



Directorate for Financial and Enterprise Affairs

CHILE: PHASE 2

**REPORT ON THE APPLICATION OF THE CONVENTION
ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS
IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE
1997 REVISED RECOMMENDATION ON COMBATING
BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS**

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EXECUTIVE SUMMARY

The Phase 2 Report on Chile by the Working Group on Bribery evaluates Chile's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Overall, while the Working Group notes that Chile has recently engaged in efforts to implement the Convention, it is seriously concerned that Chile has not responded to key recommendations in the Working Group's 2004 Phase 1 report on Chile. These recommendations relate to the liability of legal persons, sanctions, jurisdiction, bank secrecy and the definition of the foreign bribery offence.

Considering the seriousness of the situation, the Working Group has exceptionally decided to review Chile's legislation again one year from now (Phase 1bis review). The Group will also decide whether to conduct a supplementary on-site evaluation (Phase 2bis review) of Chile in view of the reports that will be provided by the Chilean authorities in the context of the Group's monitoring work.

The Working Group is particularly concerned about the continuing absence of liability for legal persons (companies) that engage in bribery and recommends that the law be promptly changed to make companies accountable. In order to meet the Convention requirement of effective, proportionate and dissuasive sanctions for foreign bribery, the Working Group also recommends that Chile substantially increase sanctions applicable to natural persons and introduce sanctions for legal persons. The Working Group reaffirmed with concern its 2004 recommendation that Chile ensure that it has territorial jurisdiction over foreign bribery committed in part in Chilean territory and recommended that Chile establish nationality jurisdiction over the foreign bribery offence in order to strengthen enforcement. Additional efforts should also be made by Chile in order to raise awareness about the Convention and the foreign bribery offence in the public and private sectors. Chile does not yet have any foreign bribery cases or investigations.

The Report also highlights a number of positive aspects in Chile's fight against foreign bribery including a significant improvement in the procedures for rendering mutual legal assistance under the new Criminal Procedure Code and the addition of foreign bribery to the list of predicate offences for money laundering. The Working Group noted Chile's issuance of an internal instruction making explicit the prohibition on the deduction of bribes for tax purposes and welcomed its expressed intent to issue a publicly-available circular on the same issue.

The Report, which reflects findings of experts from Argentina and Mexico, was adopted by the OECD Working Group along with recommendations. In addition to the exceptional Phase 1bis review mentioned above, Chile will report to the Working Group, within one year of the adoption of the Phase 2 Report, on the steps that it will have taken or plans to take to implement the Working Group's recommendations, with a further report in writing within two years. The Report is based on the laws, regulations and other materials supplied by Chile, and information obtained by the evaluation team during its on-site visit to Santiago. During the five-day on-site visit in March 2007, the evaluation team met with representatives of Chilean government agencies, the private sector, civil society and the media. A list of these bodies is set out in an annex to the Report.

A. INTRODUCTION

1. This Phase 2 report evaluates Chile's enforcement of its legislation implementing the OECD Convention, assesses its application in the field and monitors Chile's compliance with the 1997 Revised Recommendation. It reflects the Chilean authorities' written responses to the general and supplementary Phase 2 questionnaires (hereinafter, the "Responses" and the "Supp. Responses"), interviews with government experts, representatives of the business community, lawyers, accounting professionals, financial intermediaries and representatives of civil society encountered during the on-site visit in Santiago from 26-30 March 2007 (see attached list of institutions encountered in Annex 1), and review of relevant legislation and independent analysis conducted by the Lead Examiners and the Secretariat.¹

1. On-Site Visit

2. The on-site visit and the Phase 2 process were generally characterised by high levels of cooperation from the Chilean authorities. The written responses to the questionnaires were generally thorough and responsive to the questions asked; follow-up questions were answered. During the on-site visit, officials were available as needed to answer the examiners' questions, including questions that came up during the week. The logistical organisation of the on-site visit was excellent. While cooperation was generally very good, there were certain issues raised concerning information provided during the Phase 2 process with regard to central issues of bribery law reform; these are addressed below in the section on Penal Code reform.

2. General Observations

a) *Economic background and international economic relations*

3. The Chilean economy has grown rapidly in recent years and is considered to be one of the most successful economies in Latin America. Chile is an associate member of Mercosur; as such it remains largely free to negotiate trade agreements with third countries. Chile has rapidly expanded its international economic relations through a broad network of free trade agreements.

¹ The evaluating team was composed of three lead examiners from Argentina (Mauricio Alice, Counsellor, Office of the Legal Adviser, Ministry of Foreign Affairs; José Ipohorski Lenckiewicz, Anti-Corruption Bureau, Ministry of Justice; and Nestor Sosa, General Deputy Director of Internal Auditing, Federal Administration of Public Revenues, Ministry of the Economy), three lead examiners from Mexico (Laura Edith García Alcalde, Federal Public Prosecutor, General Prosecutor's Office; José Alberto Ortúzar Cárcova, Administrator for International Tax Audit, Tax Administration Service, Ministry of Finance; and Xóchitl Consuelo Lara Becerra, Vice Manager of Systems and Processes Evaluation, Tax Administration Service, Ministry of Finance), and two members of the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs at the OECD Secretariat: David Gaukrodger, Principal Administrator – Senior Legal Expert, Coordinator Phase 2 Examination of Chile; and Gwenaëlle Le Coustumer, Administrator – Legal Expert.

4. Chile's exports have grown significantly in recent years (from USD 18.2 billion in 2002 to USD 58.1 billion in 2006). Chile's major export destinations include the United States, Japan and China. Key exports include copper, fruit, fish products, pulp and paper, chemicals and wine.

5. Chilean outward investment has centred on neighbouring countries in Latin America and especially Argentina.² Total outward FDI stocks in 2006 amounted to USD 26.8 billion.³ Chilean firms have focused on breaking into new markets for services (such as electricity generation and distribution) and manufactures (e.g. paper and cellulose) and on securing natural resources (e.g. hydrocarbons and forestry). In the late 1990s and the early part of the present decade, some of the largest Chilean companies with a regional presence were taken over by foreign corporations. One area of particular complexity and uncertainty in recent years has been the supply of natural gas to Chile and Chilean companies have made substantial foreign investments in this sector.

6. Chile is a modest donor of development aid. Its development cooperation is managed by the Chilean International Cooperation Agency (AGCI) and focuses on Latin American and Caribbean countries. Bilateral technical assistance in 2005 totalled CLP 595 760 000 (USD 1 100 000). Triangular technical assistance in 2005 amounted to USD 646 000.⁴ Chile also provides assistance in the form of academic grants.

b) Political and legal system

7. Chile has a presidential system of government. The President, elected for a period of four years, is head of State and appoints the cabinet. There is a bicameral legislature (Congress) with a Senate (upper house) and a Chamber of Deputies (lower house). The Senate comprises 38 members elected for eight years and renewed partially every four years; the Chamber has 120 members who are all elected every four years at the same time as the President. Congress meets in the city of Valparaíso.

8. Chile is a unitary state. It is divided into 15 administrative regions, each of which is headed by an *intendente* appointed by the President. Every region is further divided into provinces with a governor, also appointed by the President. Each province is divided into municipalities.

9. Chile thoroughly reformed its criminal procedure system in 2000-2005, with the gradual adoption of a new Criminal Procedure Code (CPC) in all regions of the country. The reform changed the agencies involved in the fight against bribery and the conduct of investigations. Before the new code was adopted, Chile's criminal system was purely inquisitorial; the new code introduced an adversarial system and the figure of the public prosecutor.

10. Chile has also taken some preliminary steps with regard to a general reform of the Penal Code (PC). The Phase 1 report indicated that Chile expected that a Ministry of Justice (MOJ) advisory committee would issue a report on Penal Code reform by the end of 2004. The status of this project is described further below in the section on Penal Code reform.

² See generally United Nations, ECLAC (2006), Foreign investment in Latin America and the Caribbean, 2005.

³ Central Bank of Chile, Official Website (<http://www.bcentral.cl>)

⁴ See <http://www.agci.cl/estadisticasH.htm>.

c) Implementation of the Convention and the Revised Recommendation

11. Chile signed the Convention on 17 December 1997 and the implementing legislation entered into force on 30 January 2002. Like all Working Group members, Chile has also agreed to the Revised Recommendation adopted by the OECD Council in 1997. The Phase 1 review of Chile took place in 2004.

d) Cases involving the bribery of foreign public officials

12. There have been no court decisions, prosecutions or investigations in relation to foreign bribery since the establishment of the offence in 2002. During the on-site visit, the public prosecutor's office indicated that it was preliminarily checking allegations of foreign bribery that had recently appeared in the foreign press (see further below in the section on investigations).

3. Overview of Corruption Trends and Recent Measures

13. Media coverage and judicial proceedings have in recent years highlighted some noteworthy matters for the fight against corruption although only with regard to domestic corruption issues. Recently, serious corruption allegations have surfaced in various public agencies including the government sports agency. A recent public opinion poll indicated that the perception of domestic corruption is greater than that registered during a major corruption scandal in 2002.⁵ In November 2006, President Michelle Bachelet announced an anti-corruption program and created a commission coordinated by the Minister of the Economy which includes the head of Transparency International Chile, academics and other officials.

14. Chile ratified the OAS Anti-Corruption Convention in 1998 and has participated in monitoring under that Convention. Chile ratified the UN Convention on Corruption on 20 June 2006. In Transparency International's 2006 Corruption Perception Index, Chile ranked 20 out of 163 countries.⁶ Chile is not included in the countries evaluated in TI Bribe Payers Index.⁷

4. Outline of the Report

15. The balance of this report is structured as follows. Part B focuses on the prevention and detection of foreign bribery and discusses ways to enhance their effectiveness. Part C deals with the investigation and prosecution of foreign bribery and related offences, and includes sections reviewing the foreign bribery offence and the liability of legal persons. Part D sets forth the recommendations of the Working Group and the issues that it has identified for follow-up. Translations of the principal legislative and other legal

⁵ The poll was conducted by the Centros de Estudios Pùblicos (CEP). (See part 6 of the December 2006 poll at http://www.cepchile.cl/dms/lang_1/cat_443_inicio.html).

⁶ The TI Corruption Perception Index (CPI) provides data on perception of the “extent of corruption” within countries. It focuses on domestic corruption and is in fact a “poll of polls”; a composite index aggregating the results of selected international surveys and experts scorecards from different institutions. The source data used to create the composite index reflect the perceptions of non-resident experts, non-resident business leaders from developing countries and resident business leaders evaluating their own country. The questions used by the sources relate the “extent of corruption” to the frequency of bribe payments and/or overall size of bribes in the public and political sectors; and provide a ranking of countries.

⁷ The Transparency International Bribe Payers Index (BPI) ranks leading exporting countries in terms of the degree to which international companies with their headquarters in those countries are perceived to be likely to pay bribes to senior public officials in key emerging market economies.

provisions are reproduced in Annex 2. A list of the principal acronyms and abbreviations used in the report is included in Annex 3.

B. PREVENTION, DETECTION AND AWARENESS OF FOREIGN BRIBERY

1. General Efforts to Raise Awareness

a) *Government initiatives to raise awareness*

16. The principal actors in governmental efforts to improve awareness to date have been the Directorate for Special Policies in the Ministry of Foreign Affairs (MFA), with an overall coordinating role, and the National Group of Experts against Corruption (GNECC). The GNECC is a group of experts comprised of representatives of the MFA, the Ministry of Finance, the Ministry of Justice and the Public Prosecutor's Office. In addition to their expertise in their fields, the members of the GNECC have participated in Working Group evaluations.

17. Since the beginning of 2006, the MFA and GNECC have carried out three types of initiatives to raise awareness. First, during 2006, a number of awareness workshops were conducted. A first workshop was directed at members of: the General Government Internal Auditing Council; Comptroller General's Office; Financial Intelligence Unit; Chilean Investigations Police; State Defense Council; Public Prosecutor's Office; the Treasury Department; and a member of the Judiciary. MFA officials also participated in this workshop, including the General Directorate of International Economic Relations, the Directorate for Promoting Exports (PROCHILE) and the AGCI. A second workshop was aimed more specifically at representatives of the Public Prosecutor's Office, the Ministry of Justice; the State Defense Council, the Chilean Investigations Police and *Carabineros de Chile*; and the National Intelligence Agency.

18. A third workshop was aimed at the public financial sector and included representatives of the Ministry of Finance; the Directorate for Public Procurement; the Directorate of Budget Administration; the National Directorate of Civil Service; the Financial Intelligence Unit; the General Government Internal Auditing Council; the Foreign Investment Committee; the Central Bank; the Corporation for Promoting Production; the Internal Revenue Service; the Banking and Financial Institutions Superintendence; and the Securities and Insurance Superintendence.

19. Workshops organised by the MFA and GNECC so far have been given primarily to public sector entities. However, one workshop was aimed at the private financial sector and included representatives of a state-owned bank (*Banco del Estado de Chile*); and various banks, financial institutions and brokers. The Chilean authorities have indicated that during the course of 2007, additional workshops will be conducted and specific sectors from the judiciary, the academic field and civil society, etc., will be contacted for the purposes of further promoting awareness of the Convention. In addition, the Ministry of Finance has engaged in some dialogue with companies particularly in the context of Working Group reviews of Chile.

20. A second area of activity is an explanatory brochure on the Convention elaborated by the MFA with the participation of GNECC, together with instructions for it to be distributed among all Chilean representations abroad. Because of this specific focus, the brochure and instruction are discussed and commented on below in the section on Chilean diplomatic and commercial representations abroad.

21. Third, the Chilean authorities organised an anti-corruption event in September 2006 in conjunction with the OECD and with the cooperation of the Inter-American Development Bank, the Organization of American States and the UN Office against Drugs and Crime. The event was attended by representatives of 17 countries from the Americas and Europe, six international agencies and 47 national institutions from the public and private sectors and civil society. The event included two parts: (1) a conference on the detection, investigation and prosecution of bribery with a wide range of participants from the public and private sector of Chile and other countries of Latin America and Central America, including Working Group members from the region; and (2) a technical meeting on international cooperation in investigating and prosecuting bribery offenses, aimed at officials in charge of investigations and prosecutions of bribery cases in Latin and Central American countries.

22. The examining team recognises these important measures, but they consider that significant additional efforts are required. At the on-site visit, a wide range of panelists underlined that the degree of awareness of the fight against foreign bribery is very low. The examining team noted that the opening panel presentations by Chilean officials from a wide range of agencies focused practically exclusively on issues relating to the fight against domestic bribery. Moreover, as discussed below, the fight against foreign bribery often appears to be understood to be primarily about fighting the bribery of Chilean officials by foreign companies rather than a fight against bribery by Chilean companies abroad. Few awareness raising activities to date have been targeted at the private sector.

Commentary:

The lead examiners consider that the fight against foreign bribery in Chile is hampered by a very low degree of awareness about the offence and its application. They recognise the recent initiatives by the Chilean authorities to improve awareness of the Convention and Chilean law on foreign bribery, but they consider that Chile should do significantly more in this regard.

The lead examiners recommend that Chile take measures, including appropriate training, to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that interact with Chilean companies that are active in foreign markets.

They also recommend that Chile take measures targeted at the business sector to improve awareness about foreign bribery and that it seek to involve business organisations in these efforts. The examiners recommend in particular that the authorities work with the business sector to develop standards for organisational and staff-related measures to be taken by companies to prevent foreign bribery. The lead examiners also recommend that Chile should consider producing a modified and more practically-oriented version of the MFA explanatory brochure to explain the foreign bribery and related offences to other relevant constituencies, including business.

The lead examiners consider that awareness raising efforts would benefit from continued and reinforced cooperation between government ministries and agencies responsible for legal and economic affairs. They encourage the authorities to consider maintaining and or formalising the GNECC as an oversight and coordinating body for effective implementation of the foreign bribery offence in Chile, including awareness raising activities for the public and private sector.

b) Private sector initiatives to raise awareness

(i) Business organisations and companies

23. Some large Chilean corporations have issued codes of ethics and other corporate social responsibility policies. One company owned by a US parent had relatively extensive and specific policies. However, for those not subject to foreign law, the codes of ethics do not generally address foreign bribery specifically. A number of other sizable companies do not have codes of ethics. Companies do not appear to use anti-corruption clauses frequently in their contracts with agents. Limited actions appear to have been taken by companies to encourage whistleblowers; one company suggested that there was no need for a company policy because whistleblowers are protected under the law (which is not the case according to the Chilean authorities). Some banks have introduced hotlines, but they appear to be rare outside the financial sector.

24. Although generally few preventive or awareness-raising measures have been taken by companies, the examiners noted that companies at the on-site visit demonstrated concern about foreign bribery risks and that some have taken concrete action in this respect. For example, one company recognised that it did not have an ethics code, but indicated that it had decided not to enter or to withdraw from certain foreign markets because of the perceived risk of corruption.

25. Business organisations in Chile have not undertaken any awareness raising or training activities on foreign bribery. Nor has any initiative been taken to target small and medium sized enterprises (SMEs) in this respect. The business organisations represented at the on-site visit did not have any experience with advising companies about how to fight foreign bribery.

26. Professions that work directly with companies can also be key players in raising awareness and preventing bribery. However, lawyers at the on-site visit indicated that Chilean clients have not asked them for advice on foreign bribery issues to date. The Bar has not produced any specific training materials relating to foreign bribery.⁸

27. The lead examiners consider that the prompt introduction in Chile of liability and sanctions for legal persons that engage in foreign bribery, recommended below in this report, would offer an excellent opportunity to prevent foreign bribery by improving awareness of the offence in Chilean companies and related professions.

(ii) Civil society and trade unions

28. Chile has a small but active chapter of Transparency International, which follows corruption issues both in Chile and in Latin America, but few other nongovernmental organisations (NGOs) appear to take an interest in foreign bribery issues. The press regularly reports on domestic corruption issues. However, a number of panellists underlined that the press focuses primarily on passive bribery and much less on active corruption by private companies; bribery tends to be portrayed as exclusively a public sector problem. A public sector trade union representative who attended the on-site visit underlined that a low level of awareness was a key problem in the fight against foreign bribery.

⁸ Accountants and auditors are addressed in a separate section below.

Commentary:

The lead examiners consider that the low level of awareness in the private sector about the problem of foreign bribery constitutes a significant hurdle to effective implementation of the Convention in Chile. They recommend that the Chilean authorities provide support for private sector initiatives such as seminars, conferences and technical assistance targeted at the business sector and their advisers such as lawyers on foreign bribery issues. In addition, the Chilean authorities should seek to encourage business and other relevant organisations to engage in awareness-raising and to assist companies in engaging in preventive efforts.

2. Detection: Reporting and Whistleblowing

29. This section of the report reviews the applicable rules and practice with regard to the detection and reporting, by personnel in key sectors of the Chilean public service and the public at large, of suspicions of foreign bribery. It also addresses whistleblowing and the protection of whistleblowers.

a) Reporting of suspicions of crimes

30. Public officials are subject to reporting obligations contained in particular in the CPC and a law governing the public administration. Pursuant to article 175 CPC, civil servants are required to report any crimes of which they become aware in the course of their duties. Article 55 of Law N° 18,834 on the Administrative Statute Establishing the Obligations of Public Officials (the "Administrative Statute") provides for a similar obligation. According to the Chilean authorities, obligations of secrecy or discretion are not an excuse for not reporting an offence. However, they have not provided supporting case law or regulation.

31. Sanctions for non-reporting are provided for in the CPC. Pursuant to article 177 CPC and article 494 of the PC, failure to report offences is punishable by a fine between one and four monthly taxation units (*unidades tributarias mensuales*, UTM) [USD 64 to 256], which is low.⁹ The Chilean authorities have indicated that a public official who fails to report a crime of which he becomes aware because of his functions could be subject to administrative responsibility and disciplinary measures under art. 119 of Law 18,834. However, no examples of its application have been supplied.

32. Public officials met during the on-site visit were generally aware of their obligation to report suspicions of crimes. However, while considerable attention has been focused on efforts to detect and report suspicions of domestic passive bribery in many Ministries and agencies, little if any attention is paid to the detection and reporting of suspicions of foreign bribery.

33. For the general public, the CPC expressly provides any person with the right to disclose information on suspicions of offences to the Public Prosecutor's Office.¹⁰ The regional Prosecutor's Offices have call centres, where reports can be made and information can be obtained on criminal offences. No information on foreign bribery has yet been requested or received through this channel. In practice, the law enforcement authorities very rarely receive information on suspicions of active bribery, but Chile indicates that such information has given rise to important domestic bribery cases.

⁹ As of September 2007, the value of the UTM was fixed at 33,382 pesos [USD 64].

¹⁰ See article 173 CPC. Reports of such actions may also be filed with Carabineros, the PICH, or with any criminal law court, all of which should immediately forward such reports to the prosecutor.

34. Civil society representatives indicated that reporting to the press was not an effective alternative. They noted that mass media in Chile are highly concentrated and close to major business interests, and they considered that they would therefore be reluctant to publish suspicions about Chilean companies. They also noted that journalists would be more interested in corruption in Chile than in foreign cases. A similar concern exists concerning the public at large: lack of awareness about the foreign bribery offence would make reports very rare.

35. In light of the absence of foreign bribery cases, the examining team asked how domestic cases of active bribery are typically detected as a practical matter. The law enforcement authorities said that reports of most cases originate from agencies with oversight powers, and secondarily from the public officials to whom a bribe has been offered. Reporting by employees of companies involved in bribery is unusual, as is disclosure by the press. Most reports by the public concern alleged solicitation of bribes by public officials.

Commentary:

The lead examiners welcome the existence of a general duty for public officials to report suspicions of crimes to public prosecutors. However, they note that to date there have not been any reports by public officials to prosecutors of suspicions of foreign bribery. The lead examiners are also concerned that the detection and reporting of suspicions of domestic active bribery to the prosecutorial authorities by public officials remains in practice infrequent. The general lack of awareness about the foreign bribery offence, discussed above, also weakens the effectiveness of the reporting system. The lead examiners recommend that the Chilean authorities take steps to improve and facilitate the reporting in practice of suspicions of bribery.

b) Whistleblowing and whistleblower protection

36. At the time of the on-site visit, there were no safeguards in Chilean law to protect whistleblowers (employees who come forward and report offences within their enterprise or administration) against retaliation.

37. A recently adopted law now addresses the protection of government employees who report irregularities or breaches of the principle of probity.¹¹ This law will have limited impact on the reporting of foreign bribery because it focuses on the protection of people who report the lack of probity of Chilean officials. In addition, it does not apply to employees of state-owned and state-controlled companies. A representative of the Office of the Presidency of the Republic (*Ministerio Secretaría General de Gobierno*), the agency that developed the law, nevertheless indicated that the extension of the law to state companies is envisaged, without giving further details at this stage.¹²

38. The government has no plans to introduce similar protection for private sector employees.¹³ In the absence of representatives of trade-unions at the on-site visit, the examining team was not in a position

¹¹ See Law No 20.205 of 24 July 2007, named “Protection to the public official who denounces irregularities and faults to the probity principle” (*Protege al funcionario que denuncia irregularidades y faltas al principio de probidad*).

¹² State-owned companies are subject to the same labour code as private companies.

¹³ A member of Parliament has presented a bill introducing the protection of whistleblowers in the private sector, but the Chilean authorities were not able to indicate the probability of adoption of this proposal.

to evaluate whether the absence of whistleblower protection in the private sector has an impact in practice on the low level of reporting by employees. The representatives of the law enforcement agencies indicated that employees were rarely a source of information, probably out of fear of retaliation. Instead, prosecutors receive information from managers on offences committed by employees to the detriment of the company.

39. Some Chilean authorities indicated that only a few Chilean companies had introduced whistleblowing safeguards in their codes of conduct. From the companies met during the on-site visit, two presented their code of conduct, which contained a chapter on internal reporting. But these codes did not address expressly the issue of bribery of foreign public officials, which undermines the potential of receiving whistleblower reports about suspicions relating to that offence.

Commentary:

The lead examiners note the recent law establishing whistleblower protection in the public sector for persons who report suspicions of domestic bribery. They encourage the Chilean authorities to expand it to state companies. They also recommend that Chile enhance and promote the protection of private and public sector employees who report in good faith suspicions of foreign bribery, in order to encourage them to report such suspicions without fear of retaliation.

3. Officially Supported Export Credits

40. Public agencies that promote or support foreign trade and investments abroad are well situated to advise companies about the law on foreign bribery and how to address bribery risks. In Chile, the Economic Development Agency (*Corporación de Fomento de la Producción*, CORFO) is a state agency that provides loans and guarantees to financial institutions that finance exports by Chilean companies.

41. CORFO is not a member of the OECD Export Credit Group. Although the 2006 OECD Recommendation on Bribery and Officially Supported Credits (the "2006 Recommendation") expressly invites Parties to the OECD Anti-Bribery Convention to adhere to the 2006 Recommendation (art. 3), Chile has not taken any steps towards adhesion. Moreover, current practices in Chile do not comply with the 2006 Recommendation. No measures have been adopted to deter bribery in officially supported export credits, such as for example providing information on the offence to potential exporters, requesting or requiring applicants to declare that they have not and will not engage in bribery, or taking action if involvement in bribery is suspected or proved. CORFO does not require financial institutions to obtain anti-bribery declarations from their clients before providing support.

42. After the on-site visit, Chile indicated that CORFO, through an Official Letter (No. 688/2007) issued by its Vice-President, has committed to an important series of anti-bribery measures: developing seminars and other materials to raise awareness among CORFO's clients, who are financial intermediaries, about the offence of foreign bribery and how to confront the risks of bribery; requiring financial intermediary clients to inform their clients, the potential exporters, about the crime of foreign bribery so that preventive measures are adopted; and training personnel and recommending to intermediaries measures to prevent bribery, with express mention of the applicable sanctions if bribery is proved. The Official Letter also expresses CORFO's support for Chile adhering to the 2006 Recommendation. The examining team welcomes these commitments and urges Chile to implement them.

Commentary:

The lead examiners recommend that CORFO take measures to raise awareness of the foreign bribery offence among staff and clients, adopt preventive measures including due diligence requirements, and, when bribery is proven, apply sanctions in line with those provided for in the 2006 Recommendation. The lead examiners further encourage Chile to adhere to the 2006 Recommendation as soon as possible. In this regard, the examiners welcome the recent commitment by CORFO to engage in significant awareness and preventive efforts, and its interest in Chile participating more actively in export credit-related activities at the OECD.

4. Official Development Assistance

43. The AGCI is a state agency primarily dedicated to the management of the aid received by Chile. In recent years, however, the AGCI has begun providing modest assistance¹⁴ to Latin American and Caribbean countries through three channels: (1) a programme of regional and bilateral technical cooperation between developing countries;¹⁵ (2) grants to scholars; and (3) triangular assistance programmes by which Chile and another industrialised country (mainly Japan) provide assistance to a less developed country.

44. The main format for Chilean aid is the organisation of conferences and events directly managed by Chilean embassies, international organisations or non-governmental organisations. Chilean companies do not participate in the aid programmes as contractors or subcontractors. The Chilean authorities agreed that should their technical cooperation programmes develop and financial assistance be considered, they would in parallel develop awareness raising activities on bribery of foreign public officials, as well as measures of detection and reporting of suspected foreign bribery.

5. Chilean Diplomatic and Commercial Representations Abroad

45. Chilean diplomatic and commercial missions abroad have an important role to play in enhancing the awareness of companies that seek advice when considering investing or exporting abroad. They can also be a source of support to enterprises faced with solicitation of bribes, when tendering for international contracts, for example. They can additionally play a role in detecting and reporting suspicions of foreign bribery by Chilean companies. PROCHILE is part of the General Directorate of Economic International Relations at the MFA. It is primarily an export promotion agency.

a) Awareness-raising efforts

46. MFA officials, including officials from PROCHILE, participated in a workshop organised in 2006 by the GNECC (see above section on awareness). In addition, to reach a greater range of officials, an explanatory brochure on the Convention was prepared in December 2006. The brochure clearly describes

¹⁴ Bilateral technical assistance in 2005 totalled USD 1 100 000 (CLP 595 760 000). Triangular technical assistance in 2005 amounted to USD 646 000. See <http://www.agci.cl/estadisticasH.htm>.

¹⁵ The cooperation aims to develop the modernisation of the State, decentralisation and regional development, management of natural resources and environment, development of production, and social, scientific and cultural development.

the main provisions of the Convention and of the Chilean implementing laws.¹⁶ It has been distributed to all Chilean diplomatic representations abroad and posted on the MFA website. However, at the time of the on-site visit, it had not been disseminated to PROCHILE's commercial offices, even though they are the main interlocutor of Chilean companies exporting abroad. After the on-site visit, PROCHILE indicated that it will implement training, awareness and prevention measures for its officials. PROCHILE also committed to disseminate the explanatory brochure of foreign bribery to its officials abroad and to adopt the necessary measures to inform Chilean companies of the role that they should play in the prevention of foreign bribery. It will also consider including anti-bribery clauses in its contracts with private entities.

47. While the explanatory brochure is a useful tool, additional awareness raising is required to ensure that the goals of the Convention are well understood. For example, a December 2006 instruction to officials which accompanied the brochure unfortunately appears to be misleading about the principal purpose of the Convention with regard to Chile. The instruction focuses essentially on the bribery of Chilean officials by foreigners; it requests officials to distribute the brochure to "the public in general, and specifically to the persons interested in doing business with our country". The examining team notes that the obligations of Chile under the Convention principally relate to the new offence of bribery of foreign officials by Chilean companies; bribery of Chilean officials by foreigners has long been prohibited by the Penal Code.

b) *Detection and reporting of foreign bribery*

48. The December 2006 instruction to MFA officials also raises issues with regard to the reporting of suspicions. First, as noted above, it focuses on reporting of suspicions of bribery of Chilean officials: it requests all MFA officials to collect and forward information or press reports on "cases of corruption which seem to involve companies or individuals, nationals or foreigners, who do business with Chile".

49. Second, the instruction requests MFA officials to report suspicions internally to an MFA office (the Directorate for Special Policies) rather than to a prosecutor as required under the CPC. The Directorate would then check whether the suspicion is well-grounded and ensure that no false accusations are reported to prosecutors. At this stage no criteria or parameters have been developed on how to handle reports at the Directorate. The representative of the Directorate explained that the rationale for inserting a filter between officials and the prosecutor is that diplomats are not lawyers and may misinterpret the legal provisions. He added that the Ministry preferred to be prudent, especially when the honour of Chilean companies is involved. In addition, the instruction also reflects a more general policy requiring staff abroad to report all important information learned in the course of their duties to the Ministry.

50. The lead examiners are not convinced that the intermediation of the Directorate is necessary with regard to suspicions of foreign bribery. It is noteworthy that art. 176 CPC, which applies to all MFA officials including those at PROCHILE, expressly requires public officials to report suspicions of offences to prosecutors within 24 hours of discovery; it does not refer to internal reporting within a Ministry or agency. In addition, there were no concerns expressed during the on-site visit about any serious risk of prosecutors opening formal investigations based on groundless rumours spread abroad. The examining team also considers that the addition of intermediate steps between the person who learns of the suspicion and the prosecutor who can act upon it increases the risk that factors set forth in Article 5 of the Convention could be considered when deciding whether to report a suspicion. In sum, the examining team recognises the policy reasons for reports by MFA officials to the Ministry, but considers that such internal reports should accompany rather than replace the immediate direct report to prosecutors required by art. 176 CPC.

¹⁶ The brochure, distribution instructions and a link to the OECD website (to access the Convention) are available on the MFA website. See <http://www.minrel.gov.cl/webMinRel/home.do?sitio=1>.

51. In practice, so far, Chilean representations abroad have not detected any suspicions of bribery of foreign public officials by Chilean companies. In the only potential Chilean case of foreign bribery known to date, the prosecutors discovered the case directly through foreign media and not via Chilean officials in the foreign country.

Commentary:

Given the important role that foreign diplomatic and commercial representations can play in interacting with Chilean companies operating abroad, both in terms of awareness raising as well as reporting of suspicions of foreign bribery, the lead examiners welcome the initiative of the Ministry of Foreign Affairs to disseminate a brochure on the Convention to its agents. They strongly encourage the Chilean authorities to disseminate the brochure to all Chilean commercial representations that work with Chilean companies active abroad and welcome PROCHILE's recent commitment in this regard.

The lead examiners are concerned by a practically exclusive focus on foreign companies bribing officials in Chile. They consider that significant efforts are needed to ensure that the focus on Chilean companies bribing abroad is well understood. These efforts should include the prompt circulation of a modified instruction. In addition, the lead examiners consider that the instruction and other relevant materials should remind MFA employees and agents of their express duty to report suspicions directly to Chilean prosecutors under art. 176 CPC and inform them of the prohibition on considering the factors identified in Article 5 of the Convention.

Given the important role played by PROCHILE in promoting foreign trade and advising Chilean companies active in foreign markets, the lead examiners welcome its commitment to raise awareness among Chilean companies about the fight against foreign bribery; in this regard, the examiners recommend that PROCHILE take appropriate measures to improve its ability to provide advice and assistance to Chilean companies active abroad.

6. The Tax Authorities

52. The tax authorities can effectively contribute to the prevention of foreign bribery if they prohibit the deductibility of bribe payments and sufficiently publicise this prohibition. They can also be an important source of information about foreign bribery, leading to the opening of tax and criminal investigations, if they have a clear duty to report suspicions of foreign bribery to the law enforcement authorities and implement this duty in practice.

a) Denial of tax deductibility of foreign bribes and enforcement

53. Taxation of both natural and legal persons is governed by the Decree-Law No. 824 on Income Tax (“Income Tax Law”). As noted in Phase 1, the Income Tax Law does not expressly prohibit the deduction of bribe payments made to foreign public officials. Article 31 of the law allows the deductibility of “expenses necessary to generate income”. It further provides for a list of various types of deductible expenses, including compensation for services rendered, expenses incurred in introducing new goods into the market, hospitality expenses and certain donations. In Phase 1, the Working Group expressed concern about the lack of an explicit prohibition on deductibility. Chile has indicated that it considers that as a general matter, expenses relating to illegal actions cannot be deducted.

54. After Phase 1, the Director of the Internal Revenue Service (*Servicio de Impuestos internos*, SII) issued an internal instruction (*oficio*) interpreting article 31 in 2005.¹⁷ While it provides clearly for non-deductibility of bribe payments, it is unclear how widely the instruction has been publicized. Unlike circulars, which are published on the SII website, the instruction takes the form of an internal message from the Director of the SII to the Undersecretary of the Ministry of Finance and is not on the SII website.¹⁸ Tax officials indicated that it is published internally in the SII both electronically and in paper format. With regard to the legal effect of the instruction, tax officials recognised that the SII cannot prohibit something that the law allows. However, they indicated that the Director of the SII has a statutory power to interpret the tax laws.

55. After the on-site visit, the SII indicated that in the exercise of its competence it will issue a circular with a text similar to that of the internal instruction. As Chile notes, circulars are published in the Official Gazette and on the SII website so the information will be widely and permanently available for SII officials and for taxpayers. The examining team welcomes this initiative.

56. Chile has not provided any cases of bribes being reintegrated into income. With regard to one case of alleged foreign bribery prior to the entry into force of the foreign bribery offence, the Chilean authorities indicated that “given that [the] enterprise acted in [the foreign country] through a subsidiary, in the event the payment was deducted in the determination of profits, the [SII] would not have faculties to check the movements of the subsidiary, or to object the expenses thus deducted”. The examining team considers that enforcement tools should include requests to Chilean parent companies with regard to the tax treatment given to bribes by their foreign subsidiaries, particularly if the group reports using consolidated accounts.

b) Awareness and training

57. Tax officials indicated that there has not been any specific training with regard to the detection of foreign bribery, although representatives of the SII participated in the MFA-GNECC workshop on the Convention (see above). The above-mentioned internal instruction from the Director of the SII on the issue of non-tax deductibility cites the OECD Convention and clearly instructs tax inspectors not to allow foreign bribes to be deducted. The examining team recognises that the instruction constituted an important step in improving the awareness of tax officials about foreign bribery and non-deductibility of bribe payments to foreign officials; the forthcoming SII circular on non-deductibility (see above) will further assist in raising awareness. At the time of the on-site visit, the OECD Bribery Awareness Handbook for Tax Examiners had not been distributed or adapted for use in Chile; since then, the Chilean authorities have indicated that the SII will include references to the OECD Handbook in the training of new employees and will distribute it to all employees using the SII intranet service.

c) Reporting of suspicions of foreign bribery by tax inspectors and detection

58. The CPC and Administrative Statute rules requiring the reporting of crimes or misdemeanours to law enforcement authorities apply to tax officials as well as all other public officials. The reporting obligation applies notwithstanding any confidentiality obligations for tax officials. Like other public officials, tax officials were generally aware of their legal duty to report and panellists stated that they

¹⁷ See Oficio Ord. No. 4087 of 19 October 2005.

¹⁸ The SII website has a section entitled Circulars and Legislation, but it does not include *oficios*. Nor does there appear to be a collection of *oficios* available online. A website search for the *oficio* using its number was unsuccessful.

would report suspicions of non-tax offences such as bribery to prosecutors. However, no statistics are available in this area. No suspicions of foreign or domestic bribery have been reported by tax inspectors to date.

59. With regard to the international exchange of tax information, tax officials indicated that they would seek to use tax treaties to obtain information from the relevant foreign country if they suspected foreign bribery. Generally, Chile's international tax treaties do not allow the use of tax information received by a Contracting State for non-tax purposes. Chile has not yet included or sought to include in its tax treaties language similar to the proposed optional additional wording suggested in the Commentary to art. 26 of the OECD Model Tax Convention, which allows the use of information received by a Contracting State for non-tax purposes including in particular in corruption-related investigations.¹⁹

60. Overall, panellists indicated that the tax office is generally an effective agency and is considered a leader in the region. It has an effective system for cross-checking information and is generally considered to have the resources and staff to conduct its work. Tax inspectors indicated, however, that bank secrecy rules can limit the effectiveness of tax compliance work by blocking access to important bank documents.

Commentary:

The examiners welcome the administrative clarification since Phase 1 that bribes are not deductible under article 31 of the Income Tax Law. However, they note that this clarification currently takes the form of an internal instruction from the SII to an official in the Ministry of Finance and appears to be subject to limited public distribution. Because of the importance of a wide range of companies and others having a clear understanding about the rules prohibiting the deductibility of bribes to foreign public officials, the examiners welcome the decision of the SII to strengthen the explicit nature of the prohibition in a generally applicable, public and binding circular. The examiners also welcome the decision of the SII to make the OECD Bribery Awareness Handbook for Tax Examiners available to tax inspectors and to use it for training purposes. The examiners recommend that Chile actively publicise the tax rule on non-deductibility in conjunction with awareness-raising relating to the fight against foreign bribery.

7. Accounting and Auditing

61. The Chilean Accountants Association (*Colegio de Contadores de Chile* or CCCh), a voluntary organization, is the body responsible in Chile for the development and issuance of generally accepted accounting principles (GAAP) and auditing standards (GAAS).²⁰ In addition, the stockmarket regulator (*Superintendencia de Valores y Seguros* or SVS) as well as banking and pension fund regulators, have some accounting standard-setting powers and regulatory authority over the accounting profession.

¹⁹ Paragraph 12.3 of the Commentary to art. 26 of the OECD Model Tax Convention, as amended in 2006, states that "Contracting States may wish to allow the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (e.g., to combat money laundering, corruption, terrorism financing). Contracting States wishing to broaden the purposes for which they may use information exchanged under this Article may do so by adding the following text to the end of paragraph 2: 'Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.'"

²⁰ See Law 13,011 of 1958.

a) Awareness and training

62. Accountants and auditors can play a vital role in detecting and reporting suspect payments in a company's records and accounts, and alerting management, corporate monitoring bodies and/or outside authorities so that appropriate preventive or punitive action can be taken. However, this role can only be effective if, among other things, accountants and auditors are aware that foreign bribery is prohibited and subject to criminal prosecution. Panellists at the on-site visit indicated that with regard to foreign bribery issues there has not been any specific awareness raising or training of accountants and auditors in Chile by either the profession or the government.

b) Detection and reporting obligations of external auditors

63. Because foreign bribe payments cannot generally be disclosed as such in accounts, the review of accounting practices by accountants and auditors can play an important role in detecting foreign bribery. The rules and practices with regard to the reporting by auditors of suspicions of foreign bribery are also a key factor in the fight against bribery.

64. With regard to detection, important standards relating to auditors' role with regard to detecting fraud have been developed by the auditing profession, such as International Standards of Auditing (ISA) 240 or the US Statement on Auditing Standards (SAS) 99 (Consideration of Fraud in a Financial Statement Audit). These standards generally require the auditor to direct more focused efforts on areas where there is a risk of material misstatement of financial statements due to fraud, including management fraud. Auditors are required to design and perform audit procedures responsive to the identified risks of material misstatement due to fraud, including procedures to address the risk of management override of controls.

65. Certain panellists at the on-site visit stated that auditors currently have no responsibility to detect fraud in Chile; the detection of fraud is solely up to the management of the company. However, the CCCh is currently drafting a new standard in this area based on SAS 99 which is expected to be ready by the end of 2007; if effectively implemented, it should improve the role of auditors with regard to the detection of foreign bribery at least where the amounts at issue are material to the financial statements of the company.

66. With regard to the reporting of suspicions of foreign bribery detected by auditors, the Revised Recommendation contains provisions on both internal reporting (to management and corporate oversight bodies) and external reporting (to competent authorities including law enforcement agencies). [See Arts. V. B. iii) and iv) of the Revised Recommendation]. Article 59 of the *Reglamento de Sociedades Anónimas* (Company Regulations, RSA) addresses external reporting: it requires auditors to report crimes (*delitos*) and irregularities or anomalies that in their judgment may exist in the administration or accounts of the company to competent judicial and administrative authorities. It also makes clear that this obligation overrides duties of confidentiality with regard to information obtained as a result of the audit function. However, it is not clear how effective this rule is in practice particularly because it does not appear to be reflected in key audit standards.

67. For example, the currently existing auditing standard in GAAS 59 with regard to "illegal acts" by companies appears to conflict with the specific terms of art. 59 RSA. [See Chilean GAAS 59, Section 317 "Illegal Acts by Clients", para. 23] The GAAS makes no reference to the RSA obligation or to any other auditor obligation to disclose illegal acts to competent judicial and administrative authorities. It refers instead to disclosure to outside agencies "normally not being the responsibility of the auditor" and being generally precluded by confidentiality obligations. The draft text adopting SAS 99 (§ 82) contains similar text and does not refer to the obligations established by art. 59 RSA. Given their practical importance, the examiners consider that auditing standards on fraud or illegal acts should make specific reference to auditor reporting obligations established by law.

68. Following the on-site visit, the SVS indicated that it will request periodical information from auditors of registered companies with regard to the application of art. 59 RSA. More specifically, the SVS will issue an administrative rule requiring external auditors to declare on an annual basis about whether they had knowledge of irregularities in the administration or accounting of the audited enterprises and about compliance with art. 59 RSA. The examining team welcomes this initiative which should significantly improve the enforcement of art. 59 RSA with regard to registered companies.

69. With regard to internal reporting, GAAS 59 on illegal acts contains standards with regard to the reporting by auditors of illegal acts to management and audit committees. However, it is not clear that the rules fully satisfy the requirements of paragraph V.B.(iv) of the Revised Recommendation because (1) it is not clear that the reporting of all suspicions of foreign bribery is required; and (2) an effect on the financial statements may be required.

Commentary:

The examiners recommend that the Chilean authorities take steps to improve the detection of foreign bribery by accountants and auditors, including taking measures to increase awareness of those professions about the status of foreign bribery as a predicate offence for money laundering and about their role in the fight against bribery.

The examiners further recommend that Chile take all necessary measures to ensure that auditors of companies are required to report all suspicions of foreign bribery by employees or agents of the company to management and, as appropriate, to corporate monitoring bodies, without requiring any degree of expected impact on the financial statements as a condition to the reporting obligation.

The examiners also recommend that Chile take steps to improve the effectiveness of auditors' reporting obligations to competent authorities as established in art. 59 RSA. In this regard, the examiners welcome the SVS' commitment to strengthen significantly the enforcement of art. 59 RSA with regard to auditors of registered companies. The examiners recommend that the Chilean authorities take appropriate action to help ensure that existing legal requirements are highlighted in all relevant auditing standards.

8. Money Laundering Reporting

70. Chile introduced a system of prevention and detection of money laundering within financial institutions in Law No. 19,913 adopted in December 2003. The law amended several provisions on money laundering, established a Financial Intelligence Unit (*Unidad de Análisis Financiero*, UAF) and set forth reporting obligations for banks and other financial institutions concerning suspected money laundering activities.²¹ The UAF is a decentralised public service related to the Ministry of Finance.

a) Suspicious transaction reporting

71. Law No. 19,913 created the obligation for financial institutions and other reporting entities to report to the UAF any suspicious operation they notice when carrying out their activities, as well as all

²¹ This law was subsequently amended by Law No. 20,119 of 31 August 2006 to respond to concerns raised by the Constitutional Tribunal.

transactions above 450 units of account (*unidades de fomento*, UF) (approx. USD 16 350).²² While a wide range of individuals and entities are obliged to report suspicious operations under the law, accountants and lawyers are not yet covered by the law, a gap which the Chilean authorities have not explained.

72. The UAF analyses the suspicious transaction reports (STRs) sent by reporting institutions and can request further information from them. If the UAF considers that there are indications of money laundering, it will immediately inform the Public Prosecutor's Office, which may request the UAF to send all the background documents in its possession. The UAF can provide information to foreign counterparts based on reciprocity but only if the other country uses the information for the requested purpose.

73. Since its creation at the end of 2003, the UAF has received 400 STRs. At the time of the on-site visit, the Chilean authorities were not able to determine whether any of them relate to alleged foreign bribery.

b) *Sanctions for failure to report*

74. Sanctions for failure to report suspicious transactions or to respect other obligations of the law were introduced by Law N° 20,119 in 2006. Admonitions or fines may be imposed by the UAF itself pursuant to an administrative procedure. Depending on the obligation breached, the law distinguishes between serious, less serious and minor violations which carry different fines. The fine for not reporting a suspicious transaction or not answering a request by the UAF is punishable by a fine up to 5 000 UF [approx. USD 176 000]. So far, no sanction has been imposed.

c) *Typologies and guidelines*

75. The UAF is responsible for advising reporting entities about situations that are especially indicative of suspicious operations or transactions in their various fields of activity. The UAF has developed a series of training sessions for banks and other sectors, during which it focuses on the various possible predicate offences, including bribery of a foreign public official. The UAF has issued mandatory circulars for various reporting entities, which include information about "red flags" and about the Financial Action Task Force (FATF) definition of politically exposed persons (PEPs). A representative from a prominent bank indicated that foreign PEPs are already included in its manual and training procedures. Banking and financial sector representatives at the on-site visit generally described their relations with the UAF in positive terms. In addition to the UAF, the Securities and Insurance Superintendence (*Superintendencia de Valores y Seguros*, SVS) which regulates an important part of the financial sector, has issued circulars concerning the proper application of money laundering provisions, and supervises their enforcement.

22

As of 4 September 2007, the value of the UF was fixed at 18,999 pesos [USD 36.33].

Commentary:

The lead examiners welcome the recent introduction of money laundering reporting requirements in Chile. They recommend that Chile extend these requirements to appropriate non-financial entities including lawyers, accountants and auditors. They encourage the money laundering authorities to take further measures to ensure that relevant constituencies are made aware of the status of foreign bribery as a predicate offence and of the importance of paying due attention to foreign politically exposed persons. They also recommend that Chilean law enforcement authorities review existing and future suspicious transaction reports to determine if they raise suspicions of foreign bribery.

C. INVESTIGATION, PROSECUTION AND SANCTIONING OF FOREIGN BRIBERY AND RELATED OFFENCES

1. Investigation and Prosecution of Foreign Bribery

76. The law governing all the stages of the investigation and prosecution of foreign bribery is principally found in the CPC. As noted above, Chile went through a complete reform of its criminal procedure system in 2000-2005, with the adoption of a new CPC. This reform brought changes in the agencies involved in investigations and prosecution of bribery. Before the new code was adopted, Chile's criminal system was purely inquisitorial, with all powers concentrated in the hands of the criminal court judge: the same judge conducted the pre-trial investigation (through the police), conducted the trial and ruled on the case in the first instance. The reform and the new code introduced an adversarial system and the figure of the public prosecutor.

77. In addition to the CPC, the National Prosecutor can issue general instructions. Of particular importance in the discussion below is the National Prosecutor's Instruction 29 of January 2007 ("Instruction 29"), issued shortly before the on-site visit.

a) Agencies involved in the fight against domestic and foreign bribery

(i) General structure of the criminal courts and prosecution office

78. As part of CPC reform, newly created Guarantee Courts and Criminal Trial Courts have replaced the previous criminal courts. The Guarantee Courts are charged with deciding upon criminal procedure issues that involve the fundamental rights of persons involved in criminal procedures. They are staffed by Guarantee Judges. The Criminal Trial Courts hear cases of criminal offences, including bribery. Appeals are heard by Courts of Appeal with further review possible by the Supreme Court.

79. The new CPC has instituted the Public Prosecutor's Office (PPO) as the public agency in charge of investigating and prosecuting alleged criminal activities, including corruption and bribery of foreign public officials. The PPO is headed by the National Prosecutor. The selection process for the National Prosecutor involves the participation of the President, Senate and Supreme Court. A candidate for National Prosecutor is first selected by the President from a list of five possible candidates supplied by the Supreme Court. The President can only nominate the proposed candidate as National Prosecutor providing he/she is approved by a two-thirds majority vote in the Senate.

80. The PPO is hierarchically organised. There are 18 regional prosecutor's offices, including four for the Metropolitan region of Santiago, each with a regional prosecutor and deputy prosecutors who work under him/her.²³ The National Prosecutor can issue general instructions on categories of offences and has issued instructions on corruption issues (see below). However, the National Prosecutor is prohibited from sending instructions to prosecutors on particular cases (only regional prosecutors can intervene in individual cases).²⁴

(ii) *The Specialised Unit for offences by officials and public probity*

81. The National Prosecutor set up the Specialised Unit for Offences by Officials and Public Probity (the "Specialised Unit") in May 2003. This national multidisciplinary unit is composed of eight lawyers, accountants and financial analysts. It assists, counsels and trains prosecutors investigating cases of corruption.²⁵ In addition to the Specialised Unit, 57 of the 647 new Chilean deputy prosecutors are specialised in cases of corruption in the sense that such cases would generally be assigned to them although they are not exclusively assigned to such cases.

82. In 2006, the Specialised Unit organised workshops on the Convention for prosecutors in Santiago and several regions. The workshops presented the various provisions of the Convention and specifically detailed the elements of the offence and the possibilities for mutual legal assistance.

(iii) *Police and investigators*

83. The *Policía de Investigaciones de Chile* (PICH) and *Carabineros de Chile* are the only police forces in Chile.²⁶ Before the criminal procedure reform, the PICH and *Carabineros* had extensive powers because judges largely delegated investigations to them. They now assist the PPO and carry out investigative measures under the direction and responsibility of the prosecutor and provide him/her with their forensic expertise in investigations.

84. The police mainly investigate crimes and the *Carabineros* mainly seek to prevent crime, but both services could be involved in the investigation of foreign bribery. Both the PICH and *Carabineros* have units specialised in economic crimes. The seven persons composing the *Carabineros'* special unit have received training about foreign bribery. There has not been any specific foreign bribery training for the PICH.

(iv) *The State Defence Council*

85. The State Defence Council is an important agency in domestic bribery cases. However, it will rarely participate in foreign bribery cases under the new criminal procedure rules. Before the reform, the Council was in charge of the public accusation in all corruption cases, including in foreign bribery cases. In its written responses to questions before the on-site visit and in discussions at the on-site visit, the Chilean authorities indicated that the Council is now confined to the role of plaintiff in two types of cases: "those

23 With the recent creation of two new regions in Chile, there will soon be 18 regional offices.

24 See Article 17 of the Organic Constitutional Law on the Public Prosecutor's Office.

25 The Specialised Unit also liaises with other agencies such as the Comptroller General, the State Defence Council (see below) and the police. Another specialised unit is in charge of economic crime, money laundering and organised crime.

26 The *Carabineros* are regulated by the Ministry of National Defence.

that are liable to cause the State and any of its agencies an impairment of resources, or those which involve criminal offenses committed by government officials in office".²⁷ These characteristics would rarely exist in foreign bribery cases. Since the on-site visit, the Chilean authorities have indicated that they consider that the Council would be able to act in foreign bribery cases under the second part of art. 3(5) of its organic law (D.F.L. No.1), which gives it jurisdiction to act in bribery cases. The Council and the Specialised Unit regularly meet to solve problems that may arise in investigations. Support from an experienced institution such as the Council could be of significant assistance in foreign bribery cases.

b) Co-ordination among agencies, training and independence

86. Panellists uniformly recognised that communication and co-ordination were good between the PICH, *Carabineros*, prosecutors and the State Defence Council. The fundamental changes and new roles required under the reform of criminal procedure seem in general terms to be proceeding smoothly. In addition, because most large companies are located in Santiago, the investigations of foreign bribery will primarily take place in the capital, which should facilitate the co-ordination of the various authorities.

87. Prosecutors received training on the elements of the offence of foreign bribery from the Specialised Unit. However, no information was disseminated on the differentiated way to investigate domestic and foreign bribery.²⁸ Similarly, the workshop addressed the obligations of rendering mutual legal assistance (MLA) to other Parties to the Convention but did not encourage prosecutors to seek MLA when investigating foreign bribery. Therefore, any future investigation on foreign bribery entails that the Chilean authorities adopt a proactive detection methodology and perform information gathering, for instance, by reading the foreign press.

88. As discussed above, the forthcoming instruction by the National Prosecutor specifically dedicated to the Convention should reach a broad audience and should also raise the awareness of the prosecutorial and investigative authorities about the foreign bribery offence. It will complement an instruction issued in 2000 following Chile's ratification of the Inter-American Convention Against Corruption.²⁹

89. Panellists representing the law enforcement authorities expressed confidence in the independence of the PPO. They unanimously affirmed that political considerations would not influence the investigation and the prosecution of foreign bribery cases. They added that Article 5 of the Convention is legally binding and may not be ignored by the authorities conducting the investigation and prosecution.³⁰ In particular, the police representatives stated that they have never encountered political interference in their investigations; questioned about investigations of major economic interests, they noted that they had successfully investigated a prominent company in the financial market a few years ago.

27 Pursuant to Instruction 29, prosecutors are required to inform the Council within 10 business days of investigations concerning these cases. If the Council wishes to file a lawsuit, it has the same rights and obligations as any other plaintiff and does not benefit from any procedural privileges.

28 For instance, the police indicated that they usually start an investigation on alleged domestic bribery by contacting the agency for which the alleged corrupted official works. This would be more difficult with a foreign public official, especially when mutual legal assistance with the foreign country is difficult.

29 Instruction 188 of 21 November 2000 to inform prosecutors about the implications of the ratification on Chilean law.

30 Article 5 provides in relevant part that "[i]nvestigation 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."

Commentary:

The lead examiners strongly encourage the Chilean authorities to provide training to police forces on the foreign bribery offence as well as on the differences resulting from its foreign elements at the stages of detection and investigation. In this context, the lead examiners welcome the upcoming issuance of a new instruction specific to the Convention, and recommend that the Working Group follow up the question of awareness once the instruction is issued.

c) ***The conduct of investigations***

90. Criminal investigations are divided into two broad phases in Chile: (1) the "preliminary investigation" conducted by the prosecutor with the assistance of the PICH or *Carabineros*; and (2) the formalised investigation which commences once the prosecutor informs a person in the presence of the Guarantee Judge that he/she is being investigated for one or more offences. There have not yet been any investigations of foreign bribery by the Chilean authorities.

91. Prosecutors can open a preliminary investigation (1) upon receiving a report of a suspicion; (2) on their own initiative; or (3) upon a complaint filed by the victim. Although victims can thus file complaints, the notion of a "victim" in cases of active bribery is not clear. During Phase 1 the Chilean authorities declared that a competitor may qualify as a victim in a foreign bribery case where it is able to show that it is an "aggrieved" party. In addition, in the case of crimes affecting public probity, non-victims can file a complaint; it might be possible to argue that foreign bribery affects public probity. During the on-site visit, a Guarantee Judge declared that in his opinion, the competitor could not be considered as a victim in a criminal procedure because bribery causes abstract damage, although he/she would have good chance to obtain civil damages. However, the Guarantee Judges present during the visit considered that a competitor or civil society could use article 111 CPC which allows any person to consider him/herself as a victim of offences against public probity. As elsewhere, it is not clear that an offence committed by a private Chilean citizen that affects only foreign government officials would constitute an offence against public probity for this purpose. A prosecutor stated that the concept of victim is broad in the CPC, but noted that the decision would be for the Guarantee Judge. Even if the complaint is rejected, it would be reported to the PPO so that the injured competitor would be able to ensure that the case is brought.

92. Mandatory prosecution is the general rule in Chile so a prosecutor can decide not to initiate or to close an investigation only for reasons specified in the law. These include reasons such as the absence of evidence or lapse of the limitation period (at the preliminary investigation stage), or the application of a general defence or the *non bis in idem* principle (at the formal investigation stage).

93. However, although mandatory prosecution is the general rule, there are a number of exceptions. Under art. 170 CPC, discretionary decisions to close an investigation (or to not open an investigation) are possible for certain crimes. (The same rules apply under art. 170 to discretionary decisions to close or not to open a case in the first place.) Art. 170 is available in particular for crimes that do not seriously injure the public interest and carry a minimum penalty of less than 540 days. As discussed below in the section on sanctions, foreign bribery in Chile is subject to a low level of sanctions – it carries a minimum penalty of substantially less than 540 days -- and the offence accordingly potentially falls within the domain of art. 170.

94. Instruction 29 provides some guidance with regard to the rules governing the early closure of cases, including under art. 170 CPC, but it is difficult to interpret with regard to foreign bribery. The Instruction (at 5) contains a general statement that its criteria for opening and closing cases apply to "offences committed by public officials when exercising their duties and those that affect public property

and companies and entities in which the State participates or contributes” and includes a general list of offences of that nature. Foreign bribery is included in the general list of offences (but without any analysis of how it falls within the general category).

95. Chile has indicated that it considers that, although the text of Instruction 29 is focused solely on domestic bribery and does not effectively address the legally protected interest (*bien jurídico protegido*) of the foreign bribery offence, the inclusion of the foreign bribery offence in the list of offences precludes the exercise of discretion. However, the approach taken in Instruction 29 remains of concern. The provision referring to foreign bribery does not say that prosecutorial discretion is excluded; it merely states that the “criteria in the Instruction” apply to foreign bribery. It is true that the Instruction states that prosecutorial discretion is generally excluded for cases of corruption. Elsewhere in the Instruction, however, it is noted that the application of the law on issues such as prosecutorial discretion under art. 170 CPC may depend on a factual and legal analysis of the nature of participation of the public official³¹; it is unclear how this would apply in cases of foreign bribery. If it is intended to make the law depend on the exact nature of the actions of foreign officials under foreign law, it would require the analysis of foreign law, contrary to the Convention requirement that the foreign bribery offence be autonomous. (See Convention Art. 1; Commentary para. 3) Since the on-site visit, Chile has indicated that although it considers that Instruction 29 constitutes sufficient regulation, the National Prosecutor intends to address the foreign bribery offence more specifically, particularly with regard to the existence of any possible exceptions to the general rule of mandatory prosecution. The examiners welcome this commitment.

96. Under art. 170, a prosecutor seeking a discretionary closure of a case is required to provide a reasoned decision to the judge who will notify any victims or intervening parties. The judge can overrule the decision to terminate, but only on narrow technical grounds or if the victim objects. Victims and intervening parties can appeal discretionary decisions to close the investigation to higher authorities in the PPO who verify whether the decision is consistent with general policies and applicable norms.

97. Investigations can also be suspended, such as when a prosecutor is lacking evidence or cannot investigate further unless new evidence appears. Instruction 29 requires that the regional prosecutor approves any suspensions, and that minimal investigative steps -- such as witness hearings or an expert's appraisal of the accounting situation -- are performed before a decision to suspend is made.³²

98. The examining team considers that the rules governing the investigation and prosecution of foreign bribery, including with regard to the possible availability of discretionary prosecution and other alternatives to the general rule of mandatory prosecution, should be clarified. They welcome the decision of the National Prosecutor to issue an instruction that addresses prosecutorial policy and priorities based on analysis of the specific nature of the foreign bribery offence, including the fact that it does not necessarily involve Chilean public officials or the Chilean public purse.

31 See Instruction 29 at 6: “[Article 170 CPC] specifically prohibits the application of the principle of opportunity in the case of acts in which a public official has had any level of participation while exercising his duties. ... In this way, although the law does not exclude the application of the principle of opportunity for criminal acts in which public officials have participated, if their action takes place while not exercising their duties, it may be that the fact that they are public officials gives the act a connotation that seriously affects the public interest, or that by the mere penalty, the use of the authority conferred to the prosecutors in Article 170 [CPC] will not be in order.” The Instruction does not attempt to apply these principles to the specific nature of foreign bribery or to foreign officials.

32 Prosecutors can also suspend a formal investigation, with the authorisation of the Guarantee Judge, if the suspect is a fugitive, if a related civil action is pending, or because of the mental illness of the suspect.

99. As noted above, the formalised investigation commences once the prosecutor informs a person in the presence of the Guarantee Judge that he/she is being investigated for one or more offences. When the formalised investigation is complete, the prosecutor can formally accuse the suspect and ask for a hearing in front of the Guarantee Judge in order to prepare the trial. Additional alternatives to prosecution are generally available during or at the conclusion of the formalised investigation. First, prosecutors can propose the conditional discontinuance of the investigation to the Guarantee Judge (if the person investigated does not respect the conditions, the procedure restarts). Second, the suspect and the victim can agree on compensation of the victim unless the prosecutor considers that continuing the criminal procedure is in the public interest. Instruction 29 recommends that conditional discontinuance be used rarely and excludes compensation agreements for offences perpetrated by public officials or against probity.

100. In one case involving alleged bribery by an affiliate of a Chilean company in a foreign country, Chilean prosecutors have informally contacted prosecutors in the foreign country for information about the investigation, but have not yet received a reply.

Commentary:

The lead examiners welcome the intent of the Chilean authorities to clarify, in an instruction or other appropriate measure, the rules governing the investigation and prosecution of foreign bribery and in particular the rules governing any possible exceptions to the general rule of mandatory prosecution.

In general, considering the recent reform of criminal procedure in Chile and the absence of foreign bribery cases, the lead examiners recommend that the Working Group follow up the enforcement of the foreign bribery offence as it develops.

d) Investigative tools and techniques

101. As noted above, Chilean law enforcement authorities do not yet have much experience investigating foreign bribery. The only known allegations emerged shortly before the on-site visit and had not reached the stage of preliminary investigation at the time of the visit. Questioned on the kind of evidence the PICH would look for, their representative answered that they would clarify the commercial relationship between the briber and the foreign public official, request information from Interpol, interview witnesses, etc. The representatives of the PICH underlined that the major problems they face when investigating domestic bribery (and thus potentially foreign bribery) are obtaining bank information and mutual legal assistance (see below).

102. Basic investigative techniques available to prosecutors in bribery cases include search and seizure, hearing of witnesses in Chile, a Chilean consulate abroad or a foreign court, and the protection of witnesses. Prosecutors can also ask the Court of Appeal for access to various “secret” administrative documents. Special enhanced investigative techniques (undercover agents, informants, watched deliveries) are not available unless the main offence investigated relates to money laundering, drugs or terrorism.³³

33

Law No. 19,913 on money laundering and Law No. 20,000 on drug trafficking offences.

103. Investigations are generally secret during their informal phase, which can last indefinitely provided the suspect remains unaware of it. A suspect that learns of an investigation, however, can seek an order from a Guarantee Judge requiring the formalization of the investigation. Once the investigation is formalized, the investigative data can be known by all the participants unless the prosecutor orders secrecy, which he/she can do for a maximum of 40 days. The Chilean authorities have indicated that in investigations of this nature, there would normally be a long informal stage, so that when the investigation is formalized, there would be little risk to the investigation by reason of the disclosure of the case file.

104. The availability of wiretaps is not entirely clear because of the low sanctions for foreign bribery. Generally, wiretaps are available only for crimes and not for misdemeanours. Although the imprisonment sanctions for foreign bribery are at a misdemeanour level, the provision also includes a disqualification from public office. Chile has indicated that because this is the “main sanction”, wiretaps would be available in foreign bribery cases. The examining team notes that while the foreign bribery offence contains such a sanction, it is unlikely to be the main sanction in the normal case where the culprit is a private business or individual.

105. Investigative actions that might restrict or affect constitutional rights, such as wiretaps, must be authorised by a Guarantee Judge (article 9 CPC). A prosecutor indicated that it is easier to obtain an authorisation from a Guarantee Judge in cases involving alleged violent crimes than in economic crime cases. Because money laundering investigations are subject to special rules, they appear to be generally exempt from this general trend; a representative of the special money laundering unit confirmed that where needed the authorisation of the Guarantee Judge has been obtained in most money laundering cases.

106. Witness protection is organised by the Victims and Witness Support Division of the PPO and the corresponding regional units. Basic witness protection is available in cases of foreign bribery whereas enhanced protection is available in cases related to drugs, terrorism and money laundering. Moreover, while witnesses can in theory be protected in investigations of domestic and foreign bribery, prosecutors present at the on-site visit did not recall any case of domestic bribery where protection was sought or provided. Protection can be granted from the preliminary investigation until six months after the trial. The level of protection decreases as the criminal process advances: for example, the witness can obtain protection of his identity at the beginning of the investigation, but only for 40 days. The identity of the witness cannot be secret at the trial stage because the CPC requires all witnesses testifying in an oral hearing to state their name (article 307 CPC). The witness' place of residence can be kept secret. At the trial stage, protection must meet the additional criterion of “seriousness” of the situation.³⁴

107. “Substantial” co-operation of a suspect in the clarification of the facts subject to the investigation is a mitigating circumstance (article 11(9) CP). The PC does not specify what is meant by “substantial” co-operation. In contrast, a special law on drug-related offences specifies that the person must provide precise, true and verifiable information that allows the identification of the offenders, the clarification of the facts investigated or the prevention of the offence (article 22 of Law No 20.000). A prosecutor met during the on-site visit indicated that in practice the penalty can be mitigated only if the person confesses his/her participation in the offence before an investigation has started.

³⁴ According to the Chilean authorities, a “serious” situation requires that a grave threat or danger be proven. The court requires that the prosecutor provide concrete evidence that the measure is necessary. The regional unit procures equipment to protect victims and witnesses in an oral hearing, such as folding screens which prevent visual contact between the victim and the accused, closed television circuits which allow the victim and/or witness to testify in the adjoining room.

108. Because legal persons as such cannot be criminally liable, investigations do not focus on legal persons. The PICH and *Carabineros* would try to identify the natural person(s) responsible for the offence.

e) ***Bank secrecy***

109. Prosecutors and police authorities declared that bank secrecy is one of the main problems encountered in Chile when investigating alleged acts of bribery and economic crime. They anticipate similar problems in future investigations for foreign bribery.

110. Bank secrecy is subject to a series of apparently overlapping provisions. But it is clear that in foreign bribery cases, restrictions apply to the power of a Guarantee Judge to lift bank secrecy.

111. Article 154 of the General Banking Law distinguishes between bank secrecy and bank confidentiality. Bank secrecy covers a broad segment of the banking operations, such as deposits and placements of any nature kind performed by the banks, and this protection extends to the movements and balances of current accounts, savings accounts, time deposits and other forms of placement. The remaining banking operations are subject to confidentiality (see below).

112. Bank secrecy can be lifted by a Guarantee Judge in a foreign bribery case, but the law imposes restrictions. The General Banking Law authorises the prosecutor, with the approval of the Guarantee Judge, to examine or request the background related to "specific" operations that have been performed by a person formally accused and that have a "direct relationship" with the investigation. A second law, the Bank Current Accounts and Checks Law, also authorises only the disclosure of "determined financial items" of a current account, at the request of a prosecutor and with approval of the Guarantee Judge.

113. For some types of offences and situations -- but not for foreign bribery investigations – Guarantee Judges have the power to fully lift bank secrecy and order full disclosure of potentially relevant bank information. Bank secrecy can be fully lifted by the Guarantee Judge in domestic bribery cases and other cases involving investigations against public officials for offences committed in the discharge of their duties; there is no requirement that the requests relate to specific operations or have a direct relationship with the investigation. Recent legislation has given the UAF the power to obtain the complete lifting of bank secrecy from a judge where money laundering is suspected.

114. Since the on-site visit, the Chilean authorities have indicated that banking regulators (1) have for many years given a broad interpretation to the requirements of specificity and direct relationship; (2) have reminded banks that certain banking information such as the existence of an account is not subject to bank secrecy; and (3) have issued a circular urging banks to try to respond promptly where information is not considered secret under the law. However, they have not explained why the law specifically treats domestic bribery cases differently by eliminating the requirements of reference to specific or determined operations and of a direct relationship to the investigation. Given the repeated reference to bank secrecy as a major hurdle in economic crime investigations, the examining team considers that these restrictions should be eliminated.

115. In addition to or as a result of the legal limits on the lifting of bank secrecy in foreign bribery cases, there appear to be significant practical hurdles relating to obtaining bank information. Prosecutors repeatedly emphasised that bank secrecy constitutes in practice a major hurdle in economic crime investigations because of the evidentiary burden that must be met in order for a judge to lift bank secrecy (even partially). It can take several days or weeks for the Guarantee Judge to authorise the request of information because he/she requires a great deal of information before authorising the request and defining the scope of the "specific" information permitted to be disclosed. It can similarly take a significant period to obtain the information from the bank.

116. The distinction between bank secrecy and bank confidentiality also raises concerns. Banks may disclose the information associated with confidential transactions if a person establishes a legitimate interest provided that the bank considers that such disclosure has no negative impact on the customer's net worth. If the bank hesitates, as it may be likely to do in light of the potential liability and the uncertainty about the status of particular information as secret or confidential, the information can only be obtained with a judicial decision.

117. The special police unit dealing with money laundering offences confirmed that responses to information requests to banks can take one or two months especially when the bank is concerned about its customer relationship. On the contrary, the request is sometimes answered within a couple of days when a bank fully co-operates and does not require the intervention of the Guarantee Judge.

118. A bill currently before Congress, the Revised Bill on the Authorisation of the Lifting of Bank Secrecy in Money Laundering Investigations, Bulletin No. 4426-07 (the "Revised Bill") addresses bank secrecy, but only with regard to money laundering.³⁵ For money laundering cases, the Revised Bill (art. 4) would add a provision to art. 154 of the General Banking Law allowing prosecutors, with the approval of a Guarantee Judge, to obtain access to "any information available or copies of any deposits or other investments or credit transactions made by any person, community, entity or de facto partnership under investigation, to the extent that such transactions, at the discretion of the Public Prosecutor's Office, may be connected with, or contribute to ascertain, the perpetration of such offences". A similar provision would relax bank secrecy, but again only for money laundering, under the Bank Current Accounts and Checks Law. These provisions appear to give Guarantee Judges the same power to fully lift bank secrecy in criminal money laundering investigations that they currently have for administrative money laundering investigations by the UAF and for domestic bribery cases.

Commentary:

The lead examiners consider that access to financial information is of paramount importance for the effective investigation of foreign bribery offences. They are concerned that bank secrecy constitutes a significant barrier to effective investigation of foreign bribery by Chilean law enforcement agencies. They note that the Revised Bill addressing bank secrecy is currently before Congress, but that at present it only addresses the complete lifting of bank secrecy in criminal money laundering investigations.

The lead examiners are concerned in particular that the power of the Guarantee Judge to order access to bank information is significantly more restricted in foreign bribery cases than in domestic bribery cases and administrative money laundering investigations by the UAF. They recommend that Chile align the rules for foreign bribery investigations with those applicable in domestic bribery cases and money laundering investigations by the UAF in this area. In addition, they recommend that Chile take measures to ensure that financial institutions provide the required financial information promptly in appropriate cases.

More generally, the lead examiners encourage the Chilean authorities to consider aligning the treatment of the foreign bribery offence with the money laundering offence with regard to the investigative tools made potentially available to prosecutors in appropriate cases.

³⁵ As discussed below, the Revised Bill has been modified since the on-site visit to incorporate sanctions on legal persons for foreign bribery as well as for money laundering. However, the bank secrecy provisions continue at present to apply only to money laundering.

f) Mutual legal assistance (MLA) and extradition

(i) Mutual legal assistance

119. There have been significant improvements in MLA in Chile since Phase 1. The general CPC reform discussed above has had a significant impact on the MLA system. In addition, art. 20bis of the new CPC provides that foreign requests for MLA shall be handled by the PPO, which shall seek the intervention of a Guarantee Judge as necessary in the same manner as in domestic investigations. Prosecutors and others explained that in effect, this provision allows prosecutors to supply MLA directly in many cases; judicial intervention is only required in order to provide MLA where it would be required under domestic law, *i.e.*, principally where fundamental liberties are at stake. Prosecutors indicated that the procedures to obtain judicial authorisation for MLA are generally simple. Various panellists underlined that the ability of prosecutors to provide MLA directly has greatly simplified and accelerated MLA procedures in many cases.

120. A new MLA unit was created in the PPO in 2004 in order to carry out the new MLA role. It both conducts relations with foreign countries and provides advice to domestic prosecutors on MLA matters. The new unit is also now the central office for foreign countries seeking MLA. Moreover, prosecutors indicated that the general changes in the new CPC and the law of evidence has expanded the scope for cooperation including by facilitating informal cooperation. Available statistics show a steep rise in MLA in the last two years (from a low number previously).

121. The new role for prosecutors appears also to have lessened the importance of treaty-based MLA (and its attendant limitations given Chile's treaties). Prosecutors indicated that the absence of a treaty is not an impediment in many cases because MLA can be granted on the basis of reciprocity. Prosecutors also indicated that they considered that the current system was working effectively and that further statutory intervention was not needed at this stage. In terms of resources, the examiners noted that MLA specialists indicated that resources were generally sufficient to allow reasonably prompt responses. The examiners were also generally impressed by the dynamism and commitment demonstrated by the MLA specialists from the PPO, although they considered that certain allegations could have elicited a more prompt and proactive response. Given the recent nature of the system and the rapid increase in MLA requests in the most recent period, the examiners consider that the system should be monitored by the Group.

122. Since the Phase 1 report, Chile has entered into a number of additional MLA treaties in criminal matters including with Italy, Mercosur, Bolivia and Switzerland. Chile is also Party to the Inter-American Mutual Assistance Convention on Criminal Matters. Chile has also been officially invited to adhere to the European Mutual Assistance Convention on Criminal Matters and will shortly initiate the necessary procedures. According to the PPO, the case law limits on MLA referred to Phase 1 report § 108 have been superseded by art. 20 bis and are no longer applicable, but there has not been any relevant case law to date.

123. As discussed above, bank secrecy is a major barrier to effective investigation of economic crime in Chile. It is also a serious problem for MLA. The 2003 Phase 1 report required Chile to report within 1 year on its action with regard to removing its bank secrecy impediment to MLA. In 2004, Chile reported that it would create a working group in order to develop a law governing MLA. However, this commitment has not been followed by any action changing the rules on bank secrecy.

124. With regard to seizure and confiscation, the situation is also not yet resolved. Prosecutors indicated that they consider that there would not be any barrier to seizure and confiscation in response to an MLA request, but there have not been any actual cases to date. Prosecutors indicated that they have responded to a number of requests for information about assets held in Chile. In addition, in one case, the Chilean authorities seized assets of a foreign national in Chile.

125. The situation with regard to MLA for criminal proceedings against legal persons remains unsettled. The Responses (question 13.1(e)) state that no answer can be provided about foreign requests for MLA in cases involving legal persons because of the lack of corporate criminal liability in Chile. This suggests that a dual criminality requirement exists. Prosecutors at the on-site visit considered that the absence of criminal liability for legal persons in Chile would not bar Chile from providing MLA; however, the issue has not been tested. In Phase 1, Chile indicated that it could provide MLA in relation to non-criminal proceedings against a legal person. Similarly, there has not been any experience to date.

126. The Revised Bill would add a provision to the money laundering law (Law No. 19,913) that would strengthen MLA in money laundering cases. In response to an international request, a prosecutor could seek from a Guarantee Judge an order freezing assets of equivalent value to estimated laundered assets.³⁶

Commentary:

The examiners note that, from a procedural perspective, the MLA system in Chile is significantly more effective than at the time of the Phase 1 report as a result of both the general CPC reform and the art. 20 bis CPC attribution of a significant role to prosecutors. While the system appears to be generally much more responsive, the new system is in its infancy and a number of key issues have not yet been finally determined by the courts.

The lead examiners reiterate the importance of access to financial information for the effective investigation of the foreign bribery offence. They are seriously concerned that no action has been taken to remove statutory bank-secrecy barriers to MLA in foreign bribery cases identified as non-compliant with the Convention in Phase 1. These barriers interfere with Chile's ability to provide effective MLA in foreign bribery cases. The examiners recommend that Chile promptly remove limitations on bank information that can be supplied in the context of MLA requests in order to allow, in appropriate cases, all potentially relevant information to be supplied. Moreover, Chile should take effective action to ensure that no undue evidentiary burden is required in order to obtain bank information.

The lead examiners recommend that Chile take all necessary measures to ensure that MLA can be provided in foreign bribery cases involving legal persons. The examiners recommend that the Working Group follow up generally with regard to the functioning of the new MLA system, and in particular with regard to seizure and confiscation.

(ii) *Extradition*

127. Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them. Chile has not had any experience with passive or active extradition in any matter relating to foreign bribery.

128. Article 431 CPC sets forth the criteria for active extradition and requires, *inter alia*, that the offence must carry a minimum prison sentence of at least one year. The Chilean foreign bribery offence does not meet this standard and active extradition is thus currently impossible under the Code provision. For passive extradition, art. 449 CPC requires that the offence be one for which extradition is authorised under applicable treaties.

36 The Revised Bill provision would also make this power available in domestic money laundering cases.

129. Chile indicated in Phase 1 that the Convention would provide the legal basis for extradition in the absence of an extradition treaty. However, the examiners note that active extradition would not be possible from non-Parties to the Convention; moreover, passive extradition from non-Parties would be unavailable in the many cases where the applicable treaty imposes a one-year minimum. Moreover, even with regard to Parties, prosecutors and others may not be aware that special rules apply beyond those in the CPC. As discussed in the section on sanctions, the examiners consider that Chile should promptly increase the applicable sanctions for foreign bribery in order to ensure that they are effective, proportional and dissuasive; in order to address additional concerns with regard to extradition, they consider that the increase should be of a magnitude that removes any sanctions-based limitation on active and passive extradition in foreign bribery cases.

130. In early 2006, Peru formally requested that Chile extradite former Peruvian president Alberto Fujimori to face, *inter alia*, corruption charges in Peru. The Chilean authorities detained Mr. Fujimori and extradition proceedings have been underway. Because of the date of the relevant events, the proceedings are subject to the old criminal procedure code. In July 2007, the first instance judge denied the extradition of Mr. Fujimori finding that the evidence submitted by Peruvian Government was not sufficient to prove the facts argued in the extradition request. The Peruvian government filed an appeal on 13 July.

Commentary:

The examiners recommend that in increasing the sanctions for foreign bribery (as recommended in the section on sanctions), Chile should ensure that they are sufficient to eliminate any sanctions-based limitation on extradition in foreign bribery cases.

2. *Penal Code Reform and Reform of the Law Relating to Foreign Bribery and Sanctions*

131. The Phase 1 report recommended changes to remedy serious deficiencies in Chilean law including relating to the foreign bribery offence, the liability of legal persons, sanctions and jurisdiction. (See Phase 1 report at pp. 29-30.) At the time of Phase 1 (2004), Chile expressed an intent to address deficiencies in the context of comprehensive Penal Code reform. As noted in the report, a 2002 Executive Decree created an expert Advisory Committee to the Ministry of Justice (the “Advisory Committee”) in charge of preparing a report on a revised Penal Code which was expected to be released by the end of 2004. Given the scope and importance of legislative changes recommended by the Phase 1 report and Chile's commitment to address issues in the context of a general Penal Code reform process, the Phase 2 examiners were very interested in the progress of that project.

132. The pre-onsite visit supplementary written questionnaire asked Chile about actions taken with regard to the various Phase 1 recommendations. Chile's Responses did not refer to any government action since the Phase 1 report in response to the Phase 1 recommendations relating to the foreign bribery offence, sanctions, liability of legal persons or jurisdiction. Matters were either unaddressed or were expected to be addressed in the future and only in the context of general Penal Code reform.³⁷ Ministry of Justice officials generally explained the lack of action on the basis that the government and the Ministry of Justice had other priorities.³⁸

³⁷ See Supp. Response 10-13 (liability of legal persons and sanctions unaddressed and to be addressed in context of Penal Code reform); Supp. Response 17 (no changes made to territorial jurisdiction); Supp. Response 4 (no legislative action with regard to deficiencies in the foreign bribery offence).

³⁸ See, eg., Supp. Response 10.

133. The Advisory Committee submitted its draft penal code (the "preliminary draft code") to the President of the Republic at the end of 2005. Since then, the text has been at the Ministry of Justice in preparation for submission of a proposal to Congress. At the time of the Responses, the general part was expected to be submitted to Congress in the first half of 2007 with the special part to be addressed at some time in the future.³⁹ It will be some time before the special part of the Code – which would normally address the foreign bribery offence and its applicable sanctions – is reviewed by the Ministry of Justice and a bill is drafted for submission to Congress.

134. At the on-site visit, the examining team expressed serious concerns about the lack of government action with regard to implementing the Phase 1 recommendations and the Convention. The examining team considers that implementation of the Convention by Chile requires prompt legislative action on a priority basis and that the current status of the Penal Code reform project does not make it an appropriate method to achieve this result. The special part of a new Penal Code will not be ready even for submission to Congress as a draft bill for a significant period. Moreover, there has been no public debate to date about the immense project of revising the entire Penal Code; such debate will apparently commence only upon the submission of a draft bill for each part to Congress.

135. In addition to the core problem of a lack of government action with regard to implementing the Phase 1 recommendations and the Convention, the examining team is concerned about a lack of awareness among key officials during the Phase 2 process about the state of bribery law reform. During the on-site visit, Ministry of Justice officials stated that the preliminary draft code did not include any changes to the foreign bribery provisions, explaining that the Advisory Committee had completed its review of the relevant provisions prior to having received the Working Group recommendations. After the on-site visit, the examining team located a copy of the preliminary draft code in a law review article on the internet.⁴⁰ The preliminary draft code contains significant proposed changes to the foreign bribery provisions and to other relevant provisions; a number of the changes appear to address Phase 1 recommendations. The examining team finds the answers at the on-site visit about the provisions of the preliminary draft code to be unsatisfactory. The Chilean authorities have explained that they considered it ineffective to discuss with the examining team a preliminary draft which would be revised by the Ministry of Justice.

136. The examining team recognises that the preliminary draft code is a draft, not a government bill. In light of Chile's view that the document does not reflect government policy, its substance is not analysed herein. The non-governmental nature of the preliminary draft code, however, underscores the lack of government action to implement the Phase 1 recommendations and the Convention. The core of the problem appears to be a lack of commitment and resources to implement promptly — and thus outside the process of general Penal Code reform — the basic laws necessary to achieve compliance with the Convention.

137. The Chilean authorities have reported on some significant actions taken since the on-site visit. In light of concerns expressed at the on-site visit, the Ministry of Finance prepared the Revised Bill, which expanded an original bill creating sanctions for legal persons for money laundering by incorporating additional provisions to also create sanctions for legal persons for foreign bribery.⁴¹ The Revised Bill was presented to Congress by the government on 30 April 2007. Although the examining team has concerns

39 The Supp. Responses (§§ 11-13) also stated that the special part of the Code would be studied only after the general part had reached the stage of a definitive project.

40 During the on-site visit, the Chilean authorities had indicated that the preliminary draft code was not publicly available. They have explained that they were unaware of its publication in the law review. See Politica Criminal n°1, 2006, at http://www.politicacriminal.cl/n_01/pdf_01/d_1.pdf.

41 As discussed above, the Revised Bill also contains amendments to bank secrecy provisions.

about a number of provisions of the Revised Bill in this regard (see below the sections on liability of legal persons and sanctions), it welcomes this attention by the Ministry of Finance to the issue of foreign bribery on a priority basis.

138. In addition, since the on-site visit, the GNECC expert group has created a proposal for a stand-alone draft law which, in its view, would capture the main necessary amendments related to the foreign bribery offence, sanctions, state-owned companies and jurisdiction. The GNECC will submit the proposal (which the examining team has not seen) for the consideration of the Chilean authorities. If it is approved, it will be submitted to the necessary internal procedures with the aim of sending it to the National Congress, by the Executive Power. The examining team welcomes this initiative by the GNECC expert group. But the examining team notes that, except for the bill referred to above on the issue of sanctions for legal persons, the government has not modified the views expressed in the Responses with regard to waiting for general Penal Code reform.

Commentary:

The lead examiners consider that Chile's expressed intent in the Phase 1 report to remedy issues of non-compliance with the Convention as part of a general process of Penal Code reform has not been successfully achieved. The examiners further note the still very preliminary nature of the Penal Code reform project and its uncertain future schedule and course. Under these conditions, the examiners consider that linking the reform of bribery law, sanctions, jurisdiction and the liability of legal persons to the Penal Code reform process would clearly cause further significant and unacceptable delays in achieving compliance with the Convention.

The examiners welcome the recent initiative of the GNECC to prepare a proposed stand-alone draft law to address certain pending legislative deficiencies with regard to the fight against foreign bribery. They also welcome the recent inclusion by the Ministry of Finance of provisions on sanctions on legal persons for foreign bribery in a government bill. However, the examiners note that the GNECC is a group of government experts and that, except for the bill on sanctions for legal persons, the government has not indicated an intent to proceed with stand-alone legislation.

In the absence of a government commitment to address pending Phase 1 legislative issues outside of the context of Penal Code reform on a priority basis, the examiners recommend that the Working Group address the lack of effective action since Phase 1 with regard to those issues in an appropriate Working Group statement or other Working Group action.

3. Offence of Foreign Bribery

a) Overview of relevant provisions

139. Title V of the PC is entitled Crimes and Misdemeanours Committed by Public Officials in the Exercise of their Functions (arts. 216-260).⁴² Part 9 of Title V of the Penal Code is entitled Bribery (arts. 248-251). Articles 248, 248bis and 249 apply to passive domestic bribery and arts. 250 and 250bis

⁴² Offences are categorised as crimes, misdemeanours and infractions (crimenes, simple delitos and faltas) depending on the severity of their sanction. See PC arts. 3 and 21. Foreign bribery is a misdemeanour.

apply to domestic active bribery. Art. 250 bis A contains the foreign bribery offence and art. 250 bis B defines a foreign public official.

b) Elements of the offence

140. The Phase 1 report reviewed arts. 250 bis A and B in detail. In this context, the Working Group took note of Chile's efforts in implementing the Convention, but issued a number of specific recommendations to remedy deficiencies in the offence.

141. Art. 250 bis A refers to offers of a bribe, but does not explicitly refer to "giving" a bribe. In the Phase 2 process, Chile has supplied cases making it clear that the crime is complete upon the making of the offer, but the cases do not appear to address the issue of the giving of a bribe. This issue can be important where, for example, a briber simply leaves behind a sum of money at the conclusion of a meeting or includes a sum of money with a document.

142. Article 1 of the Convention requires that the offence apply to bribes composed of either pecuniary or non-pecuniary benefits. As was noted in Phase 1, Chilean law applies only to "economic" advantages supplied to public officials and it appears that bribes composed of non-pecuniary advantages such as sexual favours would not be covered. Chile has cited some cases on this point, but none of them appear to find that non-pecuniary advantages are covered by the law.

143. Under the Convention, bribery requires that the briber make an "undue" payment or offer to the public official. Art. 250bis A is vague about the nature and source of its impropriety or undueness requirements. It has no express requirement that the advantage offered by the briber be undue. Nor does it require that the act/omission expected to be provided by the public official be undue or improper. The text of the law could thus in theory apply to entirely legitimate payments seeking proper official action. Chile has recognised in this regard that its law is vague and remedial action is being studied.

144. The first paragraph of art. 250 bis A applies where the briber spontaneously offers the bribe; the second paragraph applies significantly lesser sanctions in cases involving solicitation of the bribe by public officials to which the briber consents. This type of provision typically encourages active bribers to denounce solicitations in order to further the effective prosecution of the passive offence against public officials. Given the absence of the corresponding passive offence applicable to foreign public officials, there is no obvious basis for its application in cases involving bribery of foreign officials. Moreover, given Chilean law, it can be expected that alleged bribers of foreign public officials will frequently, if not invariably, claim that they were solicited. Disproving this claim may be difficult for prosecutors because – unlike the case in domestic bribery cases – the foreign official will often be unavailable. Questioned about its purpose with regard to foreign bribery, a Ministry of Justice official indicated that it had a didactic purpose and reflected the lesser seriousness attached to a favourable response to solicitation. The examiners consider that the sanctions for the briber who pays after being solicited must in all cases be effective, proportional and dissuasive (see below the section on sanctions).

145. Bribes through intermediaries are not expressly addressed in the law. Article 15 PC provides that a party who induces another party (*e.g.*, intermediary) to commit a criminal act would be guilty as a principal offender. As in Phase 1, no case law has been provided with regard to liability for use of an unwitting intermediary, *i.e.* one unaware of the unlawful nature of the act. It also remains unclear whether authorisation of the perpetration of a criminal offence would be covered by Chilean principles applicable to complicity.

146. The PC defines a "foreign public official" in art. 250 bis B as, *inter alia*, any person exercising a public function for a foreign country, including for a public agency or "public service enterprise" (*empresa*

de servicio público). The Responses suggest that "public service enterprises" may be only those that are both created by statute and that carry out a public function. [See Supp. Response 4(g).] Many state-owned or state-controlled enterprises carrying out public functions may be created other than by statute. The examining team notes that the Commentary (§ 14) defines a "public enterprise" as "any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence".

Commentary:

As outlined above, the examiners are very concerned about the lack of government action since Phase 1 in addressing the deficiencies in the foreign bribery law in Chile. They note that the government does not currently plan to address the special part of the Penal Code, which contains the foreign bribery provisions, until sometime in the future. The examiners recommend that the Chilean authorities promptly make necessary changes to the law.

In particular, the lead examiners recommend that Chile promptly take all necessary action to ensure that the foreign bribery law can apply to (i) the giving of a bribe; and (ii) bribes composed of non-pecuniary benefits. The law should also be modified, with due regard to the Convention, to eliminate vagueness with regard to the requirement of undueness or impropriety of the advantage and to ensure that the concept of "public service enterprise" in the definition of foreign public officials is consistent with the Convention definition of a "public enterprise".

The lead examiners recommend that the Working Group follow up with regard to the coverage of bribery through intermediaries, including unwitting intermediaries.

c) ***Defences***

147. Comments by a senior Chilean official reported in the press raise some concern about whether the prevalence of bribery in the foreign jurisdiction could be a defence or attenuating factor for liability for foreign bribery under Chilean law. In commenting on potential liability for bribery of wealthy Chilean businessmen in a foreign jurisdiction in which they were the subject of a proceeding for domestic bribery, a press report quoted the Chilean Foreign Minister as stating that the historical context of widespread bribery in the foreign country during the relevant period would constitute "at least a mitigating factor".⁴³ Under the Convention, foreign bribery is an offence "irrespective of ... perceptions of local custom [or] the tolerance of such payments by local authorities" (Commentary 7). Chile has stated that the prevalence of bribery in the foreign jurisdiction is not a defence or a mitigating factor although it has not cited any case law or other authority. It has not otherwise responded to an invitation to comment on the statement.

148. The Supp. Responses (§ 6) indicate that the defences of mistake of law and mistake of fact are potentially available in foreign bribery cases in Chile. The application of the mistake of law defence is not entirely clear. It appears that Chilean law requires consciousness of the "illicitness" of the acts performed in order to obtain a conviction, which could raise concerns about a defence based on ignorance of the existence of the relatively new foreign bribery offence. The Chilean authorities have indicated that they consider that bribery, including foreign bribery, is well known to be wrong and that it would not be credible to claim to have been acting lawfully.

⁴³ See "Lucchetti: Cancillería considera perjudicial intervención diplomática", El Mercurio, 4 October 2005. The allegations involved facts pre-dating the Convention.

Commentary:

The lead examiners recommend that the Working Group follow up with regard to (1) whether the prevalence of bribery in the foreign jurisdiction can constitute a defence or mitigating factor; and (2) the application of the defence of mistake of law to the foreign bribery offence.

d) Jurisdiction

(i) Territorial jurisdiction

149. 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 on the Convention clarifies that “an extensive physical connection to the bribery act” is not required.

150. As noted in Phase 1, article 5 of the PC and article 5 of the Organic Court Code (*Código orgánico de tribunales*, COT) set forth the principle of territoriality for all offences. The Phase 1 report notes that 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”. To the extent that the law requires that the offence begin in Chile, it appears to be inconsistent with the Convention. If the bribe began with an offer made outside Chile, Chile could not establish territorial jurisdiction even though the bribe was actually given in Chile. The Working Group therefore recommended that Chile review this deficiency. Chile has not modified applicable law in this area.

151. During the on-site visit, prosecutors stated that they would consider that territorial jurisdiction would exist if part of the offence took place in Chile, regardless of whether the offence began in Chile. However, there is no case law.

152. Officials from the Ministry of Justice indicated that the COT provisions on jurisdiction are expected to be included in the general part of the new Penal Code.

153. Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution. Chile does not yet have any practical experience with such consultations.

(ii) Nationality jurisdiction

154. 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”.

155. Article 6 PC excludes nationality jurisdiction except where it is specifically provided for by law. Art. 6(8) COT applies nationality jurisdiction to offences “included in treaties”. This provision has never been applied by the courts. Prosecutors and legal specialists at the on-site visit offered differing interpretations of this provision, some arguing that it would apply only to offences created in the treaty itself and others arguing that it could extend to treaties, like the Convention, that mandate the creation of an offence in national law. There was general agreement among prosecutors and legal specialists that it is at best uncertain that nationality jurisdiction exists under current law and that clear rules adopting nationality jurisdiction would facilitate effective enforcement of the foreign bribery offence.

156. Chilean law also provides for nationality jurisdiction for bribery "committed by Chilean public officials or by foreigners working for Chile". [See COT art. 6(2).] In this context, the lead examiners recommend that Chile adopt nationality jurisdiction in foreign bribery cases.

157. As noted above, MOJ officials indicated that the COT provisions are expected to be included in the general part of the new Penal Code.

(iii) *Legal persons and jurisdiction*

158. As discussed below in this report, Chile has not yet adopted criminal liability for legal persons for foreign bribery. In the absence of substantive liability for legal persons, issues of jurisdiction over legal persons have not yet been clarified. The examining team considers that the standards for jurisdiction over legal persons should be considered and adopted in conjunction with the necessary reform of the substantive liability of legal persons for foreign bribery.

Commentary:

The lead examiners are concerned about the uncertainties and limited extent of jurisdiction under Chilean law over foreign bribery cases, including the lack of nationality jurisdiction. The examiners recommend that Chile take all necessary action to ensure that territorial jurisdiction exists where part of the offence occurs on Chilean territory regardless of whether the offence began in Chile.

The lead examiners note that prosecutors and other legal specialists considered that the clear adoption of nationality jurisdiction in foreign bribery cases would improve the enforcement of the offence in Chile. In light of the provisions of article 6 COT that establish nationality jurisdiction over other offences, including over bribery committed by Chilean public officials, the lead examiners recommend that Chile adopt nationality jurisdiction for the foreign bribery offence.

The lead examiners are concerned about the lack of jurisdiction of the Chilean courts over legal persons that commit foreign bribery. They recommend that Chile take all necessary measures to provide for clear jurisdiction over legal persons in cases of foreign bribery in accordance with the provisions of the Convention.

e) *Limitations periods and time limits on investigations*

159. Article 6 of the Convention requires that any statute of limitations with respect to the bribery of a foreign public official provide for "an adequate period of time for the investigation and prosecution" of the offence. Chile has both limitations periods and limits on the length of investigations.

160. The statute of limitations for the foreign bribery offence is governed by the general rules of the PC (articles 93-105). Because the foreign bribery offence is a misdemeanour (*simple delito*), the statute of limitations is five years.⁴⁴ The statutory period is suspended for a maximum of five years during periods where the alleged offender is abroad.

⁴⁴ As noted in the sanctions section, sanctions are mitigated if more than two and one half years have elapsed between the date of the commission of the offence and the date on which the investigation began.

161. The limitations period is also suspended once the investigation is "formalised" against an alleged offender.⁴⁵ Prosecutors indicated that they can reach the formalisation stage relatively quickly. If the prosecution is "paralysed" for three years the limitations period starts to run again. (See art. 96 PC). A Guarantee Judge indicated that this provision is never applied in practice and is not of practical concern with regard to foreign bribery cases.

162. In addition, the new CPC (art. 247) introduces time limits for investigations. The period during which the prosecutor can investigate a case is limited to a maximum of two years from the date of formalisation of the investigation. Judges initially fix shorter periods of 60 days to a year for simpler or less serious cases, but can issue extensions up to two years.

163. A wide variety of panellists confirmed that there is no possibility for an extension beyond the two year maximum established by art. 247 CPC. Although the examining team recognises the concerns about unduly long investigations, it considers that the two year time limit does not provide a balance with the interest of ensuring the effective investigation of complex cases dealing with corruption of foreign officials. Collecting intelligence from abroad, for example, is time-consuming, and the case in Chile may often depend on the investigation abroad. Serious concerns exist regarding the adequacy of a two year limitation period on investigation in cases involving bribery of foreign public officials.

164. Prosecutors, judges and others did note that in practice art. 247 provides for some flexibility for three reasons: (1) because the investigation does not automatically terminate at the expiry of the time period, the defence must request the judge for a ruling and in some cases the defence may have an interest in prolonging the case⁴⁶; (2) prosecutors can seek to delay the start of the two-year period by extending the preliminary (pre-formalisation) investigation; and (3) prosecutors can dismiss the case and seek to refile it as a new case. However, the examiners consider that these sources of possible flexibility do not fully allay their basic concerns. Defence forbearance after the two-year period has expired may not exist in important cases. The extension of preliminary investigations is not possible where judicial intervention is needed. Panellists confirmed that refiling the case would not be possible where it is based on the same facts.

165. The examining team noted with concern the comment of a senior judge who underlined that, in his experience with international economic crime investigations, delays in obtaining MLA from OECD countries were a bigger obstacle than the two-year limit. Such delays in the provision of MLA by OECD Working Group members, should they arise in foreign bribery cases, are of serious concern to the Working Group and could usefully be brought to its attention for review. However, even under ideal conditions, MLA takes time and frequently leads to a need for further MLA and domestic investigation. A rigid two-year time limit is ill-adapted to international cases even under favourable conditions.

Commentary:

The lead examiners recommend that Chile take appropriate action to ensure that the overall limitations period for the foreign bribery offence is sufficient to ensure adequate investigation and prosecution, including that the two year period for formalised investigations can be extended as necessary.

⁴⁵ As discussed above in the section on the conduct of investigations, an investigation is formalised once the prosecutor informs a person in front of the Guarantee Judge that he/she is being investigated for one or more offences.

⁴⁶ The defence may have an interest in prolonging the investigation period where it is expecting to receive exculpatory evidence.

4. Liability of Legal Persons

166. 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". In Phase 1, the Working Group noted that Chile failed to implement the requirements of the Convention on this issue and urged the Chilean authorities to implement the Convention as soon as possible.

167. At the time of the on-site visit, Chile had not taken any action since Phase 1 with regard to the liability of legal persons for foreign bribery. The Supp. Responses (§ 10) explain that this inaction was due to the existence of other law reform priorities.

168. The Phase 1 report noted that "the Chilean authorities stated that the Executive has pledged to consider criminal liability of legal persons with the context of the [Penal Code] reform process and that by the end of 2004 the Ministry of Justice's Advisory Committee will issue a report concerning the new [Penal Code]". During the course of the Phase 2 process, divergent views have been expressed about whether the Advisory Committee was requested to address the criminal liability of legal persons. A member of the Committee did not recall such a request; he stated that the Committee had considered the issue on its own motion to some degree, but had not included a proposal in the preliminary draft code.

169. Although the Responses refer to various administrative sanctions potentially applicable to legal persons in Chile, none directly addresses foreign bribery. The provisions involve very general rules that could, in certain circumstances, potentially apply to corruption by specific types of legal persons. For example, non-profit organisations that fail to conform to their corporate purpose can be dissolved; banks and other financial institutions guilty of regulatory violations can be subject to fines, censure or admonitions; dissolution or fines are applicable for anti-trust violations. These provisions were reviewed in detail in Phase 1 and were found to be insufficient to constitute compliance with Article 2. The Chilean authorities confirmed that no changes have occurred that could modify the conclusion reached in Phase 1 concerning these provisions. In particular, none of these general provisions has ever been applied to a case of domestic or foreign bribery.

170. Some government officials during the on-site visit speculated about Chile possibly seeking to comply with the provisions of the Convention on legal persons through a general regime of administrative liability rather than through criminal liability as contemplated in Phase 1. However, officials recognised that no efforts have been made to prepare any concrete proposals relating to a regime of administrative liability for legal persons for bribery. Officials recognised that such a regime would be complicated to develop for a number of reasons. Different types of legal persons are subject to administrative regulation by different ministries. Panellists were not able to identify an existing agency that would be qualified to enforce a generally applicable regime of administrative liability for foreign bribery.

171. The examining team noted with interest that while Ministry of Justice officials considered that the liability of legal persons would be difficult to achieve, representatives of companies at the on-site visit expressed support for the introduction of such liability if it were necessary to achieve compliance with Chile's international obligations. One company representative stated that he expected that business organisations would push for compliance by Chile with such obligations because of Chile's reliance on the global trading system.

172. At the time of the on-site visit, there had been some very recent activity at the Ministry of Finance with regard to introducing liability for legal persons for money laundering.⁴⁷ However, the project as it stood at the time of the on-site visit did not apply to foreign bribery. (See also below the section on the offence of money laundering).

173. As noted above in the section on Penal Code reform, the bill has been revised since the on-site visit. The Revised Bill contains provisions on sanctions against legal persons for foreign bribery. While the recent attention to sanctions on legal persons is welcome, the provisions of the Revised Bill appear to raise a number of concerns. The examining team has not had the opportunity to discuss the bill with the Chilean authorities or other constituencies.

174. Concerns raised by a brief review of the Revised Bill include the following: (1) it applies only to private law legal persons; (2) it does not create autonomous liability for legal persons because (i) a natural person must be identified as a culprit in every case; and (ii) a conviction of a natural person is required in order to sanction the legal person; (3) sanctions are expressly designed to be preventive without any requirement that they be dissuasive or effective; and (4) sanctions against the legal person can only be imposed at the same time as those imposed against the natural person. In addition, sanctions on the legal person may require that the natural person have misused the corporate entity; it is unclear whether the Revised Bill would apply to a normal case of a company bribing to obtain a contract.

175. The examining team welcomes the recent attention given to the preparation of legislation concerning legal persons. However, it considers that the issue of the liability of legal persons continues to require sustained attention and that the Chilean authorities should carefully review in this regard the requirements of the Convention.

Commentary:

The lead examiners are very concerned about Chile's continuing non-compliance with Article 2 and 3 of the Convention with regard to the liability of legal persons for foreign bribery. The lead examiners underline that although Chile ratified the Convention in 2001, as of the Phase 2 on-site visit the government had taken no action – either before or after the Phase 1 report – towards introducing liability of legal persons for foreign bribery.

The examiners welcome the efforts, notably by the Ministry of Finance, to address, in the period since the on-site visit, sanctions for legal persons that engage in foreign bribery, but they have some serious concerns about the proposed approach. The examiners recommend that Chile strengthen its recent efforts and introduce effective liability of legal persons for foreign bribery in accordance with the Convention on a priority basis.

⁴⁷ A recent (2006) Gafisud money laundering report on Chile recommended that Chile introduce liability for legal persons for money laundering.

5. Sanctions for Foreign Bribery

a) Criminal sanctions

(i) Natural persons

176. The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties”. 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 a comparable effect are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

177. For natural persons, the level of sanctions applicable to foreign bribery in Chile depends on whether the briber (i) offers a bribe to a public official; or (ii) consents to solicitation. In cases of offers, the penalty is imprisonment for 61 days-3 years, a fine of up to twice the advantage offered, and possible disqualification from holding public office. In cases of solicitation, the possible prison sentence drops to only 61-540 days while the other possible sanctions remain unchanged.

178. As a general matter, the sanctions in Chile for foreign bribery are very low. The sanctions are thoroughly analysed in the Phase 1 report §§ 41-46, and the report (at p. 30) expressed concerns and made recommendations in this area. No statutory changes have been made since the Phase 1 report. Panellists at the on-site visit confirmed that there is "no chance" that an average first offender would receive a prison sentence for foreign bribery in Chile given the sanctions provided for in the offence.

179. In addition, there are a number of provisions that automatically reduce sanctions still further. For example, sanctions become almost *de minimis* if the "*media prescripción*" of art. 103 PC applies. This provision significantly lowers the applicable sanctions if the briber gives him/herself up to the authorities or is detained more than two and a half years after the offence was committed (*i.e.* after half of the limitations period has run). In such cases, the maximum prison sentence is only 1-60 days.

180. The reform of sanctions is subject to the problems discussed above with necessary amendments postponed until a general process of Penal Code reform is complete at a date to be determined.

Commentary:

The lead examiners consider that the sanctions for foreign bribery in Chile do not meet the standards of the Convention. They recommend that sanctions be substantially increased to ensure that applicable sanctions in all cases are effective, proportionate and dissuasive. The level of minimum sanctions should be increased to ensure that extradition and mutual legal assistance are not hampered by the level of applicable sanctions in any foreign bribery case. In addition, the examiners consider that Chile should consider whether to increase available sanctions for foreign bribery cases in order to achieve sanctions proportional to those for economic crime cases.

The lead examiners also recommend that the Chilean authorities eliminate mandatory reductions of sanctions for foreign bribery (1) in cases of solicitation; and (2) in cases where the case begins more than half way through the limitation period. The lead examiners also recommend that in conjunction with the recommended amendment of the law to ensure its

application to bribes composed of non-pecuniary advantages, the Chilean authorities appropriately modify the method of fixing pecuniary sanctions for foreign bribery.

The lead examiners are seriously concerned by the lack of action by Chile since the Phase 1 report towards correcting issues relating to sanctions clearly identified in that report. The examiners recommend that Chile introduce appropriate legislation on a priority basis and that the Working Group address the situation in an appropriate Working Group statement or other Working Group action.

(ii) *Legal persons*

181. The Convention requires effective, proportionate and dissuasive sanctions on legal persons for foreign bribery, including monetary sanctions. As described above in the section on the liability of legal persons, as of the on-site visit Chile had not taken any action since Phase 1 to introduce liability for legal persons in compliance with the Convention. The absence of effective liability precludes effective sanctions.

182. The Revised Bill provides for fines on legal persons of between 200 and 1500 UTM [USD 12 800 to USD 96 000]. The examining team considers these proposed fines to be too low to dissuade significant companies from engaging in foreign bribery.

Commentary:

The lead examiners are very concerned about Chile's continuing non-compliance with the Convention with regard to sanctions on legal persons for foreign bribery. The examiners recommend that Chile introduce appropriate legislation on a priority basis and that the Working Group consider addressing the situation in an appropriate Working Group statement or other Working Group action.

b) *Confiscation and pre-trial seizure*

183. During the investigation, the PPO or the victim may request the Guarantee Judge to adopt a precautionary measure set forth in the Civil Code of Procedure to be issued against the suspect's assets. Articles 290 and 298 of the Civil Code of Procedure lists the precautionary measures which are qualified as ordinary or extraordinary. Ordinary measures include confiscation of the item that is the object of the lawsuit, the withholding of certain assets and the prohibition on the conducting of certain actions or the entering into contracts involving specific assets. Extraordinary measures are those requested by the person reporting the offence that are not prescribed by the law, the granting of which requires the judge to demand a guarantee for the damages that may be caused. The purpose of these precautionary measures is to guarantee the eventual payment of fines and legal costs that may be imposed on the defendant, which motivates PPO requests for them, or to ensure the relevant civil compensation, which makes the victim eligible to request them.

184. Case law has extended a requirement that the investigation must be formalised before the precautionary measure of seizure is possible. This means that the suspect must be informed about the investigation before any measure can be taken. The Responses (question 7.1) indicate that this has caused difficulties in some cases of financial offences and that a more effective procedure would allow precautionary measures to be requested without the suspect's knowledge and before he/she has the chance to dispose of his/her assets.

185. Confiscation of the proceeds and instruments of the offence is provided for under art. 348 CPC. Chile has indicated that confiscation can be applied to third parties. However, the Chilean authorities have confirmed that because of the absence of criminal liability of legal persons in Chile, no measure of confiscation can be pronounced against a legal person. Measures have been imposed only against fictitious companies.

Commentary:

The lead examiners recommend that Chile take all necessary measures to ensure that pre-trial seizure can be initially obtained in appropriate cases without the suspect's knowledge and before he/she has the chance to dispose of his/her assets. They also recommend that Chile take all necessary measures to ensure that, with regard to foreign bribery, confiscation from legal persons is available in appropriate cases.

c) Administrative sanctions

186. Article 3(4) of the Convention requires Parties to “consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official”, in addition to the criminal sanctions examined above. Paragraph 24 of the Commentary adds that “among the civil or administrative sanctions … which might be imposed … are: exclusion from entitlement to public benefits or aid; [and] temporary or permanent disqualification from participation in public procurement …”.

187. There are no additional civil or administrative sanctions applicable to active bribers in Chile. There is no provision for the exclusion of bribers from officially supported export credits or from development aid programmes. CORFO can deny access to its subsidies based on a legal and commercial review, but bribery is not part of the list of factors reviewed. PROCHILE has not developed a policy of sanctions either.⁴⁸ PROCHILE has indicated that it does not have the power to apply administrative sanctions. However, it will exclude from its export promotion programs Chilean companies or persons convicted of foreign bribery. In addition, as noted above in the section on prevention, it will consider including anti-bribery clauses in its contracts with private entities.

188. Chilean public procurement laws do not provide for any policy of administrative sanctions for foreign bribery. Applicants for public contracts are not required to produce a declaration that they have not bribed in the past, nor are they obliged to present codes of conduct or ethical programmes. There is no blacklist of debarred companies. The Directorate for Public Procurement (*Chilecompra*) maintains a formal list of suppliers, but bribery is not a cause for exclusion from the list. A representative of the General Secretary of Government indicated that the law on public procurement aims at promoting transparency rather than sanctioning companies, but noted that the question of disbarment could be considered. A representative of a public sector trade union was of the opinion that disbarring companies that bribe would be fair because it would mirror the existing sanction of possible revocation of corrupt public officials.

189. Following the on-site visit, *Chilecompra* indicated that it expects to send to the Ministry of Finance proposed revisions to a bill before Congress that would introduce a bar on public procurement contracts with legal or natural persons convicted of foreign bribery. The examining team welcomes this initiative which, if adopted, would significantly increase the sanctions on foreign bribery in Chile.

48 Similarly, agencies charged with privatisation procedures in Chile do not have any mechanism to preclude participation in privatisation by persons that have been convicted or are suspected of bribery. As noted above, Chilean official development assistance programmes do not involve Chilean companies as contractors or subcontractors so there is little opportunity to apply any administrative sanctions.

190. Also following the on-site visit, CORFO stated that it would be willing to apply sanctions for foreign bribery provided an official system of communication of foreign bribery convictions between states is created, so that CORFO would know about such convictions. While the examining team recognises that such an international system would be helpful, they encourage CORFO to begin by taking into consideration convictions in Chile and other convictions about which they are aware. In addition, measures such as requiring applicants to disclose convictions could assist in providing CORFO with the necessary information.

Commentary:

The lead examiners recommend that Chile consider the imposition of additional administrative sanctions upon natural and legal persons subject to criminal sanctions for the bribery of a foreign public official. They welcome the recent initiative of Chilecompra in this regard and invite the relevant government authorities to follow up actively upon it.

6. The Offence of Money Laundering

191. At the time of Chile's Phase 1 review in October 2003, neither domestic nor foreign bribery of a public official was a predicate offence for money laundering. Created in 1995, the offence was originally applicable only to drug-related crimes. In December 2003, Law No. 19,913 amended several provisions on money laundering, added active bribery of a Chilean or foreign official to the list of predicate offences, and developed the money laundering prevention system (see Section B.8).⁴⁹

a) Scope of the money laundering offence

192. Article 27 of Law 19,913 provides that the following actions constitute money laundering:

- a) Whoever in any way hides or disguises the illicit origin of certain assets, knowing that they originate, directly or indirectly, from the perpetration of acts that constitute one of the offences considered in laws...; or else, knowing said origin, hides or disguises these goods.
- b) Whoever acquires, possesses, has or uses the mentioned goods, with the intention of making a profit, when at the moment of receiving them he has known their illicit origin.

193. Three types of actions are thus targeted: to hide or dissimulate the illicit origin of certain assets; to hide or dissimulate the assets themselves; and to acquire, possess, have or use these assets.

194. Article 27 applies to the laundering of the proceeds of the listed offences but not the laundering of the instruments, *i.e.*, in cases of active bribery, the bribe. A representative of the UAF indicated that a public tender obtained as a result of a bribe could be considered as proceeds of active bribery and confiscated, and the natural person hiding its illegal origin could be sanctioned for money laundering.

⁴⁹ Law 19,913 abrogated Law 19,366 of 1995, and has been amended by Law No. 20,119 of 31 August 2006 to respond to several concerns of the Constitutional Tribunal.

195. Law 19,913 expressly covers the laundering of assets originating from a predicate offence perpetrated abroad provided that the act is also punishable in the country where it was committed. According to Chilean prosecutors, it is not required that bribery of a foreign public official be an offence in the foreign country, but simply that the acts could be qualified as a criminal offence (*e.g.* bribery of a domestic public official, trading in influence, etc.). A prior conviction for the predicate offence is not needed for the money laundering to be sanctioned.

196. As noted above, the Revised Bill would introduce sanctions against legal persons for money laundering.

b) Enforcement of the money laundering offence

197. Chile has created specialised units to investigate and prosecute money laundering. The PICH has a brigade specialised in money laundering and drug-related offences and the PPO created a Unit Specialising in Money Laundering, Economic Offences and Organised Crime (*ULDDECO*).

198. The investigation of money laundering offences benefits from special enhanced investigation powers set out in articles 31 to 33bis of the law, including undercover agents and an extended period during which the investigation can be kept secret.

199. Money laundering based on non-drug offences is still recent and there have been fewer than one hundred investigations to date. No conviction has been obtained since Law 19,913 entered into force.

c) Sanctions for money laundering

200. Article 27 establishes the criminal sanctions for money laundering: imprisonment from 5 years plus a day to 15 years and a fine of 200 to 1 000 UTM (USD 12 800 to 64 000). The sanction is mitigated in cases of "inexcusable negligent laundering" or cooperation with the authorities. There are no additional administrative sanctions for money laundering.

201. Confiscation is applicable to the instrument and proceeds of money laundering, including against non bona fide third persons. So far confiscation has not yet been imposed in any case of money laundering, but seizure has been, including against legal persons considered as fictitious because they were deemed to exist only for the purpose of perpetrating money laundering offences.

Commentary:

The lead examiners welcome the addition of foreign bribery as a predicate offence for money laundering. Because of the relatively recent date of this change and the absence of any money laundering cases linked to bribery to date, the examiners were not in a position to definitively assess the implementation of the offence in practice and recommend that the Working Group follow up with regard to this offence as practice develops.

The lead examiners also welcome recent efforts towards the introduction of liability of legal persons for the offence of money laundering in the Revised Bill, and recommend that the Working Group follow up its legislative progress and review the law once it is adopted.

7. Foreign-Bribery-Related Accounting Misconduct

202. In Article 8, the Convention contains explicit obligations with regard to accounting standards and the sanctioning of foreign-bribery-related accounting misconduct; the Revised Recommendation provides further standards in this area. Article 8(2) of the Convention mandates that "each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for [the accounting omissions and falsifications referred to in Article 8(1)] in respect of the books, records, accounts and financial statements of such companies". These mandatory provisions in the Convention reflect (1) a recognition that, due to the need to conceal the payments at issue, in many cases foreign bribery will be accompanied by accounting misconduct; and (2) the importance of enforcing accounting standards to combat foreign bribery.

a) Accounting and auditing requirements and standards

203. Under the Ley de Sociedades Anónimas 18,046 (the "Company Law"), corporations may be (1) "open" (widely-held); or (2) "closed". Different financial reporting and auditing obligations apply in each case. To be considered open, a corporation must have 500 or more shareholders and at least 10% of its subscribed capital must belong to a minimum of 100 shareholders. Open corporations are statutorily regulated by the SVS. Closed corporations may voluntarily register with (and be regulated by) the SVS; over 200 of these closed corporations have opted to do so and are presently on the SVS' Securities Registry (*Registro de Valores*). Within this report, "registered companies" is used to refer to (i) open companies and (ii) closed companies that have elected to be subject to SVS regulation (*i.e.*, companies that are on the SVS' Securities Registry). Banks, pension funds, insurance companies and other financial institutions are subject to separate financial reporting regulation. A few major companies with substantial international relations, including companies in the mining and agricultural sectors, are not registered and are not subject to a financial regulator.

204. With regard to books and records requirements relating to bribery, there are a number of relevant legal provisions but they are quite general. The Company Law requires all corporations to prepare annual financial accounts in accordance with Chilean generally accepted accounting principles (GAAP). In addition, article 25 of the Commercial Code requires that any natural or legal trading 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. The examiners are concerned that these general provisions may not fully satisfy the requirements of Article 8 of the Convention. The examiners note that Chilean authorities also cite numerous provisions of the Tax Code in respect of the prohibition of off-the-books accounts and related misconduct. (See Phase 1 report at 20-21.)

205. The CCCh has an agreement with the Inter-American Development Bank (IADB) to adopt International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB). The CCCh will adopt the IFRS by January 2009; it is engaged in an intensive process of careful translation of the IFRS and intends to adopt them without modifications. But it appears that the scope of application of the new standards may be very limited. Panellists at the on-site visit stated that the SVS has opted to make the IFRS mandatory only to a small number of approximately 120 specifically defined companies out of the approximately 4000 companies that it regulates. As one panellist pointed out, one anomalous result is that Chile's largest company would not be required to use IFRS. Moreover, there are no plans to use the simplified version of the IFRS that the IASB is developing for SMEs.

206. Following the on-site visit, the SVS indicated that it considers that all of its supervised entities should adopt international accounting standards. Such standards will first be applicable to the main

evaluated companies, but will be extended within two years to other registered companies as well as to the other financial market entities that it regulates (intermediaries, management committees of funds, insurance companies, etc...).

207. SVS Technical Bulletins require disclosure of material contingent liabilities by registered companies.⁵⁰ But the provision would appear to have little practical effect at present with regard to the fight against foreign bribery because of the absence of corporate liability for bribery.

208. Registered corporations must be audited each year. Article 56 of the Company Regulations (Reglamento de Sociedades Anónimas or RSA) requires that auditors apply generally accepted auditing standards (GAAS) and, specifically for open corporations, follow any instruction issued by the SVS on auditing matters. Non-registered corporations are not required to be audited; their accounts are verified only by a company-appointed "inspector of accounts".

209. The currently applicable standards for accountant and auditor qualifications and certification are weak, but they are under active review. CCCh's 2005 report to the International Federation of Accountants (IFAC) notes that "no minimum requirement governs the content of academic curricula leading to the accounting profession. Each of the nation's 44 universities that award accounting degrees is responsible for its own curriculum. There is little coordination both between universities and/or with the CCCh. There is a voluntary process of university certification underway, which has been validated by the CCCh; but at this stage few university programs have agreed to be certified."⁵¹ There is neither a professional examination nor a practical experience requirement for registering as a professional accountant in Chile.

210. As for auditors, the SVS keeps a register of public accountants authorized to perform statutory audits for registered companies. According to the IFAC report, SVS requirements for the registration of auditors, whether firms or individuals, are in substance (1) a university degree in accounting and auditing or in business administration, and, (2) depending on the type of accounting degree, three or five years of experience in the field of audit. SVS does not take any proactive measures to review the qualifications of those in its register other than request that an annual information form be submitted. The SVS does have the authority to suspend or remove firms or individuals from the register. However, given the absence of standards with regard to university programs and access to the profession, there appear to be few guarantees of audit quality inherent in this system. Inspectors of accounts (used in non-registered companies) are subject to lower standards than auditors. They are only required to be "individuals of adult age who have not been found guilty of a criminal offence".

211. The examiners were pleased to note ongoing work with regard to auditor qualifications and certification. Panellists at the on-site visit indicated that the CCCh is working with the IADB to improve audit quality and to develop a certification process that would be sanctioned by examinations. They noted that this is a priority project and it is hoped that it will be in place by the end of 2007. A separate draft bill in progress would improve standards for auditor independence. Currently, auditors are considered independent even if they own up to 3% of the capital of companies they audit, a rule which falls below international best practices. Inspectors of accounts can own up to 100% of the company. There are no rotation requirements of any kind for auditors.

50 SVS Technical Bulletins nos. 1-6 (Circular Letter No. 1501 SVS).

51 See http://www.ifac.org/ComplianceAssessment/published_survey.php?MBID=CHIL1

212. With regard to internal controls, the SVS requires external auditors of insurance companies to issue an opinion with respect to the quality of internal controls. Pension funds and pension fund administrators have similar obligations. However, these requirements do not apply to other registered or non-registered companies. Certain open corporations are required to have directors' committees (*comités de directores*) pursuant to the Company Law. The committees are supposed to exercise oversight on various issues including financial reporting and the auditor relationship. However, the IFAC report (§ 68) states that the "vast majority of these committees are not currently exercising active oversight of their company's internal control environment, audit process and financial reporting, mainly due to a lack of resources to cover those issues in adequate depth; as such, they cannot be viewed as equivalent to audit committees." Questioned at the on-site visit about this report, an SVS official recognised that the SVS has not taken action since the IFAC report to improve directors' committees.

213. Following the on-site visit, the SVS indicated that art. 50 bis, paragraphs 9 and following of the Company Law provide that (1) the extraordinary board of shareholders adopts the budget for the functioning expenses of the committee of directors and its advisors; and (2) members of the directors' committee are jointly responsible for the damages they cause to the shareholders and the company. The SVS thus considers that the law gives all the necessary tools to allow directors' committees to accomplish the functions established by the law. In this context, the SVS, in its oversight capacity, is prepared to apply sanctions to directors who do not carry out their duties. The SVS considers that the supposed lack of resources cannot be accepted as an excuse of negligence unless directors demonstrate that they have taken the necessary action to require the board of shareholders to provide appropriate funds.

214. Chile has a significant number of state-owned enterprises, including Codelco, the largest company in Chile. Chile indicates that these companies are subject to the similar accounting rules as privately-owned companies, and that they are subject to external audit requirements.

b) Enforcement and sanctions

215. Prosecutors stated that art. 197 PC, the principal PC provision applicable to false accounting, is difficult to prove because it requires proof of damage to a third party.⁵² This contrasts with the offence of falsification of "public documents", which does not require such damage. Prosecutors stated that they see accounting aspects primarily as a "tool of investigation" rather than as a likely area for charges, and that accounting misconduct is only punishable if it is linked to another offence.

216. The Securities Market Law (No. 18045) applies only to registered corporations, but it contains an important provision potentially applicable to accounting misconduct.⁵³ Article 59(a) of the law punishes with imprisonment those who maliciously give false data or certify false facts to the SVS, to a stock

52 Art. 197 states in relevant as follows: "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. 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".

53 Under article 59 of the 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).

exchange or to the public in general. In a major recent fraud scandal (Inverlink), charges under art. 59(a) have been brought against ex-directors and top executives of the Inverlink enterprises overseen by the SVS, as well as against an accountant. The SVS recognised that there were no charges for the breach of the accounting fraud provisions of the PC, but it noted that accounting misconduct was the basis for more serious charges, such as securities fraud.

217. Article 133 of the Company Law is a general provision covering violations of the law, regulations or SVS rules. However, as noted above, the books and records requirements appear very general; moreover, damage to a third party is required. Law No. 3,538 (1980) includes another general provision allowing the SVS to impose administrative penalties on registered corporations, 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 SVS. In addition to being very general, it applies only to registered companies.

218. Prosecutors indicated that tax-related enforcement is the only area in which accounting misconduct is addressed for the vast majority of companies. A variety of Tax Code provisions are potentially applicable. (See Phase 1 Report § 91) However, the examiners doubt whether these provisions would sanction accounting fraud in the absence of a failure to pay applicable tax. Prosecutors indicated that the CPC has special rules for tax offences which must be the subject of a complaint by the SII.

219. With regard to auditors, the CCCh indicated that it has an active policy of enforcing ethical standards.

Commentary:

The lead examiners recognise the important efforts by Chilean accounting and auditing professionals to establish rigorous accounting and auditing standards and to adhere generally to the relevant international standards relating to accounting and auditing. The examiners welcome the active work of the CCCh on its IFRS project. However, they are concerned about the limited reach of the project as planned and they encourage the Chilean authorities to extend IFRS to all registered companies, and to consider adopting the simplified international accounting standards for SMEs currently under development. In this regard, the examiners welcome the SVS' announced intention to extend IFRS to all registered companies within a defined period.

In light of the general nature of the accounting standards provisions in the Company Law, the examiners recommend follow up by the Working Group with regard to the application in practice of Article 8.1 of the Convention.

The examiners encourage the Chilean authorities to accelerate their efforts to improve auditor quality standards, certification and independence.

In addition, the examiners are concerned by the weak enforcement of accounting and auditing obligations in the area of bribery and the limited number of enforcement actions. Particularly in light of existing domestic bribery cases, the Chilean authorities and professional bodies should enforce accounting and auditing offences more effectively in bribery cases and develop relevant case law and standards. The examiners also recommend follow up with regard to the application in practice of Article 8.2 of the Convention with regard to the applicable sanctions.

D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW UP

220. The Working Group is seriously concerned that as of the Phase 2 on-site visit in March 2007 Chile had not taken any steps to address the Working Group's Phase 1 recommendations with regard to the liability of legal persons, sanctions, jurisdiction, bank secrecy or the foreign bribery offence. While the Working Group notes that Chile has engaged in efforts to implement the Convention, it recommends, as set forth below, that Chile take prompt action in order to achieve full compliance with Articles 1, 2, 3, 4 and 9 of the Convention.

221. As discussed in the body of this report, the Working Group considers that Chile's expressed intent in the Phase 1 report to remedy several issues of non-compliance with the Convention as part of a general process of Penal Code reform has not been successfully achieved. The Working Group notes the still very preliminary nature of the Penal Code reform project and its uncertain future schedule and outcome.

222. In this context, the Working Group notes with interest Chile's efforts since the March 2007 on-site visit to prepare legislation with regard to sanctions on legal persons for foreign bribery outside of the context of Penal Code reform. It strongly urges Chile to proceed as promptly as possible to adopt legislation providing for both liability and sanctions on legal persons that fully complies with the Convention. With regard to the foreign bribery offence, sanctions generally and jurisdiction, the Working Group also notes that preliminary work by the National Group of Experts against Corruption (GNECC) to prepare draft legislation has begun since the on-site visit. The Working Group also strongly urges the prompt adoption of legislation in these areas, as well as in the area of bank secrecy.

223. Considering the seriousness of the situation it has observed in Chile, the Working Group will engage in an exceptional additional review of Chile's legislation (Phase 1bis) one year from now in parallel with Chile's oral follow up. This review will focus on Chile's implementation of Articles 1, 2, 3, 4 and 9 of the Convention and on Chile's efforts to address the corresponding recommendations below. The Group will also decide whether to conduct a supplementary on-site evaluation (Phase 2bis) of Chile in view of the reports that will be provided by the Chilean authorities in the context of the Group's monitoring work.

224. Based on its findings regarding Chile's implementation of the Convention and the Revised Recommendation, the Working Group also (i) makes the following recommendations to Chile under part I; and (ii) will follow up the issues in part II when there is sufficient relevant practice.

Part I. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

225. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Chile:

- a) take additional measures, including further training, to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that interact with Chilean companies active in foreign markets, including trade promotion, export credit and development aid agencies (Revised Recommendation, Paragraph I);
- b) provide support for private sector initiatives such as seminars, conferences and technical assistance targeted at the business sector on foreign bribery issues, and, in cooperation with business and other relevant organisations, assist companies in engaging in preventive efforts (Revised Recommendation, Paragraph I);
- c) work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to develop specific training on foreign bribery in the framework of their professional education and training systems (Revised Recommendation, Paragraph I);
- d) require CORFO to adopt anti-bribery policies with regard to export credit operations, and consider adhering to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits (Revised Recommendation, Paragraph I);
- e) consider maintaining and/or formalising the GNECC as an oversight and coordinating body for effective implementation of the foreign bribery offence in Chile, including awareness raising activities for the public and private sector (Revised Recommendation, Paragraph I).

226. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Chile:

- a) revise the instruction document sent to Ministry of Foreign Affairs (MFA) staff regarding foreign bribery to better reflect the nature of the foreign bribery offence and applicable reporting obligations, and issue it to all MFA staff including those at PROCHILE (Revised Recommendation, Paragraph I);
- b) take steps to facilitate the reporting of suspicions of foreign bribery to prosecutors, including by improving the enforcement of the general duty for public officials to report suspicions of crimes directly to law enforcement authorities under art. 175 CPC and art. 55 of Law N° 18,834; and enhance and promote the protection of private and public sector employees who report in good faith suspicions of foreign bribery, in order to encourage them to report such suspicions without fear of retaliation (Revised Recommendation, Paragraph I);

- c) introduce money laundering reporting requirements for appropriate non-financial entities including lawyers, accountants and auditors (Convention, Article 7; Revised Recommendation, Paragraph I);
- d) require auditors to report all suspicions of bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, and take steps to improve the effectiveness of auditors' reporting obligations to competent law enforcement authorities as established in art. 59 of the Company Regulations (RSA) (Revised Recommendation, Paragraph V.B).

Recommendations for ensuring effective investigation and prosecution of offences of bribery of foreign public officials and related offences

227. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Chile:

- a) clarify, in an instruction or other appropriate measure, the rules governing the investigation and prosecution of foreign bribery and in particular any possible exceptions to the general rule of mandatory prosecution (Convention, Article 5; Revised Recommendation, Paragraph 1);
- b) align the rules for lifting bank secrecy in foreign bribery cases with the rules applicable in domestic bribery cases and in money laundering investigations by the Financial Intelligence Unit (UAF); and take measures to ensure that financial institutions provide the required financial information promptly in appropriate cases (Convention, Articles 5 and 9(3); Revised Recommendation, Paragraph 1);
- c) take all necessary measures to ensure that Chile will not decline to render mutual legal assistance (MLA) in foreign bribery cases on grounds of bank secrecy; and that MLA can be provided in criminal and non-criminal cases of foreign bribery involving legal persons (Convention Articles 2 and 9);
- d) consider aligning the treatment of the foreign bribery offence with the money laundering offence with regard to the investigative tools made potentially available to prosecutors in appropriate cases (Convention, Article 5; Revised Recommendation, Paragraph 1);
- e) promptly take all necessary action to ensure that territorial jurisdiction extends over all foreign bribery offences committed in whole or in part in Chilean territory; and adopt nationality jurisdiction in foreign bribery cases in order to strengthen enforcement of the offence (Convention, Article 4(1), (2) and (4));
- f) take action to ensure that the overall limitations period for the foreign bribery offence is sufficient to ensure adequate investigation and prosecution, including that the two year period for formalised investigations can be extended as necessary (Convention, Articles 5 and 6; Revised Recommendation, Paragraph 1).

228. With respect to the offence of foreign bribery, the Working Group recommends that Chile:

- a) amend the law to ensure that (i) the foreign bribery offence can apply to bribes composed of non-pecuniary benefits; and (ii) vagueness with regard to the requirement that the advantage supplied by the briber be "undue" is eliminated (Convention, Article 1);

- b) take all necessary measures to ensure that (i) the foreign bribery offence can apply to the giving of a bribe; and (ii) the concept of “public service enterprise” in the definition of “foreign public official” is consistent with the Convention definition of a “public enterprise” (Convention, Article 1).

229. With respect to the liability of legal persons for foreign bribery, the Working Group recommends that Chile amend the law to ensure that all legal persons can be held liable for bribery of foreign public officials in accordance with the Convention (Convention, Article 2).

230. With respect to sanctions for foreign bribery, the Working Group recommends that Chile:

- a) substantially increase the criminal sanctions applicable to foreign bribery in order (i) to provide for effective, proportional and dissuasive sanctions, including in cases where the bribe is solicited by the foreign public official; and (ii) to ensure that effective mutual legal assistance and extradition are not excluded by the level of applicable sanctions in any foreign bribery case (Convention, Article 3(1));
- b) eliminate mandatory reductions of sanctions for foreign bribery (i) in cases of solicitation of the bribe by the foreign public official; and (ii) in cases where the case begins more than half way through the limitation period (Convention, Article 3(1));
- c) in conjunction with the recommended amendment of the law to ensure its application to bribes composed of non-pecuniary benefits, appropriately modify the method of fixing pecuniary sanctions for foreign bribery (Convention, Art. 3);
- d) amend the law to provide that legal persons shall be subject to effective, proportional and dissuasive sanctions for foreign bribery, including fines or monetary sanctions, and confiscation (Convention, Articles 2, 3);
- e) take all necessary measures to ensure that seizure can be initially obtained in appropriate cases without the prior knowledge of the suspect (Convention, Article 3(3));
- f) consider the imposition of additional administrative sanctions upon natural and legal persons subject to criminal sanctions for the bribery of a foreign public official (Convention, Article 3(4)).

231. With respect to related accounting/auditing offences and obligations, the Working Group encourages the Chilean authorities to extend international financial reporting standards (IFRS) to all registered companies in accordance with the intent of the Superintendence of Securities and Insurance (SVS); to consider adopting developing simplified international accounting standards for small and medium sized enterprises; to enforce accounting and auditing offences more effectively in bribery cases; and to continue their efforts to improve audit quality standards, including with regard to certification and independence (Revised Recommendation, Paragraph V).

232. With respect to related tax offences and obligations, the Working Group recommends that Chile implement the decision of the Internal Revenue Service (SII) to strengthen the explicit nature of the prohibition on deducting foreign bribes from taxable revenue in a generally applicable, public and binding circular.

Part II. Follow-up by the Working Group

233. The Working Group will follow up on the issues below, as practice develops, in order to assess:
- a) the functioning of MLA under the CPC, and in particular with regard to seizure and confiscation and the provision of MLA in cases involving legal persons;
 - b) the coverage of bribery through intermediaries, including unwitting intermediaries;
 - c) whether the prevalence of bribery in the foreign jurisdiction can constitute a defence or mitigating factor;
 - d) the enforcement of the foreign bribery offence under the CPC as it develops;
 - e) the application in practice of the Company Law provisions implementing Article 8 of the Convention.

ANNEX 1 – PARTICIPANTS IN THE ON-SITE VISIT

- Ministry of Foreign Affairs
 - Directorate of Special Policies
 - Directorate of Juridical Matters
 - Legal Affairs Division
 - General Directorate of Economic International Relations
 - PROCHILE
- Ministry of Justice
- Ministry of Finance
 - Internal Revenue Service
 - Superintendence of Securities and Insurance
 - Banking and Financial Institutions Superintendence
 - Directorate of Budget Administration
 - Pension Funds Administrators Superintendence
- Ministry of Economy, Development and Reconstruction
 - Chilean Corporation for Promoting Production (CORFO)
 - Foreign Investment Committee
- Ministry Secretary General of the Presidency of the Republic (MINSEGPRES)
- Public Prosecutor's Office
 - Specialized Unit on Public Officials Crimes and Public Probity
 - Prosecutors
 - Victims and Witness Support Division
 - Extradition and International Assistance Unit
 - Specialized Unit in Money Laundering, Economic Offences and Organised Crime
- Investigative Police (PICH)
- Police Asset Laundering Investigating Brigade (BRILAC)
- Carabineros de Chile
- Financial Analysis Unit (UAF)
- Chilean Central Bank
- Comptroller General's Office
- General Government Internal Auditing Council
- National Group of Experts against Corruption
- National Directorate of Civil Service (training)

- Gambling Casinos Superintendence
- National Customs Service
- State Defense Council
 - Illicit Drugs Traffic Division
 - Department of Studies
- International Cooperation Agency (AGCI)
- Directorate for public procurement (ChileCompra)
- Court of Public Contracting
- Supreme Court and Guarantee Judges
- Judicial academy
- Member of Congress (Senator)
- Chilean Accountants' Association
- Accounting firms
- Companies
- Business associations
- Commercial banks
- Banking and financial institutions association
- Bar association
- Lawyers
- University professors in criminal law and accounting/auditing issues
- Non-governmental organisations
- Media representatives
- Public sector trade unions and associations

ANNEX 2 – EXCERPTS FROM RELEVANT LEGISLATION

PENAL CODE

Title V. Crimes and Misdemeanours Committed by Public Officials in the Exercise of their Functions

Part 9. Bribery

Art. 248. A public official who solicits or accepts to receive fees in excess of those receivable on account of his position or an economic advantage for himself or a third party for executing or having executed an act proper to his office for which no fees are set shall be punishable by suspension in any of its degrees and a fine amounting to half the advantage solicited or accepted.

Art. 248 bis. A public official who solicits or accepts an economic advantage for himself or for a third party for refraining or having refrained from acting in relation to the performance of official duties or for carrying out or having carried out an act in violation of the duties proper to his office shall be punished with short-term imprisonment in its minimum to medium degrees, a partial or absolute disqualification for holding provisional public offices in any of its degrees and a fine amounting to twice the advantage solicited or accepted.

Should the violation of the duties proper to his office consist in exerting undue influence on another public official with a view to obtaining from him a decision that may give rise to an advantage for a third party, the delinquent official shall be punished with a perpetual partial or absolute disqualification for holding public offices, besides the imprisonment and fine referred to in the foregoing paragraph.

Art. 249. A public official soliciting or accepting an economic advantage for himself or a third party to commit any of the crimes or misdemeanours under this Title or in paragraph 4, Title III, shall be punished with perpetual partial disqualification and provisional absolute disqualification or else with perpetual absolute disqualification for holding public offices and a fine amounting to three times the advantage solicited or accepted.

The foregoing provision is without prejudice to the sanction applicable to a crime or misdemeanour committed by the public official, which, in any case, shall be no less than short-term imprisonment in its medium degree.

Art. 250. He who offers or consents to give an economic advantage to a public official, to his benefit or that of a third party, to perform an act or an omission under articles 248, 248 bis and 249 or for having performed such act or omission shall be imposed the fine and disqualifications established thereunder. In the case of an advantage consented to or offered for the actions or omissions referred to in article 248 bis, a briber shall be punished also with short-term imprisonment in its minimum to medium degree, if offering an advantage, or short-term imprisonment in its minimum degree, if having consented to the offering of an advantage. In the case of an advantage consented to or offered in relation to the crimes or misdemeanours referred to in article 249, a briber shall be punished also with short-term imprisonment in its medium degree, if offering an advantage, or short-term imprisonment in its minimum to

medium degree, if having consented to the offering of an advantage. In the foregoing cases, a briber may not be imposed an additional punishment for his liability in the crime or misdemeanour committed by a public official.

Art. 250 bis. In the cases in which the offense foreseen in the foregoing article had as purpose the act or omission of one of the acts stated in articles 248 or 248 bis, that mediates in a criminal proceeding in favour of the accused, and were committed by its spouse, by any of its ancestors or descendants, having blood relationship or arising from legal ties, by a collateral having blood relationship or arising from legal ties, up to the second degree inclusive, or by a person bound to him by adoption, the fine that corresponds according to the above-referred provisions, shall only be imposed to the responsible.

Art. 250 bis A. He who offers a foreign public official an economic advantage, for that official or a third person, to act or refrain from acting in order to obtain or retain – for him or a third party – a 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 he who offers the said advantage to a foreign public official for his having acted or refrained from acting.

He who, under the circumstances described in the foregoing paragraph, has consented to the offering of said advantage shall be punished with short-term imprisonment, minimum degree, as well as the fine and disqualification referred to above.

Art. 250 bis B. For the purposes of the provisions in the foregoing article, "foreign public official" shall mean 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 enterprise. It shall also mean any official or agent of a public international organization.

Art. 251. The goods received by the public official shall always fall in confiscation. In the case of articles 249, and article 250 paragraph second, for the application of the punishment of suspension or disqualification that correspond in their capacity as accessory to imprisonment, the following rules shall apply:

1º If the accessory punishments were more serious than those established in article 249, the first ones shall be imposed in their maximum degree; and,

2º If the punishments established in article 249 were more serious than the accessory punishments, those that are not less than the maximum degree thereof shall be imposed in their overall extension.

CRIMINAL PROCEDURE CODE

Art. 20 bis. Expedition of international assistance requests. The requests of a foreign country's competent authorities, for proceedings to be carried out in Chile, shall be forwarded directly to the Public Ministry, which shall request the intervention of the Guarantee Judge of the place in which these should take place, as deemed necessary by the nature of the proceedings according to the dispositions of the Chilean law.

Art. 58. Penal responsibility. The criminal action, whether public or private, cannot be brought but against the persons responsible of the crime.

Criminal responsibility may only be made effective on natural persons. Those that have intervened in the punishable act respond for the legal persons, without prejudice of the civil liability affecting the corporation in whose name they have acted.

Art. 175. Mandatory denunciation. Are obliged to file a formal accusation:

- a) The members of Carabineros de Chile, Chilean Civil Police and Gendarmerie, of all the crimes they presence or that they are aware of. The members of the Armed Forces are also obliged to file denunciations on all the offenses they are aware of in the discharge of their duties;
- b) The public prosecutors and the other public officials, of the crimes that they are aware of in the discharge of their functions, and especially in its case, those noticed in the ministerial behaviour of their subordinates; [...]

Art. 176. Term for filing a report. The persons referred to in the foregoing paragraph shall file a report within twenty-four hours of the time they became aware of the offense. [...]

ORGANIC COURT CODE

Art. 5. The courts referred to in this article shall try any actions filed within the Chilean territory, irrespective of their nature or the capacity in which the parties may appear before the court, without prejudice to the exceptions laid down in the Constitution and Chilean laws. [...]

Art. 6. The following crimes and misdemeanours perpetrated without the territory of the Republic of Chile are subject to Chilean jurisdiction:

1. Crimes or misdemeanours perpetrated by a Chilean diplomatic or consular officer in the performance of his official duties;
2. Embezzlement of public monies, frauds and illegal exactions, breach of trust in the custody of documents, disclosure of confidential information, bribery by Chilean public officials or foreign public officials working for Chile;
3. Crimes or misdemeanours against sovereignty or State security, perpetrated by Chileans, either born in Chile or naturalized as Chileans, and those in paragraph 14, Title VI, Book II, Criminal Code, where they pose a threat to the health of Chilean inhabitants;
4. Crimes or offenses perpetrated by Chileans or foreigners on board a Chilean vessel in the high seas, or on board a Chilean warship at anchor in the waters of a foreign country;
5. Falsification of State seals, national currency, credit documents issued by the State, Municipalities or public agencies, perpetrated by Chileans or foreigners staying in Chilean territory;
6. Crimes and misdemeanours perpetrated by Chileans against Chileans if perpetrators return to Chile without having been tried by the authorities of the country where the crime or offense was perpetrated;
7. Piracy;
8. Crimes or misdemeanours included in treaties concluded with other countries; and
9. Crimes or misdemeanours punished under Title I, Decree No. 5,839, of September 30, 1948, which stated the final wording of the Law on Democracy Permanent Defense, perpetrated by Chileans or foreigners working for the Republic of Chile.

LAW 18.834 ESTABLISHING THE ADMINISTRATIVE STATUTE

Art. 55. The obligations of each public official include:

[...]

k) Denounce, with due promptness, before the Public Prosecutor's Office or before the police if there is no prosecutor's office in the place where the public official is serving, the crimes or misdemeanours and to the authority having jurisdiction the facts of an irregular nature which he learns about while exercising his duties;

REGULATIONS FOR CORPORATIONS (RSA)

Art. 59. Account inspectors and independent auditors shall keep confidential any non-disclosed corporate information which has become known to them in the discharge of their duties.

The provisions in the foregoing paragraph are without prejudice to their duty to inform shareholders of the outcome of their review and to report any offenses and irregularities existing, in their opinion, in corporate management or accounting to the competent law enforcement and administrative authorities.

GENERAL BANKING LAW

Art. 154. The deposit and collecting of funds of any nature received by banks are subject to banking secrecy and information regarding such operations cannot be disclosed other than to the holders of the same or somebody expressly authorized by them or their legal representatives. Any infringement on the above rule will be penalized with minor imprisonment of minimum to medium-range degree. The remaining operations are to be kept confidential and banks may only disclose them to those who provide legitimate reasons and in any case, provided that the disclosure of such information does not entail patrimonial damages to the client. In any case, banks may disclose the operations described in the previous subsections in comprehensive non-personalized and unbiased terms, only for statistical or informational purposes if it entails public or general interest, as qualified by the Superintendence. In cases investigated by ordinary and military justice, if necessary, courts may order information to be sent to them or to be examined, regarding deposits or other transactions of any nature carried out by whomever may be party to or defendant in such cases; such information should be relevant to specific operations directly related to the proceedings. With prior authorization from a judge of guarantees, the prosecutors of the Public Prosecutor's Office may likewise examine or request that the information indicated in the previous subsection which is directly related to the investigations conducted by them, be submitted to them.

ANNEX 3 – PRINCIPAL ABBREVIATIONS

Abbreviation	Spanish	English
Administrative Statute		Law N° 18,834 on the Administrative Statute Establishing the Obligations of Public Officials
AGCI		Chilean International Cooperation Agency
CCCh	Colegio de Contadores de Chile	Chilean Accountants Association
Company Law	Ley de Sociedades Anónimas 18,046	Law N° 18,046 on Companies
CORFO	Corporación de Fomento de la Producción	Economic Development Agency (responsible for export credit)
COT	Código orgánico de tribunales	Organic Court Code
CPC		Criminal Procedure Code
GAAP		Generally accepted accounting principles
GAAS		Generally accepted auditing standards
GNECC		National Group of Experts against Corruption
IADB		Inter-American Development Bank
IFAC		International Federation of Accountants
ISA		International Standards of Auditing
MFA		Ministry of Foreign Affairs
MLA		Mutual legal assistance
MOJ		Ministry of Justice
PC	Código penal	Penal Code
PICH	Policía de Investigaciones de Chile	Chilean Investigative Police
PPO	Ministerio público	Public Prosecutor's Office
Responses		Responses by Chile to the general Phase 2 questionnaire
Revised Bill		Revised Bill on the Authorisation of the Lifting of Bank Secrecy in Money Laundering Investigations, Bulletin No. 4426-07, (30 April 2007)
RSA	Reglamento de Sociedades Anónimas	Company Regulations
SAS		Statement on Auditing Standards (US)
SME		Small and medium-size enterprise
Specialised Unit	Unidad especializada en delitos funcionarios y probidad del Ministerio Público	Specialised Unit of the PPO for Offences by Officials and Public Probity
STR		Suspicious transaction report
Supp. Responses		Responses by Chile to the supplementary Phase 2 questionnaire
SVS	Superintendencia de Valores y Seguros	Superintendence of Securities and Insurance
UAF	Unidad de análisis financiero	Financial Intelligence Unit
UF	Unidad de fomento	Unit of account
UTM	Unidad tributaria mensual	Monthly taxation unit