meet prosecutors and investigative judges who conducted actual foreign bribery cases. On repeated occasions before the on-site visit, the evaluation team requested a meeting with these prosecutors and judges. The Argentine authorities stated that they invited these officials to the on-site visit well in advance and sent subsequent reminders, but none of them could attend because of professional and personal commitments. Instead, Argentina was represented by several prosecutors, trial judges and a single investigative judge who had experience in cases of economic crime but not foreign bribery. As explained below at p. 25, the absence of prosecutors and investigative judges involved in actual foreign bribery cases prevented the evaluation team from assessing Argentina's efforts in investigating and prosecuting actual foreign bribery cases. It also precluded the Working Group from exploring how the legislative and systemic criminal justice issues identified in this report impacted actual foreign bribery cases. Accordingly, the evaluation team was unable to fully assess Argentina's implementation of the Convention.

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<sup>1</sup> Spain was represented by Mr. Juan B. Delgado Cánovas, Senior Judge, Spanish General Council of the Judiciary; and Mr. Manuel Toledano Torres, Chief, Area of Normalization and Accounting Technique, Accounting and Auditing Institute, Subdirection General for Normalization and Accounting Technique. Slovak Republic was represented by Mr. Vladimír Turan, Prosecutor, Head of Section, Fight against Organised Crime, Terrorism and International Crime, Office of the Special Prosecutor, General Prosecutor's Office. Dr. Barbora Bowers, Advisor, International Public Law Department, Ministry of Justice attended the on-site visit and assisted in the preparation of this report. Ms. Alexandra Kapišovská, General State Advisor, International Law Department, Ministry of Justice, took part in the Working Group meeting to discuss and adopt this report. The OECD Secretariat was represented by Mr. William Loo, Ms. Leah Ambler and Ms. Sophie Wernert, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

<sup>2</sup> See paragraph 26 of the [Phase 3 Procedure](#), which provides that an evaluated country may attend, but should not intervene, in non-government panels.

## **2. Summary of the Monitoring Steps Leading to Phase 3**

4. The Working Group previously evaluated Argentina in Phase 1 (September 2001), Phase 2 (June 2008) and the Phase 2 Written Follow-Up Report (September 2010). As of September 2010, Argentina had fully implemented 10 out of 29 Phase 2 Recommendations (see Annex 1 at p. 69). The Phase 2 Report (paras. 277-278) contemplated supplementary Phase 1bis and Phase 2bis evaluations of matters that caused serious concern to the Working Group, namely the absence of corporate liability and nationality jurisdiction, as well as institutional reforms and severe shortcomings in criminal procedure. As explained in this report, these major deficiencies remain largely unrectified, but the Working Group has yet to consider whether to conduct supplementary evaluations.

## **3. Outline of the Report**

5. This report is structured as follows. Part B examines Argentina's efforts to implement and enforce the Convention and the 2009 Recommendations, having regard to Group-wide and country-specific issues. Particular attention is paid to enforcement efforts and results, and weaknesses identified in previous evaluations. Part C sets out the Working Group's recommendations and issues for follow-up.

## **4. Economic Background**

6. Argentina is a G20 member and the third largest economy in Latin America. In 2013, it was the 21<sup>st</sup> largest economy among the 41 Working Group members. It ranked 29<sup>th</sup> and 30<sup>th</sup> in exports and imports of merchandise and services in the Working Group. The main export destinations were Brazil (21%), China (7%), US (5%), Chile (5%), and Venezuela (3%). Agricultural products and animal feed were by far the most significant exports. Argentina is one of the founding members of the Mercosur free trade agreement that consists of five other South American countries. In 2013, Argentina had the 32<sup>nd</sup> largest outward stock of foreign direct investment among Working Group members.<sup>3</sup>

## **5. Cases Involving Bribery of Foreign Public Officials**

7. Since Argentina became a Party to the Convention in 2001, ten allegations of Argentine individuals or companies bribing foreign officials have surfaced. Three of the allegations are under investigation. An investigation into one allegation was not opened because of a lack of information. Investigations into two allegations ended without charges. A seventh allegation was determined not to involve foreign bribery but other offences after an investigation. Two allegations that potentially involve foreign bribery were reported after the on-site visit; at the time of this report, it remains unconfirmed whether these cases involve foreign bribery. The tenth allegation surfaced days before this report was adopted. Case names in this report are anonymised at Argentina's request.

8. Of substantial concern is that the evaluation team could not meet the Argentine prosecutors and investigative judges who investigated these allegations. The discussion of the cases in this report is thus based on information in media reports, Argentina's questionnaire responses, and discussions with the international co-operation department of the Ministry of Foreign Affairs and Worship (MFA). Officials from the Ministry of Justice and Human Rights and the Public Prosecutor's Office also took part in the discussion, but they did not have direct knowledge about the investigations in question. The evaluation team also received a written summary with voluminous annexes about one case from an investigative judge

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<sup>3</sup> Source: International Monetary Fund World Economic Outlook Database (April 2014); World Trade Organisation; UNCTADStat; *Instituto Nacional de Estadística y Censos* (13 February 2014), "Argentine Foreign Trade Statistics". GDP at current prices.

at the end of the on-site visit. The delay in providing the material and the judge's absence from the on-site visit precluded a meaningful discussion of the case during the visit. As further explained at p. 25, the available information raised many issues about several of the foreign bribery cases which regrettably could not be discussed and clarified with the prosecutors and judges who were responsible for the investigations.

**(a) Terminated Foreign Bribery Cases**

9. *Case #1 – River Dredging:* The *Comisión Administradora del Río de la Plata* (CARP) was created by treaty between Argentina and Uruguay in 1973. Its purpose is to regulate and manage issues regarding the river Rio de la Plata and which involve these two countries. The Commission consists of government officials from Argentina and Uruguay. According to media reports,<sup>4</sup> CARP had contracted a Uruguayan Company R to dredge a canal in the Rio de la Plata area since 1991. As the contract neared its expiration in 2012, an Argentine CARP member allegedly offered a Uruguayan CARP member a bribe on behalf of Company R to facilitate the contract's renewal. The bribe was allegedly offered in Buenos Aires. The allegations triggered a diplomatic row between the two countries.

10. At the on-site visit, Argentine government officials – not the investigative judge or prosecutor in the case – stated that the investigation of the alleged bribe-payer had been terminated in May 2014 because of a lack of co-operation from Uruguay. Argentina had opened an investigation in May 2012 after receiving complaints from two Parliamentarians. Four MLA requests were sent to Uruguay, two of which were refused. A further MLA request to a third country seeking the testimony of the Uruguayan CARP member was denied because the official claimed diplomatic immunity.

11. A media report<sup>5</sup> – but not Argentina's questionnaire responses – described an earlier attempt to terminate the investigation. The investigative judge reportedly closed the case in December 2012 partly because of the principle of double jeopardy due to an on-going investigation in Uruguay. This seems unusual, since the Uruguayan investigation appeared to target Company R and not the alleged Argentine bribe-payer. After reviewing a draft of this report, Argentine officials stated that the principle of *non bis in idem* in Argentina applies to investigations. Unfortunately, the evaluation team was unable to discuss this and other issues with the investigative judge and the prosecutor in the case as they did not attend the on-site visit. The decision to close the case was eventually overturned by the Federal Court of Appeals.

12. *Case #2 – Power Project (Philippines):* According to media reports,<sup>6</sup> Argentine Company M allegedly paid a USD 2 million bribe to the Philippine Secretary of Justice to win a USD 470 million power complex contract. The bribe was allegedly paid through an intermediary J. The money transited through bank accounts in Switzerland, Hong Kong, and the Cayman Islands. The intermediary J later stated publicly that he had paid the Secretary of Justice USD 2 million to avoid having to testify against a former president in a corruption inquiry. In other words, the payment was not a bribe on behalf of Company M. The Secretary of Justice was later charged with extortion in 2007.

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<sup>4</sup> [El Observador](#) (5 May 2012); [Ambito Financiero](#) (12 May 2012); [La Nación](#) (25 July 2012); [MercoPress](#) (7 August 2012); [El Observador](#) (7 August 2012); [Siglo21](#) (10 August 2012); [El Observador](#) (29 December 2013); [Complaint of Graciela Ocaña and Manuel Garrido](#) (12 June 2014); [La Nación](#) (11 July 2014).

<sup>5</sup> [Punta del Este News](#) (15 December 2012).

<sup>6</sup> [Philippine Center for Investigative Journalism](#) (2-3 April 2001); [Philippine Star](#) (16 January 2003); [La Nación](#) (15 January 2003); [Philippine Center for Investigative Journalism](#) (2 July 2005); [GMA News](#) (10 January 2007); [GMA News](#) (7 July 2009); [Philippine Center for Investigative Journalism](#) (17 April 2008); [GMA News](#) (8 January 2007); [Inquirer](#) (14 January 2014).

13. The Phase 2 Report (paras. 16-17 and 104) noted substantial delay in the opening of an investigation in Argentina. The allegation surfaced in the Philippine media in 2002 and then in the Argentine media in 2003. No action was taken by the Argentine authorities until June 2005, when the Working Group informed Argentina of the allegations. The MFA then passed the information to the Argentine law enforcement authorities who opened proceedings in May 2006.

14. The Argentine investigative judge initially attempted to terminate the case before the investigation was completed. The investigative judge sent an MLA request to the Philippines on 8 August 2007 for information about a contract and records of legal proceedings. Separately, Argentina requested bank information from Switzerland but the request was denied because of an insufficient connection between the proceedings and the evidence sought. After not receiving a reply from the Philippines, the judge closed the case on 11 November 2009. The Federal Court of Appeals reversed this decision because the Philippine MLA request was still outstanding and ordered the judge to seek tax information. The Court also noted that certain investigative steps (e.g. an analysis of Company M's accounting information) should have been taken before closing the investigation.<sup>7</sup>

15. The investigation was then reopened and terminated again after some further delay. In June 2011, the Philippines responded to Argentina's MLA request. Argentina sent a supplemental request in July 2011. On an unspecified date, the Philippines informed Argentina that the case did not involve bribery to obtain a contract. The Argentine authorities then terminated their investigation on 17 October 2012.

16. *Case #3 – Undeclared Cash (Venezuela)*: According to media reports,<sup>8</sup> W is a dual Venezuelan-US citizen. On 4 August 2007, he arrived in Argentina from Venezuela on a private flight hired by Argentine and Venezuelan officials with USD 800 000 in a suitcase which he did not declare as required. In mid-August 2007, Argentine Parliamentarians filed a criminal complaint alleging transnational bribery and money laundering. This case is included in this report because of the initial suggestions that foreign bribery had been involved, even though W was ultimately charged only with smuggling. The case is also relevant to the discussion of a number of issues in the report, namely the opening of foreign bribery investigations (p. 23), executive contact with law enforcement about specific cases (p. 33) and disciplinary processes of judges and prosecutors (p. 35).

17. *Case #4 – Gas Plant (Bolivia)*: According to media reports,<sup>9</sup> Argentine Company C formed a joint venture with a Bolivian Company U. The joint venture then signed a USD 86.3 million contract with the Bolivian state-owned energy company YPF in July 2008 to build a natural gas processing plant in Bolivia. In January 2009, the joint venture received the first USD 4.5 million instalment under the project. Days later, a Company U executive was killed and robbed of USD 450 000 as he was about to meet family members of R, the head of YPF. The incident sparked speculation that the executive was delivering a bribe to R. In January 2012, R was convicted of corruption and sentenced to 12 years' imprisonment. M, an Argentine national who is Company C's owner and president, was convicted in *in absentia* in Bolivia and sentenced to six years.

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<sup>7</sup> Investigative decision to terminate case no. 9421/2006 dated 17 October 2012, p. 2.

<sup>8</sup> [Clarín \(9 August 2007\)](#); [Parlamentario.com \(17 August 2007\)](#); [Clarín \(14 December 2007\)](#); [St. Petersburg Times \(17 December 2007\)](#); [Clarín \(1 January 2008\)](#).

<sup>9</sup> [Latin Petroleum Magazine \(1 April 2009\)](#); [Jornada \(1 May 2009\)](#); [Daily Express \(28 January 2012\)](#); [La Razón \(27 January 2012\)](#); [Latin American Herald Tribune \(12 February 2009\)](#); [Latin American Herald Tribune \(14 February 2009\)](#); [Business News Americas \(2 April 2009\)](#); [Achacachi Post \(19 May 2010\)](#); [EJU \(23 July 2009\)](#); [Hidrocarburosbolivia.com \(23 July 2009\)](#); [El Deber \(23 April 2010\)](#); [La Patria \(11 May 2010\)](#); [La Razón \(18 June 2010\)](#); [Daily Express \(28 January 2012\)](#); [Associated Press \(27 January 2012\)](#); [Los Andes \(28 January 2012\)](#).

18. There are separate legal proceedings that appear unrelated to the foreign bribery allegation in this case. Two additional Argentine firms, LG and SM, were subcontracted by Company C. YPF suspended payments to both firms after the corruption allegations surfaced. There is no information suggesting that either firm engaged in corruption. Nor were the firms investigated or charged in Bolivia.<sup>10</sup>

19. The Argentine authorities do not appear to have investigated Company C or its owner and president M for foreign bribery. The questionnaire responses referred only to the suspension of payments to two Argentine companies that were sub-contractors of the joint venture (presumably LG and SM). The responses then stated that the joint venture was “under investigation in the neighbour country”; no reference was made to any Argentine investigation. The questionnaire responses also did not mention M or his conviction *in absentia*. The Argentine authorities requested MLA from Bolivia in September 2009 and received the information in March 2010. It is unclear what evidence was sought from Bolivia as the investigative judge and prosecutor in the case did not attend the on-site visit. Argentina stated that the judge could not attend because he was on duty in a court 1 500 km from Buenos Aires.

20. After the on-site visit, Argentine government officials informed the evaluation team that the prosecutor considered that there was insufficient evidence to prove the offence. The judge then dismissed the investigation. There remains no explanation of why the information provided by Bolivia was insufficient or whether steps were taken to gather additional evidence in Argentina.

21. *Case #5 – Inter-American Development Bank Debarment Case (Honduras)*: On 20 February 2008, the Inter-American Development Bank (IDB) debarred several Argentine individuals and companies for engaging in “corruptive practices” in relation to a project in Honduras.<sup>11</sup> Argentina was not aware of the decision until it received the Phase 3 questionnaire in 2014. The MFA subsequently sought additional information from IDB. IDB denied the request on asserting privilege over information relating to its investigation. On this basis, the Argentine authorities stated that a formal investigation would not be opened.

**(b) On-Going Foreign Bribery Cases**

22. *Case #6 – Oil Refinery (Brazil)*: According to media reports,<sup>12</sup> Argentine Company O agreed to purchase an oil refinery and petrol stations in Argentina from Brazilian Company P in 2009. Company O allegedly secured the contract by making bribe payments that ultimately benefitted members of a Brazilian political party in the ruling coalition and their political campaigns. The payments were allegedly channelled through a Uruguayan company.

23. Argentina’s questionnaire responses stated that an investigation was opened after a Parliamentarian filed a complaint in May 2013. After a “preliminary analysis”, Argentina requested MLA from Brazil in November 2013. Just before the adoption of this report, Argentina informed the evaluation team that Brazil replied to this request in June 2014. There is no information on other investigative steps. In April 2014, Brazil’s Federal Police opened an investigation for tax fraud relating to the sale of the refinery and other unrelated offences. Brazilian judges have ordered searches and document production.

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<sup>10</sup> La Nación (17 March 2009); Los Andes (16 March 2009); EJU (25 March 2009).

<sup>11</sup> Ambito.com (24 March 2010); IDB List of Sanctioned Individuals and Firms ([www.iadb.org](http://www.iadb.org)).

<sup>12</sup> Epoca (9 August 2013); La Nación (13 August 2013); La Nación (18 May 2013); La Nación (4 April 2014); La Razón (11 April 2014); Revista Líderes (14 April 2014); La Vanguardia (8 May 2014).

24. *Case #7 – Agribusiness Firms (Venezuela)*: Argentina and Venezuela signed an agreement in 2005 under which Argentina would sell agricultural machinery to Venezuela in return for fuel oil. Argentine companies participating in the scheme had to pay a 15% commission initially to a company in Miami, Florida. After 2008, commissions were paid to two Panamanian companies. The funds were deposited in US bank accounts. Some 20 Argentine companies paid commissions under the scheme. In 2010, the media reported that the commissions had been channelled to unspecified officials as bribes.<sup>13</sup>

25. The steps taken by Argentina to investigate this case are not entirely clear. An investigation was opened in 2008 after Parliamentarians filed a complaint. The MFA indicated at the on-site visit that nine MLA requests had been sent to the US, France, Panamá and Venezuela since 2010. All of the requests had been executed by May 2013 apart from a 2010 request to Venezuela and a 2014 supplemental request to the US. On the last day of the on-site visit, Argentina provided a document from the investigative judge in the case. It is unclear why the investigation has progressed at a slow pace, or what steps were taken to pursue the outstanding MLA requests.

26. *Case #8 – Grain Export (Venezuela)*: Media articles published in July 2014 after the on-site visit<sup>14</sup> indicated that Argentina signed an agreement with Venezuela in 2013 to export grain. In 2014, the owners of an Argentine Company X met a family member of a Venezuelan official at the highest level. Shortly thereafter, Company X secured a contract to export grain to Venezuela at substantially over market prices. Company X was the only company that received a permit from the Argentine government to export grain to Venezuelan under the 2013 agreement. A senior Argentine official stated that the sale price had been set by Venezuelan authorities. A formal investigation on this allegation has not yet been opened.

27. *Case #9 – Military Horses (Bolivia)*: Shortly before the Working Group adopted this report, media articles<sup>15</sup> indicated that the Bolivian military procured a quantity of horses. The contract was awarded to an Argentine company in September 2014 not by tender but after direct negotiations between the parties. The price of the horses reported by some government officials may have greatly exceeded the value of the contract that was signed. Argentina states that an investigation for smuggling has been opened but could not confirm whether foreign bribery was also involved in the case.

28. *Case #10 – Oil Sector Construction (Brazil)*: A few days before the Working Group adopted this report, media articles<sup>16</sup> reported that an Argentine company allegedly bribed executives of a Brazilian state-owned oil company to win construction contracts. The case is under investigation in Brazil. Given the timing, the Argentine authorities could not indicate whether they have opened an investigation.

### **Commentary**

***The lead examiners are concerned about foreign bribery enforcement in Argentina. Several foreign bribery allegations implicating Argentine companies and individuals have surfaced since Phase 2. Judicial investigations have been opened into most of these allegations, which is***

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<sup>13</sup> Cadena Entrerriana (27 April 2010); Clarín (6 May 2010); Clarín (7 May 2010); Clarín (7 January 2014); Clarín (8 January 2014); Quinto Día (10 January 2014); Clarín (27 April 2014).

<sup>14</sup> Clarín (6 July 2014); El Comercio (6 July 2014); Maduradas (6 July 2014); Clarín (8 July 2014); Cubaencuentro (10 July 2014); El Carabobeño (17 July 2014); Clarín (17 July 2014); Clarín (29 July 2014); Informe21.com (19 August 2014).

<sup>15</sup> Página Siete (31 October 2014); El Deber Santa Cruz (1 November 2014); Gaceta Mercantil (3 November 2014).

<sup>16</sup> La Nación (5 December 2014); Infobae (5 December 2014); Buenos Aires Herald (5 December 2014).

*a welcome development. These investigations, however, have not yielded charges or convictions, and have progressed very slowly. Argentina contends that one of the reasons for the delay was the lack of co-operation by foreign authorities. However, Argentina does not appear to have actively pursued co-operation in at least some of these cases. These concerns are exacerbated by the failure of the prosecutors and investigative judges in charge of actual foreign bribery cases to attend the on-site visit. Their absence denied the lead examiners an opportunity to discuss many of the issues raised by the cases and thus seriously undermined the effectiveness of the on-site visit and this Phase 3 evaluation.*

*Furthermore, as explained throughout this report, the lead examiners are also gravely concerned about Argentina's lack of progress in addressing serious systemic deficiencies identified in the Phase 1 and 2 Reports. Argentina continues to be non-compliant with the Convention by failing to provide for corporate liability and nationality jurisdiction over foreign bribery. Delays and other deficiencies continue to impede effective enforcement of serious economic crime cases.*

## **B. IMPLEMENTATION AND APPLICATION BY ARGENTINA OF THE CONVENTION AND THE 2009 RECOMMENDATIONS**

29. This part of the report considers Argentina's approach to key horizontal (Group-wide) issues identified by the Working Group for all Phase 3 evaluations. Consideration is also given to vertical (country-specific) issues arising from Argentina's progress on weaknesses identified in Phase 2, or from changes to Argentina's domestic legislative or institutional framework.

### **1. Foreign Bribery Offence**

30. Argentina's foreign bribery offence in Article 258bis PC is unchanged since Phase 2:

Article 258bis. Any person who, directly or indirectly, offers or gives a public official from a foreign State or from an international public organisation, for this official's benefit or for the benefit of a third party, money or any object of pecuniary value, or other compensations, such as gifts, favours, promises or advantages, for the purpose of having such official do or not do an act in related to the performance of his official duties, or to use the influence derived from the office he holds, in a matter linked to a transaction of an economic, financial or commercial nature, shall be punished with reclusion from one (1) to six (6) years and special disqualification for life in respect of the exercise of any public office.

31. This section considers several outstanding issues, some of which date back to Phase 1. It first examines three matters relating to the foreign bribery offence, namely (a) the definition of a foreign public official; (b) the meaning of an "undue" advantage; and (c) bribes to induce an official to act outside his/her competence. The section then considers applicable defences and jurisdiction to prosecute.

32. Argentina has launched a reform of its Penal Code (PC) after abandoning an earlier effort in 2008. The Draft Bill to Reform, Update and Harmonise the Argentine Penal Code (Draft PC Bill) purports to address some but not all of the deficiencies concerning penal legislation identified by the Working Group in this and previous reports. The Draft PC Bill is in the early stages of the legislative process. Public consultation on the Draft PC Bill ended in July 2014. At the time of this report, the government was considering the outcome of the consultation and had not submitted the Bill to Congress for consideration and adoption. Consistent with established Working Group practice, this Phase 3 Report will refer to some aspects of the Draft PC Bill but will not give the Bill the same level of scrutiny as the present law. In

assessing Argentina's implementation of the Convention, the Working Group will also only take into account legislation that has entered into force. The Working Group will assess any relevant new legislation only if and when it is enacted.

**(a) Definition of Foreign Public Official**

33. Article 258bis covers bribery of a "public official", a term defined in Article 77 PC:

Article 77. The terms "public official" [*funcionario público*] and "civil servant" [*empleado público*] as used in this Code refer to any person who temporarily or permanently discharges public functions, whether as a result of popular election or appointment by the competent authority.

34. This definition continues to include two deficiencies identified in Phase 1 (pp. 5-6 and 29) and Phase 2 (paras. 189-194). First, the definition is not autonomous. Evidence of foreign law must be tendered to prove that the bribe recipient is a foreign public official, according to Argentine officials in Phase 2 and Phase 3. Second, the definition is too narrow. It does not cover bribery of employees of foreign State-owned or State-controlled enterprises as required in Article 1(4) and Commentaries 12-17 of the Convention. The definition also only covers public officials from a "foreign State". It does not cover officials of "any organised foreign area or entity, such as an autonomous territory or a separate customs territory" (Convention, Commentary 18). Argentina has not eliminated these deficiencies as requested in Phase 2 Recommendations 4(a) and 4(b). The Draft PC Bill amends the definition but some inconsistencies with the Convention remain. In Phase 3, Argentina maintains that its definition of a foreign official would be broadly interpreted having regard to the Convention. The Working Group considered this argument in Phase 2 (paras. 191-192) but nevertheless found that a legislative amendment was necessary to ensure Argentina's compliance with the Convention.

**(b) Undue Pecuniary or Other Advantage/Improper Advantage**

35. Article 258bis differs from the Convention by not requiring that the advantage offered to the official be "undue", or that the advantage obtained by the briber be "improper". This caused concern that the offence may criminalise legitimate payments seeking proper official action (Phase 2 para. 195). Recommendation 4(c) asked Argentina to ensure that the vagueness in this aspect of the offence be eliminated. Argentina has not implemented this recommendation. In Phase 3, Argentina argued that all payments made personally to an individual public official are necessarily illegitimate. The Draft PC Bill does not address this deficiency. Argentina stated that the terms "undue" or "improper" were not included in the foreign bribery offence in the Draft PC Bill to avoid creating a more restricted offence.

**(c) Coverage of Acts or Omissions outside the Official's Authorised Competence**

36. Article 258bis expressly covers bribery in order that a public official performs acts or omissions "related to the performance of [...] official duties." In Phase 2, the Working Group decided to follow up whether the offence extends to bribes paid for any use of the public official's position, whether or not within the official's authorised competence (Follow-Up Issue 13(d)). There have not been concluded foreign bribery cases that would clarify this issue. However, Argentine officials stated that Article 258bis expressly covers payments to induce an official to use the influence derived from his/her office. In their view, the offence would therefore include bribery in order that an official acts outside his/her competence.

**Commentary**

***The lead examiners are seriously concerned at Argentina's continuing failure to rectify deficiencies in its foreign bribery offence, including shortcomings identified by the Working***

***Group in Phase 1 some 13 years ago. The lead examiners reiterate Phase 2 Recommendation 4 that Argentina (a) introduce an autonomous definition of foreign public officials; (b) ensure that this definition covers, in a manner consistent with the Convention, officials of foreign public enterprises and public officials of organised foreign areas or entities that do not qualify or are not recognised as States; and (c) eliminate the vagueness in the offence resulting from the absence of a requirement that the advantage be “undue” or that the advantage obtained by the briber be “improper”. The Working Group should continue to follow up the application in practice of Article 258bis PC, including cases where a bribe is paid in order that an official acts outside his/her authorised competence.***

***(d) General Defences and Exceptions***

37. Solicitation is a defence to active *domestic* bribery in Argentina, according to the Phase 2 Report (paras. 198-199) and on-site visit participants in both Phases 2 and 3. The Argentine domestic active bribery offence in Article 258 PC is linked to the passive bribery offence. A person commits domestic active bribery by making a payment to obtain conduct that constitutes domestic passive bribery as defined in Article 256 PC. However, domestic passive bribery as defined in this provision does not cover an official who solicits or illegally demands a payment; such conduct is covered by a different offence in Articles 266-268 PC. Solicitation consequently falls outside the domestic passive bribery offence under Article 256 PC, and hence also outside the domestic active bribery offence in Article 258 PC.

38. The Phase 2 Report (para. 199) queried whether solicitation would also be a defence to the active *foreign* bribery offence. Argentina argued that the answer is no because the active foreign bribery offence in Article 258bis is not linked to a corresponding passive foreign bribery offence. The analysis described in the previous paragraph thus cannot be transposed to the foreign bribery context. In the absence of supporting case law, the Working Group decided to follow up this issue (Follow-Up Issue 13(c)).

39. There has not been case law since Phase 2 that would resolve this issue. Discussants at the Phase 3 on-site visit were uncertain. The *Oficina Anticorrupción* (OA) opined that solicitation would not be a defence to active foreign bribery but conceded that the issue has not been resolved. One trial judge stated vaguely that certain factors would have to be considered, while another said the situation could be different when the case involves business. It is difficult to draw any conclusion from these comments apart from the obvious observation that the issue is not yet settled.

40. A matter not discussed in earlier evaluations is the defence of acting under “due obedience” (Article 34(5) PC). On-site visit participants overwhelmingly agreed that the defence applies only to military officials acting on the orders of superiors. The defence is thus unlikely to apply to foreign bribery.

***Commentary***

***The lead examiners recommend that the Working Group continue to follow up whether the solicitation or “illicit demand” of an undue payment or other advantage by a foreign public official can exclude the liability of the active briber.***

***(e) Jurisdiction to Prosecute Foreign Bribery***

41. This section addresses Argentina’s territorial and nationality jurisdiction to prosecute natural persons for foreign bribery. This report does not address jurisdiction to prosecute legal persons given the absence of corporate liability for foreign bribery (see p. 17).

(i) *Territorial Jurisdiction over Natural Persons*

42. A Party to the Convention is required to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory”. An extensive physical connection to the bribery act should not be required for exercising territorial jurisdiction (Convention Article 4(1) and Commentary 25).

43. Argentina has territorial jurisdiction to prosecute “crimes committed – or whose effects take place – in the territory of the Argentine Republic or in any place under its jurisdiction” (Article 1(1) PC). In Phase 1 (pp. 12-13), Argentina indicated that any action performed toward the accomplishment of an offence (e.g. a telephone call, fax or email) would be sufficient for territorial jurisdiction. The Phase 2 Report (para. 172) considered a 1988 Supreme Court case which held that an offence is “committed” in all jurisdictions where part of the act or the effects of the offence occurred. Nevertheless, on-site visit participants were uncertain and questioned whether Argentina had an effective basis for establishing territorial jurisdiction in foreign bribery cases occurring mainly abroad. The Working Group accordingly decided to follow up this issue (Follow-Up Issue 13(b)).

44. There have not been jurisprudential developments since Phase 2 that would clarify the scope of territorial jurisdiction. Participants at the Phase 3 on-site visit gave their personal opinions based on hypothetical situations. The OA repeated that a bribe offer to a foreign official made by phone from Argentina is sufficient to attract territorial jurisdiction. Falsifying accounting records located in Argentina to conceal foreign bribery is also enough. All of the private bar representatives agreed that there would be jurisdiction to prosecute a briber who offers a bribe abroad, returns to Argentina, and then transfers the funds to a foreign official. As further explained at p. 26, the *Gas Plant (Bolivia) Case* could have been an opportunity to explore how territorial jurisdiction operates in an actual foreign bribery case. Unfortunately, the investigative judge and prosecutor in the case did not attend the on-site visit.

45. Additional jurisprudence referred to by the Argentine authorities raises more questions than it answers. None of the cited cases involved bribery. In one case, the court held that there was no jurisdiction to hear a libel case where the alleged defamatory statement was made in Argentina but intended to be published abroad.<sup>17</sup> This ruling would seem to undercut Argentina’s assertion that any action performed in Argentina toward the accomplishment of an offence triggers territorial jurisdiction. The court in another case did not have jurisdiction where funds from a Uruguayan bank account were diverted to a second foreign account.<sup>18</sup> The information provided by Argentina did not indicate any connection in the case with Argentina, e.g. whether the order to transfer the funds originated in Argentina. A third case concerned an alleged fraud where a foreign company failed to insure goods that were being shipped to Argentina from abroad. The court had jurisdiction because the effects of the offence were felt in Argentina.<sup>19</sup> It is not evident that similar reasoning could be applied to a foreign bribery case.

***Commentary***

***The lead examiners reiterate Phase 2 Follow-Up Issue 13(b) and recommend that the Working Group continue to follow up the application of territorial jurisdiction in foreign bribery cases.***

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<sup>17</sup> Sarlo, *Beatriz s/recurso de casación* (16 July 2004), Case no. 4 997, Court of Criminal Appeals.

<sup>18</sup> *Silbergleit, Claudio Hugo and others* (5 April 2010), Case no. 38 808, Court of Appeals on Criminal and Correctional Matters.

<sup>19</sup> *Castillo Armas, Nicolás* (11 February 2011), Case no. 29 641, Court on Criminal and Correctional Matters.

(ii) *Nationality Jurisdiction over Natural Persons*

46. Article 4(2) of the Convention states that if a Party has jurisdiction to prosecute its nationals for extraterritorial offences (i.e. nationality jurisdiction), then it should establish jurisdiction according to the same principles over foreign bribery.

47. Since Phase 1 in 2001, the Working Group has urged Argentina to adopt nationality jurisdiction to prosecute foreign bribery. Argentina has jurisdiction to prosecute an “agent or employee of the Argentine authorities” for offences (including foreign bribery) committed outside of Argentina in the performance of his/her duties (Article 1(2) PC). There is no similar jurisdiction to prosecute Argentine nationals who are not officials and who commit foreign bribery extraterritorially. The OA acknowledged in 2006 that Argentina “still lacks a proper basis for jurisdiction to apply Argentine penal law when an Argentine person bribes a foreign public official abroad”. It supported the establishment of nationality jurisdiction for the foreign bribery offence (Phase 2 para. 174).

48. Argentina has not made progress on this issue since Phase 2. The government submitted a Bill on this matter to Congress in 2010. By June 2011, the Bill had passed the Committee of Criminal Legislation without amendments. Unfortunately, the government withdrew the Bill later that year because it decided to reform the Penal Code. In Phase 3, Argentina claimed that Article 2 of the Draft PC Bill published in 2014 would introduce universal jurisdiction for extraterritorial offences which would be applicable to foreign bribery.

*Commentary*

*The lead examiners are seriously concerned that Argentina does not have nationality jurisdiction to prosecute foreign bribery, despite the Working Group’s recommendation on this matter since 2001. As the Working Group has noted,<sup>20</sup> the absence of nationality jurisdiction poses a serious challenge to a country’s ability to effectively prosecute foreign bribery cases. The lead examiners reiterate Phase 2 Recommendation 6 and recommend that Argentina adopt nationality jurisdiction to prosecute foreign bribery cases on a priority basis.*

**2. Responsibility of Legal Persons**

49. Some 13 years after becoming a Party to the Convention, Argentina remains unable to hold legal persons liable for foreign bribery. During that period, five legislative initiatives to introduce corporate liability for foreign bribery were started. Each of the first four initiatives progressed slowly before it was ultimately withdrawn by the government. The latest initiative is a second attempt to create corporate liability as part of a general reform of the Penal Code (PC). In the meantime, criminal corporate liability has been established for several other offences but not foreign bribery.

50. Each of the Working Group’s previous evaluations of Argentina considered a different legislative initiative to establish corporate liability. The 2001 Phase 1 Report (p. 9) stated that Argentina was preparing a draft corporate criminal liability bill that would be submitted to Congress by July 2001. By 2004, however, the government had withdrawn the bill in favour of a broad PC reform. The government published a draft PC in May 2006 but then quickly postponed the reform to 2008 (Phase 2 para. 207). Meanwhile, a senator submitted a separate bill on corporate liability for foreign bribery to Congress in 2007 (Phase 2 para. 212). But both the draft PC and the Senate bill had been abandoned by the time of the 2010 Phase 2 Written Follow-Up Report. Instead, the government prepared three draft bills to implement

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<sup>20</sup> See [Phase 3 Canada](#), para. 121.

corporate liability and other Phase 2 Recommendations. A Congressional committee approved the bills in 2011, only for the government to withdraw the bills later that year and revert to its 2004 position of seeking broad PC reform. Three more years passed before the government published a Draft PC Bill with corporate liability provisions for public consultation in 2014 (see p. 13). At the time of this report, the government is considering the consultation results.

51. While efforts to create corporate liability for foreign bribery floundered, similar efforts for other offences flourished. In 2011, corporate liability was created for tax offences, insider trading and other securities offences, money laundering, and terrorism financing.<sup>21</sup> When Congress passed these laws, it was also considering the three bills to implement the Working Group's Phase 2 Recommendations, including the one on corporate liability. Why the foreign bribery corporate liability bill was not enacted along with those for the other offences is wholly unclear. In any event, that the government enacted corporate liability for these other offences amply demonstrates its ability to push through reforms that it prioritises. The government displayed its ability to enact reforms again when highly controversial and contentious legislation to "democratise" the judiciary passed the legislature within weeks in 2013 (see p. 35).

52. The government's latest decision to address this issue through broad PC reform raises further questions. As the Phase 2 Report (para. 217) noted, general PC reform will likely give rise to significant debate and delay its adoption. The draft PC is thus not "a suitable vehicle for the necessary urgent introduction of liability of legal persons in order to achieve compliance with the Convention". A Parliamentarian at the on-site visit further noted that Congress has passed 25 amendments to the PC since 2011. Broad PC reform thus does not appear to have precluded amendments to specific PC provisions.

53. Argentina has provided a copy of the corporate liability provisions in the Draft PC Bill that has been circulated for public consultation. The provisions provide different tests for imposing liability depending on the individual's relationship with the company and whether the offence brings benefits or profits to the legal person. As noted at p. 13, the Working Group will only take into account legislation that has entered into force when assessing Argentina's implementation of the Convention. Relevant new legislation is assessed only if and when it is enacted.

### ***Commentary***

***The lead examiners are seriously concerned that Argentina remains unable to impose corporate liability for foreign bribery. Argentina has not taken effective action to address this issue. Since 2001, four legislative initiatives to address this issue have been abandoned without Congress even voting on the matter. The current proposal to rely again on general Penal Code reform is in very early stages. In any event, this process will likely be protracted. In sum, Argentina is no closer to resolving this issue than during its Phase 2 evaluation in 2008, or even its Phase 1 evaluation in 2001.***

***The lead examiners are especially disappointed that Argentina has created corporate liability for several other offences but not foreign bribery. This strongly suggests that Argentina does not consider corporate liability for foreign bribery to be a matter of priority. The lead examiners reiterate the Working Group's view expressed in Phase 2 (para. 201) that Argentina has not demonstrated political will to create corporate liability for foreign bribery.***

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<sup>21</sup> Law 24 769, Article 14; Articles 304 and 313 PC; Law 26 734, Article 6. In addition, since 1981 Law 22 415, Article 887 has provided joint liability for companies and individuals for customs offences. Corporate criminal liability for currency exchange offences has been available since 1995 under Law 19 359, Article 2(f) as amended.

***For these reasons, the lead examiners consider that Argentina remains in serious non-compliance with Articles 2 and 3 of the Convention. They reiterate Phase 2 Recommendations 5 and 9(a) and urge Argentina to adopt legislation on a priority basis to ensure that legal persons can be held liable for foreign bribery.***

### **3. Sanctions**

54. This section assesses sanctions available for foreign bribery. Additional sanctions such as debarment from public procurement contracts and other public advantages are considered at p. 61.

#### **(a) Sanctions against Natural Persons for Foreign Bribery**

55. Financial sanctions for foreign bribery are insufficient. The Article 258bis PC offence is punishable by confinement (*reclusión*) of 1-6 years and perpetual disqualification from exercising a public function. A very small fine of up to ARS 90 000 (USD 10 575)<sup>22</sup> can be imposed where an offence is committed “with the aim of monetary gain” (Article 22bis PC). A fine is arguably not available at all if the gain is not pecuniary or goes not to the briber but his/her company. In Phase 2 (para. 221), Argentina indicated that the prevalence of bribery in a foreign jurisdiction and the tolerance of such payments by the foreign authorities could be taken into account by the judge as a mitigating circumstance pursuant to Article 41 PC. This raised concerns about compliance with Commentary 7 of the Convention.<sup>23</sup> This issue remains unresolved as there are no convictions of and hence no sentences for foreign bribery in Argentina.

56. A lack of concluded foreign bribery cases precludes an assessment of sanctions imposed in practice. Statistics on sanctions imposed in domestic bribery cases could have offered some guidance, but Argentina could not provide this information. The Phase 2 Report (para. 220) noted that sanctions for white-collar crime were generally low and that the courts had not developed coherent sentencing criteria. Phase 2 Recommendation 9(d) asked Argentina to ensure that sanctions in practice were sufficient, but the Working Group converted this Recommendation to a follow-up issue in 2010. Phase 2 Follow-Up Issue 13(a) addressed the same issue.

#### ***Commentary***

***The Working Group has stated in other evaluations<sup>24</sup> that the absence of fines for the foreign bribery offence may affect the effective, proportionate and dissuasive character of sanctions. Fines are available for foreign bribery cases in Argentina. But at a maximum of USD 10 575, these fines are too small since foreign bribery cases often involve contracts of substantial value. The lead examiners therefore recommend that Argentina substantially increase the maximum fine available for foreign bribery. Argentina should also take steps to ensure that fines are available where the gain obtained by a briber is not pecuniary or does not go to the briber but his/her company. Argentina should also maintain detailed statistics of sanctions (including confiscation) imposed in cases of bribery and other economic crimes. The Working Group should also follow up sanctions imposed for foreign bribery in practice, including whether sentences imposed comply with Commentary 7 of the Convention.***

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<sup>22</sup> Based on official exchange rate of the Central Bank of Argentina on 14 November 2014.

<sup>23</sup> Commentary 7 states that the offence of foreign bribery should be “irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.”

<sup>24</sup> [Phase 3 Italy](#), para. 54 and Commentary after para. 71.

**(b) Sanctions against Legal Persons for Foreign Bribery**

57. Argentina does not have corporate liability for foreign bribery and hence cannot impose sanctions against legal persons for this crime. Confiscation against legal persons is discussed below.

**4. Confiscation of the Bribe and the Proceeds of Bribery**

58. Provisions on confiscation have not been amended since Phase 2 and an inability to provide value confiscation remains. Article 23(1) PC provides for conviction-based confiscation of “things that have been used to commit the offence, and the things or profits that constitute the proceeds or gains from the offence”. This allows the confiscation of the bribe and the direct proceeds of bribery. It does not provide for confiscation of property which corresponds to the value of the bribe or the proceeds of bribery (value confiscation). Argentina argued that the provision would be supplemented by other sources of law such as international treaties, jurisprudence and doctrine. Non-conviction-based forfeiture was introduced in 2011 for money laundering (Article 305 PC) but not for other crimes.

59. An additional issue is whether Article 23(1) PC allows confiscation of indirect proceeds of crime, i.e. proceeds derived from direct proceeds. Argentina’s questionnaire responses state that the provision does not explicitly cover indirect proceeds of crimes but that the *Alsogaray* case involving an offence of unjust enrichment resolves this issue.<sup>25</sup>

60. Confiscation against legal persons has been applied but issues described in the Phase 2 Report remain. Confiscation can be imposed against legal persons that benefited from an offence and when the perpetrators or co-perpetrators acted as “agents for someone” or as “organs, members or managers” of the legal person (Article 23(3) PC). Whether this covers bribery committed by *de facto* managers in practice is unclear (Phase 2 para. 226). Confiscation can be ordered against a legal person only after the natural person who committed the crime has been convicted.<sup>26</sup>

61. A further question is whether confiscation is routinely ordered in practice. The Phase 2 Report (para. 224) stated that the application of the confiscation provisions was ineffective. In Phase 3, Argentina cited several measures that attempt to increase the use of confiscation.<sup>27</sup> However, statistics provided by Argentina show that confiscation remains infrequent, with only 13 orders for confiscation of money and 7 of motor vehicles in 2012-2013. This is perhaps unsurprising, given that confiscation against natural persons is conviction-based and economic crime cases rarely result in convictions because of delays (see p. 26). It is unclear how many bribery cases resulted in confiscation.

62. Even when ordered, confiscation may be delayed or not for the full amount. Confiscation in the *Alsogaray* case was ordered in 2004 and effected only in 2009. In the *IBM* case, the court ordered confiscation for ARS 82 million (which the Argentine authorities state was for the full amount of the illicit profits). The order was confirmed on appeal in August 2010 but remained unexecuted as of February

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<sup>25</sup> *Maria Julia Alsogaray* (31 May 2004), Federal Criminal Court of the City of Buenos Aires. See also *Pedro Norberto Sánchez y otros* (10 May 2013), Federal Oral Tribunal of Corrientes. See also [FATF \(2014\), Argentina – 11th Follow-up Report](#).

<sup>26</sup> *Skanska y otros* (31 August 2010), Federal Criminal Court of Appeals.

<sup>27</sup> Measures cited by Argentina include: PGN Resolutions 129/2009 and 134/2009 ordering prosecutors to initiate financial investigations; publication of a financial investigation manual by the Office of Coordination and Follow-up on Offences Against the Public Administration (OCDAP) before its dissolution; establishment of the Unit for the Recovery of Assets and the Office for Economic Research and Financial Analysis (see p. 17); and the OA’s “aggressive” asset recovery policy.

2014.<sup>28</sup> In the *Ansaldo-Energia* case, the court found that the amount of the settlement did not cover the full loss to the state.<sup>29</sup> In the *Skanska* case, ARS 34 million were seized but only ARS 17 million were ordered confiscated.

### *Commentary*

*The lead examiners recommend that Argentina amend its legislation to provide for confiscation of property the value of which corresponds to that of the bribe and the proceeds of bribery, or that monetary sanctions of comparable effect are applicable. They also recommend that Argentina take further steps to ensure that confiscation is routinely ordered in foreign bribery cases, that the amount of confiscation represents the full benefits of the offence, and that confiscation orders are executed without unreasonable delay.*

*The lead examiners note that there is limited jurisprudence on confiscation of indirect proceeds of foreign bribery, and none at all on confiscation against a legal person of the proceeds of offences committed by a de facto manager. They therefore recommend that the Working Group follow up these issues.*

## **5. Investigation and Prosecution of the Foreign Bribery Offence**

63. Of major concern are continuing systemic deficiencies in the enforcement of serious economic crimes such as foreign bribery. In Phase 2, the Working Group expressed serious concerns over extraordinary delays in the resolution of economic crime cases, lack of resources and specialisation within law enforcement authorities, a high number of vacant judicial positions, widespread use of surrogate judges, and executive contact with law enforcement about cases. Phase 2 Recommendation 3(a) accordingly asked Argentina to address systemic deficiencies in enforcement, while additional Recommendations targeted specific issues. In 2010, based on information provided by the Argentine authorities, the Working Group considered that many of these Phase 2 Recommendations had been fully implemented. But according to information obtained in this Phase 3 evaluation, there has in fact been little or no improvement on almost all of these issues.

64. As noted earlier, also of concern is the absence from the on-site visit of the investigative judges and prosecutors who conducted actual foreign bribery cases. As a result, the Working Group cannot fully assess Argentina's enforcement efforts in these cases. These officials' absence also deprived the Working Group of an opportunity to explore whether the legislative and systemic criminal justice issues identified in this report impacted actual foreign bribery cases.

65. Days before the Working Group discussed and adopted this report, Argentina enacted a new Criminal Procedure Code (CPC). After the on-site visit, Argentine informed the evaluation team in October 2014 that the government had submitted a bill in Congress to replace the CPC. The bill was enacted by Congress on 4 December 2014. The Argentine authorities stated that the new CPC would address some of the deficiencies identified in this report (see p. 26 for more details). The law will enter into force only after implementing legislation has been enacted. Argentine authorities indicated that a bicameral Congressional Commission is expected to start working on such legislation in March 2015. Given the timing of this development, the Working Group has not had an opportunity to examine the new CPC or to seek the views of Argentine lawyers, academics and civil society on the legislation. Obviously, there has

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<sup>28</sup> CIPCE and INECIP (2014), *La reforma procesal penal frente a la corrupción*, pp. 6 and 14.

<sup>29</sup> *Miguel Ángel Cuervo y otros* (29 April 2013), Federal Criminal Court of the city of Buenos Aires (pp. 166, 180); Settlement agreement (7 September 2011) in *Ministry of Economy v. Ansaldo Energía S.p.a.*

also not been any practice under the new CPC to determine whether the law will in fact satisfactorily address the concerns of the Working Group. Unless otherwise stated, references to the CPC in this report do not refer to this new CPC but its predecessor.

66. This section begins with an overview of Argentina's procedural framework for criminal enforcement of foreign bribery and the enforcement of actual foreign bribery cases. The balance of the section addresses specific enforcement-related issues. Difficulties in obtaining information from the financial intelligence unit and tax authorities are addressed later at pp. 42 and 51.

**(a) Procedure for Foreign Bribery Investigations**

67. As noted in Phase 2 (para. 93), an analysis of Argentina's foreign bribery enforcement framework is complicated by the different approaches to foreign and domestic bribery investigations. To properly evaluate the system, the following discussion addresses both foreign and domestic bribery cases.

**(i) Law Enforcement Bodies**

68. Foreign bribery investigations in Argentina are conducted by an investigative judge who may delegate the case to a federal public prosecutor (Article 196 CPC). Delegations have been made in several foreign bribery investigations to date. Federal prosecutors are part of the *Ministerio Público* (MP) which is headed by the Attorney General (*Procurador General de la Nación*, PGN). Prosecutors can conduct all investigative acts (Article 198 CPC) but some measures require the prior authorisation of the investigative judge. The Federal Police (*Policía Federal Argentina*, PFA) provides police support in investigations.

69. Three prosecutorial units created after Phase 2 may support investigations. In December 2012, Argentina created a specialised prosecutorial unit, the Special Office for Economic Crimes and Money Laundering (PROCELAC). PROCELAC consists of six operational areas including crimes against the public administration; money laundering and terrorism financing; and economic fraud and banking. PROCELAC states that its jurisdiction includes foreign bribery cases. It generally does not lead judicial investigations but provides advice and technical support to the prosecutor in charge of an investigation upon request as adjunct prosecutor. PROCELAC may receive complaints about offences and conduct preliminary investigations (see below). In 2014, Argentina created the Unit for the Recovery of Assets and the Office for Economic Research and Financial Analysis. These three prosecutorial units could in theory support foreign bribery cases but this has yet to occur in practice. The issue of specialisation is further discussed at p. 30.

70. As noted in Phase 2 (paras. 93 and 100), two agencies with the most experience in domestic corruption investigations do not investigate foreign bribery (except in very exceptional cases). The National Prosecutor of Administrative Investigations (*Fiscalía de Investigaciones Administrativas*, FIA) within the MP prosecutes corruption cases involving Argentine federal officials or state funds. As such, the FIA can investigate foreign bribery only if the crime is committed by an Argentine official, which will be rare. Since Phase 2, the FIA's role in domestic corruption cases may have diminished. In Phase 3, Argentina provided very little information on the FIA. On-site visit participants stated that the position of the FIA's head has been vacant for some time. The government advertised the vacancy in May 2011 but submitted a candidate to the Senate for approval in July 2014. The appointment was completed on 10 December 2014.

71. The second body with extensive experience in domestic corruption (but not foreign bribery) investigations is the Anti-Corruption Office (*Oficina Anticorrupción*, OA) in the Ministry of Justice and Human Rights. OA's constituting legislation limits its jurisdiction to domestic corruption cases. Article 13 of Law 25 233 states that OA is responsible for "the development and co-ordination of programmes to

fight corruption in the national public sector”. Similarly, Decree 102/1999 states that OA has jurisdiction over corruption offences involving the national public administration, companies and other entities. Like the FIA, OA can thus investigate foreign bribery only if the crime is committed by an Argentine official, which will be rare (Phase 2 Report para. 102). In Phase 3, OA acknowledged that it generally cannot conduct preliminary investigations in foreign bribery cases. However, it asserted that it can investigate Argentine state-owned enterprises (SOEs) that commit foreign bribery, though this has never been tested. OA also asserted that it may promote transparency and the prevention foreign bribery as part of its general responsibility of ensuring Argentina’s compliance with international conventions on corruption.<sup>30</sup>

(ii) *Opening Foreign Bribery Investigations*

72. Investigation (*instrucción*) is legally mandatory once the authorities become aware of a foreign bribery allegation, including through a complaint (*denuncia*) (Article 71 PC). The Phase 2 Report (para. 103) noted that Argentine law provides for broad rights for individuals and organisations to initiate a criminal investigation. Any person who becomes aware of a crime that is prosecutable *ex officio* (including domestic and foreign bribery) may report it to a judge, prosecutor or the police. A person who deems him/herself a victim of such a crime may also report (Article 174 CPC). Once opened, an investigation is led by an investigative judge who may delegate the case to a federal public prosecutor (Article 196 CPC; Phase 2 Report para. 108).

73. Preliminary investigations are exceptionally allowed for certain crimes.<sup>31</sup> Preliminary investigations are limited to measures that do not require judicial authorisation. The evidence gathered may then be used to file a complaint to start a formal investigation. PROCELAC states that, after receiving a complaint of foreign bribery, it may conduct a preliminary investigation, though this has never occurred. The OA and FIA can conduct preliminary investigations in domestic corruption cases (but not foreign bribery) upon receiving a complaint or on their own initiative.

74. The time taken to open foreign bribery investigations has been reduced since Phase 2 but there is still room for improvement. The Phase 2 Report (paras. 16-17 and 104) observed that the media first reported the allegations in the *Power Project (Philippines) Case* in 2002. An investigation was opened only in May 2006 after the Working Group informed Argentina of the allegations and the MFA passed the information to prosecutors. Since Phase 2, investigations were opened reasonably soon after the media reported the five new foreign bribery allegations.

75. There are, however, questions over why law enforcement authorities have not directly relied upon foreign bribery allegations reported in the media to commence investigations. Argentine and foreign media reported all six foreign bribery allegations that have resulted in investigations to date. Yet, none of these investigations were commenced directly as a result of the media reports. Instead, complaints by Parliamentarians who learned of the allegations through the media reports led to the commencement of four investigations (*River Dredging, Oil Refinery (Brazil), Agribusiness Firms (Venezuela), Undeclared Cash (Venezuela)*). Complaints from the MFA accounted for the remaining two cases (*Power Project (Philippines)* and *Gas Plant (Bolivia)*).

76. A clearer legal basis could improve the use of media articles to open investigations directly. Specific legislative provisions authorise FIA and OA (which are only responsible for domestic corruption cases) to open cases based on media information. No similar provisions apply to judges and prosecutors

<sup>30</sup> Decree 466/2007, Annex II(1).

<sup>31</sup> Organic Law of the Prosecutor’s Office, Article 45(c); PGN Resolution 18/2005, Article 21.1 and 21.4; Decree 102/1999 Article 3; Phase 2 Report paras. 106-107; PGN Resolution 914/2012, Section IV.A.e).

with jurisdiction over foreign bribery. At the on-site visit, PROCELAC stated that media reports can be used to open an investigation. However, the only investigative judge who attended the on-site visit considered the media an unreliable source.

77. Better organisation could also help. Jurisdiction over foreign bribery is given to all federal judges and prosecutors with material jurisdiction over federal criminal matters. No single body or agency has been given specific responsibility to respond to foreign bribery allegations published in the media. A published allegation could thus prompt reactions by multiple judges and prosecutors, or none at all, as has been the case so far. One solution could be to extend OA's jurisdiction to include foreign bribery, and expressly require OA to react to foreign bribery allegations in the media, including by conducting preliminary investigations and filing complaints with the judiciary.

78. There are also some questions over whether anonymous information (e.g. from a whistleblower) can be used to start foreign bribery investigations. In domestic corruption cases, the FIA and OA are expressly authorised to rely on anonymous information by their constituting legislation. No similar provisions apply to judges and prosecutors with jurisdiction over foreign bribery. Argentine officials argued that the absence of an express authorisation on judges and prosecutors to rely on anonymous information does not prohibit them from doing so. But if this was true, then the provisions authorising the FIA and OA to use anonymous information would be redundant, which arguably could not have been the legislator's intention. The evaluation team was unable to discuss the use of anonymous information with the judges and prosecutors who conducted actual foreign bribery cases. PROCELAC stated that it has opened some investigations (not involving foreign bribery) based on anonymous complaints.

#### *Commentary*

***Foreign bribery allegations reported in the mass media are a significant source of information for opening investigations. In the lead examiners' view, Argentine law enforcement authorities should react to such media reports directly, rather than wait for a complaint referring to the report to be filed. The lead examiners therefore recommend that Argentina take steps to ensure that its law enforcement authorities routinely and systematically assess credible foreign bribery allegations that are reported in the media on a timely basis.***

***The lead examiners also note that, unlike the FIA and OA, judges and prosecutors with jurisdiction over foreign bribery cases are not expressly authorised to rely on anonymous information. The lead examiners were also unable to determine whether anonymous information was used in actual foreign bribery cases, since the judges and prosecutors who conducted these cases did not attend the on-site visit. They therefore recommend that Argentina ensure that foreign bribery cases may be commenced based on information provided anonymously.***

***Finally, the lead examiners note that foreign bribery allegations may be detected through a wide variety of sources. They therefore recommend that the Argentine authorities use proactive steps to gather information from diverse sources of allegations and enhance investigations.***

#### *(iii) Terminating Investigations and Prosecutions, Including Settlements*

79. A decision to close a case is taken by the prosecutor if a judge has not yet been seized (Article 181 CPC; Phase 2 para. 113). An investigative judge can terminate a case at any stage of the criminal proceedings (Article 334 CPC). Article 336 CPC specifies the grounds for termination: (i) the

penal action is extinguished;<sup>32</sup> (ii) the alleged crime has not been committed; (iii) the act is not a crime; (iv) the subject of the investigation did not commit the crime; (v) justification, insanity or immunity. The prosecutor or complainant may appeal a decision to close a case (Phase 2 para. 114). If the investigative judge has completed the investigation and decides the matter should go to an oral trial (*juicio*), then the case is transmitted to a separate judge or judicial panel to determine a verdict of acquittal or conviction (Articles 399, 401-403 CPC). The federal courts hear trials and appeals of foreign bribery cases.

80. There is limited scope for settlements. An abbreviated procedure is available if the prosecution seeks a sentence of less than six years' imprisonment. The prosecution and the defence can reach an agreement about guilt and sentence when the prosecutor seeks to commence the oral trial. A court may reject the agreement only if it needs more information about the facts, or if it disagrees with the legal classification of the case (Article 431bis CPC; Phase 2 para. 115). The court cannot reject the settlement if it disagrees with the agreed sentence, or impose a more severe sentence than agreed (Article 431bis(5) CPC). The Phase 2 Report (para. 115) noted that the procedure has never been used in a corruption case. That remains the case today. A separate procedure for trial suspension is available for offences punishable by a maximum of three years' imprisonment (Article 76bis-76quater PC). Foreign bribery does not qualify.

**(b) Specific Foreign Bribery and Related Enforcement Actions**

81. Regrettably, the evaluation team did not have all of the necessary information to assess Argentina's foreign bribery enforcement efforts. Unlike other Working Group Phase 3 evaluations, the prosecutors and judges who conducted actual foreign bribery cases in Argentina did not attend the on-site visit. The prosecutors and the single investigative judge at the visit did not have direct knowledge of the investigations. The questionnaire responses and MFA officials provided limited information. Additional information was gleaned from the media but could not be discussed with the Argentine authorities who conducted the investigations. The investigative judge in the *Agribusiness Firms (Venezuela) Case* provided a written summary with voluminous annexes at the end of the on-site visit. The delay in providing the material and the judge's absence from the on-site visit precluded a meaningful discussion of the case during the visit.

82. The limited information that was available still raises many questions about whether Argentina has fully investigated the foreign bribery allegations that have surfaced. Beyond requesting MLA from foreign authorities, there is little or no information on whether any additional investigative steps have been taken in cases such as *River Dredging* and *Oil Refinery (Brazil)*. Media reports indicate that the *Oil Refinery (Brazil)* case had a connection to Uruguay, but MLA has not been requested from that country. In the *Gas Plant (Bolivia) Case*, an Argentine national has been convicted *in absentia* in Bolivia of bribing a Bolivian official. There is no information on whether Argentina investigated the Argentine individual or his company before closing the case. Instead, Argentina's questionnaire responses referred only to two other Argentine companies that were not suspected of engaging in bribery. Argentina stated that information on investigative steps beyond seeking MLA was included in the written submission on the *Agribusiness Firms (Venezuela) Case*. But since the evaluation team received the submission at the end of the on-site visit, it obviously did not have an opportunity to discuss the information with the investigative judge in the case.

83. A related question that also has not been fully answered is the slow pace of investigations. MLA requests were outstanding for long periods of time in cases such as *Power Project (Philippines)* (almost four years), *Agribusiness (Venezuela)* (three years) and *Oil Refinery (Brazil)* (since November 2013). The MFA stated at the on-site visit that it followed up these requests. However, it is unclear whether the

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<sup>32</sup> Action is extinguished by Congressional amnesty or expiry of limitation period (Articles 59 and 61 PC).

prosecutors and investigative judges took steps to facilitate the requests or to seek alternative sources of information. In the *Gas Plant (Bolivia) Case*, Argentina received the requested assistance from foreign authorities in March 2010. There is no information on whether the case has progressed since that time. As discussed at p. 26, systemic causes of delay in Argentine criminal proceedings are of major concern to the Working Group. Unfortunately, the evaluation team was unable to examine the impact of these systemic factors on actual foreign bribery cases.

84. The absence of the prosecutors and investigative judges also precluded a discussion of sensitive and important issues concerning Article 5 of the Convention. As mentioned at p. 9, the *River Dredging Case* triggered a diplomatic row between Argentina and Uruguay. The evaluation team was unable to fully explore whether the diplomatic tensions influenced the investigative judge and prosecutor. The evaluation team also could not inquire about an initial unsuccessful attempt by the investigative judge to close the case on grounds of double jeopardy. The decision to close seems unusual, since the Uruguayan investigation appeared to target a Uruguayan Company R and not the alleged Argentine bribe-payer. After reviewing a draft of this report, Argentine officials stated that the principle of *non bis in idem* applied to investigations. However, the evaluation team could not explore this theory with the prosecutors and judges who decided to close the case. Likewise, the evaluation team could not discuss an initial unsuccessful attempt to close the *Power Project (Philippines)* in 2009 when MLA requests to the Philippines and domestic inquiries were still outstanding.

85. Without meeting the investigative judges and prosecutors, the evaluation team also could not examine how some of the legal issues described in this report played out in actual foreign bribery cases. For example, in the *Gas Plant (Bolivia) Case* Argentine Company C allegedly bribed a Bolivian official through a joint venture. M, an Argentine national who is Company C's owner and president, was convicted of corruption *in absentia* in Bolivia. Argentina does not have nationality jurisdiction to prosecute M for foreign bribery. However, discussions with the judge and prosecutor could have shed light on whether there was territorial jurisdiction in this case, and in particular whether Argentina's territorial jurisdiction is as expansive as it claims (see p. 16). Similarly, although Argentina does not have corporate liability for foreign bribery (see p. 17), it would have been useful to examine whether Company C could be pursued for alternate offences such as money laundering.

#### ***Commentary***

***The lead examiners deeply regret that they did not have an opportunity to meet the prosecutors and investigative judges who investigated actual foreign bribery allegations in Argentina. Written information on the cases provided by Argentina before, during and after the on-site visit is an inadequate substitute for an in-person discussion. Without an opportunity to meet these officials, the lead examiners could not clarify many issues raised by these cases. They were thus unable to properly assess Argentina's actual foreign bribery enforcement efforts. They therefore recommend that the Working Group revisit these issues in a future evaluation of Argentina.***

#### **(c) *Statutes of Limitation and Delays in Criminal Proceedings***

86. The 2008 Phase 2 Report (para. 109) observed that delays in criminal proceedings "constitute one of the principal impediments to effective enforcement in Argentina". Phase 2 Recommendations 3(b) and 3(e) therefore asked Argentina to address this issue. In 2010, the Working Group considered both Recommendations fully implemented. Nevertheless, in Phase 3 virtually all participants across all sectors at the on-site visit stated that delays in proceedings remain undiminished. Information from other sources corroborates this conclusion. The impact of a very recently enacted Criminal Procedure Code (CPC) cannot be determined at this time.

87. The foreign bribery offence is subject to a statute of limitations of six years but the period is restarted by major procedural acts. Time runs from the commission of the offence, after which the Argentine authorities have six years to summon a person (*declaración indagatoria*), another six years to investigate before filing the indictment (*requerimiento de elevación a juicio*), six further years to summon the accused to for trial (*citación a juicio*), and a final six years from conviction (even if appealed) until the execution of the sentence. No suspension occurs where the accused is a fugitive or if an MLA request is outstanding (Articles 62(2) and 67 PC; Phase 2 paras. 179-180).

88. A further limitation period on the length of investigations is not applied in practice. Article 207 CPC requires investigations to be completed in four months from the first interrogation of a suspect. The period can be extended on application to the Court of Appeal. The Phase 2 Report (para. 109) noted that in practice this time limit is “wholly inapplicable in complex economic crime cases” and that delay is much longer in practice. Participants at the Phase 3 on-site visit agreed with this position.

89. This much longer period of delay in practice was of great concern to the Working Group in Phase 2. Studies cited in the Phase 2 Report (paras. 110-111) referred to corruption cases that lasted 14 years on average. Of the 1 668 complaints of domestic corruption filed by the OA since 1999, not a single resulted in a conviction. Few cases even reached the oral trial stage. One judge said that taking a case to trial required a “personal crusade”. The Phase 2 Report (para. 277) concluded that Argentina was “rarely able to effectively investigate and prosecute serious economic crimes to a resolution on the merits, in particular because of lengthy delays in getting to a decision”.

90. The Argentine authorities took some measures to address these concerns after Phase 2. The Phase 2 Report (para. 277) referred to a draft CPC based on an accusatorial system that had just been published. Before that initiative was completed (see below), Argentina enacted three laws in 2008 which were less ambitious in scope. Law 26 373 aimed to address a common defence delay tactic of preventing cases from proceeding to trial by filing interlocutory appeals. Law 26 374 sought to accelerate appeals by combining and shortening proceedings. Law 26 371 created a new appellate court but the court is still not operational (see p. 31). In addition, PGN Resolution 67/2010 required prosecutors to ask courts to fix early hearing dates and to deny defence delay manoeuvres. The Federal Court of Criminal Appeals Resolution 1/2012 provided rules which are meant to speed up investigations of complex cases.

91. Unfortunately, these measures were clearly ineffective as little has changed since Phase 2. Delay remains a major impediment to enforcement, according to almost all investigative and trial judges, lawyers, academics, parliamentarians, and civil society representatives at the Phase 3 on-site visit. Recent studies and reports make the same point. A 2012 report jointly produced by governmental and non-governmental bodies analysed 21 domestic corruption cases.<sup>33</sup> The average length of the proceedings was more than 11 years, including over 7 years for investigations. Of the 6 concluded cases, 3 had been time-barred. The defence filed 139 interlocutory appeals in the 16 cases in which indictments had been issued. A second report in 2014 considered 15 corruption and economic crime cases and reached similar conclusions.<sup>34</sup> The 2013 MESICIC Report (paras. 94-100 and 216-217) also noted that 63 domestic corruption cases were time-barred in 2007-2010. Just 3.11% of the total cases were referred for trial, and only one case resulted in a conviction and sentence. Complex investigations took 14 years on average.

92. Information from the Argentine authorities also leads to the same conclusion. Prosecutors and investigators at the on-site visit readily acknowledged that delays remained substantial. Argentina was requested but did not provide statistics on delay or cases that had been time-barred. It stated that 1 133

<sup>33</sup> OCDAP et al. (2012), *Los procesos judiciales en materia de corrupción*, pp. 6, 8 and 14.

<sup>34</sup> CIPCE and INECIP (2014), *La reforma procesal penal frente a la corrupción*.

proceedings had been initiated for corruption in 2009-2013. However, it could not provide the figure on the number of convictions, raising the spectre that, as in Phase 2, few proceedings are successfully concluded. OA intervened as a plaintiff in nearly 130 cases since 1999, but trials have been completed in only 13 cases, and 35 cases are under or pending trial. In addition, in 2009-2013 OA filed 173 criminal complaints of corruption but had to intervene 236 times to oppose defence motions to terminate prosecutions due to the statute of limitations. This disproportionately high number suggests that many cases are at risk of being time-barred. Delay may also have contributed to the lack of confiscation, and the low number of convictions for money laundering and false accounting (see pp. 20, 40 and 45).

93. The slow pace of actual foreign bribery investigations reinforces the concerns about delay. As mentioned at p. 25, it is not clear whether several cases have been proactively investigated. MLA requests were outstanding for long periods of time in cases such as *Power Project (Philippines)*, *Agribusiness (Venezuela)* and *Oil Refinery (Brazil)*. In the *Gas Plant (Bolivia) Case*, there is no indication that the case has progressed since Argentina received the requested assistance from foreign authorities in March 2010. The *Power Project (Philippines) Case* dragged on for over six years before it was terminated without charge. In several cases, it is unclear whether any investigative steps had been taken apart from requesting MLA. As mentioned, the evaluation team did not have an opportunity to discuss these issues with the prosecutors and investigative judges who conducted the cases.

94. One cause of the extraordinary delay in economic crime cases is the general criminal procedural framework. In both Phases 2 and 3, many on-site visit participants stated that Argentina's legal system protects an accused's rights by allowing many opportunities for interlocutory proceedings and appeals. This includes challenges to investigative measures while an investigation is on-going. Defendants frequently abuse these features by launching spurious proceedings as a delaying tactic. The above-mentioned figures from other reports on interlocutory proceedings corroborate this point. But while interlocutory proceedings are clearly a cause of the delay, it is not the only one. The foreign bribery investigations described above, for example, progressed at a very slow pace without any attempts by defendants to delay.

95. Another cited cause of delay is the use of both prosecutors and investigative judges to conduct an investigation. An investigative judge may – but is not required to – delegate the investigation to a prosecutor (see p. 22). Several judges and lawyers at the on-site visit believed that this is unsuited to modern complex economic crime cases. Instead, making prosecutors mainly responsible for all investigations would be more efficient. The investigative judge would then be limited to hearing applications by the prosecutor, such as for investigative measures that require judicial authorisation or to transfer the case to trial. One caveat, however, is that a diminished role for the investigative judge could remove an important check on prosecutorial action and executive interference in investigations. Several on-site visit participants also favoured introducing an adversarial system of criminal procedure similar to the CPC reform described in the Phase 2 Report that has since been abandoned.

96. Several additional explanations for delays were offered. Argentine officials and one investigative judge stated that corruption cases are complex. This is true, but similarly complex investigations in most other countries have not suffered from such extreme delays. Other contributing factors include insufficient resources, lack of specialisation, judicial vacancies and the use of surrogate judges. These issues are discussed in greater detail in the next sections. Some individuals have considered that delay is the manifestation of a broader lack of political will to combat corruption (Phase 2 Report para. 111).

97. In the week before providing its comments on a draft of this report, the Supreme Court announced on 21 October 2014 that it would establish a group of ten experts to support corruption cases heard in federal criminal courts. The Argentine authorities state that these experts would be available in foreign bribery cases. However, the instrument establishing the experts group does not refer to foreign

bribery or the Anti-Bribery Convention but does mention other international anti-corruption conventions.<sup>35</sup> The experts group is also yet to be operational.

98. As mentioned earlier, Argentina enacted a new CPC on 4 December 2014, just before the Working Group adopted this report. Once it enters into force, the Argentine authorities state that the new CPC will overhaul the country's criminal procedure by introducing an accusatorial system of justice. Other new features include shorter limitation periods for complex cases to be completed, streamlined procedures and reduced opportunities for interlocutory appeals. The changes, the Argentine authorities believe, will eliminate delay in complex economic crime cases. The new CPC would not, however, apply to pre-existing cases. Much time will be required to clear up this backlog of cases that are subject to the current CPC.

99. Having taken these important steps, it will be extremely important that Argentina promptly implements the new CPC and ensures that it effectively eliminates delay in practice. Mere enactment of the new CPC is an important first step but it is not enough. Argentina's earlier efforts to reduce delay are instructive. As already mentioned, Argentina enacted Law 26 371 in 2008 to create a new appellate court to reduce delay. The court is still not operational today. Much like the new CPC, two other laws enacted in 2008 were meant to address interlocutory appeals and to streamline procedures. Both laws seem to have had negligible impact. While these three laws modify specific aspects of the justice system, the new CPC apparently introduces fundamental, wholesale changes. Hundreds, perhaps thousands, of judges, prosecutors, lawyers and investigators will have to be trained and given time to adjust. A Congressional commission will begin work only in March 2015 to draft laws on budget, restructuring of judicial organs, and training.

#### *Commentary*

*The lead examiners are seriously concerned about the extraordinary delays in economic crime cases in Argentina and the lack of improvement on this issue. They reiterate the Working Group's comments in Phase 2 that "there appears to be a general expectation that corruption cases will not be addressed on the merits, which can create significant risk that those engaging in bribery will feel able to act with impunity." The lead examiners note in particular the extraordinary length of the delay, how long this problem has persisted and how well-known it is.*

*The lead examiners note also that the Phase 2 Report recommended that Argentina review applicable criminal procedural rules, train officials on case management, and ensure prompt investigations and prosecutions. These recommendations were not sufficiently far-reaching, since they were deemed implemented by 2010 but delay in economic crime cases remains as serious today as it has ever been.*

*Argentina states that the new CPC adopted on 4 December 2014 would significantly reduce delay in complex economic crime cases. While this development is encouraging, the evaluation team and the Working Group have not had an opportunity to evaluate the new law. The law is also not yet implemented. Furthermore, because the new CPC appears to drastically change Argentina's criminal procedures, its implementation poses a significant challenge. The speed of the new CPC's implementation and ensuring the law's effectiveness will be another test of Argentina's political will to tackle delay. The lead examiners therefore recommend that Argentina take steps to promptly implement the new CPC, and ensure that the new law effectively reduces delay in practice. They also recommend that the Working Group evaluate*

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[Acordadas 34/2014, Expte. no. 6015/2014, Corte Suprema de Justicia de la Nación.](#)

*the new CPC in a future evaluation after it has entered into force, and follow up the impact of the new CPC on delay in complex economic crime investigations and prosecutions in practice.*

*Finally, the lead examiners note that the causes of delay in Argentina are varied and do not relate exclusively to the CPC. They recommend that Argentina take further steps to ensure that prosecutors and investigative judges in economic crime cases act promptly and proactively without delay. Argentina should actively assess the effectiveness of its measures to reduce delay by maintaining and analysing statistics on delay and economic crime cases that have been time-barred. Additional recommendations to reduce delay caused by inadequate resources and judicial vacancies are described at pp. 31 and 32.*

**(d) Resources and Specialisation**

100. The Phase 2 Report (paras. 138-142) noted that delays were also due to the lack of resources and specialised expertise in corruption cases. Investigators and prosecutors were often heavily outmatched by the resources available to defendants. There was widespread belief that additional resources and training were needed for corruption cases. The situation is exacerbated in foreign bribery cases because the specialised FIA and OA handle only domestic corruption cases. There are no specialised units among investigative judges and prosecutors for foreign bribery investigations. Phase 2 Recommendation 3(c) thus recommended that Argentina ensure adequate resources, including specialised and experienced personnel, are made available for foreign bribery investigations and prosecutions.

101. Since Phase 2, Argentina has created three specialised prosecutorial units to support economic crime cases (see p. 22). Established in December 2012, PROCELAC's staff of about 60 consists mostly of lawyers but also 10 forensic accountants. In 2014, Argentina created the Unit for the Recovery of Assets and the Office for Economic Research and Financial Analysis. Argentina did not indicate the number and qualifications of the staff in these two units or whether the units are operational.

102. The new units are a step in the right direction but they fall short of fully addressing the need for specialised units for foreign bribery investigations. The three units only provide advice and technical support upon the request of the prosecutor in charge of a case. Investigative judges and prosecutors with no specialised training in foreign bribery investigations will continue to lead these cases. Furthermore, the three specialised units have yet to support a foreign bribery investigation and hence their impact remains to be seen. In 2014, PROCELAC and the Ministry of Security organised a training event on economic crime in Argentina and regionally. It is unclear whether the event focused on foreign bribery. Additional training organised by PROCELAC also did not specifically focus on foreign bribery.

103. Overall, there is evidence that resources continue to be insufficient. The 2013 MESICIC Report (paras. 88-89) found that federal judges needed additional support personnel in complex cases. A 2012 report by government and non-governmental bodies noted that the courts did not have enough accounting experts.<sup>36</sup> The experts group established in October 2014 is not yet operational (see p. 28). One investigator at the on-site visit stated that investigative judges are burdened with many other time-consuming non-corruption cases. An investigative judge reported that some courts are overburdened, while a trial judge also said more resources are needed. Actual foreign bribery investigations have progressed slowly (see p. 28). This may indicate a lack of resources, though the evaluation team was unable to canvass this matter with the judges and prosecutors in charge of the cases. Argentina's questionnaire responses provided detailed information on the resources of only the OA, which does not investigate foreign bribery. As noted

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<sup>36</sup>

OCDAP et al. (2012), *Los procesos judiciales en materia de corrupción*, p. 11.

at p. 23, the absence of a specialised foreign bribery unit may have been one reason why the Argentine authorities did not react swiftly to media reports of foreign bribery allegations.

### *Commentary*

*The lead examiners welcome the creation of specialised prosecutorial units to support economic crime cases. However, it is too early to determine the impact of these units on foreign bribery investigations. Moreover, the lead examiners were unable to fully assess whether resources and specialisation impacted Argentina's foreign bribery enforcement actions since the relevant judges and prosecutors did not attend the on-site visit. Nevertheless, the available information indicates that specialisation and resources continue to be insufficient. The lead examiners therefore reiterate Phase 2 Recommendation 3(c) and recommend that Argentina (a) ensure that adequate resources, including specialised and experienced investigative judges, are made available for foreign bribery investigations and prosecutions; and (b) provide foreign bribery-specific training to all judges and prosecutors that have jurisdiction to investigate and prosecute this crime.*

#### *(e) Judicial Vacancies and Surrogate Judges*

104. The Phase 2 Report (paras. 130-132, 136) expressed significant concerns about an extraordinary number of vacant judicial positions, and the resultant impact on delay and judicial independence. Some 20% of national judge seats were vacant as of December 2007. This was due to a high rate of resignations and delays in the appointment process. For each vacant federal judgeship (except for the Supreme Court), the Judicial Council assembles a panel based on a public competition and the candidates' qualifications. The President chooses from the panel, but the decision must be confirmed by two-thirds of the Senate. On average, it took over two years to appoint a judge. The vacancies in turn led to delay in resolving cases.

105. There have not been major improvements since Phase 2. According to data provided by Argentina, 94 federal judicial positions were vacant (22.2% of total positions) as of 31 May 2014. For courts with jurisdiction to hear foreign bribery, the vacancy rate was 25.6% (21 out of 82 positions) as of August 2014. Only one appointment was made in 2013. A revealing example is the new court created by Law 26 371 in May 2008 to reduce delay in proceedings (see p. 27). The court's judges were appointed some 5½ years later in November 2013. The court was still not sitting as of May 2014 because the Judicial Council had yet to elaborate certain operational matters. The Argentine authorities point out that all federal judgeships in Buenos Aires had been filled as of October 2012. That is encouraging, but as the *Gas Plant (Bolivia) Case* shows, some foreign bribery cases are investigated and prosecuted outside of the capital.

106. Other sources of information also indicate a large number of judicial vacancies. Numerous representatives of the judiciary, civil society and the legal profession at the on-site visit expressed their concerns about the number of vacancies. Several reports stated that judicial appointments took up to five years because of delays by the Judicial Council and the Executive. The number of vacancies each year far outstripped the number of competitions held to fill these positions.<sup>37</sup>

107. Judicial vacancies give rise to the use of surrogate judges who are, in theory, temporary appointments to fill vacant positions until a permanent appointment can be made. Since 2008, surrogate judges are required to be chosen from retired judges or existing judges from another court or jurisdiction. If

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<sup>37</sup> [MESICIC \(2013\)](#), paras. 83 and 85; Asociación por los Derechos Civiles (ADC) (31 October 2012), “[Comunicado de ONGs a propósito de las deficiencias en el sistema de selección de jueces](#)”; ADC (31 October 2012), [Los jueces subrogantes en el Poder Judicial de la Nación](#), pp. 2 and 6.

no such judge is available, then surrogate judges are selected from a list of eligible persons drawn up by the government and approved by the Senate.<sup>38</sup> Court clerks have often served as surrogates.

108. The Working Group has noted that widespread judicial vacancies and use of surrogate judges contribute to delay in the resolution of investigations and prosecutions. The Phase 2 Report (paras. 132-134) noted that important domestic corruption cases did not have judges assigned. Drawing on existing judges to serve as surrogates exacerbates the problem of judicial vacancies. The investigative judge at the Phase 3 on-site visit stated that he was overloaded when he had to perform double-duty as a surrogate. This can only add to delay in proceedings.

109. The Working Group has also noted that judicial vacancies and surrogate judges impinge upon judicial independence (Phase 2 para. 133). Appointments made from the government's list of eligible persons do not have the same Constitutional safeguards of independence and qualifications. Any federally registered lawyer may be placed on the list without input from the Judicial Council or a public competition. Moreover, candidates for judgeships may be involved as surrogate judges in resolving sensitive cases during the pendency of their candidacy. Delay in processing candidates thus increases the risk of executive interference, and perceptions that these surrogate judges favour the Executive to avoid jeopardising their candidacy. Representatives of the legal profession and civil society at the Phase 3 on-site visit expressed strong concerns about surrogate judges for these reasons.

110. The Working Group further noted that the break in continuity of investigative personnel resulting from vacancies and appointment of surrogates also impact independence and delay. Frequent resignations led to disruptions. Judges in major corruption cases were often replaced (Phase 2 paras. 130-134 and Recommendation 3(c)). A recent case illustrates these points. According to media reports,<sup>39</sup> a surrogate investigative judge conducted a corruption investigation against an individual who reportedly had close ties to an Argentine official at the highest level of government. As the case neared the indictment stage after years of investigation, the government replaced the surrogate judge. Examples like these give rise to a perception of government interference in judicial investigations, as the on-site visit participants observed. At a minimum, the disruption to the investigation exacerbates delays.

### *Commentary*

*The lead examiners are extremely concerned that there has been little improvement since Phase 2 on judicial vacancies and the use of surrogate judges. They are encouraged that there are currently no vacancies in Buenos Aires, which is the jurisdiction where most corruption cases will be investigated and heard. However, the overall percentage of vacancies remains the same as in Phase 2. The procedure for appointing surrogates has been modified but concerns about judicial independence remain. The lead examiners therefore recommend that Argentina take urgent measures to reduce the number of judicial vacancies and surrogate judges. They also reiterate Phase 2 Recommendation 3(c) and recommend that Argentina take measures to increase the continuity of investigative personnel for particular cases, including judges and prosecutors, to the greatest degree possible.*

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<sup>38</sup> Laws 26 372 and 26 376; Judicial Council Resolution 8/2014.

<sup>39</sup> [Clarín \(10 May 2013\)](#); [Clarín \(16 May 2013\)](#); [La Voz \(17 May 2013\)](#); [La Nación \(18 May 2013\)](#); [La Nación \(24 May 2013\)](#).

*(f) Article 5 of the Convention*

111. Under Article 5 of the Convention, foreign bribery investigations and prosecutions must be governed by the rules and principles that apply generally to all cases. These cases must also not be influenced by considerations of national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal persons involved. Commentary 27 on the Convention adds that foreign bribery cases must not be subject to political influence, and that allegations must be seriously investigated by adequately-resourced bodies.

112. The Phase 2 Report (paras. 144, 152-156) noted that “the Argentine judicial system has suffered from a significant degree of political interference”. Some measures had been taken to improve the situation, such as a reform of the selection of Supreme Court judges. Nevertheless, the Working Group raised two matters of concern: executive contact with law enforcement about particular cases, and discipline of judges by the Judicial Council. Additional concerns about judicial independence deriving from judicial vacancies and surrogate judges are described at p. 31. As mentioned at p. 26, the evaluation team was unable to discuss with prosecutors and judges the role of Article 5 factors in actual foreign bribery cases.

*(i) Executive Contact with Law Enforcement about Specific Cases*

113. The Phase 2 Report (paras. 146-151) expressed serious concerns over two reported instances where the executive government contacted law enforcement officials who were conducting domestic corruption investigations. The first concerned intelligence service agents who allegedly visited and informed an investigative judge that the President was very interested in a major tax fraud/corruption cases that the judge was investigating. A second case involved a senior government official asking a prosecutor to keep the government informed of a case’s progress. The prosecutor later disclosed to a cabinet minister by telephone his suspicions about two government officials which resulted in the officials’ immediate dismissal. A book by an investigative journalist referred more generally to relatively frequent direct and indirect contact between government ministers and federal judges and prosecutors.

114. Phase 2 Recommendation 3(d) therefore asked Argentina to ensure that Article 5 factors do not influence foreign bribery cases, and to consider measures that limit the disclosure of confidential case information. In 2010, the Working Group found Recommendation 3(d) fully implemented but that the matter should be reconsidered when cases of executive contact arise.

115. There is evidence that cases of executive contact have indeed arisen again. Phase 3 on-site visit participants stated that executive contact with law enforcement officials about specific cases is common in Argentina. They discussed one case reported in the media<sup>40</sup> where an investigative judge in a money laundering case ordered the search of certain premises. When the police arrived for the search, the premises’ owner called a senior government official. This official in turn phoned the investigative judge, who called off the search. The judge later claimed that the official informed him that the officers executing the search had asked for a bribe. However, the judge halted the search without investigating the bribery claim because he considered the official a “trusted source”. The bribery claim and the judge’s conduct are being investigated.

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<sup>40</sup> [Infobae \(11 March 2014\)](#); [La Nación \(12 March 2014\)](#); [PanAm Post \(14 March 2014\)](#); [Infobae \(28 March 2014\)](#); [Cadena 3 \(29 March 2014\)](#); [Buenos Aires Herald \(29 March 2014\)](#); [Diario Uno \(7 April 2014\)](#); [La Nación \(15 April 2014\)](#); [Clarín \(18 April 2014\)](#); [El País \(26 April 2014\)](#).

116. Another example of executive contact is the *Undeclared Cash (Venezuela) Case*, which involved a dual Venezuelan-US citizen arriving in Argentina with large amounts of undeclared cash (see p. 10 for more details). After an investigative judge opened an investigation, a senior government official strongly criticised the judge's handling of the case in a public statement and interviews. He also threatened to report the judge to the Judicial Council. This led the judge to withdraw from the case "for reasons of decorum" and because the government official's comments could "compromise the objectivity in resolving the case". The judge was reinstated after the Court of Appeal overruled her decision to withdraw.<sup>41</sup>

117. On-site visit participants gave further examples. They referred to another case in which a very senior government official was under investigation for corruption allegedly committed prior to taking office. According to media reports,<sup>42</sup> the lawyer of the senior official's co-defendant exchanged text messages with the investigative judge to discuss the case. The judge was removed from the case after the communication came to light. One on-site visit participant who had previously worked for a judge added that there were regular phone calls by the government to the judge's office.

118. The problem of executive contact has not lessened since Phase 2, contrary to Argentina's contention. The Argentine authorities argue that all foreign bribery allegations that were known before the on-site visit had resulted in investigations. Some of the allegations were referred to law enforcement by the Executive. The closing of certain investigations was challenged in the courts. That said, the investigative judges and prosecutors in the actual foreign bribery cases did not attend the on-site visit (see pp. 7 and 25). The evaluation team therefore could not explore whether there has been executive contact in these cases. As noted at p. 25, there is some evidence of improper attempts to prematurely close sensitive foreign bribery cases such as *River Dredging (Uruguay)*. Furthermore, any comfort derived from the opening of the foreign bribery investigations is more than offset by the very troubling examples of executive contact described above.

### *Commentary*

*The lead examiners are concerned that there continues to be reported instances of government officials contacting judges and prosecutors about specific cases. As the Working Group observed in Phase 2 (para. 149), even innocuous contact to discuss individual cases inevitably give rise to serious suspicions of political influence. Even if there is no actual influence, these contacts weaken the legitimacy and thus the effectiveness of the law enforcement system. Comments meant to be innocuous may be interpreted by others differently. The risk of actual efforts to exercise political influence also rises with the frequency of such contact. The lead examiners are also concerned that they did not have an opportunity to discuss with judges and prosecutors whether there had been executive contact in actual foreign bribery cases.*

*For these reasons, the lead examiners reiterate Recommendation 3(d) that Argentina take steps to ensure that the factors listed in Article 5 of the Convention do not influence foreign bribery investigations and prosecutions. Argentina should also take steps to ensure that government officials refrain from contacting judges and prosecutors about specific cases.*

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<sup>41</sup> Perfil (10 August 2007); Página12 (11 August 2007); Diario Uno (11 August 2007); Infobae (11 August 2007); Clarín (13 August 2007); Clarín (15 August 2007); La Voz (15 August 2007); La Gaceta (16 August 2007).

<sup>42</sup> Perfil (11 April 2012); Clarín (11 April 2012); La Nación (15 April 2012); La Nación (27 April 2012); Clarín (28 April 2012); Infobae (8 November 2013).

(ii) *Disciplinary Processes of Judges and Prosecutors*

119. Prosecutors are subject to disciplinary sanctions including suspension (*prevención*), warning and a fine. These sanctions are imposed by the Attorney General, or a court if the misconduct occurred during proceedings. A prosecutor may also be removed from office by an impeachment court that consists of seven members: three members who meet the constitutional requirements of being Supreme Court judges (one each appointed by the Executive, the Senate, and the Supreme Court); two lawyers appointed by the legal professional bodies; one prosecutor; and one public defender.<sup>43</sup>

120. The Judicial Council exercises disciplinary powers over judges (but not Supreme Court judges). The Council investigates and penalises administrative misdemeanours, but refers cases of serious misconduct, which includes corruption, to an impeachment tribunal (*jurado de enjuiciamiento*). In Phase 2, judges indicated that, in exceptional cases, disciplinary proceedings against judges had been used as pressure tactics in sensitive cases (Phase 2 paras. 152-153).

121. Reforms to the Judicial Council shortly before the Phase 2 Report controversially increased the influence of the political branches of government. The reform gave the political branches 7 out of 13 seats on the Council<sup>44</sup> (rather than 9 out of 20 previously) and thus the majority needed to veto candidates and block removals. The Executive and majority party were also in effect given the power to appoint five members. If these five members voted together, they could block the two-thirds majority vote needed to select and remove judges. The proportion of political members in the impeachment tribunal was also increased from one-third to four out of seven, i.e. a majority. The Judicial Council must inform the Executive of proceedings to remove a judge but is not required to make the decision public (Phase 2 paras. 154-155). As a result of these developments, the Working Group decided to follow up the functioning of the Judicial Council (Follow-up Issue 13(h)).

122. Since Phase 2, the media has widely reported government efforts to further increase political control over the Judicial Council.<sup>45</sup> In March 2013, the government announced plans to “democratise” the judiciary. The most controversial reform was to expand the Judicial Council to 19 members, 12 of whom would be elected by popular vote. Candidates’ names would be listed on political party ballots during general elections, which would effectively give the ruling party control over the Council. The remaining seats would go to six Congress members and one government representative, thus further strengthening the ruling party’s grip on the Council. Council decisions would be taken by a simple majority rather than two-thirds as before. These proposals were considered to significantly reduce judicial independence and prompted vociferous protests from judges, lawyers, international organisations and civil society. Nonetheless, legislation was introduced and adopted by Congress in May 2013, just two months after the reforms were announced. In June 2013, however, the Supreme Court found the law unconstitutional.

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<sup>43</sup> Law 24 946 Organic Law of *Ministerio Público*, Articles 16-20; PGN Resolution 162/2007.

<sup>44</sup> Argentina states that these seven seats would have consisted of six legislators and one representative of the Executive Branch. The six legislators would have been split evenly between the upper and lower houses of Congress, with four from the majority party blocks in each house and two from the minority.

<sup>45</sup> FT (2 March 2013), “[Buenos Aires to ‘democratise’ judiciary](#)”; Reuters (8 May 2013), “[Argentine congress passes judicial reform bill](#)”; El Mundo (20 June 2013), “[Kirchner afirma que ‘más temprano que tarde’ se harán los cambios en la Justicia](#)”; La Razón (20 June 2013), “[Presidenta de Argentina insiste en ‘democratizar’ la Justicia tras fallo adverso de Supremo](#)”; El País (21 June 2013), “[Fernández seguirá dando la batalla por la reforma judicial](#)”; The Economist (21 June 2013), “[Foiled: Argentina’s judicial reforms](#)”; El País (23 June 2013), “[Kirchnerismo pretende una nueva Constitución contra corporaciones](#)”; New York Times (5 July 2013), “[Cristina and the Supremes](#)”.

123. On-site visit participants also referred to recent examples of actual and threatened disciplinary proceedings against judges and prosecutors. As described at p. 34, a senior Argentine official publicly threatened an investigative judge with disciplinary proceedings in the *Undeclared Cash (Venezuela) Case*. Another case involved a corruption investigation of a businessman with reportedly close links to an Argentine official at the highest level of government. After the businessman publicly complained that the prosecutor did not have the power to investigate, the Attorney General called for the prosecutor's dismissal in December 2013. The prosecutor was duly suspended a few days later and removed from the case. In July 2014, an impeachment court lifted the suspension.<sup>46</sup> At the on-site visit, trial and investigative judges did not express concerns about the disciplinary process. One judge, however, said that the threat of disciplinary action could be used as a pressure tactic. Argentina provided four examples of judges who had been disciplined but not comprehensive statistics on the removal and discipline of judges. MESICIC (2013 Report para. 104) was also unable to obtain relevant statistics.

124. The evaluation team learned of additional relevant developments that occurred shortly before this report was adopted. According to the Argentine authorities, the Judicial Council summoned a judge as early as March 2014 due to complaints that the judge had acted with unreasonable delay in two cases. Later, a legislator presented to the judge a complaint for accounting irregularities against a company in which an Argentine official at the highest level is a shareholder. The judge executed a search warrant at the company's premises on 20 November 2014. On 27 November 2014, the Argentine Under-Secretary of Justice (who is not a shareholder in the company) filed a complaint against the judge in the Judicial Council for "poor performance" in this case. The Judicial Council then considered the complaints against the judge for unreasonable delay that had been made before the search was executed. On 3 December 2014, the Judicial Council decided against the judge and cut the judge's salary by 30% as a sanction. The Council's decision by a one-vote majority was not sufficient to suspend the judge. The Argentine authorities added that the new President of the Judicial Council had stated in September 2014 her intention to tackle delay in cases.

125. The Argentine authorities stated that media articles and legislators provided different interpretations of these events. Some articles stated that the judge had searched the company to halt the pre-existing proceedings against him in the Judicial Council. Others came to the opposite view that the judge was punished by the Judicial Council in retaliation for the investigation into the company in which an Argentine official at the highest level is a shareholder. Some media articles also reported allegations that a hotel managed by the company that was searched had been used to launder money.<sup>47</sup>

126. Regardless of these competing interpretations, these developments nevertheless raise serious concerns. The Under-Secretary of Justice filed a complaint against the judge one week after the search was executed. This suggests an attempt by the Executive to interfere with the investigation through the disciplinary process. Furthermore, after the search was conducted, the Under-Secretary and the official at the highest level who is a shareholder of the company criticised the judge in social media. A senator of the ruling party then filed a criminal complaint against the judge for embezzlement, illicit enrichment, money laundering, and breach of duty in an unrelated matter.

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<sup>46</sup> Clarín (23 May 2013); La Nación (6 December 2013); Infobae (12 December 2013); Clarín (12 December 2013); Fiscales Federales (13 December 2013); Clarín (29 April 2014); La Nación (29 April 2014); La Nación (17 July 2014); Wall Street Journal (28 July 2014).

<sup>47</sup> La Nación (24 November 2014); Perfil (26 November 2014); La Nación (26 November 2014); La Republica (26 November 2014); La Nación (26 November 2014); Wall Street Journal (27 November 2014); El Periodiquito (27 November 2014); La Nación (27 November 2014); La Nación (27 November 2014); La Nación (3 December 2014); La Nación (3 December 2014); Diario Registrado (8 December 2014).

## Commentary

*The lead examiners are seriously concerned by the Argentine government's use of disciplinary proceedings against judges and prosecutors. The Phase 2 Report noted that judicial disciplinary proceedings had been used as pressure tactics against judges in sensitive cases. This trend has since continued in Phase 3. A senior Argentine official called for the prosecutor's dismissal in the Undeclared Cash (Venezuela) Case. The Attorney General instituted proceedings against a prosecutor in a sensitive case that led to his dismissal in December 2013. Most recently, the Under-Secretary of Justice filed a complaint against another judge one week after a search was executed in a case linked to Argentine officials at the highest levels. These actions are a serious assault on judicial and prosecutorial independence. As the Working Group has commented on numerous occasions, the protection of judges and prosecutors from external pressure and influence is essential to ensuring that extraneous political and economic factors do not affect foreign bribery cases.<sup>48</sup>*

*For these reasons, the lead examiners recommend that Argentina ensure that the exercise of investigative and prosecutorial powers, in particular for the foreign bribery offence, is not subject to improper influence by concerns of a political nature. In particular, Argentina should take all necessary steps to ensure that actual or threatened disciplinary action against judges and prosecutors does not adversely affect foreign bribery investigations and prosecutions, and is not motivated by considerations of national economic interest, potential effect upon relations with another State, or identity of the natural or legal person involved. The lead examiners also reiterate Phase 2 Follow-up Issue 13(h) and recommend that the Working Group continue to follow up the functioning of the Judicial Council.*

### (g) Investigative Techniques

127. This section considers the means of gathering information in foreign bribery investigations. Concerns regarding the obtaining of information from the financial intelligence unit and tax authorities are discussed later at pp. 42 and 51.

128. The Phase 2 Report (paras. 124-125) stated that search and seizure as well as special investigative techniques are available in investigations of all crimes, including foreign bribery. Wiretapping and surreptitious video recording had been used in domestic corruption investigations. CPC Articles 234-236 address wiretapping and interception of correspondence but there are no provisions on surreptitious recording or controlled deliveries. The FIA is expressly authorised to use these techniques (UNCAC Report pp. 8-10) but it is not competent to investigate foreign bribery.

129. Freezing and seizure of assets are available under multiple provisions. Article 231 CPC and Article 23(9)-(10) PC allow seizure of objects as evidence or for later confiscation. Article 23 PC also allows seizure to avoid "the consolidation of the benefit" of the crime or to "prevent the impunity of the offenders". Article 518 CPC allows seizure to guarantee any monetary sanction, civil compensation and costs. The Phase 2 Report (para. 228) noted that seizure may not have been applied in practice. In Phase 3, Argentina's National Registry on Confiscated and Seized Assets indicated that the authorities seized ARS 74 million (USD 8.7 million) and additional sums in other currencies in 238 cases in 2012-2013. 19 cases involved crimes against the public administration but how many involved bribery is unknown.

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<sup>48</sup> Phase 3 Reports on Turkey (paras. 87-92); Czech Republic (paras. 97-99); France (paras. 92-96); Slovenia (paras. 9, 73-78); and South Africa (paras. 80-101); and Phase 2 Report on Russia (paras. 127-135).

130. Information subject to bank secrecy may be obtained during an investigation only with a court order (Law 21 526, Article 39). In Phase 2 (para. 121), the ability of prosecutors and magistrates to obtain bank information varied. Some did not report significant problems. FIA and OA officials had serious difficulties but these bodies do not investigate foreign bribery. In Phase 3, Argentine authorities did not report concerns but the evaluation team was unable to hear the views of prosecutors and investigative judges who conducted actual foreign bribery cases (see p. 7). The FIU has been granted powers to obtain confidential bank information without judicial authorisation.<sup>49</sup> After the on-site visit, Argentina added that, bank secrecy applies to operations where banks take deposits from the public (passive operations) but not operations in which banks place money (active operations) (Law 21 526).

131. There is no central registry for corporate information. The Phase 2 Report (para. 123) described difficulties for prosecutors and judges to obtain corporate information. Company registries are generally under provincial jurisdiction and no national registry existed. Phase 2 Recommendation 3(f) asked Argentina to “accelerate efforts to create an effective national register of information relating to all Argentine companies”. In 2010, the Working Group considered this Recommendation fully implemented because Law 26 047 establishing the registry had been enacted. However, Argentina confirmed that there is still no operational central corporate registry. Law 26 047 requires each state to pass laws to participate in a central registry. At present, only 16 of 23 jurisdictions are part of the registry.

#### *Commentary*

*The lead examiners recall Phase 2 Recommendation 3(f) and recommend that Argentina accelerate efforts to implement an effective national register of information relating to all Argentine companies. The lead examiners are also disappointed that they could not assess the use of investigative techniques in actual foreign bribery cases.*

## **6. Money Laundering**

132. This section addresses Argentina’s criminal money laundering offence, including enforcement in practice, followed by the reporting of suspicious money laundering transactions to Argentina’s financial intelligence unit, UIF (*Unidad de Información Financiera*). The last part deals with challenges for law enforcement authorities in obtaining information from UIF.

### **(a) Money Laundering Offence**

#### **(i) Elements of the Money Laundering Offence**

133. In 2011, Argentina repealed Article 278 PC that was considered in Phase 2 and enacted a new money laundering offence in Article 303 PC.<sup>50</sup>

Article 303(1) A prison term of three (3) to ten (10) years and a fine equal to two (2) to ten (10) times the amount of the relevant transaction will be imposed on any persons who transform, transfer, manage, sell, tax, conceal or in any other way circulate goods originating from criminal offences, with the possible consequence of having the origin of the original or surrogate goods appear lawful, and as long as they have a value equal to or over three hundred thousand Argentine pesos

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<sup>49</sup> Law 25 246, Article 14 as amended by Law 26 683.

<sup>50</sup> The Phase 2 Report also considered the offence of concealment in Article 278 PC, which remains in force.

(ARS 300 000),<sup>51</sup> whether the crime constitutes a single act or repeated and related different actions.

134. The penalty described above for the offence is increased under certain aggravating circumstances. If the laundered property exceeds ARS 300 000, the maximum penalty is imprisonment of three to ten years and a fine of two to ten times the value of the laundered property (Article 303(4) PC). The maximum penalty further increases by one-third for offenders who are public officials, or who regularly engage in money laundering or are members of a group that does so (Article 303(2) PC). Receiving money or goods originating from a criminal offence for the purpose of laundering is a separate offence (Article 303(3) PC). The new offence covers self-laundering since, unlike its predecessor, it is not limited to individuals who launder the proceeds of offences “in which they have not participated”. Phase 2 Recommendation 12(c) is thus implemented.

135. Article 303 PC does not expressly cover the laundering of instrumentalities of a crime. Article 303(1) only covers the laundering of goods “originating from” (*bienes provenientes*) criminal offences. The same wording was employed in the now-repealed Article 278 PC, which the Working Group found did not cover the laundering of instrumentalities of a crime, such as a bribe (Phase 2 para. 247). Argentina argues that the laundering of a bribe would be covered because once the bribe is given to a foreign official, it “originates from” the crime of bribe-taking committed by the official.

136. Another issue is that the new offence does not expressly cover the laundering of indirect proceeds of crime. This is because Article 303(1) only covers the laundering of “goods originating from criminal offences” but not property that derives from these goods. Argentine authorities again disagree. They argue that indirect proceeds are covered because Article 303(1) applies to the laundering of “goods originating from criminal offences, with the possible consequence of having the origin of the original *or surrogate goods* appear lawful” [italics added]. In addition, a trial court recently held that Article 278 PC (the predecessor of Article 303 PC) covered the laundering of indirect proceeds.<sup>52</sup> Whether the courts would apply this interpretation to the new Article 303(1) PC would need to be followed up.

137. The new offence also does not address earlier concerns regarding the laundering of proceeds from an offence that was committed outside Argentina. Article 303(5) PC prohibits such cases only if the act constituting the predicate offence is punishable in the jurisdiction where it occurred (i.e. dual criminality). Hence, if an official of country C is bribed in country B and the proceeds are laundered in Argentina, then it is an offence under Article 303 PC only if country B has criminalised foreign bribery. Article 303 PC thus arguably falls short of Article 7 of the Convention, which requires the money laundering offence to apply “regardless of where the bribery occurred” (Phase 2 para. 249 and Follow-up Issue 13(e)).

138. Article 304 PC was also enacted in 2011 to create a new corporate liability regime for money laundering. Liability arises when money laundering is committed in the name, with the participation, or for the benefit of a legal entity. The maximum penalty is a fine of two to ten times the value of the laundered property; debarment from procurement and total or partial suspension of activities of up to ten years; loss or suspension of state benefits; publication of conviction; and cancellation of the legal entity if money laundering is the entity’s main activity or the sole purpose of its creation. The infringement of internal rules and procedures, and the lack of supervision over natural persons who commit the crime, are factors considered at sentencing. They are not full defences to the offence.

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<sup>51</sup> Approximately USD 37 500.

<sup>52</sup> *Pedro Norberto Sánchez y otros* (10 May 2013), Case 721/2010, Federal Criminal Oral Tribunal in Corrientes. See also FATF (2014), [Mutual Evaluation of Argentina – 11<sup>th</sup> Follow-up Report](#), p. 12.

(ii) *Enforcement of the Money Laundering Offence*

139. Enforcement of the money laundering offence, like other economic crimes, is a major challenge. The Phase 2 Report (para. 252) identified that enforcement in practice was rare. Money laundering was criminalised in 1989. By 2008, there had only been two convictions. Since Phase 2, there have been more proceedings (250 on-going as of April 2014). But given the delay in economic crime cases, convictions remain a rarity, with only four cases yielding convictions of 13 individuals since 2008. No legal persons have been convicted.

140. The Phase 2 Report (para. 251) also expressed concern that, to secure a conviction, the prosecution must prove that the person accused of money laundering had specific knowledge of the predicate offence. In Phase 3, Argentina stated that a conviction of the predicate offence is not required, since the new Article 303 PC offence covers laundering of goods originating from “an unlawful criminal act” (*ilícito penal*) instead of “an offence” (*delito*). Argentina also referred to case law which stated that it is not necessary to prove that the offender knew of the specific circumstances of the predicate offence. Knowledge of the general category of offences that gave rise to the proceeds is sufficient.<sup>53</sup>

*Commentary*

*The lead examiners note that Argentina has improved its money laundering offence since Phase 2, such as by expanding the offence to cover self-laundering. The lead examiners recommend that the Working Group follow up the application of the money laundering offence in Argentina, including: (a) whether the offence covers the laundering of a bribe and the laundering of indirect proceeds of crime, (b) whether foreign bribery is always a predicate offence to money laundering, without regard to the place where the bribery occurred, and (c) enforcement of the money laundering offence in practice.*

(b) *Prevention, Detection, and Suspicious Transaction Reporting*

141. Law 25 246 (AML Law) lays out Argentina’s anti-money laundering (AML) system and created UIF, Argentina’s financial intelligence unit. Decree 1963/2010 gives UIF a central role in AML matters. The Executive Branch appoints the Head of UIF on the suggestion of the Ministry of Justice and Human Rights and may remove the Head for cause (Law 25 246 Articles 9 and 9bis).

142. Concerns remain that legal professionals are not required to report suspected money laundering transactions (Phase 2 paras. 241-245 and Recommendation 12(b)). The AML Law sets out obligations to file suspicious transaction reports (STRs) to UIF. Legislative amendments in 2011 extended reporting obligations to accountants and auditors but not lawyers.<sup>54</sup> Also exempt from reporting are certain *síndicos*, who under Argentine corporate law are a type of statutory auditor entrusted with observing that the corporation abides by the law. Appointment of a *síndico* is not mandatory, except for corporations that are publicly held or public utilities, or whose capital exceeds ARS 10 million (USD 1.175 million). A *síndico* must be an accountant or a lawyer. Those who are lawyers are not subject to the STR reporting regime.

143. There are also doubts about due diligence for financial transactions involving foreign politically exposed persons (PEPs). In Phase 2 (para. 243), enhanced diligence was required for clients who were “public officers” but not PEPs from foreign countries. UIF has since amended its definition of PEPs to

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<sup>53</sup> Orentrajch, Pedro, (21 March 2006), Federal Court of Criminal Appeals, Court I. The case interpreted the predecessor provision of the current Article 303 PC.

<sup>54</sup> Law 25 246, Article 20(17); FIU Resolution 65/2011, Article 2(e).

include foreign PEPs (Resolution 11/2011 as amended). However, the definition is restricted to individuals who have held prominent functions in the past two years and not based on an assessment of risk.<sup>55</sup> The definition also does not cover important officials of political parties.<sup>56</sup> Before a business relationship is established, a potential customer must declare whether he/she is a PEP in an affidavit to the financial institution. When dealing with PEPs, reporting entities must “carry out a more comprehensive follow-up of the relationship”, “strengthen all necessary measures to help determine the origin of funds involved in transactions”, and “continuously monitor the business relationship”. It is unclear whether there are guidelines elaborating these requirements.

144. Typologies on money laundering predicated on foreign bribery have not been prepared. UIF provided two sample typologies that involved domestic corruption and drug trafficking. A third involved “crimes against the public administration of a foreign State” without specifying what the crime was. The typology also focused more on how illegal assets were introduced into the Argentine financial system from abroad, and not how foreign bribery might be detected.

145. Legislation requires AML measures to be applied to funds repatriated under a voluntary tax compliance programme (Decree 2170/2013, Article 14). Approximately USD 722 million had been repatriated when the programme ended on 31 March 2014. PROCELAC stated that transactions under the programme have generated STRs. Nevertheless, civil society representatives and private sector lawyers at the on-site visit expressed some concerns about the inadequacy of AML measures that were applied.

146. The number of STRs and UIF’s resources have increased dramatically since Phase 2. The number of entities required to file STRs increased from 350 in 2009 to 34 510 by March 2014. As a result, 36 079 STRs were filed in 2013 alone, up from 6 042 in 2009-2011. UIF’s budget has increased fivefold and staff size has more than doubled since 2010. Tax authorities and the National Securities Commission (*Comisión Nacional de Valores*, CNV) can no longer invoke secrecy provisions when requested by UIF to provide information (Law 26 683, Article 14(1) and Law 26 831, Article 27).

### ***Commentary***

***The lead examiners note that Argentina has improved its STR reporting system. The number of STRs filed and UIF’s resources have also increased. To further improve, the lead examiners reiterate Phase 2 Recommendation 12(b) and recommend that Argentina (a) extend money laundering reporting, due diligence and record keeping obligations to lawyers, *síndicos* and other legal professionals (subject to appropriate qualifications); (b) further enhance AML measures for financial transactions involving PEPs, including by adding important political party officials to the definition of PEPs; ensuring that due diligence of former PEPs is based on an assessment of risk and not on prescribed time limits; and issuing guidelines on the handling of PEPs; and (c) raise awareness about foreign bribery as a predicate offence to***

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<sup>55</sup> See [Financial Action Task Force \(FATF\) Guidance – Politically Exposed Persons \(June 2013\)](#), para. 44: “Recommendation 12 also defines a PEP as being someone who has been (but may no longer be) entrusted with a prominent public function. The language of Recommendation 12 is consistent with a possible open ended approach (i.e., “once a PEP – could always remain a PEP”). The handling of a client who is no longer entrusted with a prominent public function should be based on an assessment of risk and not on prescribed time limits” (underlining added).

<sup>56</sup> The FATF [Recommendations](#) (February 2012) define foreign PEPs as “individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials” (underlining added).

*money laundering, including by preparing typologies on foreign bribery-related money laundering.*

**(c) *Sharing Information with Law Enforcement Authorities***

147. UIF provided data on the information that it had submitted to law enforcement. The number of complaints that UIF has filed with law enforcement as a plaintiff increased from 1 in 2000-2009 to 46 in 2010-2014. Over the same period, it has forwarded an average of 172 STRs to law enforcement annually. In 2000-2009, judicial bodies made 201 requests for information from UIF. The frequency of requests approximately doubled to 259 in 2010-2014.

148. Of substantial concern are allegations reported by the media that UIF has inappropriately withheld information from law enforcement authorities. On-site visit participants referred to criminal investigations concerning UIF that have been reported in the media. In one on-going case,<sup>57</sup> a prosecutor and an investigative judge were investigating media reports that UIF supposedly withheld 128 out of 130 STRs that should have been forwarded to law enforcement. The only two that were transmitted concerned a media group which was reputed to be critical of the government. After the on-site visit, UIF stated the investigation was ongoing and had not resulted in indictments.

149. According to other media reports referred to by on-site visit participants, a prosecutor and an investigative judge investigated allegations that the Head of UIF, since taking office in 2010, hired unqualified family members, friends and government supporters for senior and lower-level UIF positions. Existing staff were dismissed for allegedly political reasons. After the on-site visit, UIF stated that this investigation had ended without charges.

150. The alleged withholding of information by UIF has led judicial authorities to issue an order requiring UIF to produce materials in a corruption case. Participants at the on-site visit referred to media reports<sup>58</sup> of an ongoing corruption investigation against a businessman with reported links to an Argentine official at the highest level of government. UIF received STRs originating from financial transactions involving the businessman but did not forward them to law enforcement. This led the investigative judge in charge of the corruption investigation to serve a judicial order on UIF for the production of the STRs. UIF was also ordered to produce an organisational chart identifying the responsibilities of each staff member.

151. At the on-site visit, UIF added that the judicial proceedings against its Head were without merit. In its view, the proceedings were the result of the initiative of individuals in the media who had committed crimes against humanity under a previous military government and thus opposed the current administration. UIF also stated that it co-operated with and provided information to the judicial authorities in these investigations. In addition, the Financial Action Task Force (FATF) removed Argentina from its follow-up process in October 2014.<sup>59</sup> Argentina stated that this process focused on UIF's technical compliance with norms but also included components concerning the effectiveness of UIF. However, during this process FATF did not deal with the above-mentioned allegations and judicial investigations

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<sup>57</sup> La Política (6 October 2011); La Nación (6 October 2011); La Nación (20 August 2012); La Nación (1 September 2012); La Nación (1 September 2012); La Nación (9 September 2012); Clarín (12 January 2014); La Nación (24 May 2014).

<sup>58</sup> La Nación (13 January 2014); Infobae (13 January 2014); La Voz (13 January 2014); Clarín (13 January 2014); Clarín (14 January 2014); La Gaceta (14 January 2014).

<sup>59</sup> FATF (2010), Mutual Evaluation Report: Argentina; FATF (2014), Argentina – 11th Follow-up Report.

against the UIF, and did not meet legislators or journalists at FATF's on-site visit of Argentina in September 2014.

### *Commentary*

***The lead examiners are seriously concerned about media allegations that UIF does not forward STRs and other relevant information to law enforcement. They therefore recommend that Argentina take steps to ensure that UIF processes and forwards STRs to law enforcement without undue delay.***

## **7. Accounting Requirements, External Audit, Corporate Compliance and Ethics Programmes**

152. This section considers Argentine accounting standards that prohibit the types of accounting misconduct described in Article 8 of the Convention and penalties for such misconduct. It then turns to external auditing measures for detecting and reporting foreign bribery. The last part assesses Argentine companies' corporate compliance, internal controls and ethics measures for addressing foreign bribery.

### **(a) Accounting Standards**

153. As in Phase 2 (paras. 76 and 256), general accounting and auditing standards in Argentina are primarily set by the Argentine Federation of Expert Councils on Economics (*Federación Argentina de Consejos Profesionales de Ciencias Económicas*, FACPCE). FACPCE is a private, professional association that consists of 24 separate Councils (one for each province and one for the city of Buenos Aires). The Councils are entitled by law to set standards for the accounting and auditing profession and to oversee their implementation. All accountants must be registered with the relevant Council.

154. A variety of bodies play additional roles. CNV regulates entities listed on exchanges<sup>60</sup> and generally adopts standards set by FACPCE. Unlisted companies are subject to FACPCE standards endorsed by the *Inspección General de Justicia* (IGJ) in the city of Buenos Aires<sup>61</sup> and by an equivalent body in each of the 23 provinces. State-owned enterprises (SOEs) are subject to a separate regime that applies to the government generally, with accounting rules set by the National Accounting Office (*Contaduría General de la Nación*; Financial Administration Law 24 156), and audits conducted by the Office of the Comptroller General (*Sindicatura General de la Nación*, SIGEN) and the Office of the National Auditor General (*Auditoría General de la Nación*, AGN). The National Insurance Superintendent (*Superintendencia Nacional de Seguros*) and the Central Bank issue standards that apply to the institutions under their supervision.

155. The Phase 2 Report (paras. 256-260) found that it was unclear whether Argentine law effectively prohibited the establishment of off-the-books accounts, slush funds and other accounting misconduct described in Article 8 of the Convention. A variety of legal provisions stipulated only general accounting requirements without clearly addressing the misconduct described in Article 8. Article 44 of the Code of Commerce (Law 2 637) required "traders" to report their transactions, and keep accounts with a true description and clear justification for each transaction. Articles 45-53 imposed additional requirements on the nature of the accounts that traders must keep. The Commercial Company Law 19 550 (Articles 61-73) imposed some further general requirements. At the time of Phase 2, Argentina was only in the early stages of responding to international financial reporting standards (IFRS). Phase 2 Recommendation 10(a) thus asked Argentina to continue to strengthen accounting standards.

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<sup>60</sup> Laws 17 811, 22 169 and 26 831, Article 19.

<sup>61</sup> Law 22 315, Articles 2, 3 and 7.

156. Since Phase 2, Argentina has introduced strengthened accounting standards but these are mandatory only for the small number of listed companies. IFRS was adopted in 2009 and applied to listed companies effective 2012.<sup>62</sup> This has affected only 173 companies as of October 2014, according to CNV. Unlisted companies in about half of Argentina's provinces choose between IFRS and Argentine "generally accepted accounting principles" (GAAP). The remaining unlisted companies, which constitute a majority and include those in Buenos Aires, cannot apply IFRS and must use Argentine GAAP or simplified "IFRS for SMEs".<sup>63</sup> Likewise, only some SOEs are required to follow IFRS; others follow Argentine GAAP or standards set by the National Accounting Office.<sup>64</sup> Banks are expected to adopt IFRS by 1 January 2018. The National Insurance Superintendent is studying the impact of introducing IFRS to the insurance industry. The upshot is that most Argentine companies may continue to apply Argentine GAAP which is said to be "significantly less demanding than IFRS".<sup>65</sup> FACPCE, however, states that Argentine GAAP is regularly updated and not less demanding than IFRS.

157. The Argentine authorities did not indicate whether foreign bribery-related training had been provided to the accounting profession, particularly in light of the recent incorporation of IFRS standards. The accounting profession mentioned that it was considering the inclusion of foreign bribery in accountant certification programmes and university degrees.

### *Commentary*

*The lead examiners are encouraged that Argentina has made IFRS mandatory for listed companies. This approach is justified since these companies tend to be more complex and economically significant. However, IFRS is not mandatory for unlisted companies and some SOEs, even though many of these companies may also be complex and internationally active. The lead examiners therefore reiterate Phase 2 Recommendation 10(a) and recommend that Argentina continue to strengthen accounting standards, such as considering to allow all unlisted companies and SOEs to choose IFRS.*

*The lead examiners also reiterate Phase 2 Recommendation 1(c) and recommend that Argentina work with the accounting profession to raise awareness of the foreign bribery offence, and encourage the profession to develop specific training on foreign bribery in the framework of their professional education and training systems.*

### *(b) False Accounting Offence*

158. The Phase 2 Report (paras. 271-272) expressed concerns about the applicable sanctions for false accounting. Article 300(2) PC<sup>66</sup> prohibits omissions and falsifications of books, records, accounts and financial statements by a legal person's incorporator, director, administrator, liquidator and *síndico*. The offence is punishable by imprisonment of six months to two years. A fine of up to ARS 90 000 (USD 10 575) may also be imposed if the offence is committed "with the aim of monetary gain" (Article 22bis PC). The available sanctions were far lower than those for tax fraud so that most cases were dealt with as tax cases. Legal persons could not be held liable for false accounting under Article 300(2) PC.

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<sup>62</sup> [FACPCE Technical Resolution 26](#); CNV Norms 2013, Title IV, Chapter III.

<sup>63</sup> [www.ifrs.org](http://www.ifrs.org) (April 2014), "IFRS Jurisdictional Profile: Argentina".

<sup>64</sup> Law 24 156, Article 87; Ministry of Economy Resolution 25/1995; Law 19 550.

<sup>65</sup> World Bank (2009), [Report on the Observance of Standards and Codes – Accounting and Auditing](#), p. 23.

<sup>66</sup> The equivalent provision was in Article 300(3) PC in Phase 2 (Law 26 733, Article 2).

159. Since Phase 2, Argentina has increased sanctions only against listed companies. CNV may now sanction listed companies for administrative violations (including breach of accounting standards) by a fine of ARS 5 000 to 20 million (USD 587 to 2.35 million) that may be increased to up to five times the advantage gained or damage caused.<sup>67</sup> However, CNV states that it usually imposes a fine only if a company is a repeat offender or fails to comply despite being warned. Article 300(2) PC has not been amended since Phase 2.

160. Actual enforcement of the false accounting offence likely continues to be limited though clear data are unavailable. Since 2008, 63 proceedings have been commenced for accounting fraud under Article 300(2) PC. The number of convictions was not provided but is likely to be low due to delay in economic crime cases (see p. 26). CNV inspected 228 listed companies since 2009 but the number of sanctions imposed for accounting violations was again unavailable.

161. Argentina referred to additional administrative sanctions against unlisted companies but these do not fully meet the requirements of the Convention. In Buenos Aires, the IGJ may impose administrative fines of ARS 355 600 (USD 41 786) against limited liability companies and ARS 30 million (USD 3.53 million) against capitalisation companies and associations.<sup>68</sup> However, the penalties do not seem to apply to all types of accounting misconduct, but only to a failure to present financial statements in legal terms or in accordance with certain formal requirements. Furthermore, IGJ stated in Phase 2 (para. 274) that it was “not really an enforcement agency” and that it was “unlikely to take action”. In Phase 3, IGJ said that it had imposed administrative sanctions for accounting misconduct in four cases in 2014. Information on available administrative sanctions against unlisted companies outside Buenos Aires and SOEs was not provided.

### *Commentary*

*The lead examiners are not convinced that Argentina punishes accounting misconduct with effective, proportionate and dissuasive sanctions. The maximum sanctions available for accounting fraud under Article 300(2) PC have not been raised. Data on actual enforcement is incomplete. Provisions for administrative fines against unlisted companies do not fully meet the requirements of the Convention. The lead examiners therefore reiterate Phase 2 Recommendation 10(a) and recommend that Argentina take measures to enforce the accounting fraud offence and accounting requirements more effectively in bribery cases, and increase applicable sanctions where appropriate.*

### *(c) External Auditing*

162. The Phase 2 Report raised several matters concerning the role of external auditing in fighting foreign bribery, namely the entities subject to external audits; the applicable auditing standards; qualifications and independence of external auditors; quality control of audits; and an auditor’s duty to report foreign bribery.

#### *(i) Entities Subject to External Audits and External Auditing Standards*

163. In Phase 2 (para. 263) Argentina stated that listed and large unlisted companies must be externally audited but did not identify all of the applicable statutes or rules. Argentina also referred to some partial and inadequate substitutes for external audits for unlisted companies. Phase 2

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<sup>67</sup> Law 26 831, Articles 132-133. Additional administrative sanctions may also apply.

<sup>68</sup> Organic Law of IGJ 22 315, Articles 12-14.

Recommendation 10(b) therefore asked Argentina to consider whether requirements to submit to external audit are adequate.

164. Additional information has been made available in Phase 3 on the entities that are required to submit to annual external audits. Listed companies monitored by CNV must be audited annually by an independent external auditor.<sup>69</sup> SOEs are externally audited by AGN.<sup>70</sup> Legislation pertaining to banks and insurance companies requires these entities to be externally audited.<sup>71</sup> At least two categories of unlisted companies are also externally audited. First, Argentine law allows companies to set up a *consejo de vigilancia* consisting of 3-15 shareholders to supervise the company. Those companies that have done so must submit to annual external audits (Articles 280-283 of Law 19 550). Second, for the 2 849 unlisted companies in Buenos Aires that meet the capital requirements in Article 299 of Law 19 550, an independent public accountant (*contador público independiente*) must conduct an external audit on the company's consolidated financial statements and individual financial statements that apply the equity method (Article 264(4) of IGJ Resolution 7/2005). It is unclear, however, whether other unlisted companies (including those outside Buenos Aires) must also be externally audited.

165. Since Phase 2, external auditing standards have been updated in parts of Argentina. FACPCE adopted the International Standards on Auditing (ISAs) in 2012.<sup>72</sup> These include ISAs 240 and 250, which require external auditors to detect material misstatements in financial statements caused by fraud or non-compliance with laws. FACPCE originally envisioned full implementation of ISAs by 1 July 2013, but adoption for Buenos Aires was postponed to financial years that begin on or after 1 January 2014. The Argentine authorities indicated that all 23 provinces have adopted the ISAs.

166. Even in jurisdictions where they have been adopted, ISAs are mandatory only for audits of listed companies. Unlisted companies are not externally audited (see above) and are therefore not covered by ISAs. IGJ also does not apply ISAs in its "permanent government supervision" of unlisted companies.<sup>73</sup> ISAs apply to external audits of SOEs that have adopted IFRS (e.g. listed SOEs, see above). The remaining SOEs are subject to standards that apply to public sector audits,<sup>74</sup> which include detection of fraud and illegal acts.<sup>75</sup> Argentina did not explain how it monitors the implementation of these standards in practice.

167. Argentina has not raised awareness of foreign bribery among external auditors. The profession has not developed red flag indicators of foreign bribery or training on foreign bribery.

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<sup>69</sup> Law 26 831, Article 105; CNV Decree 677/2001, Article 13.

<sup>70</sup> Law 24 156, Articles 116-118; AGN Resolution 145/1993.

<sup>71</sup> Law 21 526, Articles 36 and 37 (audits by the Central Bank) and Central Bank Resolution No. A5541 requiring banks to submit an external auditor report and financial statements as of the first half of 2015; Central Bank Communication "A" 5589; Resolution of the National Insurance Superintendent 21 523/1992, Articles 39.1.4 and 39.12 (annual external audit requirement for insurance companies).

<sup>72</sup> [FACPCE Technical Resolution 32](#).

<sup>73</sup> IGJ Resolution 7/2005 does not refer to ISAs or external auditing standards set by FACPCE.

<sup>74</sup> Argentina states that these standards are based on those established by the International Organization of Supreme Audit Institutions (INTOSAI).

<sup>75</sup> Section III.c2 of AGN Resolution 145/1993.

## *Commentary*

***The lead examiners reiterate Phase 2 Recommendation 10(b) and recommend that Argentina further improve requirements to submit to external audit. They also recommend that Argentina ensure full ISA implementation in Buenos Aires and all 23 provinces. As well, Argentina should take steps to ensure that external auditors and audit firms take greater account of the risks of foreign bribery in the companies that they audit.***

### *(ii) Auditor Independence and Qualifications, and Quality Control of Audits*

168. Argentina has made some progress in strengthening rules regarding auditor independence. Effective 1 January 2014, listed companies are required to change external auditors every three years. Audit firms must rotate their staff auditing a particular client every two years. An external auditor is prohibited from providing certain non-audit services to the audited company.<sup>76</sup> CNV's Code of Corporate Governance also briefly touches upon auditor rotation. However, CNV indicated at the on-site visit that the new rules on auditor rotation are controversial and could be revised in the future. FACPCE Technical Resolution 34 also adopted International Standards on Quality Control (ISQC) 21-24 that deal with auditor independence, and additional norms on independence based on the Code of Ethics for Professional Accountants prepared by the International Ethics Standards Board for Accountants.

169. In contrast, Argentina has not resolved issues relating to auditor qualifications that were identified in the Phase 2 Report (paras. 265 and 267) and Recommendation 10(b). Apart from being a chartered accountant,<sup>77</sup> external auditors need not meet any practical experience requirements or undergo professional examinations. Auditors must provide an affidavit indicating their qualifications and certifications<sup>78</sup> but this falls short of requiring them to meet particular standards. There is also no indication that the Argentine authorities scrutinise these affidavits. After reviewing a draft of this report, Argentina asserted that SIGEN Resolution 37/2006 addressed some of the issues on auditor qualification. However, SIGEN audits only the Argentine government and SOEs; the Resolution would not apply more widely to other external auditors of private sector companies.

170. Issues relating to quality control of audits also remain. As in Phase 2 (para. 267), CNV requires audit firms to develop their own quality control systems without specifying the standards to be met.<sup>79</sup> FACPCE's Technical Resolution 34 imported ISQCs on quality control virtually verbatim without adaptation to the Argentine context. There is also no information on the Resolution's implementation in Buenos Aires and the 23 provinces. Resolution 23/2012 created a department within FACPCE on "Control of Professional Practice" that may review audit papers. However, details of the department's operation were not provided. The Phase 2 Report (para. 62) noted that FACPCE in theory had the power to review audit papers but did not do so in practice.

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<sup>76</sup> CNV Norms 2013, Title I, Chapter III, Section VI, Articles 23 and 28.

<sup>77</sup> CNV Decree 677/2001, Article 13.

<sup>78</sup> Law 26 831 Article 104; CNV Decree 677/2001, Article 12; CNV Norms 2013, Title I, Chapter III, Article 23.

<sup>79</sup> CNV Norms 2013, Title I, Chapter III, Article 27.

### *Commentary*

***The lead examiners reiterate Phase 2 Recommendation 10(b) and recommend that Argentina continue efforts to improve audit quality standards, including with regard to certification of auditor qualifications and quality control of audits.***

#### *(iii) Reporting Obligations of External Auditors*

171. Phase 2 Recommendation 10(c) recommended that Argentina ensure that auditors and *síndicos* (see p. 40) are required to report all suspicions of foreign bribery by employees or agents of the company to management and, as appropriate, to corporate monitoring bodies; and consider requiring auditors and *síndicos*, notably in the face of inaction after appropriate disclosure within the company, to promptly report suspicions to the competent authorities.

172. An external auditor's duty to report wrongdoing is largely governed by the ISAs. ISAs 240 and 250 require external auditors to report material misstatements due to fraud or non-compliance of laws to the audited company's management or corporate monitoring bodies. Both ISAs require further reporting to competent authorities only if there is a legal requirement to do so. No such requirement to report suspected foreign bribery exists in Argentina, even if company management fails to respond appropriately to information about suspected foreign bribery.<sup>80</sup> FACPCE's Code of Ethics imposes a similar rule (see Phase 2 para. 84). For SOEs, Argentina states that external auditors and *síndicos* are required to report possible crimes to SIGEN (SIGEN Resolution 74/2011). AGN filed seven complaints with judicial authorities in 2009-2014, but it is unclear whether these derived from audits of SOEs or government departments. Argentina's questionnaire responses stated that strengthening the reporting obligations of external auditors could help trigger more foreign bribery investigations.

### *Commentary*

***The lead examiners welcome the Argentine authorities' recognition that requirements on external auditors to report suspected foreign bribery to competent authorities should be more stringent. Since Phase 2, reporting requirements for auditors and síndicos in SOEs have strengthened, but those in other companies have not. The lead examiners therefore reiterate Phase 2 Recommendation 10(c) and recommend that Argentina continue its efforts to ensure that auditors and síndicos that are not in SOEs promptly report suspicions of foreign bribery by employees or agents of the company to the competent authorities, notably in the face of inaction after appropriate disclosure within the company.***

#### *(d) Corporate Compliance, Internal Controls and Ethics Programmes*

173. The Argentine private sector does not appear to have adequate corporate compliance, internal controls and ethics programmes to address foreign bribery. Heavy emphasis is placed on codes of conduct, many of which do not adequately address foreign bribery issues. Measures beyond such codes are rare, particularly among SMEs.

174. When asked about corporate measures to prevent foreign bribery, private sector representatives at the on-site visit referred repeatedly to corporate codes of conduct. Business organisations asserted that large companies have such codes but their conclusion was not based on empirical surveys or studies. More importantly, these codes may not address foreign bribery or even corruption. The 13 business sector

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<sup>80</sup> As chartered accountants, external auditors are required to report suspected money laundering (see p. 30).

representatives at the on-site visit were invited to provide copies of their companies' code of ethics. Of the two that responded, one code did not mention corruption at all. The other briefly addressed gift-giving but not foreign bribery. Additional research of 18 major exporting companies showed that roughly one-third published their codes of conduct on the internet. Just one of these codes explicitly refers to foreign bribery (by referring to the US Foreign Corrupt Practices Act, not Argentina's foreign bribery offence in the PC).

175. Few Argentine companies have more sophisticated anti-foreign bribery measures beyond these limited codes of ethics. Companies at the on-site visit were asked but could not describe any policies on facilitation payments or bribery risk assessments that they had conducted. Several companies admitted the dangers of using third-party agents but did not describe measures to counter these concerns. A few other companies require agents to submit to the company's code of ethics, but this would be of little use if most codes do not address corruption (see above). On-site visit participants referred to hotlines for employees to report wrongdoing, but such measures are unlikely to be effective without sufficient whistleblower protection (see p. 60). One business association repeatedly referred to a publication on foreign bribery by the International Chamber of Commerce that had been disseminated. The publication, however, was not adapted to the Argentine context and does not even refer to the Argentine foreign bribery offence.

176. On-site visit participants were especially concerned about the lack of foreign bribery prevention and detection measures among SMEs. In February 2014, the OA surveyed 825 non-listed Argentine companies including many SMEs. Only 28% of the companies had a code of conduct, 23% had reporting channels for employees, and 17% had corruption prevention programmes. Government awareness-raising efforts have not targeted SMEs (see p. 57). One SME business association stated that government efforts to promote compliance programmes in SMEs were in their infancy and not a priority. After the on-site visit, the OA provided a plan to work with the private sector and promote corporate compliance programmes. Argentina states that the plan includes disseminating the Convention but otherwise does not specifically address foreign bribery or specify timelines for implementation.

### *Commentary*

*The lead examiners recommend that Argentina take more effective steps to promote corporate compliance, internal controls and ethics programmes to prevent and detect foreign bribery. These efforts should include raising awareness of the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance, and also target SMEs that are internationally active. The lead examiners note that the engagement with SMEs is a horizontal issue which affects many other Parties to the Convention.*

*The lead examiners also reiterate their recommendation at p. 18 that Argentina adopt legislation on corporate liability for foreign bribery on a priority basis. Robust enforcement of foreign bribery laws against companies is possibly the strongest incentive for Argentine companies to adopt effective compliance programmes to prevent foreign bribery.*

## **8. Tax Measures for Combating Bribery**

177. This section covers the tax deduction of bribes, an issue outstanding since Phase 1, followed by detection and awareness-raising by Argentine federal tax authorities (*Administración Federal de Ingresos Públicos*, AFIP). The last part describes the sharing of tax information with law enforcement in foreign bribery investigations, including difficulties with providing information to foreign authorities.

### *(a) Tax Deduction of Bribes*

178. Argentina still does not expressly prohibit the tax deduction of bribes, and the legal basis for its assertion that deduction is implicitly prohibited is unclear (Phase 1, pp. 26-28, 31; Phase 2, paras. 235-

240). The lists of deductible and non-deductible expenses in Articles 80-88 of the Income Tax Law 20 628 (ITL) do not refer to bribe payments. Several categories of permissible deductions could potentially be misused to deduct bribes. In Phase 2, Argentina argued unconvincingly that bribes were covered by the prohibition against the deduction of “net losses from illegal operations” (Article 88(j) ITL). Phase 2 Recommendation 11 asked Argentina to make explicit the prohibition on deducting foreign bribes from taxable revenue either in tax legislation or in another manner that is binding and publicly available.

179. In Phase 3, Argentina relied on a different provision to argue that the deduction of bribes is implicitly prohibited, but the legal basis for this position is also unclear. It argues that bribes are covered by the prohibition against the deduction of “donations [...] and other acts of generosity [*liberalidad*] in cash or in kind” (Article 88(i) ITL). On its face, however, this provision arguably would not cover all types of bribes. Many bribes do not take the guise of donations. A bribe paid as a *quid pro quo* to win a contract might also not be construed as an act of generosity. Moreover, the provision states explicitly that it does not bar the deduction of donations described in Article 81(c) ITL, i.e. donations to political parties and government treasuries for campaign financing, or to associations and foundations for charitable, educational or research purposes. Donations of this nature that are also bribes could accordingly be deducted. Argentina argues that political party financing is subject to specific disclosure and identification requirements. These requirements, however, do not relate to tax deductibility.

180. Draft legislation that has been prepared to expressly prohibit the deduction of bribes may not be completely effective. Argentina plans to amend Regulatory Decree 1344/1998 (which implements the ITL) to specify that the prohibition against deducting donations and acts of generosity in Article 88(i) ITL includes bribes. There are at least three problems with this approach. First, as mentioned above, many bribes may fall outside the narrow definition of donations in Article 88(i) ITL and remain deductible under other provisions that list specific deductible expenses. Second, the amendment is to an executive decree and would not modify the ITL because of the hierarchy of norms. If a bribe is presently deductible under the ITL (as may be the case), then a decree would not remedy the problem. Third, the draft amendment does not refer to the offence in Article 258bis PC. This is problematic since AFIP has its own definition of foreign bribery that differs from the PC and the Convention.<sup>81</sup> Additional matters may also need to be clarified in practice, such as whether a conviction for bribery is a pre-condition for non-deductibility, and how the authorities would assess claims for deduction in light of the amendment.

181. There are also questions about practice. Argentina could not provide an example where the deduction of a bribe has been denied, even with respect to a taxpayer who has been convicted of bribery. If a taxpayer is registered or not obliged to register, AFIP has only five years to reopen a tax return to determine whether a bribe had been deducted. The limit is ten years for other taxpayers.<sup>82</sup> These periods may be too short given the time required to secure bribery convictions (see p. 26). AFIP is also not informed of criminal bribery investigations or convictions.

### *Commentary*

***The Working Group has expressed concerns since Phase 1 in 2001 that Argentina does not expressly prohibit the tax deduction of bribe payments. The lead examiners reiterate Phase 2***

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<sup>81</sup> AFIP General Instruction 794/2007 (as amended by Instruction 816/2008) defines foreign bribery as “a specific type of corruption which entails the voluntary giving of something of value in order to influence the performance of foreign officials, either by doing something improper or failing to do something they should do within the authority of their position”. This definition is restrictive and departs from the definition in Article 1 of the Convention and Article 258bis PC (Phase 2 Report para. 62).

<sup>82</sup> Tax Procedure Law 11 683, Article 56.

***Recommendation 11 and recommend that Argentina explicitly disallow the tax deductibility of bribes to foreign public officials for all tax purposes in an effective manner. The lead examiners are encouraged that Argentina has drafted a legislative amendment to address this issue, but they urge Argentina to address concerns about the draft described above.***

**(b) *Detection and Reporting of Bribe Payments***

182. AFIP has not enhanced its ability to detect foreign bribery since Phase 2. Guidelines on detection in AFIP General Instruction 794/2007 (as amended in 2008) have not been updated. The Instruction and AFIP's website do not refer to the latest 2013 version of the OECD Bribery Awareness Handbook for Tax Examiners. Like in Phase 2 (para. 63), AFIP has never detected bribery through a tax examination. In the *Skanska* case, AFIP conducted a tax investigation but failed to initially detect bribery that had been committed in the case. A commitment made in Phase 2 (para. 68) to develop "in the near future" a system to monitor bribes identified during tax examinations did not materialise, though a database of shell companies reportedly exists.

183. As described at p. 51, AFIP has not addressed concerns identified in Phase 2 (paras. 64-68) regarding tax officials' obligations to report foreign bribery. AFIP's Instruction 794/2007 continues to prescribe a threshold for reporting and a reporting channel that are inconsistent with Article 177 CPC and the Reporting Decree. AFIP has not reported any cases of corruption detected during a tax examination.

184. AFIP has not raised awareness among its officials of their reporting obligations, the types of legally-deductible expenses which could conceal foreign bribes, and the non-tax deductibility of bribes. AFIP intends to issue further internal instructions after amending Regulatory Decree 1344/1998.

***Commentary***

***The lead examiners recommend that Argentina improve AFIP's ability to detect foreign bribery by disseminating the 2013 OECD Bribery Awareness Handbook for Tax Examiners and training AFIP officials on detecting bribery.***

**(c) *Providing Tax Information to Domestic and Foreign Law Enforcement Authorities***

185. The procedures for obtaining tax information for use in domestic and foreign bribery investigations are different. Tax secrecy covers all financial and asset-related tax returns, statements and reports in AFIP's possession (Tax Procedure Law 11 683 (TPL) Article 101; AFIP Instruction 98/2009). Tax secrecy may be lifted in a foreign bribery investigation only with prior judicial authorisation. In an investigation into domestic corruption, however, the OA may obtain relevant non-financial information without a court order. Judicial authorisation is also not required when UIF (financial intelligence unit) inquires into money laundering.<sup>83</sup> Investigative judges reported difficulties in getting tax information in Phase 2 (paras. 121-122). In Phase 3, the lone investigative judge at the on-site visit did not express similar problems.

186. Argentina's domestic legal framework does not appear to allow tax information to be provided to foreign authorities for use in criminal investigations. Article 101(3) TPL lifts secrecy for *domestic* criminal investigations but not *foreign* ones. Article 101(6)(d) TPL lifts secrecy for foreign proceedings, but the information can only be used for tax purposes and be disclosed to authorities concerned with the enforcement or collection of taxes or tax-related procedures. An MLA request for tax information from

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<sup>83</sup> Law 26 683, Article 14; AFIP Instruction 98/2009, sections 4.1 and 4.2; Phase 2 Report para. 121.

foreign criminal law enforcement authorities would not qualify under this provision. The provision also requires information to be exchanged pursuant to an international agreement to which AFIP is a party,<sup>84</sup> which would also exclude bilateral and multilateral treaties on MLA in criminal matters.

187. In the absence of a domestic legal framework, tax treaties signed by Argentina arguably cannot be used to provide tax information to foreign authorities for use in criminal foreign bribery investigations. Argentina is party to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and amending protocol. Article 22(4) of the Multilateral Convention allows information provided under the Convention to be used for other (e.g. criminal investigation) purposes when “such information may be used for such other purposes under the laws of the supplying Party” and the supplying Party authorises such use. As mentioned above, Argentine law arguably does not allow tax information to be used in a foreign criminal investigation. Argentine authorities also cannot authorise non-tax use of information by foreign authorities since the TPL does not empower them to do so. Bilateral tax treaties with Spain and Switzerland follow the OECD Model Tax Convention and thus contain language similar to the Multilateral Convention; they too may also not be used to allow tax information to be used in foreign criminal proceedings. In practice, no tax treaty partner has requested AFIP that tax information received from Argentina be used for a non-tax purpose.<sup>85</sup>

### *Commentary*

*The lead examiners recommend that Argentina promptly amend its legislation to allow tax information to be provided to foreign authorities for use in foreign bribery investigation.*

## **9. International Co-operation**

188. This section concerns MLA and extradition in foreign bribery cases. MLA in specific foreign bribery cases and providing tax information to foreign authorities are discussed at pp. 25 and 51.

### **(a) Mutual Legal Assistance**

#### *(i) Treaty and Legislative Framework for MLA*

189. Argentina has bilateral MLA treaties in force with 13 countries, including 11 Working Group members. Additional treaties are under negotiation or have been signed but are not in force.<sup>86</sup> Argentina considers that the Anti-Bribery Convention provides a treaty-basis for MLA (Phase 2 para. 159) and has received four requests under the Convention. Argentina has also received four requests under the UN Convention against Corruption (UNCAC) and four under the Inter-American Convention against Corruption. Other applicable multilateral treaties include the MERCOSUR Protocol on Mutual Legal Assistance in Criminal Matters; MERCOSUR, Bolivia and Chile Agreement on Mutual Legal Assistance in Criminal Matters; and the Inter-American Convention on Mutual Assistance in Criminal Matters.

190. The legislative framework for extradition and MLA has not changed since Phase 2. MLA is regulated by Law 24 767 on International Co-operation in Criminal Matters (LICCM). Article 134 CPC

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<sup>84</sup> AFIP Instruction 98/2009 (section 3.2.1) states that information may be exchanged pursuant to a treaty to which the Federal State of Argentina – as opposed to AFIP – is party.

<sup>85</sup> OECD (2013), *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews*, para. 257.

<sup>86</sup> Treaties are in force with Australia, Canada, Colombia, El Salvador, France, Italy, Korea, Mexico, Peru, Portugal, Spain, Switzerland, and US. Treaties with China, South Africa and Tunisia are not in force.

also deals with international rogatory requests. In the absence of a treaty, MLA may be granted if the requesting state provides an “express offer of reciprocity” (Article 3 LICCM; Phase 2 para. 158).

191. Argentina is a member of IberRed, an informal judicial co-operation network under the auspices of the Conference of Ministers of Justice of Ibero-American Countries (COMJIB). It is also a member of the *Red Hemisférica de Cooperación Jurídica en Materia Penal* (OEA) under the auspices of the OAS. Argentina states that information is also exchanged through financial intelligence units.

(ii) *Dual Criminality and Other Preconditions for MLA*

192. Dual criminality is not required for granting MLA except for coercive measures such as search and seizure, surveillance and wiretapping (Article 68(2) LICCM; Phase 2 para. 159).

193. The Phase 2 Report (para. 161) questioned whether Argentina could provide coercive MLA in foreign bribery cases against legal persons. Argentina has not established criminal liability of legal persons for foreign bribery. Incoming requests for coercive MLA in cases involving legal persons arguably would not meet the dual criminality requirement. Argentina replied that MLA would be granted in such cases because Article 1 LICCM and the Convention require broad co-operation. Furthermore, the dual criminality test in the LICCM focuses on the conduct underlying the request, not whether the investigation target is a legal person. Phase 2 Recommendation 8(a) addressed this matter but was converted to a follow-up issue after the Working Group considered Argentina’s Written Follow-Up Report in 2010.

194. A further issue raised in Phase 2 (para. 161) was whether Argentina could grant MLA to a foreign country that is taking *non-criminal* foreign bribery proceedings against a legal person. Some Parties to the Convention impose civil or administrative liability against legal persons for foreign bribery. Argentina cannot provide MLA for use in these proceedings because the LICCM only concerns criminal matters. Phase 2 Recommendation 8(b)) addressed this topic but was also converted to a follow-up issue in 2010.

195. In Phase 3, Argentina has not provided examples in which it granted an MLA request for coercive measures for use in a foreign proceeding against a legal person. It stated that it has not received any requests of this nature. One example of non-coercive measures (provision of bank data and beneficial ownership information) was given. Argentina reiterated its position that it could grant MLA (including identification, freezing, seizure and confiscation of assets) in these cases. It added that evidence provided to foreign authorities for use in an investigation against a natural person can also be used against a legal person in the same case. Just before the adoption of this report, Argentina stated that co-operation might also be available under its regime of mutual legal assistance in civil matters. It did not explain whether the full panoply of coercive criminal measures are available under the civil regime.

196. The process for lifting bank secrecy in domestic proceedings (see p. 38) also applies to MLA requests (Phase 2 para. 162). Argentina stated it has executed MLA requests for bank information promptly. As described at p. 51, there are concerns that Argentina’s legislative framework does not permit tax information to be provided to foreign authorities for use in foreign bribery investigations.

*Commentary*

***The lead examiners recommend that the Working Group continue to follow up whether Argentina can grant MLA requests submitted in the context of criminal and non-criminal proceedings within the scope of the Convention and brought by a Party against a legal person.***

(iii) *MLA in Practice*

197. MLA requests to and from Argentina are transmitted through the Central Authority, namely the Direction on International Legal Assistance (DILA) in the MFA's Legal Advisor's Office. The only exception is requests under the bilateral treaty with the US, which designates the Ministry of Justice as the central authority. A website and a publication provide detailed information on Argentina's framework and procedure for international co-operation in criminal matters. Annual seminars for law enforcement officials on international co-operation have been held around the country. Joint investigative teams with foreign authorities are available but have never been used in the corruption case.

198. Argentina provided data on MLA requests sent to foreign authorities. It sent 489 requests from September 2011 to September 2012, and 510 requests from December 2012 to December 2013 of which 369 were still pending as of April 2014. As described at p. 25, there have been delays and difficulties in securing MLA from foreign countries in foreign bribery cases. Argentina argues that the delay was due to uncooperative foreign states. However, the evaluation team was unable to determine what steps were taken by the prosecutors and judges in these cases to reduce delay and secure MLA from foreign countries. As mentioned above, the evaluation team did not have an opportunity to meet these officials at the on-site visit.

199. As for incoming MLA requests from foreign authorities, Argentina states that it has substantially improved response times. The Phase 2 Report (para. 165) stated that Argentina took six months on average to execute incoming MLA requests, though individual requests could take between two months and one year. In Phase 3, Argentina's questionnaire responses stated that average delay in processing a request had been halved to three months, and that delay in a specific case ranges from one week to six months. After the on-site visit, Argentina stated that the average response time was actually 113 days (i.e. closer to four months) based on data from 2010 to today. 18% of the 680 granted requests were answered in less than one month and 71% of the 680 granted requests were answered in less than 4 months, i.e. approximately only 30% were above the average. Argentina also stated that the current 4-month average was an improvement from Phase 2.

200. Nevertheless, data provided by Argentina suggest a significant number of requests take longer than the average to execute. The data indicate that 344 requests were received in the 12 months to 17 Dec. 2013, of which 179 requests (52%) were still pending by 28 April 2014. This means that more than half of the requests had been outstanding between 4 and 16 months, well over the average of 3-4 months stated by Argentina. Another statistic indicated that, of the 680 requests that Argentina answered from November 2010 to October 2014, 30% took more than 4 months to execute. Of the 470 requests that are outstanding as of October 2014, 84% had been outstanding for more than 4 months, and 64% for almost 10 months. One possible explanation is that many requests are executed in a very short time while a substantial number take much longer than the average.

201. There are also media reports of delays in executing MLA requests from Uruguay in a specific case.<sup>87</sup> Uruguayan authorities are investigating an Argentine businessman who is reportedly linked to an Argentine official at the highest level of government. The media reports indicated that the Argentine authorities had been unresponsive. The Argentine authorities, however, stated that they returned the request to Uruguay three days after its receipt because of formal defects in the request. After Uruguay resubmitted the requests in March 2014, the matter was forwarded to the Argentine judicial authorities five days later for execution. The request remains outstanding as of October 2014.

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<sup>87</sup> [Noticias Uruguayas \(27 June 2013\)](#); [El Pais \(29 January 2014\)](#); [El País \(15 March 2014\)](#); [El Observador \(20 March 2014\)](#); [Clarín \(5 April 2014\)](#).

202. Delay may be exacerbated by insufficient resources. DILA, the central authority for MLA, has increased its resources substantially since 2009, according to Argentina. It now has 10 lawyers and 20 support staff, which the MFA considers adequate. However, the figures above indicate that there are approximately 500 outgoing and 350 incoming MLA requests per year. DILA is also the central authority for extradition (see below). As a result, each lawyer in DILA deals with an average of almost 100 new files per year in addition to managing outstanding files.

### *Commentary*

*The lead examiners note that Argentina's statistics indicate a reduction in response times for MLA since Phase 2. Nevertheless, the statistics show that there is clear room for improvement. The lead examiners therefore recommend that Argentina continue to take further steps to ensure that MLA requests from foreign authorities are executed without undue delay.*

### *(b) Extradition*

#### *(i) Treaty and Legislative Framework for Extradition*

203. Argentina has bilateral extradition treaties in force with 14 countries including 11 Working Group members. Additional bilateral treaties are also under negotiation or have been signed but are not in force.<sup>88</sup> In addition to the Anti-Bribery Convention, other multilateral treaties that could provide extradition in foreign bribery cases include the 1889 Montevideo Treaty on Criminal International Law; Inter-American Treaty on Extradition; Inter-American Convention against Corruption; and UNCAC.

204. The LICCM and Article 53 CPC apply to extradition. Extradition may be provided in accordance with an applicable treaty or based on reciprocity. Extraditable offences are those punishable under the laws of Argentina and the requesting State by imprisonment or other deprivation of liberty, for such minimum and maximum terms the average of which must be at least one year (Article 6 LICCM). Argentine jurisdiction over the offence does not prevent extradition provided that one of the following conditions is met: (i) the offence for which extradition is requested is part of significantly more serious punishable conduct which falls under the jurisdiction of the requesting State and not under Argentine jurisdiction; or (ii) the requesting State has better access to the evidence (Article 5 LICCM; Phase 2 para. 167). Requests must be sent through the diplomatic channel. The MFA's DILA is Argentina's central authority.

#### *(ii) Extradition of Argentine Nationals*

205. A Party that declines to extradite a person for foreign bribery solely on the ground that the person is its national must submit the case to its authorities for prosecution (Convention, Article 10(3)).

206. Under Article 12 LICCM, an Argentine national whose extradition is sought may demand to be prosecuted in Argentina in lieu of extradition unless an applicable treaty mandates extradition. The final decision is made by the Argentine Executive. If the extradition request is ultimately denied on the basis of nationality, the Argentine national would be prosecuted in Argentina if the requesting State consents and waives its jurisdiction; and provides the necessary evidence. The Phase 2 Report (para. 168) stated that the requesting state must also pay the costs of prosecution but Argentina indicates that this is no longer a requirement. In any event, prosecution in Argentina in lieu of extradition could also be unrealistic because of delay (see p. 26).

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<sup>88</sup> Treaties are in force with Australia, Belgium, Brazil, Italy, Korea, Mexico, Netherlands, Paraguay, Peru, Spain, Switzerland, UK, US, and Uruguay. Treaties with Bolivia, Colombia, China, France are not in force.

207. As described at p. 10, in the *Gas Plant (Bolivia) Case* an Argentine national has been convicted in Bolivia *in absentia* for bribing a Bolivian public official. The individual remains at large in Argentina and has not been extradited. The evaluation team did not meet the investigative judge in charge of this case and could not determine whether the Argentine authorities are investigating this individual. Argentina added that a person who has been convicted in absentia can be extradited if the requesting state gives an assurance that the person would be retried.<sup>89</sup>

(iii) *Delay in Extradition*

208. The Phase 2 Report (para. 169) referred to a high profile corruption investigation in a neighbouring country in which the extradition of four suspects was granted after a four-year delay. Argentina indicated that the main reason for the delay was the appeal procedure (ordinary appeals in extradition procedures are lodged with the Supreme Court). The Working Group thus decided to follow up “the time needed to reach a final decision in extradition procedures related to corruption cases (Follow-up Issue 13(g)). Argentina initially did not provide statistics on the delay in granting extradition. After the on-site visit, it stated that the average time to extradite a person was under five months and that some of these cases involved corruption offences or were appealed to the Supreme Court. The evaluation team did not have an opportunity to examine the statistic in detail or discuss it with other on-site visit participants.

*Commentary*

***The lead examiners reiterate Phase 2 Follow-up Issue 13(g) and recommend that the Working Group follow up the time needed to reach a final decision on extradition in corruption cases.***

(c) *Denial of Co-operation Due to “Essential Public Interests”*

209. Argentina may deny extradition or MLA if the granting of the request “would prejudice Argentina’s sovereignty, security, public order or other essential public interests” (Article 10 LICCM). In handling an MLA or extradition request, the Argentine central authority, judicial authorities, and Executive successively assess whether this and other conditions are met. The decisions of the Central Authority and the courts can be appealed, but not those of the Executive (Phase 2 para. 170).

210. The Phase 2 Report (para. 171) expressed concerns that this provision could allow the extradition and MLA process be influenced by factors listed in Article 5 of the Convention. The Phase 2 Report suggested that Argentina issue guidelines to clarify that nothing in Article 10 LICCM permits the influence of Article 5 factors. Argentina has not done so since Phase 2. Argentina states that since Article 10 was enacted it was used in only one case in 2001-2002. In this case, the extradition of several individuals who were accused of crimes against humanity during a military government in Argentina in 1976-1983 was sought. Argentina refused extradition on grounds of national sovereignty and the principle of *non bis in idem*. One of the individuals was later prosecuted by Argentine authorities, while the remaining were under investigation in Argentina when extradition was denied. Argentina also states that the United Nations Model Treaty on Mutual Assistance in Criminal Matters and other UN treaties contain a similar provision.

*Commentary*

***The lead examiners reiterate Phase 2 Follow-up Issue 13(f) and recommend that the Working Group follow up whether Article 5 factors influence extradition or MLA in Argentina.***

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<sup>89</sup> Article 11(d) of Law 24 767 and applicable treaties.

## 10. Public Awareness and the Reporting of Foreign Bribery

211. This section considers Argentina's efforts to raise awareness of foreign bribery and to encourage reporting of foreign bribery to law enforcement. Similar efforts relating to tax and public advantages are described at pp. 51 and 61. Corporate compliance measures are discussed at p. 48.

### (a) Awareness of the Convention and the Offence of Foreign Bribery

212. Argentina has taken only limited steps to raise awareness since Phase 2. It has not been sufficiently proactive, especially in reaching out to the private sector. Certain key agencies have not been involved. It has not formulated an overarching government-wide strategy to address foreign bribery or to raise awareness. An inter-ministerial group has been working steadily since Phase 2 but the fruits of its efforts are not apparent.

213. Only some efforts were made to raise awareness in the Argentine public sector. Phase 2 Recommendation 1(a) asked Argentina to further train agencies that can play an important role in preventing and detecting foreign bribery, including trade promotion and diplomatic personnel. Since Phase 2, the MFA has sent annual circulars to its internal agencies, embassies, consulates and overseas trade promotion centres referring to the foreign bribery offence and informing officials of their obligation to report this crime (see below). Seminars covering foreign bribery have been held annually for future diplomats. Foreign bribery is included in the permanent curriculum of the diplomatic academy from 2014. However, there have not been efforts to raise awareness within *Fundación ExportAr*, Argentina's trade promotion agency attached to the MFA, apart from the above-mentioned annual MFA circular. OA added that it had developed a distance learning tool that touched upon the Convention.

214. Awareness-raising activities targeting the private sector were limited. The Argentine authorities have not raised awareness through seminars, conferences, technical assistance, and partnerships with the private sector, as suggested in Phase 2 Recommendation 1(b). Instead, efforts were largely confined to posting information on the Internet. The OA's website links to the Convention and provides updates on foreign bribery investigations conducted by other law enforcement agencies. A booklet entitled "The Republic of Argentina punishes Bribery of Foreign Public Officials" is available on the websites of *Fundación ExportAr* and Argentina Trade Net, the MFA's Directory of Exporters. There was no information on whether the publication was actively distributed. One SOE referred to a fruitful partnership with the OA, particularly when developing its internal compliance programme. To what degree the partnership addressed foreign bribery is unclear.

215. Consequently, the level of awareness of foreign bribery is low. At the on-site visit, civil society representatives considered that there was very low awareness of the Convention and the risk of foreign bribery. Some blamed this on the lack of publicly available information about investigations and prosecutions. The legal profession stated that the government had made no efforts to raise awareness, and that any awareness in the private sector was due to concerns about potential liability under foreign bribery legislation in the US, UK and Brazil. Several companies at the on-site visit were aware of the Convention but could not identify any government awareness-raising initiatives. Corporate compliance measures that specifically address foreign bribery are rare (see p. 48).

216. Several key agencies are strategically placed to raise awareness within the private sector but are not sufficiently active. *Fundación ExportAr* holds seminars for Argentine businesses interested in investing in specific markets overseas. These seminars, however, do not address the risk of foreign bribery, according to private sector representatives at the on-site visit. Embassies also have not proactively reached out to Argentine businesses overseas to raise awareness. Some companies at the on-site visit stated that they were well supported by Argentine embassies but there were no details on how the support related to

foreign bribery. CNV already promotes its Corporate Governance Guidelines for listed companies. It could usefully add a foreign bribery-specific component to its awareness-raising activities. The Ministry of Economy has not raised awareness among unlisted companies at all. No efforts have been made to raise awareness among the roughly 600 000 SMEs in Argentina. The Ministry of Industry's Secretariat for SMEs and Regional Development is responsible for promoting and supporting SMEs. It was invited to but did not attend the on-site visit. OA undertook to train SMEs before the end of 2014.

### *Commentary*

*The lead examiners welcome efforts by the MFA and OA to raise awareness of foreign bribery. Nevertheless, they are concerned about the low level of awareness and the inactivity of key government bodies. They therefore reiterate Phase 2 Recommendations 1(a) and 1(b) and urge Argentina to greatly increase its efforts to proactively raise awareness of foreign bribery (a) within the Argentine public administration, especially among agencies that can play an important role in preventing and detecting foreign bribery, such as overseas diplomats, Fundación ExportAr and trade promotion officials; and (b) within the private sector, including through activities such as seminars, conferences, technical assistance and partnerships with business associations.*

#### **(b) Reporting Suspected Acts of Foreign Bribery**

217. The Phase 2 Report (paras. 47-50) and Recommendation 2(a) raised three issues concerning the duty of Argentine officials to report foreign bribery: (a) inconsistent rules, (b) inadequate sanctions for non-reporting, and (c) awareness-raising. These issues have not been resolved since Phase 2.

218. The Phase 2 Report (para. 47) noted that Argentine public officials were subject to rules with inconsistent thresholds for reporting. The principal reporting obligation is in Article 177(1) CPC, which requires officials to report "crimes" that they notice in the course of their duties. Executive Decree 1162/2000 (Reporting Decree) regulates Article 177(1) CPC for officials in the public administration or Executive branch. It imposes a lower threshold by requiring the reporting of "allegations" of foreign bribery and all other crimes except domestic corruption.<sup>90</sup> Additional reporting rules for tax officials impose a higher threshold than the CPC and Reporting Decree. Under AFIP Instruction 794/2007, an official must report when he/she can "conclude the effective commission" of an offence. An MFA circular is similar to the Reporting Decree and asks embassy officials to report the "possible commission" of foreign bribery.

219. A second area of inconsistency is reporting channels. The Reporting Decree requires public officials to report alleged criminal offences directly to law enforcement authorities. Other rules provide for multiple layers of internal reporting before external reporting to law enforcement is considered. The AFIP Instruction requires reporting at a minimum to the official's superior and then to the Legal Department. Likewise, the MFA circular required reports to be channelled to the Head of Mission and then the General Directorate of Legal Matters (Phase 2 paras. 57-58). This is in accordance with Article 23(h) of the Public Service Law 25 164, which requires reporting of crimes to a hierarchical superior and not law enforcement (Phase 2 para. 49).

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<sup>90</sup> The Reporting Decree imposes an even lower threshold for reporting domestic corruption than foreign bribery. Articles 1 and 3 require reporting of "presumptions" of domestic corruption to the OA within 24 hours (Phase 2 Report para. 50).

220. The *Gas Plant (Bolivia) Case* vividly illustrates the problem with multiple layers of internal reporting. Foreign bribery allegations surfaced in the media shortly after the company executive was murdered in January 2009 while reportedly delivering the bribe. Argentina's embassy in Bolivia forwarded the allegations to MFA in Buenos Aires only in March 2009. The delay of approximately two months was explained by a need for the embassy to gather additional information such as media articles and checking whether the company was present in Bolivia. After arriving in Buenos Aires, the dossier spent three additional months while passing through the MFA's Office of the Legal Advisor, Secretariat for External Relations, and Secretariat of International Co-operation. The dossier ultimately arrived at the General Directorate of Legal Matters, which is the sole body in the MFA competent to file a complaint with law enforcement. The MFA explained that this path of transmission was necessary because the Office of the Legal Advisor and the General Directorate of Legal Matters had different Secretariats. In any event, the MFA finally reported the matter to the prosecutor's office in June 2009, some five months after the initial reports were published in Bolivia. The MFA does not consider this delay excessive, however. Feedback was also not provided to the reporting embassy.

221. The Phase 2 Report (para. 49) also noted the lack of sanctions for failure to report. Neither Article 177(1) CPC nor the Reporting Decree provides for sanctions. In Phases 2 and 3, Argentina indicated that non-reporting could be sanctioned by 1-6 years' imprisonment as an aggravated offence of concealment (Article 277 PC). As the Working Group noted, these relatively draconian sanctions are likely to be applied to cases of active concealment, not failure to report a crime. There have been 60 complaints of this crime since 2009 according to Argentina, but it is unclear whether these cases involved active concealment or non-reporting. Phase 2 Recommendation 2(a), which asked Argentina to consider whether sanctions for non-reporting are appropriate and effective, has not been implemented.

222. Phase 2 Recommendation 2(a) also asked Argentina to remind public officials, including diplomatic missions, trade promotion and tax administration personnel of their reporting obligations under the CPC and Reporting Decree. The MFA has done so via annual circulars to embassies, consulates and trade promotion centres, most recently in 2013. However, as noted above, the circular describes a different reporting procedure from the CPC and Reporting Decree. AFIP has not implemented the recommendation, as Instruction 794/2007 was issued before the Phase 2 Report, and a subsequent amendment is not relevant for present purposes.

223. Private individuals (including SOE employees) are not obliged to report crimes.<sup>91</sup> Any person may report foreign bribery to a judge, prosecutor or the police (see p. 23). Parliamentarians have filed complaints in four of the six foreign bribery investigations to date; other citizens have not reported foreign bribery allegations. (The MFA reported the two other allegations.) The Phase 2 Report (para. 50) noted that the OA had provided information on how to report domestic corruption and had received numerous complaints. This has since continued. The OA also states that it has offered secure channels for reporting.

### *Commentary*

***The lead examiners welcome the MFA's efforts to ensure the reporting of foreign bribery allegations by overseas missions. However, Argentina has not taken steps to eliminate multiple layers of internal reporting before allegations are reported to law enforcement authorities. Multiple reporting layers engender delay, as the Gas Plant (Bolivia) Case demonstrates. Direct reporting to law enforcement also helps ensure that the factors in Article 5 of the Convention are not taken into account in decisions to report allegations (Phase 2 para. 58). The lead examiners further note that different provisions continue to impose inconsistent reporting***

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<sup>91</sup> Some entities and individuals are obliged to report suspected money laundering (see p. 30).

*thresholds. Argentina has also not made sufficient efforts to remind officials of their reporting obligations under the CPC and Reporting Decree.*

*For these reasons, the lead examiners reiterate Phase 2 Recommendation 2(a) and recommend that Argentina (a) further remind public officials, including diplomatic missions, trade promotion and tax officials of their obligation under Article 177(1) CPC and Article 2 of the Reporting Decree to report alleged offences of foreign bribery directly to competent law enforcement officials; (b) ensure that administrative reporting duties in other instruments reflect and are compatible with the CPC and Reporting Decree; and (c) consider whether sanctions for non-reporting of alleged foreign bribery are appropriate and effective.*

**(c) Whistleblowing and Whistleblower Protection**

224. Argentina still does not have specific mechanisms to protect whistleblowers in the private and public sectors. Phase 2 Recommendation 2(b) asked Argentina to adopt comprehensive whistleblower protection measures to encourage employees to report suspected cases of foreign bribery without fear of retaliation. The Phase 2 Report (para. 52) noted that the OA had launched a draft public and private sector whistleblower protection bill which it expected to send to the Executive for consideration in 2007-2008. The initiative has since been abandoned because existing witness protection and unfair dismissal laws were deemed sufficient. Principle VIII of CNV's Corporate Governance Code encourages facilitation of reporting by employees on a confidential basis. The Code does not set out how confidentiality would be ensured, or require protection from retaliation.

225. Argentina refers to several other initiatives which do not quite amount to whistleblower protection. Law 25 764 offers protection to witnesses through measures such as relocation and change of identity. As the Working Group has noted on many occasions, witness protection is more limited, e.g. it does not offer protection from work place reprisals. As noted in Phase 2, Labour Contract Law 20 744 addresses unjust dismissal but not other forms of reprisals. Articles 79-81 CPC require competent authorities – not their employers – to treat victims and witnesses of crime with dignity and respect.

226. Some companies have implemented reporting mechanisms but whether they also adequately protect whistleblowers is unclear. At the on-site visit, business association representatives asserted that many companies have reporting hotlines. However, the conclusion was not based on any specific survey or studies. The OA's survey found that only 23% of 825 non-listed companies had reporting mechanisms. The survey did not consider, however, the prevalence of measures to protect whistleblowers or the frequency of whistleblowing in practice. Additional research of 18 Argentine exporting companies showed that only 5 provided information on the internet about their whistleblower hotlines.

**Commentary**

*The lead examiners are concerned at the lack of mechanisms to protect whistleblowers in the Argentine private and public sectors. As the Working Group has stated in other evaluations, general employment law provisions are not sufficient to prohibit dismissal and changes in employment conditions following a whistleblower's disclosure of information that may be of a confidential nature. Such legislation also does not address issues such as reporting channels or confidentiality of the whistleblower's information and identity.*

*The lead examiners therefore reiterate Phase 2 Recommendation 2(b) and recommend that Argentina ensure that appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on*

*reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions.*

## **11. Public Advantages**

227. This section concerns the role of Argentine agencies involved in public procurement, official development assistance, and officially supported export credits in fighting foreign bribery.

### **(a) Public Procurement**

228. A person who is convicted of “fraudulent offences” (*delitos dolosos*) or who is subject to criminal proceedings for an offence established by the Inter-American Convention against Corruption (IACAC) is debarred from obtaining public contracts with the National Public Administration. The maximum debarment period is twice the length of the prison sentence, or the period of probation if no prison sentence is imposed (Decreets 436/2000 Article 136 and 1023/2001 Article 28). The National Procurement Office (*Oficina Nacional de Contrataciones*, ONC) oversees federal public procurement.

229. Argentina has not addressed the deficiencies in this debarment regime identified in Phase 2 (paras. 231-234). Decree 893/2012 issued after Phase 2 is not relevant for present purposes. Debarment remains unavailable for some forms of foreign bribery, e.g. bribery of officials of public international organisations, which is not covered by the IACAC. ONC explained that adding grounds for debarment required a legislative amendment by Congress and cannot be done by Decree. This position is curious since the debarment regime described above was created by Decrees and not legislation. Debarment does not apply to legal persons and has never occurred in practice. The ONC asserted that companies can be debarred if a natural person committed the crime on its behalf but there is no legal basis for this assertion.

230. There are also questions about implementation. There is no indication that ONC checks whether a person should be debarred. Participants are merely required to provide an affidavit stating that there are no grounds for debarment. The ONC does not verify the debarment lists of multilateral development banks. ONC has never debarred an individual or company for a corruption offence.

### **Commentary**

*The lead examiners reiterate Phase 2 Recommendation 9(d) and recommend that Argentina (a) extend the grounds for debarment from public procurement to cover all offences falling within the scope of Article 1 of the Convention; (b) ensure the effectiveness of the exclusion mechanism, including by routinely checking debarment lists of multilateral development banks in relation to public procurement contracting; and (c) in conjunction with reform of the liability of legal persons for bribery, extend the disqualification to legal persons engaged in foreign bribery where appropriate.*

### **(b) Official Development Assistance**

231. Issues such as detection, reporting and debarment by agencies involved in official development assistance (ODA) are not relevant in Argentina. Argentina does not have an ODA programme and provides only technical assistance, for example by funding the travel of Argentine and foreign officials to training events. There are no plans for other forms of co-operation or private sector involvement.

### **(c) Export Credits**

232. Argentina has not adhered to the 2006 Recommendation of the Council on Bribery and Officially Supported Export Credits (2006 Recommendation). Argentina is also not a member of the OECD Working

Party on Export Credits and Credit Guarantees (ECG). At the time of Phase 2, support for political and extraordinary export credit risks was jointly provided by the *Banco de Inversión y Comercio Exterior* (BICE) and *Compañía Argentina de Seguros de Crédito a la Exportación S.A.* (CASCE) (Phase 2 paras. 71-72). BICE ceased to provide this support in 2009 and CASCE is no longer operational. There is currently no publicly-funded export credit or insurance mechanism in Argentina.

### *Commentary*

*The lead examiners recommend that Argentina adhere to the 2006 Recommendation on Bribery and Officially Supported Export Credits if and when it resumes the provision of officially supported export credits.*

## C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

233. The Working Group is gravely concerned about Argentina's commitment to fight foreign bribery and how little progress Argentina has made since previous evaluations. Argentina is in serious non-compliance with key articles of the Convention by failing to provide for corporate liability for foreign bribery. It has not implemented other longstanding Working Group Recommendations from 2001 on nationality jurisdiction to prosecute foreign bribery and deficiencies in the foreign bribery offence. There has been little or no improvement on problems in the criminal justice system that were identified in Phase 2. Widespread delays continue to plague economic crime investigations. A new Criminal Procedure Code (CPC) that might address delay has yet to be implemented. Additional issues impinge upon the independence of the judiciary and prosecutors, including executive contact with judges and prosecutors in specific cases, the use of disciplinary processes to pressure judges and prosecutors, and the extraordinarily high number of judicial vacancies and surrogate judges.

234. The Working Group has further concerns about enforcement in actual foreign bribery cases. Judicial investigations have been opened into several of the ten foreign bribery allegations that have surfaced since 2001. This is a welcome development. These investigations, however, have progressed very slowly and have not yielded charges or convictions. In several instances, Argentine authorities did not proactively investigate foreign bribery allegations or effectively seek the co-operation of foreign authorities. This lack of foreign bribery enforcement has contributed to a low level of awareness of and interest in fighting this offence among companies and citizens.

235. In addition, prosecutors and investigative judges in charge of these actual foreign bribery cases did not attend the on-site visit. Their absence seriously undermined the effectiveness of the on-site visit and precluded a full assessment of Argentina's enforcement efforts in practice. It also deprived the Working Group of an opportunity to explore whether actual foreign bribery cases have been impacted by the numerous legislative and systemic criminal justice issues identified in this report, such as concerns about the foreign bribery offence; jurisdiction to prosecute; the use of anonymous information to open investigations; reporting and the opening of investigations; delay in complex economic crime cases; resources and specialisation of law enforcement bodies; the impact of judicial vacancies; executive contact with prosecutors and judges; the threat of judicial and prosecutorial disciplinary processes; use of special investigative techniques; the obtaining of MLA; and information sharing with other government agencies.

236. The Working Group recalls that the Phase 2 Report (paras. 277-278) already expressed serious concerns about Argentina and considered conducting supplementary evaluations. Given the absence of corporate liability and nationality jurisdiction as well as systemic deficiencies such as delay in economic crime cases, the Working Group decided to conduct a Phase 1bis evaluation of Argentina one year after the Phase 2 Report's adoption to assess legislative developments in these areas. Depending on its conclusions

concerning progress in these and other areas, the Working Group would also decide whether to conduct a supplementary Phase 2bis evaluation or take other appropriate action. To date, supplementary evaluations have yet to be conducted.

237. The Working Group further notes that Argentina meets the criteria for supplemental Phase 3bis evaluations that are set out in its Phase 3 Evaluation Procedure (para. 68). The Working Group will consider conducting a Phase 3bis evaluation “in the event of inadequate implementation of the Convention”. Argentina meets this criterion due to its continuing inability to impose corporate liability for foreign bribery and to implement other key Working Group Recommendations since Phases 1 and 2. The Working Group will also consider a Phase 3bis evaluation “where attendance at the Phase 3 on-site visit prevents the lead examiners from assessing whether the country has adequately implemented the Convention”. As noted above, prosecutors and investigative judges who conducted actual foreign bribery cases did not attend the on-site visit. The Working Group therefore could not fully assess Argentina’s foreign bribery enforcement actions, which is a critical component of the Working Group’s Phase 3 evaluations.

238. For these reasons, the Working Group decides that Argentina should undergo a supplemental Phase 3bis evaluation by the end of 2016 which will include an on-site visit to Argentina in mid-2016. The evaluation will cover the implementation of the Recommendations set out below; relevant new legislation and developments, including those relating to follow-up issues below; and Argentina’s foreign bribery enforcement actions. The on-site visit will include meetings with investigative judges and prosecutors who have conducted Argentina’s foreign bribery enforcement actions. The Working Group will also conduct a high-level mission to Argentina in early 2016 to meet Ministers and senior officials, and to further engage with the Argentine authorities in order that they take the necessary steps to implement the Convention.

239. Regarding outstanding recommendations from previous evaluations (as set out in Annex 1 to this report), since Argentina’s Phase 2 Written Follow-Up Report, only Phase 2 Recommendation 12(c) has been fully implemented. Recommendations 1(a), 1(b), 1(c), 1(d), 2(a), 2(b), 3(c), 4, 5, 6, 9(a), 9(d), 10(a), 10(b), 10(c), 11 and 12(b) remain partially or not implemented.

240. In conclusion, based on the findings in this report on Argentina’s implementation of the Convention, the 2009 Recommendation and related OECD anti-bribery instruments, the Working Group (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites Argentina to report back on the implementation of recommendations 3 and 5(c) orally within six months (i.e. by June 2015), and of recommendations 1, 2, 3, 4(a), 4(b), 4(c), 4(d), 5(c), 5(e), 6 and 8 within one year (i.e., by December 2015). Argentina is further invited to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e., by December 2016). This written follow-up report will form part of Argentina’s Phase 3bis evaluation, which as noted above is to take place by the end of 2016.

## **1. Recommendations of the Working Group**

### ***Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery***

1. With regards to the foreign bribery offence, the Working Group recommends that Argentina:
  - (a) introduce an autonomous definition of foreign public officials (Convention, Article 1(4); 2009 Recommendation III.ii and V);
  - (b) ensure that the definition of foreign public officials covers, in a manner consistent with the Convention, officials of foreign public enterprises and public officials of organised foreign

areas or entities that do not qualify or are not recognised as States (Convention, Article 1(4) and Commentaries 12-18; 2009 Recommendation III.ii and V); and

- (c) eliminate the vagueness in the offence resulting from the absence of a requirement that the advantage provided to an official be “undue”, or that the advantage obtained by the briber be “improper” (Convention, Article 1; 2009 Recommendation III.ii and V).
2. Regarding jurisdiction over foreign bribery cases, the Working Group recommends that Argentina adopt nationality jurisdiction to prosecute foreign bribery cases on a priority basis (Convention, Article 4(2); 2009 Recommendation V).
  3. With regards to liability of legal persons, the Working Group recommends that Argentina adopt legislation on a priority basis to ensure that legal persons can be held liable for foreign bribery (Convention, Articles 2 and 3; 2009 Recommendation Annex I.B).
  4. With regards to sanctions and confiscation, the Working Group recommends that Argentina:
    - (a) substantially increase the maximum fine available for foreign bribery (Convention, Article 3(1));
    - (b) take steps to ensure that fines are available where the gain obtained by a briber is not pecuniary or does not go to the briber but his/her company (Convention, Article 3(1) and Commentary 7);
    - (c) amend its legislation to provide for confiscation of property the value of which corresponds to that of the bribe and the proceeds of bribery, or that monetary sanctions of comparable effect are applicable (Convention, Article 3(3));
    - (d) take further steps to ensure (i) that confiscation is routinely ordered in foreign bribery cases, (ii) that the amount of confiscation represents the full benefits of the offence, and (iii) that confiscation orders are executed without unreasonable delay (Convention, Article 3(3)); and
    - (e) regarding debarment, (i) extend the grounds for debarment from public procurement to cover all offences falling within the scope of Article 1 of the Convention; (ii) ensure the effectiveness of the exclusion mechanism, including by routinely checking debarment lists of multilateral development banks in relation to public procurement contracting; and (iii) in conjunction with reform of the liability of legal persons for bribery, extend the disqualification to legal persons engaged in foreign bribery where appropriate (Convention, Article 3(4); 2009 Recommendation X).
  5. Regarding investigations and prosecutions, the Working Group recommends that Argentina:
    - (a) take steps to ensure that its law enforcement authorities routinely and systematically assess credible foreign bribery allegations that are reported in the media on a timely basis; and ensure that foreign bribery cases may be commenced based on information provided anonymously (Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D);
    - (b) use proactive steps to gather information from diverse sources of allegations and enhance investigations (Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D);

- (c) take steps to promptly implement the new CPC enacted on 4 December 2014, and ensure that the new law effectively reduces delay in practice (Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D);
  - (d) take steps to (i) ensure that prosecutors and investigative judges in economic crime cases act promptly and proactively without delay, and (ii) actively assess the effectiveness of its measures to reduce delay by maintaining and analysing statistics on delay and economic crime cases that have been time-barred (Convention, Articles 5 and 6, and Commentary 27; 2009 Recommendation Annex I.D);
  - (e) ensure that adequate resources, including specialised and experienced investigative judges, are made available for foreign bribery investigations and prosecutions (Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D);
  - (f) provide foreign bribery-specific training to all judges and prosecutors that have jurisdiction to investigate and prosecute this crime (Convention, Article 5 and Commentary 27; 2009 Recommendation III.(ii) and V); and
  - (g) accelerate efforts to implement an effective national register of information relating to all Argentine companies (2009 Recommendation II).
6. With regards to judicial and prosecutorial independence, the Working Group recommends that Argentina take steps to ensure that the exercise of investigative and prosecutorial powers, in particular for the foreign bribery offence, is not subject to improper influence by factors listed in Article 5 of the Convention, including concerns of a political nature. In particular, Argentina should take all necessary steps to ensure:
- (a) actual or threatened disciplinary action against judges and prosecutors does not adversely affect the effectiveness of foreign bribery investigations and prosecutions, and is not motivated by considerations of national economic interest, potential effect upon relations with another State, or identity of the natural or legal person involved;
  - (b) government officials refrain from contacting judges and prosecutors about specific cases; and
  - (c) a substantial reduction in the number of judicial vacancies and surrogate judges, and increased continuity of investigative personnel for particular cases, including judges and prosecutors, to the greatest degree possible (Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D).
7. With regards to statistics, the Working Group recommends that Argentina maintain detailed statistics of sanctions (including confiscation) imposed in cases of bribery and other economic crimes (Convention, Articles 3(1)-(3)).
8. Regarding mutual legal assistance, the Working Group recommends that Argentina continue to take further steps to ensure that MLA requests from foreign authorities are executed without undue delay (Convention, Article 9.1; 2009 Recommendation XIII.v).

### ***Recommendations for ensuring effective prevention, detection, and reporting of foreign bribery***

9. With regards to money laundering, the Working Group recommends that Argentina:
  - (a) extend money laundering reporting, due diligence and record keeping obligations to lawyers, *síndicos* and other legal professionals (subject to appropriate qualifications) (Convention, Article 7);
  - (b) further enhance AML measures for financial transactions involving PEPs, including by adding important political party officials to the definition of PEPs; ensuring that due diligence of former PEPs is based on an assessment of risk and not on prescribed time limits; and issuing guidelines on the handling of PEPs (Convention, Article 7; 2009 Recommendation III.i);
  - (c) raise awareness about foreign bribery as a predicate offence to money laundering, including by preparing typologies on foreign bribery-related money laundering (Convention, Article 7; 2009 Recommendation III.i); and
  - (d) take steps to ensure that UIF processes and forwards STRs to law enforcement without undue delay (Convention, Article 7; 2009 Recommendation IX.i).
  
10. With regards to accounting and auditing, corporate compliance, internal control and ethics, the Working Group recommends that Argentina:
  - (a) continue to strengthen accounting standards such as considering to allow all unlisted companies and SOEs to choose IFRS; take measures to enforce the accounting fraud offence and accounting requirements more effectively in bribery cases; and increase applicable sanctions where appropriate (Convention, Article 8; 2009 Recommendation X.A.i and iii);
  - (b) work with the accounting profession to raise awareness of the foreign bribery offence, and encourage the profession to develop specific training on foreign bribery in the framework of their professional education and training systems (Convention, Article 8; 2009 Recommendation III.i);
  - (c) further improve requirements to submit to external audit; ensure full ISA implementation in Buenos Aires and all 23 provinces; and continue efforts to improve audit quality standards, including with regard to certification of auditor qualifications and quality control of audits (Convention, Article 8; 2009 Recommendation X.B.i and ii);
  - (d) ensure that external auditors and audit firms take greater account of the risks of foreign bribery in the companies that they audit (Convention, Article 8; 2009 Recommendation III.i);
  - (e) continue its efforts to ensure that auditors and *síndicos* that are not in SOEs promptly report suspicions of foreign bribery by employees or agents of the company to the competent authorities, notably in the face of inaction after appropriate disclosure within the company (2009 Recommendation X.B.iii and v); and
  - (f) take more effective steps to promote corporate compliance, internal controls and ethics programmes to prevent and detect foreign bribery (2009 Recommendation X.C).

11. With regards to tax-related measures, the Working Group recommends that Argentina:
  - (a) explicitly disallow the tax deductibility of bribes to foreign public officials for all tax purposes in an effective manner (2009 Recommendation VIII.i; 2009 Tax Recommendation I);
  - (b) improve AFIP's ability to detect foreign bribery by disseminating the 2013 OECD Bribery Awareness Handbook for Tax Examiners and training AFIP officials on detecting bribery (2009 Recommendation III.i and VIII.i; 2009 Tax Recommendation II); and,
  - (c) promptly amend its legislation to allow tax information to be provided to foreign authorities for use in foreign bribery investigation (Convention Article 9(1); 2009 Recommendation XIII.iv; 2009 Tax Recommendation I.iii).
  
12. With regards to awareness-raising, the Working Group recommends that Argentina greatly increase its efforts to proactively raise awareness of foreign bribery within:
  - (a) the Argentine public administration, especially among agencies that can play an important role in preventing and detecting foreign bribery, such as overseas diplomats, *Fundación ExportAr* and trade promotion officials (2009 Recommendation III.i); and,
  - (b) the private sector, including through activities such as seminars, conferences, technical assistance and partnerships with business associations (2009 Recommendation III.i).
  
13. With regards to reporting and whistleblower protection, the Working Group recommends that Argentina:
  - (a) (i) further remind public officials, including diplomatic missions, trade promotion and tax officials of their obligation under Article 177(1) CPC and Article 2 of the Reporting Decree to report alleged offences of foreign bribery directly to competent law enforcement officials; (ii) ensure that administrative reporting duties in other instruments reflect and are compatible with the CPC and Reporting Decree; and (iii) consider whether sanctions for non-reporting of alleged foreign bribery are appropriate and effective (2009 Recommendation IX.i and ii); and,
  - (b) ensure that appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions (2009 Recommendation IX.iii).
  
14. With regards to export credits, the Working Group recommends that Argentina adhere to the 2006 Recommendation on Bribery and Officially Supported Export Credits if and when it resumes the provision of officially supported export credits (2009 Recommendation XII.i).

## **2. Follow-up by the Working Group**

15. The Working Group will follow up the issues below as case law and practice develop:
  - (a) Application of Article 258bis PC, including cases where a bribe is paid in order that an official acts outside his/her authorised competence (Convention, Article 1 and Commentary 19);

- (b) Whether the solicitation or “illicit demand” of an undue payment or other advantage by a foreign public official can exclude the liability of the active briber (Convention, Article 1; 2009 Recommendation Annex I.A);
- (c) Application of territorial jurisdiction in foreign bribery cases (Convention, Article 4(1));
- (d) Sanctions imposed for foreign bribery in practice, including whether the sentences imposed comply with Commentary 7 of the Convention (Convention, Article 3);
- (e) Confiscation of indirect proceeds of foreign bribery, and confiscation against a legal person of the proceeds of offences committed by a *de facto* manager (Convention, Article 3);
- (f) Issues arising from Argentina’s actual foreign bribery enforcement actions which the Working Group could not fully assess because of the absence from the on-site visit of the prosecutors and investigative judges who conducted these cases (Convention, Article 5; 2009 Recommendation Annex I);
- (g) Effectiveness of measures taken to address delay in investigations and prosecutions of complex economic crimes, including the new CPC and the experts group in the federal courts (Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D);
- (h) Functioning of the Judicial Council and disciplinary proceedings against judges and prosecutors arising out of foreign bribery cases (Convention, Article 5 and Commentary 27; 2009 Recommendation Annex I.D);
- (i) Application of the money laundering offence in Argentina, including: (a) whether the offence covers the laundering of a bribe and the laundering of indirect proceeds of crime, (b) whether foreign bribery is always a predicate offence to money laundering, without regard to the place where the bribery occurred, and (c) enforcement of the money laundering offence in practice (Convention, Article 7);
- (j) whether Argentina can grant MLA requests submitted in the context of criminal and non-criminal proceedings within the scope of the Convention and brought by a Party against a legal person (Convention, Article 9);
- (k) time needed to reach a final decision on extradition in corruption cases (Convention, Article 10); and,
- (l) whether Article 5 factors influence extradition or MLA in Argentina (Convention, Articles 5, 9 and 10, and Commentary 27; 2009 Recommendation Annex I.D).

**ANNEX 1 WORKING GROUP PHASE 2 RECOMMENDATIONS TO ARGENTINA AND THEIR IMPLEMENTATION**

| <i>Phase 2 Recommendation</i>  | <i>2009 Working Group Evaluation</i> |
|--|--------------------------------------|
| <b><i>Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials</i></b>   |                                      |
| 1. With respect to <u>awareness raising and prevention-related activities</u> to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Argentina:   |                                      |
| a) provide further training to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that can play an important role preventing and detecting foreign bribery by Argentine companies active in foreign markets, including trade promotion and diplomatic personnel and tax inspectors (Revised Recommendation, Paragraph I);   | Partially implemented                |
| b) provide support for private sector initiatives such as seminars, conferences and technical assistance targeted at the business sector on foreign bribery issues, and, in cooperation with business and other relevant organisations, assist companies in engaging in preventive efforts (Revised Recommendation, Paragraph I);  | Partially implemented                |
| c) work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to develop specific training on foreign bribery in the framework of their professional education and training systems (Revised Recommendation, Paragraph I);   | Partially implemented                |
| d) require BICE to adopt, and ensure CASCE adopts, anti-bribery policies with regard to export credit operations; and seriously consider adhering to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits (Revised Recommendation, Paragraph I).  | Not implemented                      |
| 2. With respect to the <u>detection and reporting</u> of suspected foreign bribery to the competent authorities, the Working Group recommends that Argentina:  |                                      |
| a) remind public officials, including diplomatic missions, trade promotion, export credit and tax administration personnel, of their obligation under art. 177(1) CPC and art. 2 of the Reporting Decree to report alleged offences of foreign bribery directly to competent law enforcement officials; ensure that administrative reporting duties laid down in other instruments reflect and are compatible with the CPC and Reporting Decree; and consider whether sanctions for non-reporting of alleged foreign bribery are appropriate and effective (Revised Recommendation Paragraph I); | Partially implemented                |
| b) adopt comprehensive measures to protect public and private sector whistleblowers in order to encourage employees to report suspected cases of foreign bribery without fear of retaliation. (Revised Recommendation Paragraph I).  | Not implemented                      |
| <b><i>Recommendations for ensuring effective investigation and prosecution of offences of bribery of foreign public officials and related offences</i></b>   |                                      |
| 3. With respect to the <u>investigation and prosecution</u> of foreign bribery and related offences, the Working Group recommends that Argentina:  |                                      |
| a) continue and accelerate its efforts to address systemic deficiencies in enforcement with regard to serious economic crime such as foreign bribery (Convention, Article 5; Revised Recommendation Paragraph I);  | Satisfactorily implemented           |

| <i>Phase 2 Recommendation</i>   | <i>2009 Working Group Evaluation</i> |
|---|--------------------------------------|
| b) take all necessary measures to ensure that foreign bribery allegations are promptly detected, investigated and prosecuted as appropriate (Convention, Article 5, Revised Recommendation Paragraphs I and II);  | Satisfactorily implemented           |
| c) ensure that adequate resources, including specialised and experienced investigative judges, are made available for foreign bribery investigations and prosecutions; and take measures to provide increased continuity of investigative personnel for particular cases, including judges and prosecutors, to the greatest degree possible (Convention, Article 5; Revised Recommendation Paragraph I);  | Partially implemented                |
| d) ensure that factors listed in Article 5 of the Convention do not influence investigation or prosecution in foreign bribery cases; and consider further measures to limit the disclosure of confidential information about individual cases to government agencies or officials not involved in the investigation (Convention, Article 5; Revised Recommendation Paragraph I);  | Satisfactorily implemented           |
| e) review applicable rules to ensure that <i>incidentes</i> and appeals can be efficiently resolved in complex foreign bribery cases, and provide adequate training to judges and prosecutors concerning the management of such cases (Convention, Article 5; Revised Recommendation Paragraph I);  | Satisfactorily implemented           |
| f) accelerate efforts to create an effective national register of information relating to all Argentine companies (Revised Recommendation Paragraphs I, II);  | Satisfactorily implemented           |
| g) ensure tax information continues to be promptly provided to judges in appropriate cases (Revised Recommendation Paragraphs I, II).   | Satisfactorily implemented           |
| <b><i>Recommendation Pertaining to the offence of foreign bribery</i></b>   |                                      |
| 4. With respect to the offence of foreign bribery, the Working Group recommends that Argentina (a) introduce an autonomous definition of foreign public officials; (b) ensure that this definition covers, in a manner consistent with the Convention, officials of foreign public enterprises and public officials of organised foreign areas or entities that do not qualify or are not recognised as States; and (c) ensure that vagueness with regard to the requirement that the advantage supplied by the bribery be “undue” is eliminated. (Convention, Article 1) | Not implemented                      |
| 5. With respect to the <u>liability of legal persons for foreign bribery</u> , the Working Group recommends that Argentina adopt legislation on a priority basis to ensure that legal persons can be held liable for foreign bribery. (Convention, Articles 2 and 3)  | Not implemented                      |
| 6. With respect to <u>jurisdiction</u> , the Working Group recommends that Argentina adopt nationality jurisdiction in foreign bribery cases in order to strengthen enforcement of the offence. (Convention, Article 4)   | Not implemented                      |
| 7. With respect to the <u>limitations period</u> for prosecuting foreign bribery, the Working Group recommends that Argentina ensure that the statute of limitations applicable to the foreign bribery offence and possibilities for interruption and suspension allow for an adequate period of time for the investigation of the offence. (Convention, Article 6)   | Satisfactorily implemented           |
| 8. With respect to <u>mutual legal assistance</u> , the Working Group recommends that Argentina (a) ensure it can grant all MLA requests submitted in the context of criminal proceedings within the scope of the Convention and brought by a Party against a legal person; and (b) consider steps that would allow it to grant MLA requests for coercive measures in the context of non-criminal proceedings within the scope of the Convention and brought by a Party against a legal person. (Convention, Article 9)   | Satisfactorily implemented           |

| <i>Phase 2 Recommendation</i>   | <i>2009 Working Group Evaluation</i> |
|---|--------------------------------------|
| 9. With respect to <u>sanctions for foreign bribery</u> , the Working Group recommends that Argentina:  |                                      |
| a) amend the law to provide that legal persons shall be subject to effective, proportional and dissuasive sanctions for foreign bribery, including fines or monetary sanctions (Convention, Articles 2, 3);   | Not implemented                      |
| b) take all necessary measures to ensure that seizure and confiscation can be effectively applied against the active briber, including against all legal persons that benefit from foreign bribery (Convention, Article 3);   | Satisfactorily implemented           |
| c) consider steps to ensure that the sanctions imposed by courts in foreign bribery cases are effective, proportionate and dissuasive (Convention, Article 3; Revised Recommendation Paragraph I);  | Follow up                            |
| d) extend the grounds for debarment from public tenders to cover all offences falling within the scope of Article 1 of the Convention, ensure the effectiveness of the exclusion mechanism and, in conjunction with reform of the liability of legal persons for bribery, extend the disqualification to legal persons engaged in foreign bribery where appropriate (Convention, Article 3; Revised Recommendation Paragraph VI).                       | Not implemented                      |
| 10. With respect to accounting, auditing and internal controls relating to the fight against foreign bribery, the Working Group recommends that Argentina:  |                                      |
| a) continue to strengthen accounting standards, take measures to enforce the accounting fraud offence and accounting requirements more effectively in bribery cases, and increase applicable sanctions where appropriate (Convention, Article 8; Revised Recommendation Paragraph V.A);   | Not implemented                      |
| b) consider whether requirements to submit to external audit are adequate, in particular with regard to large companies; and continue efforts to improve audit quality standards, including with regard to certification, independence and quality control (Revised Recommendation Paragraph V.B);  | Not implemented                      |
| c) ensure that auditors and <i>síndicos</i> are required to report all suspicions of foreign bribery by employees or agents of the company to management and, as appropriate, to corporate monitoring bodies; and consider requiring auditors and <i>síndicos</i> , notably in the face of inaction after appropriate disclosure within the company, to promptly report suspicions to the competent authorities (Revised Recommendation Paragraph V.B). | Not implemented                      |
| 11. With respect to <u>related tax offences and obligations</u> , the Working Group recommends that Argentina take appropriate measures to make explicit the prohibition on deducting foreign bribes from taxable revenue either in tax legislation or in another manner that is binding and publicly available. (Revised Recommendation Paragraphs I, II and IV)   | Partially implemented                |
| 12. With respect to <u>related anti-money laundering obligations</u> , the Working Group recommends that Argentina maintain ongoing efforts for the improvement of the anti-money laundering regime, and, in this context:  |                                      |
| a) include foreign politically exposed persons, appropriately defined, in the definition of politically exposed persons in relevant rules and guidelines, and raise awareness about foreign bribery as a predicate offence to money laundering (Convention, Article 7; Revised Recommendation Paragraph I);   | Satisfactorily implemented           |
| b) extend money laundering reporting, due diligence and record keeping obligations to lawyers, <i>síndicos</i> and other legal professionals (subject to appropriate qualifications) (Convention, Article 7; Revised Recommendation Paragraph I);   | Not implemented                      |
| c) consider expanding the money laundering offence to include self-laundering (Convention, Article 7).  | Not implemented                      |

| <i>Phase 2 Recommendation</i>   | <i>2009 Working Group Evaluation</i> |
|---|--------------------------------------|
| <b><i>Follow-up by the Working Group</i></b>  |                                      |
| 13. The Working Group will follow up on the issues below, as practice develops, in order to assess:   |                                      |
| a) the application of sanctions against natural and legal persons in foreign bribery cases (Convention, Article 3)  | Continue to follow up                |
| b) the application of territorial jurisdiction in foreign bribery cases (Convention, Article 4)   | Continue to follow up                |
| c) whether the solicitation or “illicit demand” of an undue payment or other advantage by a foreign public official can exclude the liability of the active briber (Convention, Article 1)              | Continue to follow up                |
| d) the application in practice of art. 258 bis PC, including its application to cases where a bribe is paid for an act/omission outside of the official’s authorised competence (Convention, Article 1) | Continue to follow up                |
| e) whether foreign bribery is always a predicate offence to money laundering, without regard to the place where the bribery occurred (Convention, Article 7)  | Continue to follow up                |
| f) whether Argentine authorities consider the factors listed in Article 5 of the Convention when denying extradition or MLA in a foreign bribery case (Convention, Articles 5, 9)                       | Continue to follow up                |
| g) the time needed to reach a final decision in extradition procedures related to corruption cases (Convention, Article 10)   | Continue to follow up                |
| h) the functioning of the modified Judicial Council with regard to any disciplinary proceedings arising out of foreign bribery cases (Convention, Article 5).   | Continue to follow up                |

## ANNEX 2 PARTICIPANTS AT THE ON-SITE VISIT

### Public Sector

- Ministry of Foreign Affairs and Worship (MFA)
  - Legal Adviser Office
  - National Department of International Economic Promotion
  - General Directorate for International Cooperation
- Ministry of Justice and Human Rights (MOJ)
  - Anti-Corruption Office (OA)
  - Under-Secretariat of Criminal Policy
  - National Directorate of International Legal Cooperation and Judicial Systems
- Public Prosecutor's Office
  - Special Office for Economic Crimes and Money Laundering (PROCELAC)
  - Secretariat for Cooperation and International Relations
- Committee for Drafting a Bill to Reform the Penal Code
- Ministry of Security (Department of International Affairs)
- Federal Police
- Ministry of Economy and Public Finances, Undersecretary of Legal Affairs
- National Security Commission (CNV)
- National Accounting Office
- *Inspección General de Justicia* (IGJ)
- Office of the Comptroller General (SIGEN)
- Office of the National Auditor General (AGN)
- Ministry of Economy and Public Finance
- Financial Intelligence Unit (UIF)
- Central Bank of Argentina
- National Insurance Superintendent
- Federal Tax Administration (AFIP)
- National Procurement Office (ONC)
- *Banco de Inversión y Comercio Exterior* (BICE)

### Judiciary

- Investigative judge
- Trial judges

### State-Owned or State-Controlled Enterprises

- Fabricaciones Militares
- Aerolíneas Argentinas
- *Fábrica Argentina de Aviones Brigadier San Martín* (FAdeA)

### Private Sector

#### Private Enterprises

- Arcor SAIC
- Swiss Medical SA
- Tigre Argentina SA
- Atomlux
- Penetrit
- Todomusica
- Banco Provincia
- Banco Santander Río S.A.
- Banco Marco
- BBVA Banco Frances
- Banco de Galicia

#### Business Associations

- *Asociación de Importadores y Exportadores de la República Argentina*
- *Cámara de Exportadores de la República Argentina*
- *Asamblea de Pequeños y Medianos Empresarios de la República Argentina*
- *Cámara Argentina de Comercio*

### Legal Profession and Academics

- *Colegio Público de Abogados de la Capital Federal*
- Bruchou, Fernandez Madero & Lombardi Abogados
- Estudio Beccar Varela
- Estudio Durrieu Abogados
- Marval, O'Farrell & Maira
- Sal & Morchio
- Legal academics

### Accounting and Auditing Profession

- *Consejo Profesional de Ciencias Económicas de la Ciudad Autónoma de Buenos Aires (CPCECABA)*
- *Federación Argentina de Consejos Profesionales de Ciencias Económicas (FACPCE)*
- *Instituto de Auditores Internos de Argentina*
- Ernst & Young
- PWC
- BDO International
- Grant Thornton

### **Civil Society**

- Citizen Power Foundation (*Fundación Poder Ciudadano*), Transparency International Argentina Chapter
- Economic Crime Prevention Research Centre (*Centro de Investigación y Prevención de la Criminalidad Económica, CIPCE*)
- *Comisión de Seguimiento Convención Interamericana contra la Corrupción*
- *Foro de Estudios sobre la Administración de Justicia (FORES)*
- Observatory of the Judiciary (*Observatorio de la Justicia Argentina*)
- Página/12
- Diario Popular
- Confederación General del Trabajo (CGT)

### **Parliamentarians**

- Deputies of the Nation

### ANNEX 3 LIST OF ABBREVIATIONS AND ACRONYMS

|         |  |          |   |
|---------|--|----------|---|
| AFIP    | <i>Administración Federal de Ingresos Públicos</i> (Federal Tax Administration)  | MERCOSUR | <i>El Mercado Común del Sur</i>   |
| AGN     | <i>Auditoría General de la Nación</i> (Office of the National Auditor General)   | MESICIC  | Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption                                   |
| AML     | anti-money laundering  | MFA      | Ministry of Foreign Affairs and Worship   |
| ARS     | Argentine pesos  | MLA      | mutual legal assistance   |
| CARP    | <i>Comisión Administradora del Río de la Plata</i>   | MOJ      | Ministry of Justice and Human Rights  |
| CNV     | <i>Comisión Nacional de Valores</i> (National Securities Commission)   | MP       | <i>Ministerio Público</i> (prosecutors' office)   |
| CPC     | Federal Criminal Procedure Code  | NGO      | non-governmental organisation   |
| DILA    | Direction on International Legal Assistance, Ministry of Foreign Affairs and Worship   | OA       | <i>Oficina Anticorrupción</i> (Anti-Corruption Office)  |
| FACPCE  | <i>Federación Argentina de Consejos Profesionales de Ciencias Económicas</i> (Argentine Federation of Professional Organisations of Economic Sciences) | OAS      | Organization of American States   |
| FATF    | Financial Action Task Force  | ODA      | official development assistance   |
| FCPA    | U.S. Foreign Corrupt Practices Act 1977  | ONC      | <i>Oficina Nacional de Contrataciones</i> (National Procurement Office)   |
| FIA     | <i>Fiscalía de Investigaciones Administrativas</i> (National Prosecutor of Administrative Investigations)  | PC       | Federal Penal Code  |
| FIU     | Financial Intelligence Unit  | PEP      | politically exposed person  |
| GAAP    | Generally Accepted Accounting Principles   | PFA      | <i>Policía Federal Argentina</i> (Federal Police)   |
| GAFISUD | <i>Grupo de Acción Financiera de Sudamérica</i> (Financial Action Task Force of South America)   | PGN      | <i>Procurador General de la Nación</i> (Attorney General)   |
| IACAC   | Inter-American Convention against Corruption   | PROCELAC | <i>Procuraduría Adjunta de Criminalidad Económica y Lavado de Activos</i> (Special Office for Economic Crimes and Money Laundering) |
| IFRS    | International Financial Reporting Standards  | SME      | small- and medium-sized enterprise  |
| IGJ     | <i>Inspección General de Justicia</i>  | SIGEN    | <i>Sindicatura General de la Nación</i> (Office of the Comptroller General)   |
| ISA     | International Standards on Auditing  | SOE      | state-owned or state-controlled enterprise  |
| ISQC    | International Standards on Quality Control   | STR      | suspicious transaction report   |
| ITL     | Income Tax Law 20 628  | TPL      | Tax Procedure Law 11 683  |
| LICCM   | Law 24 767 on International Co-operation in Criminal Matters   | UIF      | <i>Unidad de Información Financiera</i> (financial intelligence unit)   |
|         |  | UN       | United Nations  |
|         |  | UNCAC    | United Nations Convention against Corruption  |
|         |  | USD      | United States dollar  |

## ANNEX 4 EXCERPTS OF RELEVANT LEGISLATION

### Penal Code

(Provided by Argentina)

#### Article 77

[...]

The terms “public official” [*funcionario público*] and “civil servant” [*empleado público*] as used in this Code refer to any person who temporarily or permanently discharges public functions, whether as a result of popular election or appointment by the competent authority.

[...]

#### Chapter VI: Bribery and Improper Lobbying

**Article 256.** Any public official who, himself or through another person, receives money or any other gift or accepts a direct or indirect promise to make, delay or stop doing something within his/her functions shall be punished with *reclusión* or imprisonment of one to six years and perpetual disqualification.

**Article 256bis.** Any public official who, by himself or through a third party, requests or receives money or any other gift or accepts a direct or indirect promise, to unduly assert his influence on a public servant to act, delay or omit to do something within his/her functions, shall be punished with *reclusión* or imprisonment of one to six years and perpetual disqualification from holding public office

If this behaviour was intended to assert undue influence of a magistrate of the judiciary or prosecutors, in order to obtain the issuance, dictation, delay or omission by a ruling, order or judgment in matters under its jurisdiction, the maximum of detention or imprisonment shall be increased to twelve years.

**Article 258.** Any person who personally or through an intermediary gives or offers any gift for the purpose of obtaining any of the conducts punished by arts. 256 and 256bis shall be punished with prison from one to six years. If the gift is given or offered with the purpose of obtaining any of the conducts described in arts. 256bis second paragraph and 257, the punishment shall be *reclusión* or prison from two to six years. If the perpetrator is a public official, special disqualification from two to six years shall also be imposed in the first case, and from three to ten years in the second case.

**Article 258bis.** Any person who offers or gives a public official from a foreign State or from an international public organisation, personally or through an intermediary, money or any object of pecuniary value or other benefits such as gifts, favours, promises or benefits, for his own benefit or for the benefit of a third party, for the purpose of having such official do or not do an act related to his office or to use the influence derived from the office he holds in an economic, financial or commercial transaction, shall be punished with imprisonment from one (1) to six (6) years and special disqualification for life in respect of the exercise of any public office.

**Article 259.** Any public official who, while in public office, accepts any gift by reason of that office, shall be punished with prison from one month to two years and complete disqualification from one to six years.

The person who presents or offers the gift shall be punished with prison from one month to one year.

**Article 266.** A public official who, abusing his position, requests, demands or makes paying or wrongly, delivered by or through a third person, contribution, a right or a gift or lightest greater rights than those possessed shall be punished with imprisonment of one to four years and disqualification from one to five years.

#### Chapter XIII: Concealment and Money Laundering

**Article 277.** 1. Prison from six months to three years shall be imposed on any person who, after the execution of a crime perpetrated by another, in which he had no participation:

- (a) Helps any criminal to elude the investigations of the authority or to avoid its actions;
- (b) Hides, alters or procures the disappearance of traces, evidence or instruments of the crime, or helps the perpetrator or accomplice to hide, alter or make them disappear;
- (c) Acquires, receives or hides money, things or goods derived from a crime;
- (d) Fails to denounce the execution of a crime or to individualize the perpetrator or accomplice of a known crime, whenever he is compelled to promote the criminal prosecution of a crime of such nature;
- (e) Assures or helps the perpetrator or accomplice to assure the products or benefits of the crime.

2. In the case of subsection 1, c) above, the minimum punishment shall be one (1) month of prison, if, in accordance with the circumstances, the perpetrator could have suspected they derived from a crime (Text in accordance with Law 25.815)

3. The maximum and minimum terms of the punishment shall be doubled when:

- (a) The preceding act is an especially serious crime. Any act which minimum term of punishment exceeds three years prison shall be deemed as a serious crime.
- (b) The perpetrator acted with a profitable purpose.
- (c) The perpetrator habitually harbours criminals.
- (d) The perpetrator is a public official (text incorporated, Law 25.815).

[...]

**Article 279.** [...]

4. The provisions of this chapter shall be applied even when the prior crime is committed outside of the special scope of application of this Code, provided that the preceding act was punishable within the jurisdiction of its perpetration.

**Article 300.** Prison from six months to two years shall be imposed on:

[...]

3. Any incorporator, director, manager, liquidator or receiver of any corporation or cooperative or any other partnership who publishes, certifies or approves an untrue or incomplete balance sheet, profit and loss statement, or their respective reports, minutes, annual reports, or informs the meeting of members distorting the truth or with reticence regarding facts which are important for the appreciation of the economical situation of the company, regardless of the purpose he had to inform it.

**Article 303.** 1) A prison term of three (3) to ten (10) years and a fine equal to two (2) to ten (10) times the amount of the relevant transaction will be imposed on any persons who transform, transfer, manage, sell, tax, conceal or in any other way circulate goods originating from criminal offences, with the possible consequence of having the origin of the original or surrogate goods appear lawful, and as long as they have a value equal to or over three hundred thousand Argentine pesos (ARS 300,000),<sup>92</sup> whether the crime constitutes a single act or repeated and related different actions.

2) The punishment established in 1) above will be increased by a third of its maximum value and half of its minimum in the following cases:

- a) Where the offender regularly engages in the activity or is a member of an association or group created for the purpose of regularly engaging in activities of such a nature; and
- b) Where the offender is a public official committing the crime during the exercise or as part of its functions. In the latter case, the offender will also be punished with a special ban on engaging in business for a term of three (3) to ten (10) years. This penalty will also be applied to any person acting within the scope of a profession or trade that requires any special authorization.

3) Any person who receives money or other goods originating from in a criminal offence with a view to using them in any of the transactions described in 1) above and giving them a legitimate appearance will be punishable by a prison term of six (6) months to three (3) years.

4) Where the value of the goods is below the amount stated in 1) above, the offender will be punishable by a prison term of 6 (six) months to 3 (three) years.

5) The provisions hereof will apply even where the predicate criminal offence was committed outside the scope of the territorial implementation of this Code, as long as the crime committed is punishable in the place where it was committed.

**Article 304.** Where the crimes punishable by the above Article are committed in the name, with the participation, or for the benefit of a legal entity, the entity will be punishable by the following sanctions, either jointly or alternatively:

1. A fine equal to two (2) to 10 (ten) times the value of the goods involved in the crime.
2. Total or partial suspension of activities for a maximum term of ten (10) years.

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<sup>92</sup>

Approximately USD 37 500.

3. Ban from participating in public calls for bids for public works or services, or in any other activities related to the Government, for a maximum term of ten (10) years.
4. Cancellation of legal entity status in the event that the corporation has been created for the sole purpose of committing the crime, or where said activities are the main activity of the entity.
5. Loss or suspension of any State benefits that may have been granted.
6. Publication of an excerpt of the conviction, to be paid by the legal entity.

In order to determine the punishment to be imposed, the courts will take into consideration the infringement of internal rules and procedures, the lack of supervision over the activities of principal and accomplices, the extent of the damage caused, the amount of money involved in the commission of the crime, and the size, nature, and economic capacity of the legal entity.

Where it is of the essence to preserve the operational continuity of the entity or of a given work or service, the sanctions provided for in (2) and (4) above will not be applied.

## **Criminal Procedure Code**

**Article 174. Right to Report** Any person who deems himself to have been injured by a crime that is prosecutable ex officio or who, although not claiming to have been injured, takes notice of such crime, may report it to the court, the prosecutor or the police. Where the crime is prosecutable only at the request of an interested party, only the parties entitled to file the complaint may report the crime, in accordance with the relevant provisions of the Argentine Penal Code. Subject to the formalities established in Chapter IV, Title IV of Book I, the person reporting the crime may request that he be considered a complainant as well.

**Article 177. Obligation to Report** The following persons shall be under an obligation to report crimes prosecutable ex officio:

1°) Officials or public servants who learn of such crimes in the course of their duties.

[...]

## **Executive Decree 1162/2000 on Reporting**

**Article 1** Public officials and employees who are obliged to report in accordance with art. 177(1) CPC, shall carry out their legal duty by notifying the Anticorruption Office of the Ministry of Justice and Human Rights about the acts and/or evidences which may lead to the presumption that a crime subject to ex officio prosecution has been committed within the National Public Administration, whether centralized or decentralized, enterprises or companies and any other public or private entity in which the State participates or in which the State constitutes the main source of resources.

The obligation described in the precedent paragraph shall be exempted from compliance in red handed crimes and in circumstances where the immediate report before the pertinent authority may result in the disappearance or loss of evidence. In such case, the official must file a complaint and a copy of it with the Anticorruption Office within twenty four (24) hours, so that it performs its pertinent functions.

**Article 2** The alleged crimes which are not subject to investigation by the Anticorruption Office of the Ministry of Justice and Human Rights shall be reported to the Judge, Prosecutor or to the Police authority by the public officials and employees of art. 1 of this decree pursuant to art. 177(1) CPC.

**Article 3** Public officials and employees mentioned in art. 1 of this decree who are aware of the existence of procedures or organisation schemes which may encourage the commission of corrupt acts within the sphere of the National Public Administration, centralized or decentralized, enterprises and companies and any other public or private entity in which the State participates or in which the State constitutes the main source of resources, shall inform of such situation to the Transparency Policy-Planning Division of the Anticorruption Office of the Ministry of Justice and Human Rights.

[...]