



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**

**CHILE: PHASE 1**  
**REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997**  
**RECOMMENDATION**

*This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 24 August 2004.*

## CHILE

### REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

#### A. IMPLEMENTATION OF THE CONVENTION

##### Formal Issues

1. Chile signed the Convention on December 17, 1997 and deposited its instrument of ratification with the OECD Secretary-General on April 18, 2001. The Convention entered into force for Chile internationally on June 18, 2001 pursuant to article 15.2 of the Convention. Nevertheless, the Convention had legal effect domestically from January 30, 2002, the date its implementing legislation, Executive Decree No. 496, was published in the Official Gazette.

2. Although the Convention prevails over domestic law in Chile, it has no direct effect on the domestic legal system and a law is needed for its implementation. Consequently, on September 30, 2002, the implementing legislation was promulgated in the form of Law No. 19,829. This Law entered into force on October 8, 2002. Thus, during the sixteen months between the entry into force of the Convention and the entry into force of Chile's implementing legislation, the Convention would appear to have had no practical legal effect in Chile.

##### Convention as a Whole

3. To comply with the requirements of the Convention as well as to implement Chile's national policy to combat corruption, Law No. 19,829 amended the Chilean Criminal Code by adding article 250 *bis* A which penalises the bribery of a foreign public official in international business transactions and by adding article 250 *bis* B which defines a "foreign public official". This Law also amended the domestic active bribery offence (article 250) to reflect the different sanctions corresponding to the foreign bribery offence. In respect of other requirements of the Convention, Chile relies on existing legislation such as the Criminal Code, the Criminal Procedure Code and the Organic Court Code. In addition, at the time of Chile's Phase 1 review in October 2003, a draft law aimed at preventing money laundering was before the Senate Finance Committee for discussion prior to its submission to Congress. This draft law aimed to establish money laundering as a predicate offence in relation to the bribery of domestic and foreign public officials.<sup>1</sup>

4. Recent legislation relevant to the bribery of foreign public officials includes the Criminal Procedure Reform. By December 2004, Chile's New Criminal Procedure Code (hereinafter "New Criminal Procedure Code") will have gradually replaced the former Criminal Procedure Code (hereinafter "Old Criminal Procedure Code") on a region by region basis, until the incorporation of the Metropolitan Region which includes the city of Santiago, as of December 16, 2004.<sup>2</sup> The New Criminal Procedure Code has

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<sup>1</sup> The draft law was not available for review by the Working Group. On December 18, 2003, Law No. 19,913 which establishes the Financial Analysis Unit (UAF) and which amends several provisions on money laundering, was published in the Official Gazette.

<sup>2</sup> Following the October 2003 Working Group meeting, the date for the incorporation of the Metropolitan region was extended to June 16, 2005 by Law No. 19,919 published in the Official Gazette on December 20, 2003. At the time of Chile's Phase 1 review, four Regional Prosecutors had already been appointed for the thirteenth region (Metropolitan region). Oral Court judges (*jueces orales*) and Guarantee judges (*jueces*

taken effect in eight out of Chile's thirteen regions, four more of which will be incorporated as of December 16, 2003 (see article 5 *infra*).<sup>3</sup> The reform of the Criminal Code is also being studied. In this connection, Executive Decree No. 443 of June 12, 2002 established an Advisory Committee to the Ministry of Justice in charge of preparing a report which is expected to be released by the end of 2004.<sup>4</sup>

5. The Chilean Political Constitution has precedence over the Convention which has precedence over any other law. However, article 5 of the New Criminal Procedure Code states that the law must be strictly interpreted with respect to the deprivation of liberty and prohibits any interpretation by analogy. Accordingly, Chilean courts are not obliged to interpret the implementing legislation in accordance with Article 1 of the Convention and its relevant Commentaries where the elements of the offence are not clearly defined in the implementing legislation. Jurisprudence is not a formal source of law in Chile, but the Chilean authorities state that courts do look to jurisprudence in respect of certain matters. Article 342(d) of the New Criminal Procedure Code states that judgements must be firmly grounded in legal rationale or legal literature and must take into account the surrounding circumstances.

## 1. ARTICLE 1: THE OFFENCE OF BRIBERY OF A FOREIGN PUBLIC OFFICIAL

6. Law No. 19,829 amended the Chilean Criminal Code by adding article 250 *bis* A which criminalises the bribery of a foreign public official. Article 250 *bis* A provides:

*A person who offers an economic advantage to a foreign public official, to his benefit or that of a third person, for performing an act or refraining from acting in order to obtain or retain, for himself or a third party, any business or advantage in the field of international business transactions shall be punished with imprisonment, fine and disqualification, as referred to in article 248 bis, first paragraph. The same punishment shall be imposed on a person who offers the said advantage to a foreign public official for his having acted or refrained from acting.*

*A person who, under the circumstances described in the foregoing paragraph, consents to afford said economic advantage shall be punished with short-term imprisonment, minimum degree, as well as the fine and disqualification referred to above.*

7. Article 10 of the Criminal Code sets forth the general circumstances which exonerate a person from criminal liability, including for the offence of bribery (e.g., state of necessity, mistake of law, etc.). For instance, the defence of mistake of law requires that the requisite showing of intent for the foreign bribery offence is missing. However, this defence does not absolve the offender but carries a reduced penalty for the offence. While the current Criminal Code does not provide special exoneration for bribery, the Chilean authorities have stated that the draft of the New Criminal Code may include some specific defences applicable to bribery.

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*de garantia*) are currently being appointed and candidates are being called to fill the vacancies of assistant prosecutors. Additionally, investigative and law enforcement agencies are being strengthened.

<sup>3</sup> Since the Working Group meeting, the Chilean authorities have informed the Secretariat that 12 out of Chile's 13 regions had adopted the New Criminal Procedure Code as of June 16, 2003.

<sup>4</sup> In addition, Chile's legislative body, the National Congress, is currently discussing a series of bills which further the Government's aim to combat corruption. These include Bulletin No. 2394-07 (establishing a mandatory affidavit to be sworn by public officials); Bulletin No. 1179-07 (strengthening control by the Chamber of Deputies); Bulletin No. 1296-03 (prohibiting Cabinet Ministers from serving as board directors of companies that have received state contributions); and Bulletin No. 81-344 (promoting transparency and limiting electoral expenses). Further, following Chile's Phase 1 review in October 2003, the Chilean authorities stated that Presidential Message No. 7000-350 of October 2003 had proposed a bill to regulate "Interests Management (Lobbying) and Transparency in Public Decision-Making".

## **1.1 The Elements of the offence**

### **1.1.1 any person**

8. Article 250 *bis* A of the Criminal Code sanctions “A person who offers” a bribe to a foreign public official. This applies to all natural persons, as no one enjoys immunity under Chilean laws. However, the Constitution provides for procedural limitations concerning members of the executive, legislative and judicial branches.<sup>5</sup> The Constitution subjects them to criminal prosecution for offences committed in the performance of their official functions subject to the authorisation of the Parliament or the courts.

### **1.1.2 intentionally**

9. Article 1 of the Criminal Code states that an offence is a voluntary act or omission punishable by law. Thus, all offences under Chile’s laws are deemed to be intentional except in special cases where the law specifically provides a punishment for an act which may involve either intent or negligence. The bribery of a foreign public official is actionable when committed voluntarily and knowingly, e.g., in order to obtain a certain outcome (*dolus*). This definition does not encompass recklessness as to the consequences of one’s acts (*dolus eventualis*).

### **1.1.3 to offer, promise or give**

10. Article 250 *bis* A, paragraph 1 refers to a person who “offers” a bribe. Article 250 *bis* A, paragraph 2 covers “he who... consents to afford said economic advantage”. Similarly, article 250 concerning the domestic active bribery offence refers to “he who offers or consents to afford” an economic advantage.

11. Article 250 *bis* A does not refer to a person who “promises” or “gives” a bribe as stated in article 1.1 of the Convention. The Chilean authorities state that the act of “promising” or “giving” a bribe is not necessary because the mere “offer” of a bribe is an offence under Chilean law. Further, Chile explains that a promise and/or a gift can be inferred from the act of offering a bribe. Inversely, an offer can be inferred from the act of promising or giving a bribe. However, there is no case law at present which supports this interpretation. In addition, because the Chilean authorities appear to concede that the acts of promising, offering and giving are not simultaneous, the construction of article 250 *bis* A which looks solely to the “offer” of a bribe could be problematic in the case where an offer was made before the entry into force of the implementing legislation but the bribe was given after the effective date. The Chilean authorities state that in such case, it would be up to the courts to decide whether such offence would be actionable under Chilean law. It is not inconceivable that a court, however, would reject the case, based on the principle that an act is punishable in Chile only if it is defined as an offence in a pre-existing law.<sup>6</sup>

12. Moreover, the Chilean authorities state that an offence is not completed where the offer does not come to the attention of the foreign public official and an attempted offence also requires knowledge on the part of the foreign public official (see 1.3 *infra*). Not only does this fall short of the Convention’s standard which does not require knowledge on the part of the foreign public official, but it undercuts the tenor of the provision which expressly states that the mere “offer” of a bribe is an offence.

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<sup>5</sup> These include the President of the Republic and cabinet ministers, regional and provincial governors, senators and representatives, judges, prosecutors and officers of the Public Prosecutor’s office.

<sup>6</sup> Chilean Political Constitution, Article 19(3).

13. The construction of article 250 *bis* A also draws a distinction between a person who causes or solicits the foreign public official to engage in bribery (“offers”) and a person who consents to the solicitation of a bribe by the foreign public official (“consents to afford”) which is a lesser offence under Chilean Law. The Chilean authorities explain that because it is the public official and not the briber who initiates the bribe in the case of solicitation, a lower sanction is applied. Since a person would not be offering a bribe in response to a solicitation (“offer” implies that the person is the initiator), in practise, the reduced sanction for responding to a solicitation should only come into play where the person agrees to the solicitation—thus, there is a promise or the person provides a benefit.

#### **1.1.4 any undue pecuniary or other advantage**

14. Article 250 *bis* A refers to “an economic advantage”. Chile states that the term “economic advantage” refers to tangible or intangible pecuniary advantages. The Chilean authorities state that non-pecuniary advantages bear no relation to the construction of the offence of bribery under Chilean laws. Consequently, the term “economic advantage” would not appear to cover non-pecuniary advantages such as, say, an honorary distinction or a university admission. This does not conform to the Convention which proscribes all types of advantages, including non-pecuniary ones. According to the Chilean authorities, any advantages whether or not pecuniary can be valued and therefore would be covered. However, the Chilean authorities have not provided any supporting case law in this regard.

15. Article 250 *bis* A does not expressly require that the economic advantage be “undue”; the Chilean authorities state that implicit in the foreign bribery offence is the offer, etc. of an “undue advantage”.

16. Chile states that while there is no case law on such issue, an “economic advantage” which is permitted or required by the written law or regulations or case law of the foreign public official’s country would not be an offence under Chilean law. Notwithstanding, in a case in which the advantage, while not expressly permitted or required by the local law of the foreign public official’s country, were also not prohibited thereby, the Chilean authorities state that a Chilean court would rule that the advantage is improper and deemed an offence under Chilean laws.

#### **1.1.5 whether directly or through intermediaries**

17. Article 250 *bis* A does not stipulate that the offence may be committed through intermediaries as set forth in article 1.1 of the Convention. The Chilean authorities state that nevertheless, persons who bribe through intermediaries are punishable under Chilean law: article 15 of the Criminal Code states that a party who induces another party (e.g., intermediary) to commit a criminal act (e.g., to offer or consent to the solicitation of a bribe) would be guilty as a principal offender.

18. When the person who actually offers, etc. the bribe (the intermediary) is unaware of the fact that he/she is committing an unlawful act (for example, where the intermediary believes in good faith that the advantage is lawful and not a bribe, for instance, where he/she believes the fee is legally due), Chilean Criminal Law punishes the person who instructs the intermediary as the principal offender. However, case law on this assertion has not been provided.

#### **1.1.6 to a foreign public official**

19. Article 250 *bis* B defines “foreign public official” as follows:

*any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected, and any person exercising a public function for a foreign country,*

*including for a public agency or public service enterprise. It shall also mean any official or agent of a public international organisation.*

20. The Chilean definition differs from the Convention in that it does not cover all “public enterprises” but only “public service enterprises” which are limited to public utilities. It would thus be more restrictive than the Convention. However, the Chilean authorities state that a Chilean court would refer to the definition of public official under article 260(13) of the Criminal Code which expands the ambit of public function to include public enterprises.

21. Article 250 *bis* B does not define what is meant by “public function”, “public agency”, “public service enterprise”, “public international organisation” or “foreign country” (Commentaries 12-18). The Chilean authorities indicated that a court would rely not only on the Convention and its Commentaries, as they have interpretative value for Chilean courts, but also on the definition of such terms in Chile’s laws regarding domestic public officials.<sup>7</sup> For example, Chile points to article 260(13) of the Criminal Code which defines the term “public official” as:

*any official performing a public function or office whether in the central administration or in semi-fiscal, municipal, autonomous or other State institutions or companies which may be dependent upon the State, although said official has not been appointed by the President nor received a salary paid by the State. This description is irrespective of whether the office is filled by popular election.*

22. Finally, the Chilean authorities indicated that because the term “foreign country” is not defined under Chilean law, Chilean courts would rely on the definition of “State” under international law, i.e., entities acknowledged as such under international law. Chilean authorities also say that the foreign bribery offence would extend to officials at all levels and subdivisions of national and local government [(article 1.4(b) of the Convention)]; however it is uncertain whether it would extend to any organised foreign area or entity, such as an autonomous territory or a separate customs territory as required by Commentary 18.

### **1.1.7 for that official or for a third party**

23. Article 250 *bis* A stipulates that the advantage is intended “for that official or a third person”. According to the Chilean authorities, the term “third person” covers legal persons, as well as natural persons.

24. The Chilean authorities confirm that article 250 *bis* A covers the situation where the bribe is, or is intended to be, transmitted directly to the third party by the person giving the bribe, without the foreign public official physically receiving the bribe and regardless of the relationship between the foreign public official and the third party. However, Chile has not provided case law supporting such affirmation.

### **1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties**

25. Article 250 *bis* A applies to a bribe offered, etc. to a foreign public official for him/her to “act or refrain from acting”. This formulation follows the Convention’s wording. Article 250 *bis* A also covers a

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<sup>7</sup> Chile also cites to the following sources of law to which a court may refer with respect to the meaning of terms contained in article 250 *bis* B’s definition of “foreign public official”: Law No. 18,575 Organic Constitutional Law on General Bases of the State Administration, Administrative Statute approved by Law No. 18,834 and Law 19,653 on the Probity of Public Officials.

bribe to a foreign public official for “having acted” or “having refrained from acting.” This goes beyond the standard set forth in the Convention and accordingly is not discussed herein.

26. Article 250 *bis* A does not specify whether the official’s act or omission shall be in relation to the performance of official duties. If article 250 *bis* A is in fact intended to apply (which seems unlikely) to all of the acts of a foreign public official including those not related to his/her official duties, it would have a broader reach than the Convention in this respect.

27. The Chilean authorities confirm that the offence extends to any use of the public official’s position, whether or not within the official’s authorised competence but in relation thereto. Accordingly, it would appear that, consistent with Commentary 19, the case where an executive of a company who gives a bribe to a senior official of a government, in order that the official use his/her office--though acting outside his/her competence--to make another official award a contract to that company, is covered by article 250 *bis* A.

### **1.1.9/10 in order to obtain or retain business or other improper advantage/in the conduct of international business**

28. Article 250 *bis* A applies to a person who bribes “in order to obtain or retain, for him or a third party, any business or advantage “in the field of international business”. According to the Chilean authorities, legal persons as well as natural persons may be third parties.<sup>8</sup>

29. Even though the offence does not specify that the advantage sought is “improper”, the Chilean authorities state that the term “improper” is implied. In addition, they confirm that article 250 *bis* A would proscribe situations where the company concerned was the best-qualified bidder or could otherwise have properly been awarded the business in accordance with Commentary 4. Also, this provision would proscribe situations falling within the scope of Commentary 5 such as something to which the company concerned was not clearly entitled.

30. The Chilean authorities confirm that an offer, etc. to obtain an advantage which would facilitate international business as a whole, such as local tax breaks, right of entry, licenses or permits, would be covered by article 250 *bis* A in addition to transactions that *per se* involve obtaining an advantage in international business (e.g., a contract to build a bridge in a foreign country).

## **1.2 Complicity**

31. Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

32. In Chile, complicity is a form of criminal participation punishable under the general rules on participation set forth in the Criminal Code unless the law provides for a specific sanction. The sanctions applied to crimes of complicity depend on the offender’s involvement in the offence: (i) for inducers, the sanction is the same as that for the perpetrator of the offence (article 15);<sup>9</sup> (ii) for accomplices who assist in the perpetration of the offence either before or concurrently with the offence, the sanction is one degree

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<sup>8</sup> However, because legal persons are exempt from criminal liability under Chilean law, the Chilean authorities state that in such case, each member of the Board of Directors would be held individually (but not jointly) liable.

<sup>9</sup> See Section 3.1/3.2 *supra*, discussing the penalties for the foreign bribery offence.

lower than that for the consummated offence (article 16)<sup>10</sup>; (iii) for “accessories after the fact”, i.e., persons other than principal offenders or accomplices who have knowledge of the perpetration of the offence or the acts carried out to perpetrate it but take part in the offence after its perpetration, the sanction is a penalty lower in two degrees than that which is applied to the principal offender (article 17).<sup>11</sup> The Chilean authorities have not indicated whether authorisation would be covered by complicity.

### 1.3 Attempt and conspiracy

#### *Attempt*

33. Article 1.2 of the Convention requires that attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

34. Attempt of any offence, including bribery of a domestic or foreign public official, is governed under article 7(3) of the Criminal Code, which provides: “*An attempt to commit a crime exists where the offender has begun to directly execute a crime or misdemeanour, but one or more supplementary acts for full consummation are missing.*”

35. Article 7(3) defines an attempt as the initiation of the offence by means of direct action. In the case of foreign bribery, both the briber and the foreign public official must have knowledge of the bribe in order to constitute an attempt to bribe. In the case where a bribe is offered but the foreign official is not aware of the bribe, this would not be deemed an attempt or a completed offence under Chilean law. It is unclear what would qualify an attempt as opposed to a completed offence, in particular since the Chilean authorities state that a mere offer of a bribe constitutes a completed offence. Under article 7(2), a frustrated offence of bribery occurs when all the acts for a completed offence have been taken, but the offence is not consummated due to events beyond the control of the perpetrator.

36. Article 7(1) of the Criminal Code which punishes both attempt and frustration applies in the case of foreign bribery. Under the general rules in the Criminal Code, the penalty for attempt is two degrees lower than the completed offence. The penalty for frustration is one degree lower than that for the consummated offence.

#### *Conspiracy*

37. Neither conspiracy to bribe a domestic public official nor conspiracy to bribe a foreign public official is punishable under Chilean law.

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<sup>10</sup> Idem. For short-term imprisonment, minimum degree ranges from 61-540 days; medium degree ranges from 541 days-3 years; and maximum degree ranges from 3 years and 1 day-5 years.

<sup>11</sup> Idem. Such participation can be (i) by benefiting from the proceeds of the crime or misdemeanour or by facilitating means for the offenders to benefit therefrom; (ii) by hiding or making use of the *corpus delicti*, proceeds or instrumentalities of a crime or misdemeanour in order to prevent the discovery thereof; (iii) by harbouring, hiding or facilitating the offender’s escape; or (iv) by habitually sheltering, receiving or protecting offenders, knowing their condition, even without being aware of the specific crimes or misdemeanours they may have committed, by facilitating the means for them to meet or to hide their weapons or the proceeds of the offence, or by providing assistance or news in order to protect them, take precautions or to save themselves.

## **2. ARTICLE 2: RESPONSIBILITY OF LEGAL PERSONS**

38. Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official”.

### **2.1 Criminal Responsibility**

39. In Chile, there is no criminal liability of legal persons, as the *societas delinquere non potest* principle is set forth in the Old Criminal Procedure Code (article 39) and the New Criminal Procedure Code (article 58). However, there is no constitutional bar to imposing criminal liability of legal persons in Chile and the Chilean Government has indicated that it intends to address the criminal liability of legal persons within the general framework of the ongoing reform of the Criminal Code. Executive Decree No. 443 of June 12, 2003 which established an Advisory Committee to the Ministry of Justice is expected to issue a report for drafting a reform bill by the end of 2004.

### **2.2 Non-criminal Responsibility**

40. The Chilean authorities state that civil and administrative liability exists for certain types of legal persons or under certain circumstances applicable to the foreign bribery offence. However, these provisions do not specifically address foreign bribery. Instead, they provide more general liability that could, in certain circumstances, encompass corruption and other offences (i.e., dissolution of non-profit organisations that fail to conform to corporate purpose; fines, censure or admonition for banks and other financial institutions guilty of regulatory violations, dissolution or fines for anti-trust violations). For corporations in general, dissolution of the corporation or foundation is a possible sanction where the entity acts in contravention of its corporate purpose or fails to abide by regulatory requirements.

## **3. ARTICLE 3: SANCTIONS**

41. The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are subject to “effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

### **3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Public Official**

42. For natural persons, the level of sanctions applicable to the active bribery of a foreign public official (article 250 *bis* A) and a domestic public official (article 250) depends on whether the briber (i) offers a bribe to a public official or (ii) consents to solicitation. In respect of the domestic bribery offence, the level of sanctions also depends on the gravity of the corresponding passive bribery offences under articles 248-249, particularly the public official’s act or omission sought in return for the bribe. A comparison of the sanctions for domestic and foreign bribery shows that discrepancies in the range of penalties exist particularly for the aggravated offence of bribing a domestic public official to induce him or her to commit certain types of offences (set forth under Title V, Book II or Title III, paragraph 4 of the Criminal Code, e.g., violating official duties/constitutional rights). Even though article 1 of the Convention covers the case corresponding to this type of bribery, the range of sanctions in respect of fines in the case

of offering or consenting to solicitation are three times the “economic advantage” for domestic bribery whereas it is two times for foreign bribery. Additionally, for consenting to solicitation in the case of domestic bribery under the circumstances above, the sanction of imprisonment is higher than for the foreign bribery offence. Further, the types of accessory sanctions (i.e., disqualification) for this type of offence are different.

43. According to the Chilean authorities, the aggravated bribery offence is specific to crimes under Chilean laws that govern the violation of public officials’ duties or constitutional rights. Because it would be unlikely that a foreign public official could transgress Chile’s domestic laws, Chile argues that the sanctions for the aggravated domestic bribery offence cannot be compared to sanctions for foreign bribery. Aside from this distinction, Chile states that the sanctions for domestic and foreign bribery are comparable.

The applicable (cumulative) sanctions for natural persons for the active bribery of foreign public officials (article 250 *bis* A) and domestic public officials (articles 248-250) are summarised below:

Act/omission of public official	Fine	Imprisonment <sup>12</sup>	Accessory Sanctions: Disqualification from holding public office
<b>article 250 <i>bis</i> A: active bribery of a foreign public official</b>			
act or omission	twice the advantage	offer: 61 days-3 years	provisional partial or absolute disqualification
		consent to afford: 61 days-540 days	
<b>articles 248-250: active bribery of a Chilean public official</b>			
commission of proper act for which no fees are set <sup>13</sup>	half the fees or advantage	-	suspension of public function (61 days-3 years)
omission of proper act or commission of improper act <sup>14</sup>	twice the advantage	offer: 61 days-3 years	provisional partial or absolute disqualification
		consent to afford: 61 days-540 days	
commission of improper act of trading in influence <sup>15</sup>	twice the advantage	offer: 61 days-3 years	perpetual partial or absolute disqualification
		consent to afford: 61 days-540 days	
certain listed criminal offences or misdemeanours committed by the official <sup>16</sup>	three times the advantage	offer: 541 days-3 years	offer: perpetual partial or absolute disqualification or provisional absolute disqualification
		consent to afford: 61 days-3 years	consent to afford: perpetual partial or absolute disqualification or provisional absolute disqualification

<sup>12</sup> In Chile, deprivation of liberty includes imprisonment (*presidio*), confinement (*reclusion*) and prison (*prision*). Prison, temporary imprisonment and confinement are either long-term or short-term and consist of minimum, medium or maximum degrees. Bribery is always sanctioned by short-term imprisonment, the degrees for which depends on the type of bribery.

<sup>13</sup> See article 248 and article 250, para. 1.

<sup>14</sup> See article 248 *bis* para. 1 and 2, and article 250, para. 2.

<sup>15</sup> See article 248 *bis*, para. 1 and 2, and article 250, para. 2.

<sup>16</sup> See article 249 and 250, para. 3 (violation of duties or constitutional rights).

44. The Chilean authorities say that fines may be imposed whether or not the bribe is actually given because “the offence is consummated by the mere fact of an offer”. However, because the level of the fine is determined by the “economic advantage” offered, its value must be quantifiable in order for a fine to be imposed. In the case of an “economic advantage” received which is different from that which was promised or offered, the Chilean authorities state that the amount of the bribe promised or offered would be considered to determine the level of fines. This could result in a small fine based on the value of the bribe, even when the bribe procured a substantial return (“quo”), thus not reflecting the gravity of the offence. Also, it is unclear whether and how fines would be imposed in the event non-pecuniary advantages will be covered by the offence in the future.

45. Generally, mitigating and aggravating circumstances may affect the level of sanctions in accordance with general sentencing guidelines set forth under the Criminal Code. For example, pursuant to article 103 of the Criminal Code, if the briber gives him/herself up to the authorities or is found after two and a half years (at least half of the statutory limitations period must have expired), the Court shall deem that two or more material mitigating circumstances and no aggravating circumstances exist for the offence.

46. It is noteworthy that the penalty for embezzlement (misappropriation) of public monies under article 233 of the Criminal Code ranges from 541 days-3 years to 5 years plus 1 day-15 years, depending on the amount embezzled. These sanctions are considerably higher than those applied to the domestic and foreign bribery offences. Also, a fine and disqualification from public positions and office are imposed.

### **3.3 Penalties and Mutual Legal Assistance**

47. Mutual legal assistance (“MLA”) is not contingent upon the seriousness of the penalty attached to a crime in Chile or in the requesting state for which MLA is sought, but rather on the existence of bilateral and multilateral treaties. Treaty-based MLA, including the use of coercive measures such as search and seizure, is also not conditional on the length of imprisonment set forth in the criminal law of Chile or the requesting state.

### **3.4 Penalties and Extradition**

#### *Generally*

48. The conditions which need to be satisfied to request or provide extradition are governed by the Criminal Procedure Code except where bilateral or multilateral treaties exist. As mentioned earlier, the New Criminal Procedure Code will have fully replaced the Old Criminal Procedure Code when it is implemented by the Metropolitan region (Santiago) on December 16, 2004<sup>17</sup> (see discussion under “Convention as a Whole” *supra*). During the transition period, where Chile requests extradition, the relevant Code is that which is applicable in the region in which the offence in question is prosecuted at the time of the request. Where another Party requests Chile for extradition, the Old Criminal Procedure Code shall apply until December 16, 2004<sup>18</sup> after which the New Criminal Procedure Code shall apply.<sup>19</sup>

#### *Where Chile Requests Another Party for Extradition (“Active Extradition”)*

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<sup>17</sup> See footnote 2 *supra* which states that after the Working Group meeting, this date was extended to June 16, 2005.

<sup>18</sup> *Idem.*

<sup>19</sup> This is because the Supreme Court, which is responsible for hearing foreign extradition requests, sits in Santiago which is part of the Metropolitan Region and which is scheduled to adopt the New Criminal Procedure Code on June 16, 2005 (see footnote 2 *supra*).

49. Under article 635 of the Old Criminal Procedure Code, extradition may be sought for any criminal offence punishable by imprisonment exceeding one year. Although the provision is silent as to whether the criterion of “exceeding one year” refers to the maximum or the minimum length of imprisonment, case law has clarified that this condition refers to the maximum length of imprisonment.

50. Under article 431(1) of the New Criminal Procedure Code, Chile may request extradition in a criminal proceeding for any offence whose minimum length of imprisonment exceeds one year or where the imprisonment sentence imposed exceeds one year. Because the minimum penalties for foreign bribery fall below this threshold, they are insufficient to enable Chile to request the extradition of the offender from another territory.

#### *Where Another Party Requests Chile for Extradition (“Passive Extradition”)*

51. Under article 644 of the Old Criminal Procedure Code, there is no requirement pertaining to the length of imprisonment for providing extradition. The Law only stipulates that the person on Chilean territory who is concerned by the extradition request be prosecuted or has been sentenced in the requesting country.

52. Article 440 of the New Criminal Procedure Code provides for extradition in the case where a foreign country requests extradition of a natural person in Chile who is accused of an offence which is assigned a sanction of more than one year imprisonment in that country.

### **3.5 Seizure and Confiscation**

53. Article 3.3 of the Convention requires each Party to take necessary measures to provide that “the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable”.

#### *Seizure*

54. Articles 83, 217 and 218 of the New Criminal Procedure Code permit pre-trial seizure of a bribe or its proceeds upon the authorisation of the Guarantee Judge, for the purpose of securing evidence or to ensure their availability in the event that a fine or confiscation are imposed at trial. Further, after the closure of an investigation, a victim may request probative seizure up to 15 days before the commencement of the preparatory hearing. At the trial stage, the parties may not request seizure.

55. Article 380 of the Old Criminal Procedure Code provides that the judge who initiates a formal investigation must decree the seizure of property which belongs to the defendant to secure the payment of possible costs, fines, etc. Articles 7 and 114 allow the judge to order seizure to secure evidence. At any stage of the proceedings, a victim or anyone prejudiced by the offence may request the seizure of property belonging to the defendant.

#### *Confiscation*

56. Article 31 of the Criminal Code states that “any penalty imposed on a crime or misdemeanour entails the loss of proceeds thereof and of the instruments used to commit it unless they belong to a third party not liable for the crime or misdemeanour”. It is noteworthy that because legal persons are not criminally liable under Chilean law, article 31 would not be applicable to legal persons as principal offenders or as third parties. Thus, if a legal person held a bribe or its proceeds, neither could be confiscated. Article 251 of the Criminal Code states that property received by a domestic or foreign public official shall be confiscated for the public treasury. However, this provision applies to passive bribery; it

does not address the confiscation of a bribe that is still in the briber's hands nor the proceeds of the bribe (i.e., what the briber receives in return for the commission of the offence) which are or remain within the control of the offender (i.e., briber) in the case of active bribery.

57. Confiscation of the proceeds and instruments of the offence shall be ordered pursuant to article 504 of the Old Criminal Procedure Code and article 348 of the New Criminal Procedure Code. Article 348 states that confiscation is mandatory. The Chilean authorities state that article 504, though unclear in its wording, also prescribes mandatory confiscation. In the event that confiscation of the bribe or its proceeds is unavailable, the Chilean authorities state that monetary sanctions of comparable effect that are available for the foreign bribery offence include the imposition of a fine or a bond. In the case of a fine, its amount may be fixed or variable according to the offence. In the case of a bond, the court sets its amount.

### **3.6/3.7 Additional Civil and Administrative Sanctions**

58. Article 119 of the Administrative Statute provides for the dismissal of a public official who has been convicted of a crime or misdemeanour, which would include the foreign bribery offence.

59. In addition, if a subsidy, award or economic advantage has been obtained through bribery, the granting authority shall render the illegal act null and void.<sup>20</sup>

60. A "victim" may file a civil action for restitution or damages during a criminal proceeding or alternatively, may file a civil action before a civil court pursuant to article 59 et seq. of the New Criminal Procedure Code and article 10 et seq. of the Old Criminal Procedure Code. Article 24 of the Criminal Code which allows a victim to file a civil action damages states that "a verdict of guilty rendered in a criminal action entails an obligation by authors, accomplices, aiders and abettors and any other person holding criminal liability to pay court costs and damages".

61. However, it is doubtful whether the requisite elements of "victim" and "damages" are present in the case of foreign bribery. This is due to the difficulty in qualifying and/or identifying, say, a competitor as a "victim" and in characterising the proceeds of a bribe (i.e., what the briber obtains in return for the commission of the offence) as "damages". However, the Chilean authorities appear to say that a competitor would have standing as a "victim" and that damages could be assessed, for example, as an "opportunity cost" (i.e., the value of a potential contract).

## **4. ARTICLE 4: JURISDICTION**

### **4.1 Territorial Jurisdiction**

62. Article 4.1 of the Convention requires each Party 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". Commentary 25 clarifies that "an extensive physical connection to the bribery act is not required".

63. Article 5 of the Criminal Code and article 5 of the Organic Court Code set forth the principle of territoriality for all offences, including the foreign bribery offence.<sup>21</sup>

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<sup>20</sup> Currently, there are no other administrative sanctions which might be imposed for the foreign bribery offence, such as, say, exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities, judicial supervision or a judicial winding up order (see Commentary 24).

64. For offences that need not produce actual harm to constitute a crime, such as domestic or foreign bribery (crimes of “endangerment”), territorial jurisdiction is established where the action began. The Chilean authorities confirm that an e-mail, fax or telephone call would suffice to establish the required nexus as long as the offer began in Chile. Because the constituent element of the foreign bribery offence is the “offer” and not the promise or gift of a bribe, article 5 requires that the “offer” (e.g., a specific part of the offence) begin on Chilean territory. This is problematic because if the action began with an offer which was made outside Chile, Chile could not establish territorial jurisdiction even though the bribe was actually given in Chile. It is also unclear whether the whole “offer” must be made in Chile or whether the initial steps in making the “offer” would suffice.

65. For offences that produce actual harm, territorial jurisdiction is established where an offence bears its consequences or results. But as discussed above, this is not applicable to the foreign bribery offence. However, the Chilean authorities consider that because the “effects” principle is gaining ground in legal opinion in Chile, courts may extend jurisdiction to cover offences such as bribery which produce consequences in Chile whether or not they produce harm. Nevertheless, this concept exists only in legal literature for the moment.

#### **4.2 Nationality Jurisdiction/Extraterritorial Jurisdiction**

66. Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”.

67. Chilean laws provide for nationality jurisdiction for a limited list of offences only (article 6 of the Organic Court Code). This list does not include the active bribery of foreign public officials. It does include offences related to legally protected Chilean public interests, such as crimes or misdemeanours against sovereignty or state security, falsification of State seals or national currency, embezzlement of public monies, breach of trust in the custody of documents, and bribery of Chilean public officials or foreign public officials working for Chile. Chile also applies the universality principle in relation to piracy.

68. However, article 6(8) of the Organic Court Code states that offences committed outside Chilean territory and included in treaties entered into with other countries are subject to Chilean jurisdiction. But Chile states that it is unclear whether a court would establish nationality jurisdiction in respect of the foreign bribery offence pursuant to this provision. So far, no case law exists which extends extraterritorial jurisdiction over Chilean nationals for offences included in international treaties.

#### **4.3 Consultation Procedures**

69. Article 4.3 of the Convention requires that when more than one Party has jurisdiction over an alleged offence described in the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

70. The Chilean authorities state that there is no express legislative provision for consultation procedures but that jurisprudence allows for such procedures under general law principles.

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<sup>21</sup> In addition, crimes or misdemeanours perpetrated by Chileans or foreigners on board a Chilean vessel in the high seas (article 6(4) of the Organic Court Code) are subject to Chilean jurisdiction.

#### 4.4 Review of Basis of Jurisdiction

71. The Chilean authorities state that due to the recent entry into force of the foreign bribery legislation, it is premature to assess the effectiveness of its jurisdiction over the offence. Nevertheless, it intends to review its basis of territorial jurisdiction over the foreign bribery offence.

### 5. ARTICLE 5: ENFORCEMENT

72. Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “shall 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”.

#### 5.1 Rules and Principles Regarding Investigations and Prosecutions

73. The investigation and prosecution of the offence of bribery of foreign public officials are initiated, suspended, or terminated pursuant to the general rules set forth in the Criminal Procedure Code. The investigation and prosecution of crimes in Chile are subject to one or two procedure code(s) depending on the region concerned, as Chile has enacted a New Criminal Procedure Code which will gradually replace the Old Criminal Procedure Code on a region by region basis ending with the incorporation of the Metropolitan Region (which includes Santiago) on December 16, 2004.<sup>22</sup> The New Criminal Procedure Code has taken effect in eight out of Chile’s thirteen regions.<sup>23</sup> Article 483 of the New Criminal Procedure Code provides that it will apply to offences that have been committed after the date of its entry into force. Article 11 of the New Code states that where the New Code is in effect, a court may use its discretion to apply the Old Code if it determines that it contains provisions “more favourable to the accused”. However, Chile adds that this provision may be used only under exceptional circumstances and has not been applied to date.

74. The New Criminal Procedure Code changes the criminal justice process by promoting an open, oral adversarial system of justice as opposed to the Old Criminal Procedure Code which is based on the traditional model of an inquisitive trial system. Chapter VI-A of the Political Constitution creates the position of Public Prosecutor who is exclusively responsible for investigating and prosecuting offences. Article 80A(1) of that Chapter states that the Public Prosecutor’s Office shall “bring a public criminal action in accordance with the law” and “shall take measures aimed at protecting victims and witnesses”.<sup>24</sup> In comparison, under the Old Criminal Procedure Code, a judge (*juez de instrucción*) is responsible for conducting a closed criminal investigation and, once he/she has gathered the evidence, for trying the case. Additionally, the trial stage is closed to the public. Under the New Criminal Procedure Code, the Public

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<sup>22</sup> Following the October 2003 Working Group meeting, the date for the incorporation of the Metropolitan Region was extended to June 16, 2005 by Law No. 19,919 which appeared in the Official Gazette on December 20, 2003.

<sup>23</sup> Since the Working Group meeting, the Chilean authorities have informed the Secretariat that 12 out of Chile’s 13 regions had adopted the New Criminal Procedure Code as of June 16, 2003.

<sup>24</sup> Article 6 of the New Criminal Procedure Code provides that the Public Prosecutor’s Office shall ensure the adequate protection of the victim in all stages of a criminal action and shall enforce his/her rights. The Public Prosecutor shall promote monetary agreements, protective measures or other means which seek to redress damages caused to the victim. This is in addition to any civil action for damages which may be filed by the victim. Further, it provides that law enforcement officers and other agencies shall facilitate a victim’s participation in any steps of the investigative or procedural process which requires his/her involvement.

Prosecutor is exclusively responsible for conducting the investigation which is done under the supervision of the Guarantee Judge (*juez de garantía*) in certain cases. Following indictment by the Public Prosecutor, the case is heard by the Guarantee Judge or the Oral Court, as the case may be. The trial stage is open to the public.

75. Under the New Criminal Procedure Code, the principle of mandatory prosecution prevails.<sup>25</sup> Pursuant to article 166(2), the Public Prosecutor's Office, with the assistance of law enforcement officials,<sup>26</sup> shall commence a "criminal action" when it becomes aware of an alleged offence. Criminal action means either (i) initiating a preliminary investigation pursuant to articles 166, 172 et seq. and 180 et seq. or (ii) conducting a formal investigation before the Guarantee Judge pursuant to articles 229 et seq.

76. The Public Prosecutor is the sole body responsible for commencing an investigation upon his own initiative<sup>27</sup> or upon a complaint filed by the victim (article 172 of the New Criminal Procedure Code). Further, any person may report a bribery offence, but only a victim is entitled to take part in the proceedings.<sup>28</sup> It is the opinion of the Chilean authorities that pursuant to article 108 of the New Criminal Procedure Code, a competitor may qualify as a victim in a foreign bribery case where it is able to show that it is an "aggrieved" party.

77. Criminal action can only be suspended, interrupted or terminated under the circumstances prescribed by law. Concerning suspension, under article 167, the Public Prosecutor may, with the

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<sup>25</sup> Articles 53-58 of the New Criminal Procedure Code set forth the procedure to be followed in criminal actions. Pursuant to article 53, a public criminal action must be prosecuted *ex officio* by the Public Prosecutor's Office unless special provisions apply. Several "opportunity" elements under the new procedural system allow prosecutors to elect not to proceed with criminal action by applying "alternative" or "selectivity" mechanisms set forth in the law. These include temporary suspension for lack of sufficient evidence (article 167 of New Criminal Procedure Code), non-initiation of an investigation because of lack of a cause of action or statutory bar (article 168), or non-initiation or abandonment of a criminal action under the opportunity principle *per se*, e.g., the existence of acts which do not seriously injure the public interest in the case of offences carrying a minimum penalty that do not exceed short-term imprisonment in its minimum degree (61 days) which is the case for most bribery offences (article 170). In the latter case, the Chilean authorities state that foreign bribery *de facto* seriously affects the public interest and that the international obligations contracted by Chile would prevent the use of the opportunity principle in cases of foreign bribery. In the case of temporary suspension, the victim may file a complaint before the Public Prosecutor or the court. A victim may challenge the Prosecutor's decision not to initiate an investigation by filing an action before the court.

<sup>26</sup> The police (Investigations Police and *Carabineros de Chile*) has no power to initiate, suspend or terminate criminal proceedings. Under article 79 of the New Criminal Procedure Code, the police assist the Public Prosecutor's office in the investigation. Article 80 provides that they shall discharge their duties under the direction, instructions and responsibility of the prosecutors.

<sup>27</sup> See articles 3, 77 and 166 et seq. of the New Criminal Procedure Code. Complaints may also be filed before the police or the courts (including a Guarantee Judge) in which case the complaint must be remitted to the relevant Public Prosecutor's office. There are no special procedural or approval requirements for initiating criminal proceedings by the Public Prosecutor's Office.

<sup>28</sup> Public officials who become aware of a bribery offence in the performance of their duties are obligated to report it (article 84(3) and article 55(k) of Law No. 18,834 (Public Servants' Administrative Statute)). There is no administrative authority which can prevent the initiation or investigation of a foreign bribery offence or the suspension or termination thereof. Once the procedure is initiated, it may only be terminated by a court decision which may be appealed. Also, article 139 of Organic Law No. 10,336 requires the Comptroller General's Office to report bribery, etc. of which it becomes aware in the course of its investigations.

authorisation of the regional Prosecutor,<sup>29</sup> temporarily suspend an investigation if both (i) the Guarantee Judge has not yet been involved in the proceedings and (ii) the evidence is insufficient at such stage to proceed further. However, according to the National Prosecutor's Directive No. 42 of January 17, 2001, temporary suspension would not be applicable to bribery since such measures concern common misdemeanours but not offences carrying higher sanctions or affecting the public interest such as bribery.

78. Article 237 of the New Criminal Procedure Code allows for conditional suspension of an investigation if the penalty for the offence does not exceed three years' imprisonment (which is the case of foreign bribery), the accused has not previously been convicted of a crime or a misdemeanour and the accused consents to such procedure.<sup>30</sup> Such action, which imposes certain requirements on the accused for a certain period of time, does not go to Oral Court and does not require a guilty plea. Although the foreign bribery offence would be covered by this alternative mechanism, the National Prosecutor has issued instructions to restrict its use and the Chilean authorities therefore consider that this procedure would not be used in practice.<sup>31</sup> In addition, prosecutors are empowered to use plea-bargaining under the new system in accordance with guidelines prescribed by the Public Prosecutor's Office.<sup>32</sup> So far, neither plea-bargaining nor other out-of-court resolutions have been used in domestic bribery cases and no foreign bribery case has been investigated to date.

## 5.2 Considerations such as National Economic Interest

79. The Chilean authorities point to the independence of the judiciary and the Public Prosecutor's Office in affirming that national economic interest, the potential affect upon relations with another State or the identity of the natural or legal persons involved may not influence the investigation and the prosecution of foreign bribery cases. In particular, Chile states that national economic interest would not influence a Public Prosecutor's decision to terminate a criminal action already filed or not to initiate a criminal action even if the offence "fails to seriously affect the public interest". Current legislation states that any offence whose minimum sanction exceeds 540 days is considered *de facto* to seriously affect the public interest (article 170).<sup>33</sup> However, the minimum sanction for foreign bribery (61 days) fails to meet this threshold. Notwithstanding, on December 15, 2000, the National Prosecutor issued Directive No. 35 which states that "the expression "seriously affect the public interest" is not related to the penalty assigned to the offence but to a legally-protected interest which must be weighed on a case by case basis". The Chilean authorities

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<sup>29</sup> For offences that are punishable by imprisonment such as bribery, the regional Prosecutor reviews whether the prosecutor carefully assessed that it was not feasible to conduct preliminary proceedings because of the lack of evidence to clarify the facts.

<sup>30</sup> The claimant is entitled to be heard but the judge is not obliged to take his or her opinion into account. Conditional suspension of proceedings pursuant to this article does not prevent the claimant from pursuing a civil action for damages.

<sup>31</sup> Instructions 36 and 61; Official Letters 256/00, 163/02, 295/02, 626/02, 404/03 and 551/03.

<sup>32</sup> See *Comparative Report: Judicial Reform Processes in Latin America, Follow-Up Project*, prepared by Christian Riego and Fernando Santelices for the Justice Studies Center of the Americas (revised 3/03 and available from the following website: [www.cejamericas.org](http://www.cejamericas.org)). In respect of plea-bargaining, the Report cites the example of an accused who enters a guilty plea in exchange for the prosecutor's guarantee of a specific maximum sentence, stating that this procedure is not available for sanctions for which the expected sentence exceeds five years' imprisonment. *Idem.* (Under Chile's laws, the maximum imprisonment for the foreign bribery offence is three years.)

<sup>33</sup> An offence committed by a public official in the performance of his/her official duties is also deemed to "seriously affect the public interest" pursuant to article 170(1). However, this provision is restricted to bribers who are public officials and it does not appear that offering, etc. a bribe could be characterised as an act within his/her official duties.

state that the sanction applied to the foreign bribery offence “does not mean that it should necessarily be considered as an offence which fails to seriously affect public interest”. They are confident that this Directive, along with safeguards under the New Criminal Procedure Code and a victim’s right to file a claim, would make this exception inapplicable to the foreign bribery offence.

## 6. ARTICLE 6: STATUTE OF LIMITATIONS

80. Article 6 of the Convention requires that any statute of limitations with respect to bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of this offence.

81. The statute of limitations for the foreign bribery offence is governed by the general rules of the Criminal Code (articles 93-105). Because the foreign bribery offence is a “misdemeanour”, the statute of limitations is five years for initiating a criminal action and for sentencing purposes (whether the bribe is offered or given as a result of solicitation). The statutory period for criminal action begins to run on the date on which the offence was committed. It is notable that if two and one half years or more have elapsed between the date of the commission of the offence and the date on which the investigation began, the sanction is mitigated under certain circumstances (see *supra* 3.1/3.2).

82. The statutory period is interrupted when a person commits another crime or misdemeanour (interruption causes a new statutory period to run all over again). Further, article 100 of the Criminal Code provides that for any period the offender spends abroad during the running of the statute of limitations, such period extends the initial five-year limitations period one day for every day spent abroad to a maximum of five years. Therefore, for the foreign bribery offence, the limitations period could be extended to a total of ten years maximum.

83. The limitations period is suspended once a criminal action is filed against an alleged offender.<sup>34</sup> However, if the prosecution is “paralysed” for three years or if there is no conviction three years after the commencement of proceedings, the statutory period recommences (article 96 of the Criminal Code).

84. In addition to statutory limitations, the New Criminal Procedure Code introduces time limits for investigations (article 247). The period during which the Prosecutor can investigate a case is limited to two years from the date on which the investigation began.<sup>35</sup> After two years, the Prosecutor must ask the Guarantee Judge for an extension on the grounds that more time is needed to ascertain the facts. Although there is no statutory limit for extended investigations, the Chilean authorities state that the judge shall balance the interests of the accused and the Prosecution in deciding whether to grant more time. Should the Prosecutor fail or refuse to end the investigation, the accused or plaintiff may request the judge to summon the parties to a hearing to do so.<sup>36</sup>

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<sup>34</sup> Under article 233 of the New Criminal Procedure Code, “filing a criminal action” is deemed to take place when the investigation is initiated by the Prosecutor.

<sup>35</sup> Such two year period shall be suspended in the event the proceedings are conditionally suspended or in the event the case is dismissed with prejudice.

<sup>36</sup> The Prosecutor may declare at the hearing that he/she is willing to comply with the request to terminate the investigation, in which case he/she has ten days to indict the alleged offender. Failing this, the judge, *ex officio* or at the request of either party, shall hear the parties and decree a dismissal without prejudice pursuant to articles 406 and 409 of the New Criminal Procedure Code. Alternatively, the judge may decree a dismissal with prejudice pursuant to articles 406 and 408 of the New Criminal Procedure Code. Such decision may be appealed.

## 7. ARTICLE 7: MONEY LAUNDERING

85. Article 7 of the Convention provides that, if a Party has made bribery of its own public official a predicate offence for the purpose of its money laundering legislation, it shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

86. In Chile, neither domestic nor foreign bribery of a public official is a predicate offence for money laundering. At the time of Chile's Phase 1 review, a bill was before Congress' Senate Finance Committee which incorporated the offence of bribery of domestic or foreign public officials as predicate offences for money laundering.<sup>37</sup> This bill amended several provisions related to money laundering, created a Financial Analysis Unit (UAF) and set forth reporting obligations by banks and other financial institutions on suspected money laundering activities.

## 8. ARTICLE 8: ACCOUNTING

87. Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, each Party prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for effective, proportionate and dissuasive penalties in relation to such omissions and falsifications.

### 8.1/8.2/8.3 Accounting Requirements/Companies Subject to Requirements/Penalties

#### *Books and Records/Accounting Standards*

88. Accounting rules are set forth under the Chilean Corporations Law and the Commercial Code. In addition, regulatory bodies are empowered to issue accounting regulations for the entities under their control. These include the Securities and Insurance Commission (*Superintendencia de Valores y Seguros*, hereinafter: "SVS") which regulates listed companies and insurance companies; the Banking Commission, etc. Further, Law No. 13,011 authorises the Chilean Accountants Association (*Colegio de Contadores de Chile A.G.*) to issue "generally accepted accounting principles" (*PCGAs*) and "generally accepted auditing regulations" (*NAGAS*).<sup>38</sup> Such accounting and auditing principles and regulations have the force of law.

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<sup>37</sup> Following the Working Group meeting, a bill was adopted in December 2003. Because the Law was published in the Official Gazette on December 18, 2003, the draft law was not available for review by the Working Group which met in October 2003 for Chile's Phase 1 review. During the Phase 1 review, Chilean authorities stated that the draft law had been sent for constitutional review because its bank secrecy provisions were deemed unconstitutional. Also, supervisory responsibility was transferred from the judicial authorities to the Finance Ministry.

<sup>38</sup> According to Chile, the *PCGAs* and *NAGAS* "generally tend to converge with International Accounting Regulations". See Technical Bulletin No. 56 issued by the Chilean Accountants Association, stating that the sources of generally accepted accounting principles and regulations to be applied in Chile are: (i) International Accounting Regulations (*NIC*) issued by the International Accounting Regulations Committee (IASC); (ii) decisions by "foreign bodies" composed of experts on accounting matters; and (iii) practices or decisions generally accepted either because they are "customary" within a specific industry, or because of their sound application to "specific knowledge or circumstances in generally accepted decisions".

Absent specific guidance under Chilean accounting and auditing principles and regulations, Law No. 13,011 states that international accounting regulations shall apply.<sup>39</sup>

89. Article 73 of Law No. 18,046 on Corporations which applies to corporations (*sociedades anonimas*), states that “accounting entries shall be made in permanent records in accordance with the applicable laws and with generally accepted accounting principles”. Article 74 provides that the Board shall submit for shareholder approval the annual report on the company’s financial position during the last fiscal year with the general balance sheet,<sup>40</sup> a profit and loss statement and the report by external auditors or account inspectors, as the case may be. Such documents shall clearly reflect the net worth of the corporation, profits and losses at the close of the fiscal year, as well as director compensation for the prior fiscal year.<sup>41</sup> The Law also states that the company shall make available to the shareholders the books and minutes in relation to the company, its subsidiaries and affiliates, 15 days before the shareholders’ meeting. All related party transactions between a director that has an interest in a transaction and the company or between affiliated companies must comply with normal “conditions of fairness” and are required to be disclosed at the shareholders’ meeting.<sup>42</sup>

90. Article 25 of the Commercial Code requires that any natural or legal person must keep a general journal, a ledger, a balance book and a copybook for accounting purposes. Article 27 provides that the general journal shall set forth on a daily basis and in chronological order, the business transactions undertaken by the person and describe in detail the nature and circumstances of the transaction.

91. The Chilean authorities also cite to numerous provisions of the Tax Code in respect of the prohibition of off-the-books accounts, etc. and the powers of the Internal Revenue Service to seize documents and records and apply sanctions ranging from fines to imprisonment.<sup>43</sup> However, since these

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<sup>39</sup> Chile states that in the absence of specific decisions in Chile, the independent auditor shall consider (i) the International Auditing Guidelines issued by IFAC; (ii) the Statements of Auditing Standards (SAS) issued by the Inter-American Institute of Public Accountants; and (iii) other general decisions issued by renowned professional associations.

<sup>40</sup> Any shareholder may file a criminal or civil action to determine the composition of the balance sheet which has been approved, rejected or changed by a shareholders’ resolution. (Articles 2314 et seq. of the Civil Code, articles 10 et seq. of the Criminal Procedure Code, and articles 53 et seq. of the New Criminal Procedure Code generally allow shareholders to challenge illegal resolutions before the courts.) Shareholders may also file an administrative action before the supervisory authorities (V.Gr. article 27, para. 4 of the Securities and Insurance Commission Organic Law). Title XIV, article 133 of the Law on Corporations holds managers and legal representatives jointly liable for civil sanctions upon breaching that law to the detriment of a third party.

<sup>41</sup> Director compensation includes remuneration outside of their position as director, such as representation expenses and other expenses as well as any other payment made to them by the company. (Taken from “*Report on Corporate Governance Issues in Chile*” by Ricardo Escobar C., Carey Cia. Ltda., at 8 (April 2000) (hereafter: “Corporate Governance Report”) In respect of penalties for non-compliance with accounting requirements, article 133 of Law No. 18,046 states that if a person violates the law, its regulations or applicable bylaws or regulations issued by the Commission to the detriment of a third party, that person, managers or legal representatives of legal persons (unless it is established that they were not involved in, or they dissented from, the unlawful act) shall be liable for civil, administrative and criminal penalties, as well as compensation for damage. However, this provision would not be relevant to the foreign bribery offence because it would be difficult to show that the establishment of off-the-book accounts, falsifications, etc. would cause “detriment to a third party”.

<sup>42</sup> See *supra*, footnote 41, Corporate Governance Report, at 9.

<sup>43</sup> See, e.g., article 97, No. 4 of the Tax Code on False Invoices; Circular Letter No. 60 of Sept. 4, 2001 on infringements and sanctions for false invoices and Circular Letter No. 78 of Dec. 23, 1997 establishing the procedures to be followed upon detection of “irregularities” which is punishable with imprisonment.

rules do not directly apply to accounting for the purpose of financial reporting (although they might have indirect impact on companies that apply the same rules for both purposes), they would not appear to be the relevant rules for the purpose of article 8 of the Convention. Chile states, however, that Tax Code provisions supplement accounting rules for financial reporting by, *inter alia*, requiring taxpayers to use sound accounting practices (article 16 of the Tax Code) and to stamp the Internal Revenue Service seal on their accounting books and records “in order to ensure that they are truthful” (article 17). Further, Chile states that even though some differences exist in accounting criteria established by generally accepted accounting principles (*PCGAs*) and those for tax purposes, the accounting formal framework laid down in the Commercial Code is “supplemented by the guidelines issued by the Internal Revenue Service whose powers are contained in Statutory Decree No. 7/1980”.

92. With respect to specific types of entities, Chile refers to several specific laws. Firstly, for companies listed on the stock exchange (other than banks, financial institutions, mutual funds management companies, or other persons/entities expressly exempted by law), article 4 of the Decree-Law No. 3,538 of 1980 (Securities and Insurance Commission Organic Law) requires such corporations to keep accounting records in accordance with the regulations issued by the SVS, and in the absence of a specific provision, with the generally accepted accounting principles in Chile.<sup>44</sup> Article 4(e)(3) states that under the authority granted to it, the SVS “may order that the value entered in some account items is rectified or corrected where it is established that said value has not been recorded in accordance with the rules issued by the Commission or generally accepted accounting principles and regulations” and in particular, when such value “is not true to reality”. Such provision also authorises the Commission to review financial statements during the preceding four years. Article 4(i) states that the Commission has the authority to issue regulations ensuring that the minutes, books and records it requires are “true to reality”.

93. Pursuant to articles 27 and 28 of the Decree-Law No. 3,538, the SVS may impose penalties on corporations subject to its control, as well as on their directors, managers, employees, etc., that breach the laws, regulations, bylaws and other rules governing them, or that fail to comply with the directions issued by the Commission. Under article 27, penalties for a corporation, its directors, managers, dependent employees, account inspectors or liquidators include one or more of the following: (i) censure; (ii) a “fine for fiscal benefit” up to 15,000 UFs per corporation (which may be increased up to three times in the case of recidivism);<sup>45</sup> and (iii) in the case of corporations, revocation of the corporate existence. Under article 28, penalties for persons or entities other than those above include one or more of the following: (i) censure; (ii) a “fine for fiscal benefit” up to 15,000 UFs per corporation (which may be increased up to five times in the case of recidivism); and (iii) for natural persons appointed or authorised by the Commission to discharge certain duties or perform certain acts, suspension for up to one year and revocation of their authorisation or appointment. Such penalties are in addition to other sanctions that may be imposed under other laws.

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Additionally, article 197 of the Criminal Code states: “He who, to the detriment of a third party, makes any evidentiary falsehood under article 193 [lying when narrating material facts, altering a lawful document, concealing an official document, etc.] shall be punished with short-term imprisonment in any of its degrees” and, in some cases, a fine ranging from 11 to 15 monthly tax units. If such evidentiary falsehoods have been made in bills of exchange or other negotiable instruments, the persons liable therefor are punished with short-term imprisonment, maximum degree and in some cases, a fine ranging from 16 to 20 monthly tax units. Article 198 states: “He who fraudulently makes use of false instruments referred to [in article 197] shall be punished as the perpetrator of evidentiary falsehood”.

<sup>44</sup> This is also provided in Circular Letter no. 1,501 of 2000.

<sup>45</sup> Chile states that under article 29, the amount of a fine may, at the discretion of the Commission, either be within the limits set forth under articles 27 and 28 or up to 30% of the “irregular issuance value or transaction”. Recidivism is defined as 2 or more infringements committed within a 12-month period. As at August 4, 2003, the value of the Unidad de Fomento (“UF”) was \$16,939.29 Chilean pesos, or US\$24.

94. Secondly, Chile refers to Securities Law No. 18,045 governing “open” corporations<sup>46</sup> and “partnerships limited by shares”<sup>47</sup> which have at least 10% of paid-up capital owned by 100 or more shareholders (exclusive of those whose interest, whether individually or through private or legal persons, is in excess thereof), or have 500 or more shareholders. Under article 59 of such Law, (i) a person who knowingly provides a false document or “ratifies” false information to the SVS, the stock exchange or the general public, or (ii) an accountant or auditor who issues an unfaithful opinion on the financial standing of a person under record-keeping obligation in this law, is punishable by short-term imprisonment in its medium degree to long-term imprisonment in its minimum degree (541 days to 10 years). Under article 60(j), any person who willingly conceals or eliminates accounting or custody records of a broker is punishable by short-term imprisonment in any of its degrees (61 days to 5 years).

95. Finally, the Chilean authorities refer to the General Banking Law which applies to the financial institutions regulated by the Banking Commission (as well as their affiliates, etc. other than those regulated by the SVS), and state that in accordance therewith, transactions must be entered into accounting records clearly identifying their origin or purpose and that the accounting shall follow generally accepted accounting principles in Chile as well as the regulations issued by the Banking Commission. The President of the Commission may impose administrative penalties of admonition, censure or a fine up to 5,000 UFs for an act breaching the General Banking Law or the Commission’s directives.

96. Articles 157 and 158 of the Banking Law impose criminal penalties on (i) officials who approve or submit fraudulent or false balance sheets or conceal its situation and (ii) general managers or persons acting as such should a financial institution omit to record any operation affecting the net worth or liability of a company. In addition, article 157 states that directors and managers who have endorsed or submitted a fraudulent or false balance sheet or concealed its situation, particularly advances made to directors or employees, are punishable with short-term imprisonment, medium to maximum degree (541 days to 5 years) and a fine ranging from 1,000 to 10,000 tax units.<sup>48</sup> Further, if an entity is declared bankrupt as a result of such acts, the person responsible therefor is liable for fraudulent bankruptcy. Fraudulent bankruptcy is punishable under article 229 of Law No. 18,175 on Bankruptcy with short-term imprisonment, medium to maximum degree (541 days to 5 years) or long-term imprisonment, minimum degree (541 days to 10 years).

97. Under article 158 of the Banking Law, shareholders, incorporators, directors, managers, officers, employees or independent auditors who (i) alter or distort data or background information in balance sheets, books, statements, accounts, etc.; (ii) conceal or destroy them in order to impede, deviate or elude control by the Commission in accordance with the law; or (iii) provide, subscribe or submit altered or distorted evidence, shall be punished with short-term imprisonment, medium to maximum degree (541 days to 5 years). Articles 14-17 of the Criminal Code relating to authors, accomplices or accessories after the fact shall also apply. Article 159 stipulates that if a financial institution fails to record any operation affecting the net worth or liability thereof, its general manager or any appointee thereof shall be punished with short-term imprisonment, medium to maximum degree (541 days to 5 years).

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<sup>46</sup> Open corporations are either entities that are listed, that have at least 500 shareholders, that have at least 100 shareholders that hold together at least 10% of the share capital, or that are subject to SVS supervision.

<sup>47</sup> The Chilean authorities state that “partnerships limited by shares” (*comanditas por acciones*) are entities whose capital takes the form of shares or coupons provided by shareholders whose name does not appear in the corporate name and who do not manage the corporation.

<sup>48</sup> In August 2003, the adjustable economic unit was valued at \$29,711 Chilean pesos or US\$43.

## *Auditing Requirements*

98. The Chilean Accountants Association (*Colegio de Contadores de Chile A.G.*)<sup>49</sup> represents the profession of auditors and is responsible for establishing auditing standards and audit report specifications.

99. External auditors must be selected from the External Auditors Register which is kept and controlled by the SVS. Executive Decree 587/1982 (Regulations of Corporations) prohibits directors, managers, employees and liquidators to act as account inspectors or external auditors. External auditors are prohibited from holding, directly or through other private or legal persons, more than 3% of the paid-up capital of the audited company. Further, the external auditors' remuneration from any one client, whether directly or through other private or legal persons, must not amount to more than 15% of their total monthly income.

100. Chile states that "open" corporations,<sup>50</sup> State corporations, regulated entities and financial institutions subject to control by the Commission of Banks are required to undergo an independent external audit.

101. The external auditors are annually appointed at the ordinary shareholders' meetings of open corporations. Their duties consist of examining the company's accounts, inventory, balance sheets and other financial statements. External auditors must report any deficiencies they encounter concerning the accounting practices adopted by the company, accounting administration and the adequacy of internal control. They ensure that the financial statements are prepared in accordance with accounting principles and norms accepted by the SVS.<sup>51</sup> Further, in fulfilling their duties to opine on whether the financial statements truthfully reflect the financial situation of the company in conformity with "generally accepted accounting principles", external auditors must comply with Section 326 of the "generally accepted auditing regulations" which state that "accounts must be true" and the submission of false information is punishable.<sup>52</sup> Other companies may choose to appoint external auditors by so stating in their by-laws or by voluntarily registering with the SVS. In addition, companies may choose to have their accounts audited by an external auditor to satisfy requirements for repatriating capital for foreign investment purposes.

102. For companies that are required to undergo an external audit, the independent auditor must give his/her opinion on the assertions contained in the financial statements as to the existence or veracity, integrity, rights and obligations, valuation or allocation and presentation and disclosure thereof, in accordance with section 326 of the "generally accepted auditing rules" on supporting evidence.

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<sup>49</sup> *Colegio de Contadores* is a member of International Federation of Accountants (IFAC). See IFAC website: <http://www.ifac.org/About/MemberBodies.tmp>.

<sup>50</sup> While the appointment of external auditors is legally required, open corporations may also provide for the appointment of account inspectors in their bylaws. Account inspectors are officers appointed by the shareholders that ensure proper compliance with legal obligations of the company and its board of directors. Like the independent external auditor, the account inspectors also supervise management.

<sup>51</sup> See *supra* footnote 41, Corporate Governance Report, at 19.

<sup>52</sup> The Chilean authorities point to "generally accepted accounting principles" which require, *inter alia*, that financial statements shall contain any basic and necessary additional information for an accurate interpretation of the financial standing and economic performance of the entity (disclosure); that every "resource and obligation" be included in order for costs and expenses to be duly related to income generated (accrual), etc. Also, the Chilean authorities cite to Technical Bulletins nos. 1-6 (Circular Letter No. 1501 SVS) which stipulate that "any debts or obligations must be entered and eventual contingencies and restrictions described in the notes to the Financial Statements which form an integral part thereof".

103. Article 59 of Executive Decree 587/1982 (Regulations on Corporations) provides that external auditors and account inspectors have “a duty to inform shareholders of the discharge of their duties and inform the competent judicial and administrative authorities of any offences and irregularities or anomalies that, in their opinion, may exist in corporate management or accounting”.

104. State-controlled entities are required by law to publish audited financial statements in a nationwide newspaper. The audited financial statements, along with the external auditor’s opinion, must also be submitted to the relevant Commission and are made publicly available. Other entities are not legally required to make the auditor’s report public.

## **9. ARTICLE 9: MUTUAL LEGAL ASSISTANCE**

105. Article 9.1 of the Convention mandates that each Party cooperate with the others to the fullest extent possible in providing “prompt and effective legal assistance” with respect to criminal investigations and proceedings and non-criminal proceedings against a legal person that are within the scope of the Convention. In addition to the requirements of article 9.1 of the Convention, there are two further requirements with regard to criminal matters. Under article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence in respect of which assistance is sought is within the scope of the Convention. Further, article 9.3 states that a Party shall not decline to provide mutual legal assistance on the grounds of bank secrecy.

### **9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance**

#### **9.1.1. Criminal Matters**

106. Chile provides mutual legal assistance in criminal matters (i) under bilateral treaties;<sup>53</sup> and multilateral treaties mainly with countries within the American continent;<sup>54</sup> and (ii) pursuant to national laws which enable Chile to provide assistance upon the request of a foreign court in the absence of a treaty.

107. Bilateral treaty-based MLA is limited to certain non-coercive measures such as service of process or demanding payment. Some bilateral treaties allow for the examination of witnesses or the taking of evidence. The Inter-American Convention on Mutual Assistance in Criminal Matters which Chile states that it will soon ratify, contains provisions on confiscation and the examination of witnesses and experts.

108. By virtue of domestic law (article 76 of the Civil Procedure Code) and in line with article 9 of the Convention, Chile will provide mutual legal assistance in the absence of a treaty in certain matters. Article

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<sup>53</sup> Chile has concluded bilateral treaties with Spain and Mexico, and also with Colombia, Uruguay and Nicaragua. In addition, Chile has signed but not yet ratified a bilateral treaty on Legal Assistance in Criminal Matters with Italy.

<sup>54</sup> Chile has concluded four multilateral treaties: (i) the Private International Law Code (which contains specific rules on letters rogatory); (ii) the Inter-American Convention on the Taking of Evidence Abroad; (iii) the Inter-American Convention on Letters Rogatory along with its Additional Protocol; and (iv) the Inter-American Convention against Corruption. Chile has signed but not yet ratified three multilateral treaties: (i) the Inter-American Convention on Mutual Assistance in Criminal Matters (and its optional Protocol); (ii) the Agreement on Mutual Legal Assistance in Criminal Matters and its Complementary Agreement (between MERCOSUR, Bolivia and Chile); and (iii) the UN Convention Against Transnational Organised Crime on December 13, 2000 (the latter is currently before the upper Chamber of the National Congress for ratification approval).

76 of Chile's Civil Procedure Code enables foreign courts to request the taking of judicial action in Chile.<sup>55</sup> Although it may be relied upon to provide MLA, its scope has been circumscribed in Supreme Court rulings to certain, minimal non-coercive measures such as service of notice or demand for payment. An MLA request is handled by the Ministry of Foreign Affairs in accordance with domestic legislation or relevant treaties, as the case may be. It is thus apparent that Chile's domestic legislation as well as its bilateral treaties concerning mutual legal assistance essentially relate to civil matters (albeit they may be relied upon in criminal matters), which explains why MLA is limited to certain, non-coercive measures.

109. Presently, Chile does not have the authority under bilateral or multilateral treaties nor under its domestic legislation, to seize or confiscate the bribe or its proceeds in connection with an MLA request. Importantly, because there is no criminal liability of legal persons under Chilean law, it is unclear whether a request for legal assistance in criminal matters for legal person would be granted by Chile.

### **9.1.2 Non-Criminal Matters**

110. The Chilean authorities indicate that Chile may provide MLA for non-criminal matters brought against legal persons by a Party for the foreign bribery offence under bilateral and multilateral treaties to the extent that such instruments refer to such matters as well as on the basis of domestic legislation (article 76 of the Civil Procedure Code).

## **9.2 Dual Criminality**

111. According to the Chilean authorities, dual criminality is not a requirement under Chile's MLA treaties.

## **9.3 Bank Secrecy**

112. In Chile, there is no access to confidential bank information pursuant to an MLA request absent a specific treaty.<sup>56</sup> Chile has not entered into any bilateral treaties that permit the lifting of bank secrecy. Further, the Chilean authorities have said that the Convention itself would not provide a sufficient legal basis on which a Chilean court could rely.<sup>57</sup>

113. Concerning domestic legislation governing the lifting of bank secrecy, courts of law, if necessary, may decree that information be provided and examined on specific transactions which bear a direct relation with the ongoing proceeding pursuant to article 154 of the General Banking Law. Also, the Banking

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<sup>55</sup> Concerning international letters rogatory, they are processed insofar as they are not contrary to public order and are based on the terms set forth under articles 391 and 392 of the Private International Law Code which require the request to be made in Spanish or accompanied by a Spanish translation.

<sup>56</sup> The procedure for lifting bank secrecy under a treaty is governed by the Private International Law Code.

<sup>57</sup> Under Chile's Political Constitution, bank secrecy is embodied in article 19(5), guaranteeing the right to privacy. Article 154 of the General Banking Law, Statutory Decree No. 3, provides that deposits and "placements" of any kind received by a bank shall be subject to bank secrecy. Exceptions are made only if the account holder or the person authorised by him/her consents thereto. Pursuant to article 154, other transactions are also subject to bank secrecy except that banks may disclose information on such transactions if a person establishes a "legitimate interest" and provided such disclosure has no negative impact on the customer's net worth. Article 1 of the Banking Current Accounts and Checks Law also guarantees bank confidentiality concerning transactions made by an account holder and the balance of his/her account unless the account holder or an authorised person consents to disclosure.

Current Accounts and Checks Law permits a court of law to decree the disclosure of “some” items of a current account in civil or criminal proceedings against the account holder.<sup>58</sup>

## 10. ARTICLE 10: EXTRADITION

### 10.1/10.2 Extradition for Bribery of a Foreign Public Official/Legal Basis for Extradition

114. Article 10.1 of the Convention provides that bribery of a foreign public official shall be deemed to be an extraditable offence under the laws of the Parties and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

115. Chile may provide extradition on the basis of multilateral<sup>59</sup> and bilateral treaties.<sup>60</sup> In the absence of a treaty, articles 637, 647 and 651 of the Old Criminal Procedure Code and articles 431 and 440 of the New Criminal Procedure Code provide the legal basis for extradition by virtue of the relevant international law principles listed below.<sup>61</sup> In addition, Chile states that the Convention is a legal basis for extradition in the absence of a treaty for the foreign bribery offence. As discussed previously (see 3.4 *supra*), during the transition period when both Codes are in force, where Chile requests extradition, the relevant Code is that which is applicable in the region in which the offence in question is prosecutable. Where another Party requests Chile for extradition, the Old Criminal Procedure Code shall apply. It is notable that the two Codes contain different requirements for extradition as concerns imprisonment thresholds.

116. Additionally, the following principles must be fulfilled in order to grant extradition under the Old Criminal Procedure Code and in accordance with article 449(b) of the New Criminal Procedure Code in the absence of a treaty: (a) dual criminality is established; (see 10.5 *infra*); (b) the offence has “minimum seriousness”;<sup>62</sup> (c) the offence is currently prosecutable (e.g., an offence which is actionable at the time of the request; however, certain defences or exceptions apply such as non-compliance with the conditions for requesting extradition (including lack of “minimum seriousness” or dual criminality, etc.) the requesting country fails to comply with formal requirements or fails to establish the involvement of the accused); (d)

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<sup>58</sup> See article 1(3). But see paragraph 4 of the Banking Current Accounts and Checks Law which states: “Nevertheless, in criminal actions against a public official having committed an offence in the performance of his duties, the Public Prosecutor’s Office, with the authorisation of a judge, may decree full disclosure of the transactions in his current account and the balance thereof.” However, this provision would not be relevant insofar as active bribery by a public official would not normally constitute an act in the performance of his/her duties.

<sup>59</sup> Chile is a signatory of the Montevideo Convention on Extradition as well as the International Private Law Code which contains rules on extradition. In addition, the Agreement on Extradition between MERCOSUR parties has been signed but not yet ratified.

<sup>60</sup> Chile has entered into bilateral extradition treaties with the following Parties to the Convention: Australia, Belgium, Brazil, Canada, Korea, Mexico, Spain, United Kingdom, and the United States of America and the following non-Parties to the Convention: Bolivia, Colombia, Ecuador, Nicaragua, Paraguay, Peru, Uruguay, and Venezuela. It has signed but not yet ratified a bilateral treaty with Italy. It is discussing draft bilateral extradition treaties with Ireland, the Netherlands and a new one with the United States.

<sup>61</sup> The Chilean authorities state that such principles have been acknowledged in rulings by the Supreme Court of Justice.

<sup>62</sup> The Chilean authorities state that « minimum seriousness » may be determined either by reference to a list of extraditable offences in treaties or by reference to a minimum penalty, which, in the case of treaties entered into by Chile, is usually a custodial sentence of more than one year.

the statutory limitation period is still running under the applicable international treaties;<sup>63</sup> (e) the requesting state has jurisdiction over the offence; (f) “doctrine of speciality”; and (g) the offence in question is not one of the prohibited offences such as “political and related offences”. (Chile notes that most international treaties it has entered into “generally do not allow” exclusions for political offences; further, it would not consider foreign bribery as a “political or related offence”.)

117. Article 644 of the Old Criminal Procedure Code and article 440 of the New Criminal Procedure Code provide that where a foreign government requests extradition, the Ministry of Foreign Affairs is the authority that receives the request and, after verification, transmits it along with the background information to the Supreme Court to decide whether or not to grant the request. The Ministry of Foreign Affairs verifies that the request and its supporting documentation comply with procedural formalities and is well-founded. The Supreme Court informs the Ministry of its decision, which in turn, notifies the requesting State whether the court has authorised the extradition of the accused. In the case where Chile requests extradition, the Ministry is responsible for making the extradition request and transmitting the requisite documentation.

118. A decision by the Supreme Court not to grant an extradition request may be appealed under the Old Criminal Procedure Code. Article 450 of the New Criminal Procedure Code also allows the appeal and possible annulment of a decision not to grant an extradition request.

### **10.3/10.4 Extradition of Nationals**

119. There are no constitutional or legal bars to the extradition of Chile’s nationals. However, the Chilean authorities believe that it would be preferable to prosecute their nationals in a Chilean court of law in the case where Chilean courts have jurisdiction and it concerns the same offence.

### **10.5 Dual Criminality**

120. As mentioned earlier, Chile states that generally, dual criminality is a condition for extradition. The Chilean authorities also state that the requirement of dual criminality would be satisfied where the offence for which extradition is sought is punishable both in the country seeking extradition and in Chile, whether or not under a different criminal statute and whether or not the offence is identical in both countries. Notwithstanding, it would appear that dual criminality would not be specifically required for the foreign bribery offence because the requirement of dual criminality under Chile’s laws or treaties shall be deemed to be fulfilled by virtue of article 10.4 of the Convention.

## **11. ARTICLE 11: RESPONSIBLE AUTHORITIES**

121. Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

122. Chile has not yet notified the Secretary-General of the OECD of the responsible authority(ies).

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<sup>63</sup> Under the Montevideo Multilateral Convention, extradition should be refused if the criminal action or penalty has lapsed in both the requesting and the requested States. Bilateral treaties that look to the statute of limitations of the requesting State include those with Bolivia, Colombia, Ecuador, Paraguay and Uruguay. Bilateral treaties that look to that of the requested State include those with Belgium, Peru and the United States of America. The bilateral treaty Chile has entered into with the United Kingdom looks to the statute of limitations in both States.

## **B. IMPLEMENTATION OF THE REVISED RECOMMENDATION**

### **3. Tax Deductibility**

123. The Decree-Law No. 824 on Income Tax (hereafter, “Income Law”) applies to the taxation of both natural and legal persons. The Income Law does not expressly prohibit the deduction of bribe payments made to foreign public officials. In addition, article 31 allows the deductibility of “expenses necessary to generate income”, and further provides for a non-limitative list of deductible expenses, among which are: (i) “wages, salaries and other compensation paid or payable in consideration of services rendered, inclusive of legal and contractual awards and any other sum payable by way of hospitality expenses”; (ii) “expenses incurred in the promotion or introduction into the market of new goods manufactured or produced by a taxpayer”; and (iii) “donations whose only purpose is to carry out gratuitous elementary or secondary education, vocational, professional or tertiary programs in Chile, whether private or State-run, provided they fail to exceed 2% of the net taxable income of a company or 0.16% of the company’s net worth at the close of the relevant fiscal year”.

124. Nevertheless, according to the Chilean authorities, bribe payments to foreign public officials are not tax deductible. However, they have not provided supporting case law to this effect. They further state that although it is possible that a taxpayer may attempt to disguise a bribe payment as a permissible deduction under article 31 of the Income Law, such disguised payment may be challenged and disregarded by the Internal Revenue Service because it would not be qualified as expenditure necessary and unavoidable to generate income. They state that their tax regulations implicitly prohibit the deductibility of bribe payments. But because bribes are not specifically excluded from allowable deductions, it is not certain whether the tax inspectors would focus on detecting such illicit payments in their inspections.

125. As concerns the cooperation between the tax and law enforcement authorities, pursuant to article 84, No. 3 of the Old Criminal Procedure Code (article 175(b) of the New Criminal Procedure Code), any public officer, including the Director of the Internal Revenue Service, must report any crime or misdemeanour of which he becomes aware in the discharge of his duties to the Public Prosecutor, to the police (*carabineros*, *gendarmarie* and police investigators) or to the courts (article 173 of the New CPC). Moreover, pursuant to article 55(k) of Law No. 18,834 which establishes the Administrative Statute, any public officer shall report any crime or misdemeanour to the Public Prosecutor or to the police and must report to the competent authority any irregularity he may become aware of in the discharge of his duties.

126. Article 60 of the Tax Code provides that the Internal Revenue Service may examine the inventories, balance sheets, accounting records and documentation of a taxpayer for purposes of its tax assessment as well as examine items included in the return or which should have been included. The Internal Revenue Service may demand a written affidavit from a taxpayer or summon any person residing within the jurisdiction of the tax office to declare the veracity of facts, data or information of any kind concerning third parties.

127. In addition, the Service’s Director has the authority to exchange information with other bodies responsible for tax matters in order to assess taxes to be levied on certain taxpayers. This authority is granted in respect of countries with which Chile has a double taxation treaty and any other country upon the authorisation of the relevant Ministry.

## EVALUATION OF CHILE<sup>64</sup>

### General Remarks

The Working Group commends the Chilean authorities for their co-operation and openness during the examination process and recognises their efforts in providing an understanding of their laws.

In order to meet the requirements of the Convention, Chile promulgated Law No. 19,829 which entered into force on October 8, 2002. This Law amended the Chilean Criminal Code by adding article 250 *bis* A and article 250 *bis* B criminalising the bribery of a foreign public official. The Working Group is satisfied with Chile's comprehensive definition of "foreign public official" which follows the wording of the Convention. The Working Group also welcomes the incorporation of domestic and foreign bribery as predicate offences for money laundering into its laws which is expected by the end of 2003.

The Working Group notes that there are deficiencies in Chilean legislation concerning certain elements of the offence, the liability of legal persons, the level of sanctions, territorial jurisdiction and bank secrecy. In addition, other issues such as nationality jurisdiction, mutual legal assistance and the non-tax deductibility of bribes will be reviewed in during Phase 2 to determine whether there is effective application of the Convention.

### Specific Issues

#### 1. The offence of foreign bribery

##### *To offer, promise or give*

Under Chilean law, the act of "offering" or "consenting to afford" an economic advantage constitutes the offence of bribery. Article 250 *bis* A does not explicitly mention the act of giving a bribe.

Chile states that the mere act of "giving" a bribe implies that an offer was made, either before or concurrently with the gift. The Chilean authorities stated that they would rely upon the interpretation of the courts on this point and that, if the act of offering were not implicit in the act of giving, an amendment of their law would be necessary.

The Working Group took note of the explanation given by Chile, but expressed concern that in the absence of case law, the offence may not cover the mere act of giving a bribe. The Working Group recommends that the Chilean authorities take remedial action in this respect.

##### *Any undue pecuniary or other advantages*

The Convention specifies that it shall be an offence to offer, promise or give any undue pecuniary or other improper advantage. Chilean legislation, however, limits itself to a reference to "economic advantages".

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<sup>64</sup> Following adoption of this report, Chilean legislation has been amended and most of the issues covered by this evaluation have been reviewed by the OECD Working Group on Bribery in Phase 1bis and Phase 1ter reports and a report on progress since Phase 2, available on the website of the OECD.

Therefore, it appears to be narrower than the Convention and exclude some types of advantages from the scope of the offence.

The Working Group strongly encourages Chile to make the necessary legislative changes. The Chilean authorities have expressed their intent to review the relevant legislation in order to be in full compliance with the Convention.

## **2. Responsibility of legal persons**

Chilean law so far provides for only one general sanction against corporations and foundations, namely dissolution where the entity has an “unlawful” purpose. In addition, there is no possibility of imposing fines on legal persons. The Working Group considered that this situation falls short of the requirement of the Convention that Parties at least establish effective, proportionate and dissuasive non-criminal sanctions for legal persons, including monetary sanctions, for the offence of bribery of foreign public officials (articles 2 and 3). Moreover, this limits the availability of confiscation, as well as mutual legal assistance in investigations against the legal person only.

The Chilean authorities stated that the Executive has pledged to consider criminal liability of legal persons within the context of the Criminal Code reform process and that by the end of 2004, the Ministry of Justice’s Advisory Committee will issue a report concerning the new Criminal Code.

The Working Group noted that Chile failed to adequately transpose the requirements of the Convention on this issue and urged the Chilean authorities to implement articles 2 and 3 of the Convention as soon as possible.

## **3. Sanctions**

The Working Group noted that in a limited number of situations, the Chilean implementing legislation introduces a difference in sanctions between the domestic offence and the transnational offence. However the Working Group agreed that this did not affect the general comparability of sanctions for domestic and foreign bribery offences.

The offence of active bribery of a foreign public official is punishable by imprisonment from 61 days to 3 years for offering a bribe, and by imprisonment from 61 days to 540 days for having consented in affording a bribe. The Working Group considers therefore that the existing sanction may not meet the standard of the Convention according to which sanctions have to be effective, proportionate and dissuasive.

In addition, the maximum amount of fines is twice the value of the “economic advantage”. The Working Group recommends that the Chilean authorities modify the way of fixing the level of pecuniary sanctions when they modify the legislation to cover non-pecuniary advantages.

Finally, considering that the imprisonment imposed in the case of active bribery of a foreign public official consists in 61 days to 3 years, the Working Group noted that Chile could not request extradition of a briber, under article 250 *bis* A since the relevant regulation requires an offence punishable by an imprisonment whose minimum duration exceeds one year.

The Working Group strongly recommends the Chilean authorities to make the necessary legislative changes. The Chilean authorities have expressed their intention to review the level of sanctions within the context of the Criminal Code reform process.

#### **4. Jurisdiction**

Territorial jurisdiction of Chile is established for bribery cases where the offence has been initiated in Chile. Chile indicated that because the effects principle is gaining ground in legal opinion in Chile, this issue may be resolved if Chilean courts extend jurisdiction to cover offences that produce consequences in Chile.

In light of the potentially limited territorial jurisdiction together with the apparent unavailability of nationality jurisdiction, the Working Group considers that Chile's legislation falls short of the requirement of article 4.1 of the Convention, which requires each Party 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", whichever part of the offence is considered.

The Working Group encourages Chile to review the deficiency detected concerning territorial jurisdiction. Moreover, the Working Group will review the applicability of the nationality jurisdiction during Phase 2.

#### **5. Mutual Legal Assistance and Bank Secrecy**

Article 9.1 of the Convention mandates that each Party cooperate with each other to the fullest extent possible in providing "prompt and effective legal assistance" with respect to criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention. Chile provides mutual legal assistance under bilateral and multilateral treaties. In the absence of a treaty with another Party to the Convention, Chile has stated that it would consider the Convention to be the basis for providing MLA. Nevertheless, the Working Group noted that the extent of mutual legal assistance provided under Chilean law is limited to certain, "minimal" non-coercive measures. The Working Group will revisit this issue in Phase 2.

In addition, Chile fails to comply with article 9.3 of the Convention which states: "A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy." The Working Group urges Chile to examine its position and to report back to the Working Group in one year.

#### **6. Non-tax deductibility of bribes**

Chilean Income Tax Law does not expressly prohibit the deduction of bribe payments made to foreign public officials, and the law provides for a non-limitative list of expenses that are specifically permitted as deductible expenses (e.g., hospitality expenses, expenses incurred in the promotion of goods, etc.). Chile states that implicitly there is a prohibition in existing tax regulations and sanctions which would not allow bribes to be disguised as a deduction.

The Working Group takes note of the explanations provided by the Chilean authorities. It is concerned that bribes might be deducted if they were disguised as legitimate business expenses and is uncertain how it would be determined in practice whether a given expense was legitimate or a bribe. The Working Group invites Chile to consider making prohibition explicit in its guidelines to its income tax authorities and will follow up on this matter to the matter in Phase 2 of the evaluation process.