ARGENTINA: PHASE 2

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

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 20 June 2008.

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EXECUTIVE SUMMARY

The Phase 2 Report on Argentina by the Working Group on Bribery evaluates Argentina's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Working Group notes that Argentina has engaged in important efforts to implement the Convention including legislative amendments in 2003 to address concerns in the Working Group's Phase 1 report. However, the Working Group is seriously concerned about the continuing absence of liability for legal persons (companies) that engage in bribery, and about systemic deficiencies in the overall framework for the investigation and prosecution of foreign bribery and related offences.

The Working Group is particularly concerned that there is still no liability of legal persons for bribery in Argentina despite the clear requirements of the Convention and the Working Group's recommendation in Phase 1. It recommends that the law be promptly changed to make companies accountable. In the area of investigation and prosecution, it appears that Argentina is rarely able to effectively investigate and prosecute foreign bribery or other serious economic crime to a resolution on the merits, in particular because of extraordinary delays in getting to a decision due, *inter alia*, to the applicable rules of procedural law. In addition, the Working Group is concerned that serious allegations of foreign bribery that appeared in the public domain in 2002 were not investigated until 2006. While these issues raise fundamental concerns, the Working Group notes that the government has commenced a reform process that would improve the federal criminal justice system. A new draft Criminal Procedure Code, based on an accusatorial system, was recently published by a commission mandated by the Ministry of Justice.

In addition to the areas noted above, the Phase 2 report also notably recommends that Argentina adopt nationality jurisdiction for the foreign bribery offence; include foreign "politically exposed persons" in relevant anti-money laundering materials; and clarify that tax rules prohibit the deductibility of bribes to foreign public officials.

In this context, the Working Group will conduct a supplementary Phase 1 bis review of Argentina one year from now to evaluate Argentina's efforts to establish corporate liability and sanctions, and to adopt nationality jurisdiction for foreign bribery cases. The review will also report on the status of legal changes with regard to broad criminal procedure and institutional reform (Recommendation 3(c)). Depending on progress in these areas (as well as with regard to its specific recommendations), the Working Group will also decide whether to conduct a supplementary on-site evaluation (Phase 2 bis review) of Argentina or take other appropriate action.

The Report also highlights positive aspects in Argentina's fight against foreign bribery including numerous recent awareness raising activities for public sector personnel that can play a key role in preventing and detecting foreign bribery, including foreign diplomatic personnel and tax inspectors. The Working Group also welcomed ongoing efforts to enhance the anti-money laundering framework.

The Report, which reflects findings of experts from Brazil and Spain, was adopted by the Working Group along with recommendations. In addition to the Phase 1bis review mentioned above, Argentina 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 Argentina, and information obtained by the evaluation team during its on-site visit to Buenos Aires. During the five-day on-site visit in December 2007, the evaluation team met with representatives of Argentine 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 Argentina's enforcement of its legislation implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention"), assesses its application in the field and monitors Argentina's compliance with the 1997 Revised Recommendation on Combating Bribery in International Business Transactions (the "1997 Revised Recommendation")[1]. It reflects the Argentine authorities' written Responses to the general and supplementary Phase 2 questionnaires (hereinafter "GQ" and "SQ" respectively); 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 Buenos Aires from 10-14 December 2007 (see attached list of institutions encountered in Annex 1); and review of relevant legislation and independent analysis conducted by the examining team.[2]

1. On-site visit

2. The on-site visit and the Phase 2 process were generally characterised by high levels of cooperation from the Argentine authorities. The written responses to the questionnaires were thorough and responsive to the questions asked; follow-up questions have generally been timely answered.

3. The Working Group on Bribery, however, had serious concerns about the postponement by Argentina of the initial agreed date for the visit, which was originally scheduled for September 2007. The Argentine government requested to postpone the on-site visit to a specific later date, and then agreed with the Working Group to reschedule the visit for 10-14 December 2007. In its press release on the occasion of the postponement, the Working Group underlined that thirty-four members of the Working Group had undergone on-site visits as of December 2007 and that it was only the second time that an examined country had declined to receive the evaluation team just prior to the commencement of the agreed date for the visit.

4. During the rescheduled December 2007 on-site visit, officials were generally available as needed to answer the examiners' questions, including questions that came up during the week. The examining team wishes to acknowledge the efforts in this regard to obtain the necessary attendance during a week in

1 Although not a Member of the OECD, Argentina – as a Party to the Convention and a full Member of the OECD Working Group – accepts the 1997 Revised Recommendation of the Council on Combating Bribery and the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials. (Convention Commentary 37)

2 The examining team was composed of four lead examiners from Brazil (Izabela Moreira Correa, Manager for Ethics, Transparency and Integrity at the Secretariat for Corruption Prevention and Strategic Information, Office of the Comptroller General; Marconi Melo, Department of Assets Recovery and International Cooperation, Ministry of Justice; Mônica Nicida Garcia, Public Prosecutor's Office; and Milton Nunes Toledo Junior, State Attorney, Office of the Attorney General of the Union, Director of the International Department), two lead examiners from Spain (Alberto Cornejo Pérez, Assistant Deputy Director for Excise Duties and Taxes on Foreign Trade in the General Directorate of Taxation, Ministry of Economy and Finance; and Dolores Villar Guzmán, State Attorney and head of the Government Delegation to the Autonomous Community of Madrid) 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 Argentina; and Sébastien Lanthier, Administrator – Policy Analyst.

which the new President was inaugurated. They also appreciated the attendance of senior officials at the opening of the visit. The logistical organisation of the on-site visit was excellent.

2. General observations

a) Economic background and international economic relations

5. Argentina's economy has undergone dramatic changes since the April 2001 Phase 1 report. Until the end of 2001, the Convertibility Law of April 1991 continued to rigidly peg the Argentine peso to the US dollar at a rate of one to one. This rigid peg formed the bedrock of economic policy from 1991-2001. Following a run on the banks in December 2001, the currency system collapsed in a major crisis in 2002. The authorities imposed a deposit freeze and foreign-exchange controls. The freeze on deposits provided a catalyst for protests that led to the collapse of the government in December 2001. In January 2002 the peso was devalued and subsequently allowed to float. Overall, its value fell by about 70% against the US dollar.

6. The stabilisation of the foreign-exchange market from mid-2002 enabled the government to ease the exchange and capital controls and to lift the deposit freeze. These policies created the conditions for an orderly transition to a new administration in 2003. Many medium-term issues remained to be resolved, including the restructuring of public-sector debt, the banking system and contracts with privatised public utilities. From 1991-2006 Argentina received almost continuous support from the IMF and was a major borrower from the Fund. In 2006, the government repaid the country's IMF obligations of USD 9.6 billion which freed policymaking from Fund conditionality.

7. Since the 2001-2002 devaluation, Argentina has experienced rapid growth. According to the Argentine authorities, growth has averaged 8.8% in the last five years which was the highest rate in Latin America over this period. In 2007, Argentina had the third largest GDP in the region (in USD at current prices), following Brazil and Mexico. Argentina ranks fifth in the region with regards to GDP per head (in USD at current prices), behind Mexico, Chile, Venezuela and Uruguay. The economic recovery that started in mid-2002 after the devaluation was led by construction and manufacturing, which grew at rates several times more rapid than agricultural output.[3]

8. Exports accounted for 23.2% of nominal GDP in 2007, compared with an average of 9% in 1990-99. In 2004-06 manufacturing exports grew substantially and exports of manufactured goods as a whole (industrial and agricultural) accounted for 65% of total exports in 2006.[4] Argentina has been a significant exporter of energy, but Argentina has cut back exports of gas since 2004 in order to meet domestic demand.

9. Argentina exports to a wide range of countries. In 2007, Mercosur countries were the destination of 23% of exports, 18% went to EU countries, 17% to ASEAN countries and 11% to NAFTA countries. Chile is also a significant export market. The exporting role of small and medium-sized enterprises (SMEs) has increased significantly in recent years. According to the Argentine authorities, over 12 000 SMEs exported in 2007 compared to 8 500 in 2003. The value of their foreign sales grew almost 180% hitting the record of USD 6.1 billion. While SMEs still account for only 11.3% of total exports by value, their share of total exports has increased during the last five years by almost 25%.

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3 The Economist Intelligence Unit. Argentina Country Profile 2006, p. 4.

4 "National Strategy for Export Development", International Trade Division, Argentina Ministry of Foreign Affairs, (August 2007) at p. 14.

10. The stock of total outward foreign investment as of 2005 is estimated at USD 22.94 billion. Top destination countries for foreign investment have included Venezuela, Chile and the United States.[5]

11. Although Argentina has traditionally received development assistance, in 1992 it also became a donor. Its development assistance is focused on technical assistance and does not involve financial assistance.

b) Political and legal system

12. Argentina is a federal republic. The President, who is both the head of State and head of government, is elected for a four-year term and is eligible for a second term. The President appoints a cabinet chief, a secretary-general of the presidency and cabinet ministers. The cabinet chief is formally in charge of the general administration of the country and can be removed by a majority vote of both houses of Congress. The legislature is bicameral. The Chamber of Deputies (lower house) has 257 members elected for four-year periods. A 72-member Senate (upper house) includes three senators from each of the 23 provinces plus the city of Buenos Aires. In accordance with the 1994 constitutional reform, the whole Senate was renewed through direct elections in mid-term elections in October 2001. Senators serve for six-year terms.

13. Argentina's federal system has 23 provinces (including the province of Buenos Aires) and one autonomous city, the Federal Capital District of Buenos Aires City. Buenos Aires City (3 million inhabitants) is not part of Buenos Aires province (14 million inhabitants). Together they account for over 40% of Argentina's total population. Each province has its own constitution, elects its own governor and legislators. The judicial system is divided into federal and provincial courts, each of them comprising lower courts, courts of appeal and supreme courts. The provinces appoint their own judges.

c) Implementation of the Convention and the Revised Recommendation

14. Argentina signed the Convention in 1997. In November 1999 the Statute on Ethics in the Exercise of Public Office (Law 25.188) entered into force. It implemented the Inter-American Convention against Corruption (IACAC) and amended the Argentine Penal Code (PC) by adding a foreign bribery offence in art. 258 bis. On 18 October 2000 the Argentine Republic approved the OECD Anti-Bribery Convention by adopting Law 25.319, and the instrument of ratification of the Convention was received by the OECD on 8 February 2001.

15. The Phase 1 report on Argentina was adopted by the Working Group in April 2001. In 2003, Argentina enacted legislation amending the art. 258 bis PC foreign bribery offence in response to the Phase 1 report.

d) Cases involving the bribery of foreign public officials

16. There have been no court decisions or prosecutions in relation to foreign bribery since the establishment of the offence in 1999. However, the treatment of serious allegations of a very large bribe by a prominent Argentine company to a very senior foreign public official in 2001-2002 raises a number of serious concerns. Starting in 2002, the case received considerable media coverage in the country of the foreign public official as well as some attention in the international media, and it was reported by a major Argentine daily newspaper in January 2003. However, no enforcement action was taken with regard to the case in Argentina until 2006. The allegations were ultimately transmitted by the Ministry of Foreign Affairs (MFA) to the General Prosecutor´s Office in May 2006 and a federal prosecutor submitted the

[5] UNCTAD, *World Investment Report 2006.*

allegation to a federal criminal court in June 2006. This was only after the Working Group, in its regular discussion of progress by Parties in implementing the Convention, asked the Argentine Government in June 2005 whether an investigation had been commenced regarding the allegations in the media.

17. The principal problems, as discussed further below, relate to (1) the lack of a pro-active approach by prosecutors to foreign bribery allegations; (2) the absence of prompt transmission by MFA officials of local news reports about the allegations to Argentine law enforcement authorities; and (3) delays in opening an active investigation due to initial uncertainties about jurisdiction. The Argentine authorities have taken and/or planned a number of remedial measures to address some of the issues raised by this case. (See further below the sections on Detection and reporting of foreign bribery by the Ministry of Foreign Affairs; Investigation and Prosecution (starting cases)).

3. Overview of corruption trends and recent measures

18. The government of Carlos Menem from 1989-1999 is widely considered to have been characterised by a high level of corruption. Scandals allegedly implicated various cabinet figures and the president. In mid-2000, allegations of bribery involving senators were made public; a criminal case relating to these allegations is still ongoing.

19. Since the economic crisis, the government has stated its intention to make the fight against corruption a priority. However, perceptions remain generally critical. Argentina ranked 105 out of 179 countries in Transparency International's Corruption Perception Index in 2007 with a score of 2.9.[6] Argentina is not included in the countries evaluated in the TI Bribe Payers Index.[7] A number of serious allegations of corruption, including with regard to alleged bribery by affiliates of foreign companies in Argentina, have been reported in the press in recent years.[8]

20. Major law reform efforts are underway or are being considered in the criminal justice system. The Ministry of Justice and Human Rights (MOJ) has overseen the preparation of a major project to reform the entire criminal procedure system: a draft new criminal procedure code was issued in September 2007. A separate commission organised by the Ministry prepared a draft penal code (hereafter, "Draft PC"), which was presented to the public in May 2006. These and other law reform projects are discussed further in the body of the report.

21. Argentina signed the United Nations Convention on Corruption (UNCAC) in 2003 and ratified it in 2006. Argentina has ratified the Inter-American Convention against Corruption (IACAC) and has actively participated in monitoring under that Convention.

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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 expert 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 headquarters in those countries are perceived to be likely to pay bribes to senior public officials in key emerging market economies.

8 As with all Phase 2 reports, this report on the implementation of the Convention by Argentina focuses on Argentina's efforts to fight foreign bribery by Argentine individuals and companies abroad.

4. Outline of the report

22. 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. Part D addresses the foreign bribery offence, the liability of legal persons, and related offences and obligations in the area of taxation and money laundering. Part E 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 provisions are reproduced in Annex 2. A list of the principal acronyms and abbreviations used in the report is included in Annex 3.

B. AWARENESS, PREVENTION AND DETECTION

1. Awareness, prevention and training

23. A low level of awareness about the Convention and the prohibition of foreign bribery can be one of the greatest impediments to prevention, detection and prosecution of foreign bribery. A new offence creates new duties and obligations for public officials, and introduces compliance costs for the private sector. To be effective, awareness raising efforts must be sustained through time, unambiguous, far reaching, and adapted to the broad range of public and private actors affected by the issue. Fostering public and private sector support and involvement in the fight against foreign bribery should also be facilitated by explaining the disastrous effects of foreign bribery, the shared responsibilities of nations in combating it, and the practical measures that can be taken to fight it.

24. Detailed below are the various steps taken by the Argentine authorities to raise awareness of the public and private sectors about foreign bribery. Also described are the outcomes of interviews with key on-site visit participants aimed at obtaining an overall impression of their knowledge of the foreign bribery offence and related issues.[9]

a) Government efforts to improve awareness

(i) Police, prosecutors and judges

25. In late June 2007, the Federal Police published the Convention in its daily bulletin, reaching all members of the police force. Argentina also indicates that as of 2008, the Federal Police has included regular training on the Convention and the role of police in the fight against transnational bribery within the syllabus of the training for commissioners, deputy commissioners and inspectors provided by the police academy (*Escuela Superior de Policía*). The Convention is also addressed in the context of the course on "special criminal legislation" taught to all police officers during their training at the police academy.

26. The website of the Public Prosecutor's Office (*Ministerio público*) includes a link to the text of the Convention and to art. 258 bis PC. However, this link is provided on the webpage relating to the National Prosecutor of Administrative Investigations (*Fiscalía de Investigaciones Administrativas*, FIA)

[9] Awareness raising and prevention initiatives taken by or targeted at foreign diplomatic representations and the Ministry of Foreign Affairs, the tax administration, export credit agencies, and associations of accountants and auditors are described in the sections of the report dealing specifically with these bodies.

under the heading "Norms that regulate the performance of the FIA". This choice of location is questionable, as the FIA would generally not have competence to handle foreign bribery cases (for more on this issue, see section on investigation and prosecution). Argentina also indicates that in 2008 a workshop is being organized jointly with the US Department of Justice to train prosecutors, judges and auxiliaries in the judiciary on matters related to MLA and extradition in criminal matters, including in the context of transnational bribery cases.

27. The lead examiners found that the police, prosecutors and judges who attended the on-site visit generally had a good level of awareness about the Convention and the foreign bribery offence created under art. 258 bis PC. However, as outlined below, a number of panellists underlined the need for training with regard to foreign bribery for law enforcement agencies and the judiciary in general. For example, an investigative magistrate with extensive experience in dealing with corruption and related cases indicated that there was a serious training deficiency concerning the analysis and techniques involved for the investigation of transnational bribery cases.

(ii) The Anticorruption Office

28. One of the main tasks of the Anticorruption Office (*Oficina Anticorrupción*, OA) relates to raising awareness about corruption issues, including foreign bribery. OA awareness raising initiatives specifically focused on the Convention (a series of workshops and a brochure) have been carried out very recently. (GQ 3.2; SQ 1.c) A short awareness raising brochure, available on the OA website, focuses mainly on the business case for avoiding corruption in international businesses (bribes are equivalent to a hidden tax, companies that bribe are not attractive for investors, etc.), but does not mention the Argentine foreign bribery offence and sanctions. It only very briefly addresses Art. 1 of the Convention, and erroneously states that Art. 1 applies to "*obtaining*, promising, and giving …" a bribe. (emphasis added) OA representatives indicated that this will be corrected to "offering" in the next version of the brochure.

(iii) Export promotion agencies

29. 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. *Fundación EXPORT.AR* is a mixed public/private institution that helps large and small companies with exporting and investing abroad. In December 2007, it published a relatively detailed awareness raising brochure for Argentine companies, in collaboration with the MFA. Regrettably, the information in the brochure is significantly out-of-date as it fails to reflect the 2003 amendments to the foreign bribery offence. *Fundación EXPORT.AR* has also sent information about the criminalization of foreign bribery to all Argentine companies identified in its database (*i.e.* 14 493 companies conducting business internationally or looking to expand operations abroad). (GQ 3.1) The examining team welcomes these recent efforts.

(iv) The Ministry of Economy and Production

30. The Ministry of Economy and Production (MOE) includes a link to the Convention on its website, and had numerous activities at the planning stage at the time of the on-site visit. This included two workshops for public officials to be held together with the MFA and the MOJ, and a seminar for exporting companies and chambers of commerce to analyze how Argentina's international obligations may impact Argentine companies. (GQ 3.1) Unfortunately, the MOE representatives who attended the on-site visit were not able to discuss these initiatives as they had not been made aware of them.[10]

[10] Argentina indicates that – due to the recent change in government during the week of the on-site visit – relevant MOE officials were not able to attend.

b) The private sector and civil society

(i) Large companies, SMEs and business associations

31. As Argentine companies become ever more involved in international markets, increasing awareness about the Convention will become vital to ensure that Argentine companies are committed to competing for markets on a level playing field. During the on-site visit, the lead examiners had the opportunity to meet with a wide variety of companies, large and small, conducting business internationally in various sectors.

32. None of the companies met during the on-site visit had ever heard about the Convention or the foreign bribery offence, which may have been due to the lack of awareness raising initiatives taken by the Argentine authorities prior to 2007. None of the companies were aware of the various recent awareness raising measures taken by the government. Company representatives believed that trade promotion agencies should be providing more information and support on foreign bribery issues. They also indicated that Argentine embassies and trade promotion agencies would constitute their first and main contact for issues related to bribery abroad, including solicitation by a foreign public official of a bribe.

33. While none of the companies openly admitted having ever been directly confronted with bribery in the past, some indicated that conducting business internationally often involved getting into "grey areas" where the legality of certain payments or practices was not entirely clear. Others indicated that they had at times suspected competitors of having bribed to ensure a favourable procurement process in a foreign market.

34. None of the companies met during the on-site visit had developed a strategy aiming to prevent employees, agents and managers from engaging in bribery when conducting international business. Very few of the companies had a code of conduct or ethics,[11] and these did not address bribery or corruption issues. Only one company reported having set up a mechanism (*e.g.* "hotline") for communicating irregularities and breach of company rules (but not bribery as such). Also, while many companies reported making frequent use of local agents when entering new markets or moving goods across borders, none reported using anti-bribery clauses in contracts or bribery risks assessments as part of pre-hiring diligence.

35. The 1997 Revised Recommendation requires Member states to encourage companies to develop internal controls which contribute to preventing bribery, make statements in their annual reports about these controls, and create monitoring bodies (such as audit committees). Argentina has taken steps to strengthen its corporate governance framework in recent years, especially for listed companies.[12] However,

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11 This is coherent with the observation that Argentina-owned companies were less likely to have such a document in place than local subsidiaries or divisions of multinational groups. See Patricia Debeljuh, *Politicas de Ética Empresarial en las 500 mayores empresas de la Argentina* (Universidad Argentina de la Empresa 2001).

12 Section 8 of Decree 677/2001 (Capital Markets Transparency and Best Practices) provides that directors, administrators and auditors (with regard to issues within their area of competence) of listed companies have a duty of diligence and loyalty to "organize and implement preventive systems and mechanisms to protect the corporate interests" and to "implement the necessary internal control to ensure a careful management"; and section 15 requires listed companies to create an independent audit committee with a duty to "supervise the performance of the internal control systems and of the administrative-accounting system, as well as the trustworthiness of the latter". In 2007 the Argentine authorities also developed a set of non-mandatory corporate governance recommendations for listed companies, stating that companies should comprehensively inform shareholders about internal controls and about the appointment procedure and composition of the audit committee. As of January 2008, listed companies have to file a new separate

in the absence of any significant awareness raising and enforcement action, it is unlikely that Argentine companies will consider controls specifically aimed at bribery prevention as falling within the scope of these rules and regulations.

36. None of the business associations met during the on-site visit had experience in advising Argentine companies on anti-bribery issues. Argentina reported that the Convention has been promoted among "business chambers, companies and other institutions of the private sector" (SQ 1.b), but it seems this promotional activity has only had limited impact to date.

37. Two state-owned companies with international activities involved in sensitive sectors (weapons manufacturing and fossil-fuel exploration and extraction) did not accept the invitation to attend the on-site visit to discuss their experience in bribery prevention. While no specific foreign bribery prevention and detection action seems to have been taken by these entities, a regulation from the Office of the Comptroller General provides some basic rules concerning internal controls, conflict of interest, loyalty and diligence for the governance and management of state companies and assets (Resolution SIGEN 37/2006).

(ii) Lawyers

38. There were no specific activities reported by, or targeted at, lawyers associations present in Argentina.

(iii) Non-governmental organisations, the media and trade unions

39. Civil society representatives met during the on-site visit were generally very critical of the Argentine government's fight against corruption, including foreign bribery. They recognised that the work of specialised agencies such as the OA and the FIA was starting to reap results, but considered that better coordination and general support for the fight against corruption were still lacking. They also considered that the cooperation and coordination with the provinces should be improved in order to make the fight against corruption more effective.

40. Some civil society representatives also criticised what they perceived as the "very limited capacity" of the Argentine private sector for "self-criticism" when it comes to corruption issues. They highlighted how Argentina lacks a serious private-sector coalition against corruption, despite the important potential of the private sector in helping prevent corruption. They also presented private sector interests as one of the main obstacles to legislative progress in such areas as the protection of whistleblowers and the liability of legal persons, and even to the handling of corruption cases themselves.

41. Representatives from the media present during the on-site visit indicated that the interest of the public in corruption issues had diminished since the economic crisis in 2001. They also indicated that there were no more than five or six investigative journalists in Argentina who could report effectively on a corruption case. Concerns about the abuse of libel and slander laws by former politicians in relation to corruption cases detected by journalists were also reported. While these politicians had been removed from office a number of years ago, some of the participants considered that these past events still had an effect on journalists' willingness to investigate and report corruption allegations.

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report at the time of filing their financial statement with the National Securities Commission, describing how the company complies with the recommendations or explaining the reasons for non-compliance.

Commentary:

The lead examiners welcome the numerous recent initiatives taken by the Argentine authorities to start raising awareness about the foreign bribery offence and the Convention. The lead examiners recommend that the Argentine authorities further increase their awareness raising efforts and ensure the accuracy and thoroughness of the material used. The lead examiners also recommend that all important actors in the fight against foreign bribery be covered by the awareness raising campaign. Export promotion agencies should be provided with additional guidance for performing their important prevention, awareness raising and assistance tasks.

The lead examiners also note that the private sector has so far been largely left out of the awareness raising campaign. The Argentine authorities should reach out to relevant professions and businesses with international activities – including large companies, SMEs, state-controlled companies and their advisers – in order to foster their interest, support private sector initiatives, provide assistance as appropriate, and encourage the inclusion of bribery prevention and detection issues in business and professional standards.

2. Detection of foreign bribery and related offences

a) Overview

42. A crucial question in the fight against foreign bribery relates to the sources of allegations and how foreign bribery cases are detected as a matter of practice. Because the foreign bribery offence occurs mainly abroad and is focused on the active briber, the sources used for its detection will generally need to be more diverse than the ones used in domestic bribery cases.

43. During the on-site visit, MP and OA representatives described anonymous reports as being particularly helpful in detecting domestic bribery cases, considering the frequent absence of any outside witnesses to corruption offences. New tools have also been put in place in the last few years to encourage the reporting of domestic corruption offences by public officials. The specific procedures set up for reporting domestic corruption offences to the OA, and how they compare with reporting procedures for foreign bribery, are further discussed in the following subsections.

44. FIA and the OA also both indicated that they could and have in the past used press reports to trigger investigations. An example was provided of a major transnational bribery allegation involving Argentine public officials that was detected based on a foreign media report. However, as described in more detail later in the report, the investigation of foreign bribery does not fall within the competence of FIA or the OA, except in cases where Argentine public officials or funds are involved.

45. The only foreign bribery investigation in Argentina so far was not detected by the Argentine authorities, despite media reports from international and Argentine sources about the allegations. As noted above, the relevant allegations in the media (some dating back to 2002) were brought to the attention of the Argentine authorities by the Working Group in 2005 and were subsequently transmitted to the MP by the MFA in 2006.

b) Reporting suspicions of bribery

46. Any person can report a suspected case of foreign bribery to law enforcement officials. Article 174 Criminal Procedure Code (CPC) provides that any person who deems himself to have been injured by a crime that is prosecutable ex officio (including domestic and foreign bribery) – or who, although not claiming to have been injured, takes notice of such crime – may report it to a judge, prosecutor or the police.

47. An obligation to report suspected criminal offences directly to law enforcement authorities can play an important role in the detection of foreign bribery. With regard to public officials, art. 177 CPC obligates Argentine public officials who notice a crime in the course of their duties to report it.[13] Executive Decree 1162/00 (the "Reporting Decree") interprets art. 177 CPC and establishes an obligation for public officials to report alleged criminal offences directly to the appropriate law enforcement authorities. This decree, which applies to all public officials, provides two different procedures: one for reporting suspected domestic corruption offences (articles 1 and 3, described below), and another for reporting suspicions of all other crimes (art. 2), including foreign bribery. In the latter case, public officials must report the "alleged crimes… to a judge, prosecutor or police authority". The Reporting Decree thus appears to set a lower threshold than art. 177 CPC, which refers to reporting "crimes". (However, the threshold also appears to remain higher than the one set by the decree for reporting domestic bribery; see below).

48. While art. 177 CPC and more expressly the Reporting Decree require public officials to report alleged offences – including foreign bribery – directly to a judge, prosecutor or police, their requirements do not appear to have been fully respected in circulars and instructions adopted by key agencies for the fight against foreign bribery, and in particular the MFA and AFIP. (See below the section on detection and reporting in the MFA and AFIP).

49. In addition, the applicable sanctions for failure by a public official to report an offence are unclear. Argentina indicated that violations of art. 177 CPC could be sanctioned by 1-6 years imprisonment under art. 277 PC, an aggravated offence of concealment. (SQ 3) The examining team questions the actual effectiveness of these relatively draconian sanctions, which appear to be more suited to cases of active concealment. The Reporting Decree does not provide for sanctions. Questioned about possible disciplinary sanctions for failures to report, Argentina suggested after the on-site visit that disciplinary sanctions could apply pursuant to the Public Service Law (Law 25.164). But this law does not establish sanctions for breach of the Reporting Decree; rather it establishes independent reporting obligations and sanctions. Moreover, the requirements are different from those in art. 177 CPC and the Reporting Decree: suspicions are to be reported to the hierarchical superior, not to law enforcement agencies (art. 23.g).[14] The lead examiners are concerned about the number of seemingly overlapping reporting rules, the lack of consistency among them, and the absence of clear and realistic sanctions for non-reporting.

50. Specific procedural measures have also been taken by the Argentine authorities to encourage reporting of suspected domestic corruption, but they do not apply to foreign bribery. First, art. 1 of the Reporting Decree provides a specific procedure for reporting domestic corruption and provides a very low evidence threshold for reporting (public officials must report "presumptions" of domestic bribery in the national administration to the OA within 24 hours).[15] Second, specific measures have been taken to allow the identity of persons who report suspicions of domestic bribery to the OA or the FIA to be kept secret. (GQ 2.5) Finally, instructions for reporting domestic corruption are clearly provided to the public on OA's website and complaints can be lodged online. OA representatives noted that these procedures have significantly increased the number of reports received from public officials. From January 2000 to June 2006, the OA received a total of 5 696 reports, of which 1 439 were anonymous and 122 were submitted

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13 Argentina indicates that all public officials are covered by this obligation. The Argentine authorities have also provided an interpretation of the definition of the term "public officials" [see section D.1(b) of the report] which suggests that employees of public enterprises that are appointed by the Executive are also covered by the obligation.

14 Law 25.164 also does not apply to Argentina's diplomatic personnel. Other exceptions include ministers, deputy ministers, heads of decentralised state agencies, the judiciary, the legislature and the military.

15 Under art. 3 of the Reporting Decree, public officials must also report to the OA if they become aware of "the existence of schemes which may encourage the commission of corrupt acts within the National Public Administration".

with protection of identity. (GQ 2.5) From 2004 to April 2008, FIA received 1087 reports of suspected domestic corruption, of which 76 were anonymous and 8 were accompanied by protection of identity measures.

Commentary:

The lead examiners consider that the numerous and overlapping reporting requirements should be rationalised with the aim of ensuring consistency and increasing effectiveness. This should include: (i) reminding public officials of their obligation under art. 177(1) CPC and art. 2 of the Reporting Decree to report alleged offences of foreign bribery directly to competent law enforcement officials; (ii) ensuring that any administrative reporting duty laid down in the Public Service Law or in ministry and agency-specific instructions duly reflects and is compatible with the CPC and Reporting Decree; and (iii) ensuring that liability and sanctions for non-reporting of alleged foreign bribery are clearly established, understood and enforceable.

The lead examiners also recommend that Argentina consider taking additional measures to encourage the reporting of suspicions of foreign bribery. The Argentine authorities should also ensure that the law enforcement body competent for investigating foreign bribery reviews local and (reasonably available) foreign media allegations of foreign bribery.

c) Whistleblower protection

51. No whistleblower protection scheme is in place (whether for reporting domestic corruption or foreign bribery) protecting persons reporting in good faith and on reasonable grounds against unjustified treatment such as dismissal. Similarly, no specific steps have been taken to encourage companies to provide channels for communication by, and protection for, persons not willing to commit bribery under instruction or pressure from their superior, or who want to report bribery suspected of having been committed by other people employed by the company.

52. In mid-2003 the OA launched a project in order to protect whistleblowers in corruption-related cases. The draft bill is designed to provide protection from unjustified treatment for persons from the public or private sector who inform about "acts of corruption", including foreign bribery. (GQ 2.5) The OA expected to send a draft bill to the Executive in late 2007 or early 2008 for consideration. However, according to a civil society representative met during the on-site visit, the government had so far shown only modest support for the OA project.

Commentary:

The lead examiners recommend that Argentina adopt comprehensive measures to protect public and private sector whistleblowers in order to encourage employees to report suspected cases of foreign bribery without fear of retaliation. They also recommend that Argentina encourage companies to provide internal channels for communication by, and protection for, persons not willing to commit bribery under instructions or pressure from hierarchical superiors, or who want to report bribery committed by other people employed by the company.

3. Foreign diplomatic representations and the Ministry of Foreign Affairs

a) Awareness-raising efforts

53. The MFA website for export-related activities (Argentina Trade Net) includes a link to the content of Art. 1 of the Convention and art. 258 bis PC.[16] However, as of May 2008 the available information was in part significantly out-of-date as it did not reflect the important amendments to art. 258 bis PC introduced in 2003. In its role as the National Contact Point of Argentina for the OECD Guidelines for Multinational Enterprises, the MFA has also participated in numerous activities for the promotion of the Guidelines. (GQ 3.2) While it is unclear whether any of these activities dealt with corruption prevention in the past, Argentina indicates that promotional activities organised in the second half of 2008 will cover the topic.

54. Regarding diplomatic missions abroad, in mid-2007 the MFA issued two official circulars (*Circulares Telegráficas* DICOL 010004/2007 and DICOL 010007/2007) to its internal departments and to its embassies, consulates and trade offices abroad, which include information related to the Convention and art. 258 bis PC. (GQ 2.3) In June 2008, the MFA issued a new circular providing additional guidance for its internal departments, embassies, consulates and trade offices to ensure they can provide adequate advice, assistance and information to Argentine companies on foreign bribery issues. The booklet developed with *Fundación EXPORT.AR* (see section B.1.a.iii) was also to be distributed to all diplomatic missions and to Argentine companies taking part in trade missions abroad.

55. Lectures and seminars covering the topic of the Convention were given in 2005 at the Argentine Council on Foreign Relations and at the School of Foreign Service. (GQ 2.3) Argentina also indicates that the regular training course for Foreign Service officers covers the Convention. In addition, at the time of the on-site visit the MFA was planning a number of additional training activities to be held annually as of 2008: a two week training seminar for Foreign Service Officers and Administrative Staff, a training module for Embassy Secretaries, and a conference for Foreign Service Institute students.

b) Detection and reporting of foreign bribery

56. As noted above, serious allegations of bribery of a very senior foreign public official by an Argentine company appeared in press articles in the foreign country in 2001-2002, and in the international press. They were not reported by the MFA to Argentine law enforcement officials until 2006, after the Working Group had noted the allegations in the press. Argentina has not satisfactorily explained this situation, but has begun to take remedial measures.

57. The MFA has recently addressed the issue of the reporting by its staff of suspicions of foreign bribery. The DICOL 010007/2007 circular (the "MFA Circular") instructs embassy, consulate and trade office personnel how to proceed when they obtain knowledge that an offence of foreign bribery might have been committed. Suspicions of foreign bribery should be reported to the Head of Mission who must then immediately inform the MFA's Bureau of Juridical Affairs. Where the Bureau of Juridical Affairs considers it appropriate, it then reports the allegation to the Prosecutor General's Office for investigation. The MFA Circular refers to public officials' reporting obligation under art. 177 CPC, but not to the Reporting Decree.[17]

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16 "*Argentina penaliza el soborno a funcionarios públicos extranjeros*"; http://www.argentinatradenet.gov.ar/sitio/datos/docus/soborno-mesurci010868-05-n.PDF (last consulted May 2008).

17 See section B.2(b) of the report for more on Executive Decree 1162/00.

58. As noted above, art. 177 CPC and the Reporting Decree, which apply to all MFA officials, require public officials to report suspicions of offences to law enforcement officials; they do not refer to internal reporting within a Ministry or agency. 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 direct report to a judge or prosecutor required by art. 177 CPC and the Reporting Decree.[18] A direct report to a judge or prosecutor would help ensure that the factors set forth in Art. 5 of the Convention are not taken into account in decisions to report allegations, and help ensure that allegations are effectively handled.

Commentary:

The lead examiners welcome the MFA's recent initiatives to raise awareness and its general statement about the need for foreign diplomatic missions and trade promotion personnel to provide assistance to companies. In this area, the lead examiners encourage the Argentine authorities to ensure – by providing regular and comprehensive training– that foreign diplomatic missions and trade promotion personnel are adequately prepared to advise and assist Argentine companies in the fight against foreign bribery.

In addition, the lead examiners consider that the MFA Circular and other relevant materials should remind MFA employees and agents of their duty to report suspicions of foreign bribery directly to a judge or prosecutor under art. 177 CPC and the Reporting Decree, and inform them of the prohibition on considering the factors identified in Art. 5 of the Convention. In light of the absence of reporting in the case referred to above, additional guidance and concrete examples might also be necessary in order to ensure that staff posted abroad is aware of the type of evidence and allegation it should report.

4. Tax authorities

a) Awareness and resources

59. During the on-site visit, the Federal Tax Administration (*Administración Federal de Ingresos Públicos*, AFIP) indicated that it had recently promoted knowledge of the Convention and the implementing legislation. The Convention and law have been distributed to staff along with a 2007 AFIP instruction dedicated to the detection of bribe payments to foreign public officials (the "AFIP Instruction").[19] In September 2007, AFIP also organised a conference targeted at its investigation and control units where the same documents were presented in more detail. In 2007 AFIP published an article about the Convention and art. 258 bis PC in a specialised publication, and since the on-site visit, has included information about the fight against foreign bribery on its website.[20]

60. AFIP representatives at the on-site visit indicated that the agency has sufficient resources and full governmental support for clamping down on tax evasion and tax fraud. The agency was also presented by representatives of the private sector as being increasingly efficient in carrying out this task.

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18 After the on-site visit, the MFA indicated that it was preparing an update of circular DICOL 010007/2007.

19 See AFIP General Instruction 794/07 (*Guidelines for Detection of Bribe Practices in Favour of Foreign Public Officials*).

20 The issue of the denial of tax deductibility of bribes is addressed below in section D.4.a).

b) Detection

61. The AFIP Instruction introduces parts of the OECD Bribery Awareness Handbook for Tax Examiners (2000) and adapts it to the Argentine context, providing tax inspectors with practical and procedural guidance for the detection of foreign bribery.

62. At the time of the on-site visit, the AFIP Instruction's definition of foreign bribery[21] largely followed the generic definition of bribery used in the OECD Handbook. This definition is not as detailed as the definition of foreign bribery used in art. 258 bis PC and the one used in the Convention, but has the advantage of being workable and easy to grasp by avoiding more technical aspects of the prohibition. Nevertheless, the lead examiners consider that because the Instruction also serves the purpose of raising awareness, more complete information could be provided about the broad scope of the prohibited conduct. After the on-site visit, Argentina indicated that it had amended the instruction to include the text of art. 258 bis PC.

63. AFIP representatives indicated that a specific area of focus for tax inspectors was the detection of shell companies. An important ongoing case of alleged bribery involving domestic public officials and a wide array of shell companies was originally initiated as a tax matter by an AFIP complaint to a tax court judge. The judicial investigation later uncovered possible bribery. At the time of the on-site visit, AFIP had not reported ever directly detecting suspected active bribery, whether domestic or foreign.

c) Reporting by tax inspectors of suspicions of foreign bribery

64. Tax inspectors, like other officials, are subject to the general reporting obligations under art. 177 CPC and art. 2 of the Reporting Decree. These general reporting obligations apply notwithstanding any confidentiality obligations for tax officials. The AFIP Instruction refers to art. 177 CPC, but the lead examiners have concerns about how the reporting rules included in the Instruction relate and compare with the more generally applicable rules in art. 177 CPC and the Reporting Decree.

65. While the general reporting rules require direct reporting to the law enforcement authorities by the public official who suspects an offence has been committed,[22] the AFIP Instruction provides for multiple layers of internal reporting at AFIP – at a minimum to the official's superior, then to the Legal Department – before disclosure to external law enforcement officials is considered.

66. Furthermore, the AFIP Instruction establishes a higher threshold for reporting suspected foreign bribery than applies under the Reporting Decree. As noted above, art. 2 of the Reporting Decree requires the reporting of "alleged crimes"; in contrast, the AFIP Instruction only requires reporting where the tax official can "conclude the effective commission" of the offence. This high threshold is applied to both internal reporting and external reporting, which raises additional questions as to the purpose of the multiple layers of internal reporting.

67. After the on-site visit, Argentina indicated that multiple levels of internal reporting within AFIP and internal assessment of the credibility of the evidence of foreign bribery have the advantage of avoiding "the activation of an expensive judicial organ without justification". The Reporting Decree appears to have resolved this question, however, by requiring the reporting of alleged foreign bribery so that the evidence

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21 The Instruction defines foreign bribery as follows: "Within the framework of this Instruction, bribes to international public officials can be defined as a specific type of corruption which entails the voluntary giving of something of value in order to influence the performance of foreign officials, either by doing something improper or failing to do something they should do within the authority of their position".

22 See section B.2(b) of the report.

may be considered by the law enforcement authorities; it does not provide for discretionary decisions by individual public officials or agencies.

68. With regard to reporting in practice, the number and type of offences forwarded to external law enforcement agencies annually by the tax authorities is unknown because there is no system in place for keeping track of such reports. AFIP could consider introducing a monitoring system of bribes identified during tax examinations into the AFIP Instruction, as suggested by item 13 of the OECD Handbook. After the on-site visit, Argentina indicated that such a system would be developed by AFIP in the near future.

69. Under Law 25.246 (anti-money laundering law – AML law), AFIP is also required to report to the financial intelligence unit (UIF – *Unidad de Información Financiera*) any suspicious act or transaction, irrespective of the amount thereof detected in the course of its work.

70. The Tax Procedural Law (art. 101(6.d)) addresses information sharing within the framework of international agreements. Tax secrecy is lifted for the purpose of sharing information with foreign tax administrations on the condition that the information is treated as confidential by the foreign tax authorities, and is used only for tax purposes. Argentina has not signed any treaty allowing tax information to be used for non-tax criminal proceedings, a possibility contemplated in the current version of the Commentary to the OECD Model Tax Convention.[23]

Commentary:

The lead examiners welcome the various awareness raising measures undertaken by AFIP. The lead examiners recommend that Argentina ensure that in all cases of alleged foreign bribery tax inspectors are required to report the allegations directly to a judge or prosecutor, in line with the reporting obligation under art. 177 CPC and art. 2 of the Reporting Decree.

The lead examiners also recommend that Argentina monitor on a regular basis the application in practice by tax inspectors of the AFIP Instruction and refine it as necessary.

5. Officially supported export credits

71. In Argentina, export credit support is administered by the *Compañía Argentina de Seguros de Crédito a la Exportación S.A.* (CASCE) as the agent of the *Banco de Inversión y Comercio Exterior* (BICE). BICE is wholly owned by the Argentine government. CASCE is owned by a private holding company which is in turn owned by the Spanish export credit company (CESCE), two Spanish banks and a German reinsurance company.

72. Support for political and extraordinary export credit risks is provided by CASCE jointly with BICE, under the supervision of the National Commission for Insurance and External Guarantees (*Comisión Nacional de Seguros y Garantías Externas,* CNSGE).[24] Neither CASCE nor BICE is a member of the

23 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 para. 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.'"

24 The members of the CNSGE are the MOE, the MFA, the National Superintendent of Insurance and BICE.

OECD Export Credit Group. Although the 2006 OECD Recommendation on Bribery and Officially Supported Credits (the "2006 Recommendation") invites Parties to the OECD Anti-Bribery Convention to adhere to the 2006 Recommendation (art. 3), Argentina has not taken any steps towards adhesion. Moreover, current practices in Argentina 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, 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.

73. Although it is CASCE rather than BICE that interacts with clients on export credit issues, BICE could apparently also play a broader role in raising awareness. The Responses indicate that the MOE has requested BICE (and the central bank) to provide their private sector customers with a wide knowledge of the Convention. In addition, an undated commercial internet publication for SMEs focusing on export credit states that BICE intends to carry out an action plan to bring the export credit regime into line with that applied in OECD countries.[25]

74. Since CASCE administers the credit support, its employees are most likely to see suspicious transactions in practice. CASCE, however, does not have any policy with regard to the reporting of suspicions of foreign bribery by its clients or their agents and affiliates to law enforcement authorities. Its employees are not considered to be public officials and are not subject to any reporting obligation with regard to suspicions of bribery by CASCE clients. BICE employees are subject to reporting obligations as public officials, but have limited contact with clients on export credit matters.

75. Following the on-site visit, Argentina indicated that under CNSGE supervision BICE is working on initiatives specifically focused on the Convention, such as: (1) including 'anti-transnational bribery' provisions in export credit applications and contracts; and (2) assessing bribery risks as part of pre-contract due diligence.

Commentary:

The lead examiners welcome the recent work by BICE on initiatives to combat foreign bribery in the context of export credit support. In this respect, the lead examiners recommend that Argentina also take note of provisions in the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits, and seriously consider adhering to it, as provided in Article 3 of this Recommendation.

Generally, with respect to combating foreign bribery in officially supported export credits, the lead examiners recommend that Argentina:

- ***raise awareness of the foreign bribery offence among the CASCE and BICE staff and among applicants requesting export credit support;***
- ***ensure that employees of CASCE and BICE are provided adequate training on due diligence procedures to detect foreign bribery, encourage and facilitate reporting of suspicions of foreign bribery they may come across in the course of their work, and remind BICE employees of their reporting obligations;***
- ***include anti-bribery provisions in relevant export credit applications and contracts; and***

[25] See http://www.portalentrepreneur.com/comercioexterior/central_comexterior_servicios_seguros_nota10.htm (last consulted May 2008).

– ***take other appropriate measures to ensure that applicants for export credit support, or anyone acting on their behalf, have not been engaged in, and will not engage in, foreign bribery.***

6. Accounting and auditing

a) Awareness and training

76. The leading organisation for the Argentine accounting profession is the Argentine Federation of Expert Councils on Economics (*Federación Argentina de Consejos Profesionales de Ciencias Económicas*, FACPCE). FACPCE, a private, professional association, consists of 24 separate Councils (one for each province and one for the federal capital). The largest Council is the one for Buenos Aires City, CPCECABA. The Councils are entitled by law to set standards for the accounting profession and to oversee their implementation. All accountants must be registered with the relevant Council.

77. In July 2007, CPCECABA published in its bulletin a one page note about the Convention and the Argentine implementing legislation (also posted on its website). While this note mentions art. 258 bis PC, it refers to an outdated version of the article. FACPCE and the profession engaged in significant awareness-raising efforts after the extension of money laundering prevention obligations to auditors, but at the time of the on-site visit no similar efforts had addressed the role of accountants and auditors in the fight against foreign bribery. Since the on-site visit, FACPCE has indicated that the Convention will be included on the agenda for the 2008 National Congress of Accountants and in a number of other forthcoming events, and will be the subject of a detailed article to be published in a magazine widely distributed to the profession.

78. On 3 July 2007 the President of the Argentine Institute of Internal Auditors (A-IIA) sent a note to all members of the institute raising awareness about the Convention. (SQ 44) However this letter aimed at raising awareness about international conventions against corruption, and did not pay any particular focus to foreign bribery and art. 258 bis PC. During the on-site visit A-IIA representatives indicated that their institute provides training to members on fraud detection and money laundering, but not on bribery.

79. Argentine corporate law also provide for *síndicos*, a type of statutory auditor entrusted with the task of observing that the corporation acts in accordance with the law and the corporate by-laws. He/she is required to be an accountant or lawyer. Appointment of the *síndico* is not mandatory, except for certain corporations (*i.e.* those which capital exceeds USD 2.1 million, are publicly held or public utilities). The majority of *síndicos* are accountants.

b) Detection and reporting obligations of external auditors and síndicos

80. 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.

81. With regard to detection, important standards relating to auditors' role in detecting fraud have been developed by the auditing profession, such as International Standard on 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.

82. There is no existing standard of this nature in Argentina. (SQ 59) In July 2003, FACPCE decided to adopt the ISAs. However, the implementation of the decision has been postponed. FACPCE recently completed its translation of ISA standards and will be broadly distributing them for comments shortly.

83. With regard to the reporting of suspicions of foreign bribery detected by auditors, the 1997 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 Paragraphs V. B. iii) and iv) of the 1997 Revised Recommendation].

84. There are no rules or standards in Argentina expressly requiring external auditors to report to company management all suspicions of bribery by agents or employees of the company. (SQ 59) After the on-site visit, Argentina suggested that a FACPCE requirement for an assessment of control systems in the audited company could be interpreted to require such reporting, but this would appear to apply in at most only some cases.

85. There is also no rule or standard requiring the reporting by auditors of suspicions of bribery to competent law enforcement authorities. Such reporting would generally be prohibited by professional secrecy obligations. (SQ 58) FACPCE's Code of Ethics establishes a general rule of professional secrecy. It can be lifted, *inter alia*, where there is a legal imperative, but there is no applicable legal imperative with regard to suspicions of foreign bribery. Disclosure is permitted (although not required) where the maintenance of secrecy would permit the commission of a crime that would otherwise be avoided.[26] In contrast to the case for bribery, reporting by auditors is required where money laundering is suspected, but the reporting obligation is not yet effective in practice in this area either.

86. Auditors are permitted to resign at any time without providing any reasons and no public disclosure of the resignation is required. As a result, an auditor who discovers illegal behaviour can simply resign without disclosing the matter.

87. There is no available information or statistics on the involvement of accountants and auditors in the detection of fraud and bribery in practice. (SQ 57) There have not been any known cases of auditors disclosing suspicions of bribery by the audited company to competent law enforcement authorities.

88. As noted above, *síndicos* have some of the functions of an external auditor. *Síndicos* do not have any obligation to report suspicions of bribery by employees or agents of the company to management or to competent law enforcement authorities. The AML law imposes money laundering obligations on *síndicos*, but only if they are certified accountants or auditors. Attorneys who are *síndicos* are not subject to any money laundering reporting obligation. (See below the section on money laundering prevention and detection framework.)

Commentary:

The lead examiners recommend that the Argentine authorities take steps to improve the detection of foreign bribery by accountants, auditors and síndicos, 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 foreign bribery. The examiners also recommend that the Argentine authorities encourage FACPCE to accelerate the process of adoption of international audit standards of direct relevance to the fight against foreign bribery, such as ISA 240.

[26] FACPCE Code of Ethics art. 32(b) and (d).

The examiners further recommend that Argentina take all necessary measures to ensure that auditors and síndicos 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. In addition, Argentina should consider requiring auditors and síndicos, notably in the face of inaction after appropriate disclosure within the company, to promptly report suspicions to the competent authorities.

7. Official development assistance

89. Argentina is a modest donor of development assistance. Development aid is the responsibility of the MFA. Representatives of the Ministry indicated that Argentina currently provides only technical assistance, typically by facilitating the availability of Argentine experts for foreign missions by covering travel costs. It does not provide development aid in the form of financial assistance. Argentina is not a member of the OECD Development Assistance Committee.

C. INVESTIGATION AND PROSECUTION

1. Overview

a) The courts

90. Argentina is a federal state and its constitution provides for both federal and provincial courts. In the area of criminal law, the federal judiciary is composed of both investigating magistrates (*jueces de instrucción*) who investigate cases to determine if an oral proceeding (*juicio*) is appropriate and judges who conduct and adjudicate cases during the oral phase (*tribunales orales*). Appeals and extraordinary appeals are heard by courts of appeals (*cámaras de apelación*), the *Cámara Nacional de Casación Penal* (National Criminal Court of Cassation) and the Supreme Court.

91. There are 16 federal jurisdictions and 23 provincial jurisdictions. Both the federal and the provincial court systems are divided according to broad specialty areas (criminal, civil, commercial, labour, administrative law, etc.). The federal criminal court system is further specialised, but only in Buenos Aires. (See below the section on subject-matter jurisdiction)

92. While the federal criminal justice system remains largely inquisitorial, with the investigative judge generally playing the key role in the investigation, many of the provinces have adopted a more accusatorial system in which the investigation is principally conducted by the prosecution. As discussed further below, the draft federal criminal procedure code would adopt an accusatorial system at the federal level.

b) Prosecutorial and investigative agencies

93. Analysis of the practical enforcement in Argentina of the foreign bribery offence is complicated by the different approaches to foreign as opposed to domestic bribery investigations. Because of the rarity of foreign bribery cases, much of the information supplied by Argentina and panellists relates to the experience of agencies that investigate domestic bribery cases. However, the agencies most specialised in

domestic corruption investigations generally do not have the power to investigate foreign bribery cases. In order to evaluate the system, the discussion below addresses both foreign and domestic bribery.

(i) Investigative judges

94. Most criminal cases in Argentina are promptly filed with an investigative magistrate. Article 196(2) CPC requires prosecutors, for example, to promptly report suspicions to a judge. Once a case is submitted to an investigating magistrate, federal criminal procedure in Argentina currently involves two fundamental judicial stages: (1) the investigation (*instrucción*), which is generally conducted by the investigative magistrate; and (2) the oral proceeding (conducted by a different judge or judges) which leads to a decision on the merits. Foreign bribery cases will generally be conducted by an investigative judge from the outset and follow these two stages. In contrast, in domestic bribery cases, there is frequently a first "preliminary investigation" stage carried out before the case is presented to a judge (see below).

(ii) The Ministerio Público

General

95. Federal prosecutors are part of the federal Public Prosecutor's Office (*Ministerio Público*, MP) and are organised pursuant to Art. 120 of the Constitution and the organic law of the MP (*Ley Orgánica del Ministerio Público*, LOMP). The MP is headed by the Attorney General (*Procurador General de la Nacion*, PGN) who is appointed by the Executive with Senate approval by a two-thirds majority.

96. The MP has been historically structured according to strict, hierarchical principles. For example, the prosecutor attached to a court of appeal retains powers of direction and surveillance over prosecutors attached to each of the courts of first instance in the same judicial circuit. In turn, the prosecutor in the court of appeal is subordinate to the PGN.

97. The MP is not specialised in part due to its traditional organisation around individual courts. Panellists at the on-site visit explained that when a case is filed with a judge, the case is mandatorily assigned to a competent prosecutor from that court (*fiscal de turno*). In practice, this competent prosecutor is considered to be the "natural prosecutor", in a manner analogous to the concept of a natural judge, and normally cannot be substituted. After the on-site visit, Argentina clarified that, as a legal matter, the Constitution refers only to the concept of the natural judge.

98. A law is required to create a specialised prosecution service. The only specialised prosecution service established by law is the FIA, designed to play a role in prosecuting domestic corruption (see below).

99. Since 2000, the MP has developed some specialized work groups of prosecutors, but they can only serve as consultants to the competent prosecutor. Such groups currently exist for tax cases, money laundering, social security fraud and other matters. None of the current specialised groups would appear to be well-suited for foreign bribery cases. The PGN can create teams of two or more prosecutors for important or difficult cases.

The FIA, a specialised prosecution service for domestic bribery cases

100. The FIA is a specialized nationwide prosecuting agency for corruption cases involving Argentina federal officials or state funds. It has no jurisdiction to investigate foreign bribery unless one of those elements is present, which will rarely be the case. It also has a limited role in domestic bribery cases. It can autonomously carry out preliminary investigations prior to the judicial stages of the case. However, once the case is filed with a judge, it has only an auxiliary role. The judge is in charge of the investigation.

The competent prosecutor appointed from the prosecutor's office attached to the judge's court, and not the FIA, runs the prosecution from that stage.[27]

(iii) The Police

101. The Federal Police (*Policía Federal Argentina*, PFA) is a nationwide police force. Until recently, it was subordinated to the Ministry of Interior, but a 2007 law now provides that it is subject to the Ministry of Justice. It has jurisdiction only over specific issues (except in Buenos Aires City where it has broader jurisdiction) and most routine police work is carried out by the provincial police forces. The police are subject to the authority of the investigative judge during the investigation. A small PFA unit conducts money laundering investigations, but the police have a limited role in investigating bribery cases. A FIA representative indicated that they do not generally play a significant role in domestic bribery cases conducted by FIA. A tax court judge engaged in a major investigation of a matter involving corruption allegations expressed satisfaction with police work on such matters, but noted that they are critically short of resources.

(iv) The Anticorruption Office

102. In addition to its awareness raising and training functions described above, the OA also participates in the investigation of domestic corruption cases through its Investigation Division. The OA's jurisdiction is similar to that of FIA and would only extend to foreign bribery in very exceptional cases. The OA can receive complaints from private individuals or public officials; encourage the institution of administrative, civil or criminal proceedings; assess media information concerning corruption issues; and act as the plaintiff in proceedings that affect State assets. As a plaintiff, it can propose measures to advance the proceedings, including proposing evidence, and appeal against decisions that are adverse to its claims. The examining team noted that some NGO representatives expressed concern about the institutional dependence of the OA on the Ministry of Justice for its funding.

2. How cases are started, conducted and ended

a) Starting cases

103. Argentine law provides for broad rights for individuals or organisations to initiate a criminal prosecution. As noted above, article 174 CPC allows any person to denounce alleged crimes to a judge, prosecutor or the police. Article 82 CPC allows aggrieved persons to become parties to the action as *querellantes*. The threshold to open an investigation is low: actions can be and have been commenced based on news reports. Once a complaint is received, investigation is legally mandatory. [See art. 29 LOMP (establishing principle of legality).]

104. While these general principles raise no difficulty, the examining team is concerned by the delay in undertaking the investigation of the important foreign bribery allegations referred to above in the Introduction. As noted, despite significant media coverage in 2001-2003, including at least one story in a major daily newspaper in Argentina, no action was taken with regard to the case in Argentina until May 2006. This was only after the publicly-available allegations were noted by the Working Group in June 2005 and subsequently transmitted to prosecutors by the MFA. The lead examiners consider that a more

[27] The FIA recovers jurisdiction if the competent prosecutor decides not to press charges. But this transfer of the case is frequently not smooth and the FIA's absence from critical stages of the case weakens its ability to reinstate an effective prosecution. The FIA is currently challenging a case in which it lost an appeal right because of an alleged judicial failure to inform it of the decision of the competent prosecutor not to file charges.

pro-active approach should be adopted by the law enforcement authorities with regard to seeking out and investigating allegations of foreign bribery.

Commentary:

The lead examiners recommend that prosecutors, and investigative judges as appropriate, seek out and follow up promptly on allegations that Argentine companies or individuals have engaged in foreign bribery.

b) Conduct of the case

105. As noted above, current procedure includes two fundamental judicial stages, the investigation and the oral trial stage. In domestic bribery cases, however, there is frequently an important preliminary stage: a preliminary investigation conducted by the FIA prior to an investigative magistrate becoming involved in the case.

(i) Preliminary investigation (in domestic bribery cases)

106. Preliminary investigations are highly developed in domestic bribery cases managed by the FIA. Indeed, the FIA generally seeks to complete as much of the investigation as possible prior to submitting the case to a judge. FIA's pre-judicial investigations, however, are necessarily limited because many investigative measures, including access to tax information, require judicial intervention. The mandatory replacement of the FIA by the competent prosecutor as the lead prosecutor on the case, which occurs mechanically upon the filing of the case with a judge, disrupts the investigation and prosecution. Panellists noted sharp conflicts between the FIA and other prosecutors, noting for example that investigative measures taken by the FIA are often not approved by the competent prosecutor on the case.

107. As noted above, there is no agency similar to the FIA dedicated to carrying out preliminary investigations of foreign bribery cases. The investigation of allegations of foreign bribery cases would instead generally commence after the filing of the case with an investigative judge. It does remain possible in theory, however, for MP prosecutors to carry on limited investigations before informing a judge about a foreign bribery case. They can, like a private lawyer, collect information to prepare a more detailed allegation to be submitted later on to the investigative judge.

(ii) The judicial investigation phase and the problem of delays

108. As noted, investigative magistrates are charged with the conduct of the investigation. They have the power to delegate investigations to a prosecutor, but panellists indicated that such decisions are exceptional. The public prosecution, the defence and other parties to the case, such as the complainant (*querellante*), can suggest investigative measures to the judge, but under current law the judge controls the process. Once the investigative judge has completed the investigation, he/she decides (in broad terms) whether to transmit the case to a separate judge or judicial panel for the oral phase and a decision, or whether to dismiss the case.

109. As originally conceived by the CPC, the judicial investigation was intended to be short. Article 207 CPC provides for the judge completing the investigation within four months from the first interrogation of the suspect with possible extensions. Panellists made clear, however, that the time limits in art. 207 are wholly inapplicable in complex economic crime cases. In practice, delays are much longer and constitute one of the principal impediments to effective enforcement in Argentina.

110. Corruption cases last 14 years on average according to a recent study of white collar crime cases in Argentina by the *Centro de Investigación y Prevención sobre la Criminalidad Económica* (CIPCE).[28] A recent editorial in a leading newspaper underlined that none of the 1668 complaints made by the OA since 1999 have resulted in a conviction.[29] Few cases even reach the oral proceeding stage. The principal reasons cited by the CIPCE study or panellists for these problems include excessive acceptance of delaying tactics in some cases; the absence of organised systems for prosecution; and the lack of resources and in particular specialised prosecutors, judges and investigators.

111. The CIPCE study notes that economic crime cases have an average of 10 interlocutory proceedings (*incidentes*) and in some cases have as many as 100, whereas these proceedings are infrequent in normal cases; they appear to be used in some cases as a litigation strategy and the courts are unable to resolve them in an organised and expeditious fashion. The discussions during the on-site visit confirmed these phenomena. One judge described the task of reaching the oral proceeding stage in a complex case as requiring a "personal crusade". Others felt that the long acceptance of a system where corruption cases last an average of 14 years without resolution demonstrates a lack of political will to attack corruption seriously.

(iii) The oral trial (juicio)

112. As noted, the delays during the investigation result in very few economic crime cases reaching the oral proceeding stage. Depending on the case, the oral proceedings may be conducted by a panel of judges (*tribunal colegiado*) or a single judge. OA representatives underlined that the oral phase, which is currently underway for a small number of corruption cases, can also suffer from lengthy delays.

Commentary:

The lead examiners are seriously concerned about the lengthy delays that characterize economic crime cases in Argentina due,* inter alia*, to the applicable rules of procedural law. There appears to be a general expectation that corruption cases will not be addressed on the merits, which can create significant risk that those engaging in bribery will feel able to act with impunity.

The examiners recognize that the problem has many causes, some of which are further analyzed below, but they consider that urgent action is required to ensure that foreign bribery allegations can be effectively investigated and prosecuted on a timely basis. They recommend that the Argentine authorities review applicable rules to ensure that incidentes and appeals can be efficiently resolved in complex foreign bribery cases. The Argentine authorities should also ensure that judges and prosecutors are adequately trained to manage these cases, including with regard to the ability to impose sanctions on parties for abuse where appropriate.

c) Ending the case

113. Prior to a judge becoming involved, a prosecutor can decide to close a file without any judicial review of the decision. (SQ 29) Prosecutors can reopen files that they have closed. As noted above, individuals can also submit the allegations to a judge.

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28 The CIPCE study is available at http://www.ceppas.org/cipce/index.php?option=com_docman&task=cat_view&gid=44&Itemid=26 (last consulted May 2008).

29 See "*Mejorar la lucha contra la corrupción*", Clarín (27 July 2007) http://www.clarin.com/diario/2007/07/27/opinion/o-02801.htm.

114. Once an investigating magistrate is involved, only he/she can decide to close the file (art. 336 CPC). Because investigation is legally mandatory, cases must in theory be investigated until a conviction or until the judge determines that they have no merit. In practice, because of the problem of delays, investigations are closed in economic crime cases mainly through the passage of time and the expiry of the limitations period. Judicial decisions to close the case can be appealed by the prosecutor or accusing party (*querellante*) to the court of appeal.

115. Argentine law provides limited scope for settlements. Under the *procedimiento abreviado* in art. 431 bis CPC, the prosecution and the defence can reach an agreement about guilt and sentence at the time the prosecutor seeks to commence the oral trial phase. However, in cases with more than one defendant, the mechanism can be applied only if accepted by all of the defendants. (See art. 431 bis 8 CPC) This requirement may have been aimed at avoiding use of the *procedimiento abreviado* for investigative purposes, *i.e.*, for encouraging one defendant to testify against another. The *procedimiento abreviado* has not been used in corruption cases to date. There is little incentive to settle even for a defendant who has bribed in a system that is generally unable to bring cases to a conclusion.

3. Subject matter jurisdiction

116. The examining team has a number of concerns with the subject matter jurisdiction (jurisdiction *rationae materiae*) of the federal courts in the context of the fight against foreign bribery. These relate in particular to (a) apparent initial judicial uncertainty over the applicable rules; and (b) the jurisdiction of key federal specialised criminal courts.

a) Judicial uncertainty in practice over jurisdiction in foreign bribery cases

117. The one foreign bribery investigation in Argentina was marked by jurisdictional uncertainty. Upon receipt of the allegations in 2006, the federal investigative magistrate in charge of the case considered that he did not have subject matter jurisdiction and that the Supreme Court had original jurisdiction to investigate the case because the case involved foreign relations. He appeared to rely on Art. 117 of the Constitution, which gives the Supreme Court original jurisdiction over cases involving ambassadors, ministers and consuls. The Supreme Court found that this provision refers to diplomatic personnel and not to foreign relations more generally and returned the case to the investigative judge. While the law in this area is thus clear, the lead examiners consider that the initial judicial uncertainty about jurisdiction in the only known foreign bribery case raises questions about the awareness of the judiciary about the basic nature of the foreign bribery offence and may raise questions about their commitment to investigate such cases vigorously. It is noteworthy that the jurisdictional issue arose in 2006, almost five years after the alleged events, and thus shortly before the possible expiration of the six year limitations period.

Commentary:

The lead examiners recommend that Argentina consider engaging in appropriate awareness-raising to ensure that relevant judges are aware of the nature of the foreign bribery offence and the applicable jurisdictional rules.

b) Related cases

118. Federal investigative judges generally have jurisdiction over all types of federal criminal cases. In Buenos Aires, however, there are a number of specialised criminal courts with narrower jurisdiction. Of particular importance are the federal criminal and correctional courts (*Justicia nacional en lo criminal y*

correccional federal) and the federal economic crime courts (*Justicia nacional en lo penal económico*) which include a subdivision for federal tax crime cases (*Juzgado nacional en lo penal tributario*).[30]

119. The jurisdictional rules governing the specialised federal courts in Buenos Aires, as currently applied, can create significant obstacles to effective investigations in bribery cases. Cases that involve allegations of both bribery and tax fraud – a frequent occurrence where false invoices are used to create a slush fund to facilitate bribery and the relevant "expenses" are deducted from income – are routinely divided into two separate judicial investigations, one for the bribery aspects and a separate one for the tax aspects. Because each case also requires its own competent prosecutor from the relevant court, the prosecution of such matters is also divided.

120. This appears to seriously weaken the effectiveness of the bribery investigation in some cases. For example, in one case, an aggressive year-long investigation of alleged false invoices by a tax court judge led to the discovery of possible bribery relating to the same events. A new separate bribery proceeding was launched, which resulted in several months of uncertainty and overlapping proceedings. Ultimately, the court of appeal separated the matter into two proceedings, one for the original tax aspects and a separate one for the alleged bribery. The bribery part of the case did not have either an active judge or prosecutor at the time of the on-site visit because the relevant personnel had resigned. The examining team questions whether commencing a new separate proceeding is an effective approach to the investigation of bribery matters.

Commentary:

Considering that many foreign bribery cases may involve tax or other additional issues, the lead examiners recommend that Argentina should consider measures to ensure that the foreign bribery and other issues can be resolved efficiently including in a single proceeding where appropriate.

4. Gathering evidence and investigative techniques

a) Access to financial, tax and corporate information

121. The lead examiners consider that it is essential to ensure effective access to relevant information – including tax and financial information – for the agency charged with the investigation of foreign bribery. As elsewhere, there are differences in the regimes applicable to foreign bribery as opposed to domestic bribery. FIA and OA representatives expressed serious concerns about their inability to get information from certain key sources in domestic bribery cases. For example, AFIP changed its legal position on tax secrecy in June 2006 and now opposes on tax secrecy grounds any request for information by the FIA, MP or OA; it will only provide information pursuant to a judicial order.[31] Similarly, FIA representatives noted that the UIF and notaries will not supply information directly to the FIA. FIA must thus decide either to continue its preliminary investigation without the information or to give up control of the case. From a systemic point of view, obtaining basic investigative information disrupts the personnel in charge of the investigation. In contrast, prosecutors and judges did not report significant difficulties with regard to access to bank information.

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30 Notwithstanding their name, the federal economic crime courts have a narrow jurisdiction focused principally on customs infractions. The term "economic crime" is used generally in this report in the broader sense often used in Phase 2 reports, *i.e.* to refer to business and financial crime or white collar crime in general.

31 See GQ 7.2 referring to General Instruction 8/06 from 30 July 2006.

122. Because the FIA and OA generally cannot investigate in foreign bribery cases, such cases would be currently investigated by a judge and/or competent prosecutor from the outset. In this context, the lead examiners noted that a judge complained of difficulties in obtaining tax information. AFIP representatives questioned this view, stating that AFIP is obliged by law to promptly cooperate with the judicial authorities.

123. Prosecutors and judges, among others, also noted difficulties in obtaining information about companies. Company registries are generally a subject of provincial jurisdiction and no national registry currently exists. Efforts are underway to create a national registry through cooperation between the provinces and the consolidation of information in the provincial registries. (GQ 5) Judges, tax officials and other panellists underlined that the absence of a national directory can make difficult or impossible to identify directors, shareholders and beneficial owners of companies.

b) Search and seizure, and other special investigative tools

124. The CPC provides judges with a range of investigative tools, including broad search and seizure powers and the ability to issue citations to witnesses. Article 236 CPC empowers judges to order wiretapping of telephone communications and to obtain telephone records. These powers are given to investigative judges for the investigation of all crimes, including foreign bribery. In some domestic bribery investigations, judges have used these powers in practice to gather evidence.

125. A wide range of techniques has been used in practice in domestic bribery cases. For example, a recent domestic corruption case involved the use of hidden cameras to generate evidence of the alleged bribe, which the judge considered in the context of issuing the indictment.[32] The indictment was under appeal as of May 2008.

c) Protection of witnesses

126. Law 25.764 of 2003 created a national witness protection program, but it applies primarily to crimes such as kidnapping, drug trafficking and terrorism. Under art. 1(2) of the law, the Minister of Justice can exceptionally extend the program to other offences, but only those related to "organized crime" or to "institutional violence". It is unlikely that the "organised crime" criterion for such exceptional extension would be satisfied in a case of alleged foreign bribery carried out by an otherwise legitimate company.

127. In a major ongoing bribery case, a key cooperating witness was given exceptional witness protection although a lawyer noted that the extent of protection amounted only to 12 months of subsidy of ARS 1500 (Argentine pesos) (USD 477)[33]. Argentina has indicated that the provision of protection was based on the witness protection provisions of the Inter-American Convention against Corruption (IACAC).

128. Other laws exist for other specific offences and 16 out of the 23 provinces have some form of witness protection program. None of these, however, would appear to be applicable in foreign bribery cases. The system as a whole, according to a lawyer familiar with it, suffers from poor coordination and limited resources.

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32 La Nación, "*Juristas defienden el uso de la cámara oculta*", http://www.lanacion.com.ar/politica/nota.asp?nota_id=964264 (21 November 2007).

33 Exchange rate as of 7 March 2008 (ARS 1 = USD 0.318).

Commentary:

The lead examiners recommend that the Argentine authorities review applicable procedures to see if tax information could be provided more promptly to judges. They also recommend that Argentina continue and accelerate its efforts to create an effective national register of information relating to all Argentine companies.

The lead examiners recommend that Argentina consider expanding its statutory witness protection program to appropriate foreign bribery cases.

5. Resources, training and priorities

a) Selection of judges and vacant judgeships

129. The creation in 1998 of a Judicial Council, which is the governing body of the federal judiciary, resulted from one of the main innovations of the 1994 constitutional reform. Until 1998, federal judges were chosen by the President with the consent of the Senate. The 1994-1998 reforms introduced a new system and judges (other than Supreme Court judges) are now selected in a three step process: (1) the Judicial Council generates a panel (*terna*) of proposed candidates for judgeships; (2) the panel of candidates is communicated to the President, who chooses freely the judge from among the candidates; and (3) the Senate must then confirm the President's choice. (Supreme Court judges are still appointed solely by the political branches.) Commentators, including judges, underlined that the 1998 system was a marked improvement and had strengthened the meritocratic basis of the judiciary. However, panellists also criticised a number of elements of the system for the selection of judges.

130. Most visibly, there are extraordinary numbers of vacant judicial positions. Approximately 20% of national judges seats (over 200 judgeships) were vacant as of December 2007.[34] The problem originates to a significant degree in delays in the nomination process for judges as well as in an apparently high rate of resignations by judges.

131. On average, it takes over two years to select a judge: the competition at the Judicial Council to generate the list of candidates takes 10 months, the President's office takes 12 months to select its candidate from the list, and the Senate takes three months to confirm the candidate.[35]

132. This situation exacerbates a number of problems. First, the lack of judges undoubtedly contributes to delays in the resolution of cases and in particular corruption cases. An NGO representative underlined that as of the time of the on-site visit, four out the six most important domestic corruption cases did not have a judge assigned to them. The resignation of the judge in charge of one key case will lead to his replacement first by a judge personally selected by the chief judge of the Court of Appeals and then by a replacement judge selected through the full Judicial Council process.[36]

133. Second, the situation has led to the widespread use of "surrogate judges" who do not offer the guarantees of independence of regular judges. A variety of panellists expressed serious concerns about the proliferation of surrogate judges (often court secretaries) who are designated by the Judicial Council without a formal competition. The Supreme Court recently ruled that such interim filling of judicial seats is

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34 See Clarín, "*Juzgados sin magistrados*", http://www.clarin.com/diario/2007/05/30/opinion/o-02601.htm (30 June 2007).

35 See Paz Rodriguez Niell, "*Hasta hora se tardó un año en definir cómo cubrir las vacantes*", La Nación, 9 December 2007.

36 Pablo Abiad, *El Club K de la obra pública: Skanska, un caso* (Planeta, December 2007) at 284.

unconstitutional and gave the government a year to develop a new method for the temporary filling of judges' seats.[37] However, a representative of an NGO noted that it was challenging the nomination of a new surrogate judge that allegedly took place ten days after the decision. It is also of concern that surrogate judges are also commonly nominated to permanent positions at the conclusion of a formal competition because such an outcome seems to weaken the entire process.

134. Following the on-site visit, the Argentine authorities indicated that under rules subsequently adopted by the Supreme Court, surrogate judges now must be either already-appointed or retired judges (except in single judge jurisdictions, where a lawyer may be designated). Subsequently, Argentina indicated that laws in this area were adopted in June 2008. They require that positions be temporarily filled in the first instance by existing judges from the same jurisdiction. If no such judge is available, surrogate judges are to be selected from a standing list of persons eligible to be a surrogate judge, which is to be created with names proposed by the President and approved by the Senate. The expectation that existing judges will be used in the first instance as surrogate judges reinforces the importance of reducing the large number of vacant positions.

135. Third, the delays in judicial nominations raise concerns about political influence on judges during the nomination process. An NGO representative underlined that candidatures for some court of appeals positions are pending for five years. Since candidates for judgeships may be involved as judges in resolving sensitive cases during the pendency of their candidacy, it is clear that undue delays in processing candidates should be avoided. A bar association recently brought a case challenging the delays at the presidential stage of the process.

136. The new government has committed to rectifying the judicial staffing situation on a priority basis. It announced in December 2007 that it plans to significantly reduce the number of vacant judicial positions. The lead examiners welcome this commitment.

137. (Concerns about recent changes to the composition of the Judicial Council are addressed separately below in the section on political influence).

Commentary:

The lead examiners note that the introduction of a Judicial Council has generally improved the meritocratic basis for the selection of the judiciary. However, they are very concerned about the large number of judgeships that are vacant or occupied by surrogate judges nominated without normal guarantees of competence and independence. They are also seriously concerned about the broader impact of delays in the judicial nomination process.

The lead examiners recommend that the Argentine authorities take measures to provide increased continuity of investigative personnel for particular cases, including judges and prosecutors, to the greatest degree possible.

The lead examiners welcome the government's commitment to rectify the problem of vacant judgeships and they urge prompt action in this regard. The lead examiners also welcome recent attention to the problem of surrogate judges. In addition, they encourage the government to strengthen further the meritocratic basis of the judicial selection process.

[37] *Rosza, Carlos Alberto y otro s/recurso de casación*, Case R.1309.XLII, (Supreme Court 23 May 2007).

b) Prosecutorial and police resources

138. As the problems with delays suggest and as panellists indicated, the investigation/prosecution is frequently heavily outmatched by the resources available to private sector firms in significant economic crime cases.

139. As noted above, one of the principal reasons cited for the inability to conclude cases is the lack of specialised prosecutors, judges and investigators. Many panellists, including judges, academics and others, indicated that prosecutors in Argentina need substantial additional resources and training in order to deal with such cases. A tax court judge with experience in investigating corruption using police support noted that they are also critically short of resources.

140. Foreign bribery cases have access to even less specialised prosecutorial expertise than domestic bribery cases. As noted above, the general federal prosecution service has no special service to deal with bribery cases. The existence of the specialised FIA and OA, which are active in many corruption cases, means that the general MP is less active in corruption cases than in other kinds of federal cases. Even if a particular MP prosecutor has relevant training and experience, the competent prosecutor system makes it difficult to bring relevant prosecutorial experience to bear on the case.

141. The FIA is an important and developing source of prosecutorial expertise about bribery matters in Argentina. The examiners have accordingly considered whether giving it a role in foreign bribery cases under the existing rules for its action in domestic bribery cases would assist in the fight against foreign bribery. FIA representatives indicated that although it was an issue for the government and legislature to decide, they considered that their agency would be capable of acting in foreign bribery cases as well as domestic bribery cases. Allowing the OA to act as a plaintiff in foreign bribery cases could also be of assistance, particularly if the FIA continues to be precluded from acting.

142. While the examining team considers that the expertise and experience of the FIA and OA with corruption investigations would be helpful, the current limitations on their actions mean that their intervention in foreign bribery cases under the existing rules for domestic bribery cases would likely not be sufficient to substantially improve matters. Civil society representatives criticized the lack of coordination between the various agencies involved in domestic corruption cases, and, as discussed above, the current system involving the FIA and OA is not resulting in adequate enforcement of the domestic bribery offence. The uncertain distribution of work between judges, MP prosecutors and the specialised agencies makes it difficult to plan work and resource needs with regard to bribery cases. It is of concern that the CPC reform proposals discussed below have not yet addressed the issue of ensuring that specialised investigators and prosecutors can follow a bribery case from its inception to the completion of the prosecution.

Commentary:

The examining team considers that the existence of specialised investigative and prosecutorial personnel is critical to successful foreign bribery prosecutions. They recommend that the Argentine authorities take appropriate action to ensure that adequate resources, including specialised and experienced personnel, are made available for foreign bribery investigations and prosecutions. The lead examiners further recommend that Argentina provide appropriate training to judges and law enforcement personnel, including prosecutors, with respect to the investigation, prosecution and adjudication of foreign bribery cases.

6. Political and economic influence

143. Article 5 of the Convention provides that decisions about investigation and prosecution of foreign bribery must not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved. Commentary 27 underlines the importance of ensuring that decisions about investigation and prosecution of foreign bribery are not subject to improper influence by concerns of a political nature.

144. In the past, the Argentine judicial system has suffered from a significant degree of political interference. A number of measures have been taken to improve the situation. For example, the government reformed the method of selection of Supreme Court judges in 2003-2004. Under President Menem, the Supreme Court was expanded from five to nine members. The four new appointees were widely regarded as very weak appointments that gave the government a so-called "automatic majority".[38] President Kirchner made the removal of members of the court who had come under suspicion one of his first priorities when he came to office. Under a June 2003 decree, new rules apply to the nomination of Supreme Court justices. They include public disclosure of nominees' qualifications and opportunities for organizations and individuals to express views about candidates. These changes and recent nominations to the Court have been generally well-received.

145. Instructions to prosecutors from the PGN are limited to matters of general policy and cannot be directed to specific cases. Representatives of FIA indicated that this policy has been applied in practice. While significant efforts have thus been made, serious concerns continue to exist with regard to possible influence in individual corruption cases.

a) Contacts with law enforcement personnel about particular cases

146. The examining team notes with serious concern that a book by an investigative journalist that was published at the time of the on-site visit (December 2007) alleges that in March 2006 two agents of the National Intelligence Service (*Secretaría de Inteligencia del Estado*, SIDE), including its legal director, visited an investigative judge.[39] The book alleges that the intelligence service agents informed the judge that "the President of the Nation was very interested" in a major tax fraud/corruption case that the judge was investigating. It is reported that the judge cut the meeting short, prepared a formal document recording the events and sent copies to the Presidential office and the Bicameral Commission of the Congress. Argentina has not supplied a copy of the judge's document.

147. There is no record of any government action in response to these alleged events. A private lawyer brought a disciplinary proceeding against the judge at the Judicial Council based on the theory that the judge should have filed a criminal complaint.[40] No decision has been taken so far in this proceeding.

148. In another matter of serious concern, a prosecutor in a domestic bribery case recently disclosed, in a private telephone conversation with a cabinet minister, his suspicions about two government officials based on tape recordings obtained in the course of the investigation. The conversation resulted in the immediate dismissal of the officials in a government decree.[41] It appears that a senior government official

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38 See, *e.g.*, The Economist Intelligence Unit, Argentina Country Profile 2006.

39 See Abiad, supra, at p. 115.

40 *Pérez Cárrega, Alejandro c/titular del Juzgado Penal Tributario nº 1, Dr. López Biscayart*, Judicial Council, File 52/07.

41 The reference in the decree to the telephone conversation reads as follows:

had earlier asked the prosecutor, through an intermediary, to keep the government informed of progress in the case, a request that was accepted.[42] The book cited above refers more generally to relatively frequent direct and indirect contact between government ministers and federal judges and prosecutors. Such alleged discussions about individual cases with senior political figures raise serious concerns.

149. First and most directly, such contacts to discuss individual cases, even when they may be innocuous, inevitably give rise to serious suspicions about political influence. Where the case involves sensitive issues like alleged corruption, this tendency is even stronger. Even if no political influence is actually exercised, these types of contacts weaken the legitimacy and thus the effectiveness of the law enforcement system in corruption cases. Second, there is a risk that comments meant to be innocuous may be interpreted differently by the recipient as well as by outsiders. Third, the risk of actual efforts to exercise political influence naturally rises with the frequency of such contacts.

150. After the on-site visit, the Argentine authorities indicated that an MP resolution requires that prosecutors preserve the secrecy of matters that become known to them in the fulfilment of their duties. They also (1) provided a decision of a criminal investigative judge dismissing a case against the prosecutor referred to above on the grounds, *inter alia*, that he was unaware that the judge in the underlying case had sealed the record shortly before the disclosure, and that the identity of persons cited to testify is not secret within the meaning of the relevant Penal Code provisions; and (2) noted that a disciplinary proceeding against the prosecutor resulted in a PGN decision advising him to conform his future conduct to the standards of prudency, composure and circumspection established in the code of conduct for MP prosecutors. FIA indicated that it does not provide information to the executive branch or other third parties until the case is presented to a judge or dismissed.

151. More broadly, the examining team considers that any disclosure of information about an investigation to non-investigative government departments should generally be avoided. This is because all such disclosures are potentially damaging to the investigation.

Commentary:

The lead examiners welcome the policy of excluding instructions to prosecutors by the PGN in individual cases. However, they note with concern that there have apparently been direct and indirect contacts between cabinet members, judges and prosecutors concerning particular bribery cases. The lead examiners recommend that Argentina take action to ensure that the factors listed

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> "Today, in a telephone conversation with the Minister of the Interior, the prosecutor [name omitted], after mentioning that 'he would collaborate with [a senior politician's] campaign', told him that 'he has taken over [*me los llevo puestos a*] [two senior public Argentine officials] in the case [name omitted] 'after a recording he had heard'.
>
> This sole circumstance, the direct mention made by the prosecutor of the case to the Minister, even under the risk of involving innocents, demands the immediate dismissal of those involved not only to permit full action of justice but also to avoid any fanciful interpretation of the government's attitude regarding this issue, which makes it unnecessary to wait for any judicial summoning that may or may not be produced."
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> See Decree No. 539/2007 (16 May 2007), http://infoleg.mecon.gov.ar/infolegInternet/anexos/125000-129999/128163/norma.htm.(last consulted May 2008)

[42] See Abiad, supra, at p. 261.

in Article 5 of the Convention do not influence the investigation or prosecution of foreign bribery cases.

The lead examiners also recommend that the Argentine authorities consider further measures to limit the disclosure of confidential information about individual foreign bribery investigations and prosecutions to government agencies or officials not involved in the investigation. Such measures could include statements clarifying that solicitation by political officials of such disclosures, as well as the provision of such disclosures by law enforcement officials, are generally improper. The circumstances in which such disclosure may be requested or considered, if any, should be carefully and narrowly defined.

b) Recent changes to the Judicial Council

152. In addition to preselecting federal judicial appointments, the Judicial Council exercises disciplinary powers over judges (except justices of the Supreme Court). Judges indicated during the on-site visit that Judicial Council proceedings against judges can be used as pressure tactics in sensitive cases, although they underlined that such situations are exceptional.

153. Argentina has a two-step process for judicial disciplinary proceedings: the Judicial Council investigates and penalises administrative misdemeanours, but refers cases of serious misconduct, which includes corruption, to an impeachment tribunal (*jurado de enjuiciamiento*).

154. In 2007, in a controversial move, the government changed the composition of the Judicial Council and impeachment tribunal by reinforcing the influence of the political branches. Whereas representatives of the political branches previously held nine of the 20 seats on the Council, they now hold seven out of 13, giving them the majority needed to veto candidates and block removals. The changes have also in effect given the Executive and majority party the power to appoint five members. If they vote together, five members can block any vote that require a two-thirds majority, which includes votes required both for the selection and removal of judges.

155. The 2007 reform also reinforced the role of political members in the impeachment tribunal. Originally made up of nine members – three judges, three legislators and three federal lawyers – it is now composed of seven members: four legislators, two judges and one federal lawyer. Political representatives thus constitute a majority. The Judicial Council must immediately inform the Executive of its decision to begin proceedings to remove a judge, but it is not required to make the decision public.

156. The changes have been sharply criticized by a wide range of civil society including bar associations and NGOs.[43] They were also criticised by a number of panellists during the on-site visit. The government has explained the changes to the Judicial Council based on the undemocratic nature of the judicial branch. It has also indicated that the changes still allow opposition parties to be represented on the Judicial Council. The government has also pointed to delays at the Judicial Council in generating panels of judicial candidates. Panellists at the on-site visit, however, pointed out that it took the presidency a year (on average) simply to choose a person from a panel of ranked candidates for transmission to the Senate

[43] See, *e.g.*, Emilio J. Cárdenas and Héctor M. Chayer, "Corruption, accountability and the discipline of judges in Latin America", In *TI Global Corruption Report* 44-48, available at http://www.transparency.org/publications/gcr/download_gcr#3 (last consulted May 2008); Gabriel Sued, "*Lanzan campaña para frenar cambios en la magistratura*", La Nación (15 December 2005) (noting rare unanimity of the main bar associations in Buenos Aires against the project as well as opposition from NGOs concerned with the administration of justice).

for confirmation, whereas the 10 month process at the Judicial Council (on average) is used to collect information, conduct examinations and establish a ranking of the proposed candidates.

Commentary:

The lead examiners recommend that the Working Group follow up with regard to the functioning of the modified Judicial Council with regard to any disciplinary proceedings arising out of foreign bribery cases.

c) Access to information

157. Access to information is an important factor in allowing civil society to review and criticise the treatment of sensitive cases, including foreign bribery cases. Access to information from the Executive is currently governed by Decree 1172 of 2003. The lead examiners noted that during the on-site visit, press, NGO and academic commentators sharply criticised limits on access to information in Argentina. A senator presented a proposed bill to improve access to information held by the government.[44] It would provide for broader rights to request information and require specific reasons for refusals, and include sanctions for unjustified refusals to provide information.

Commentary:

The lead examiners encourage Argentina to consider expanding access to government information in order to strengthen the fight against corruption.

7. Mutual legal assistance and extradition

a) Mutual legal assistance

158. Mutual legal assistance (MLA) is regulated under bilateral and multilateral treaties;[45] and under Law 24.767 (1997) on International Cooperation in Criminal Matters (LICCM). Pursuant to art. 3 LICCM, in the absence of a specific treaty with the State requesting assistance, Argentina requires an "express offer" of reciprocity in order to grant assistance requests. (GQ 13.1d) The majority of Working Group members do not have an MLA treaty with Argentina.

159. Treaties ratified by Argentina containing rules on cooperation can also serve as a basis for cooperation and replace the need for an additional express offer of "reciprocity". In a recent judgement[46] the Supreme Court indicated that being Party to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was a sufficient legal basis for cooperation with the requesting State for matters falling within the scope of that convention. The Supreme Court ruled that failing to cooperate could have constituted a breach of the convention. Argentina considers that the same

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44 Senate bill S-2118/07 on Access to Public Information.

45 According to information provided during the on-site visit, Argentina has signed mutual legal assistance treaties with Australia, Canada, Columbia, Italy, Spain and the United States; and is Party to multilateral treaties on mutual legal assistance with other South American countries (*Tratado de Derecho Penal Internacional de Montevideo de 1889* ; *Protocolo de asistencia jurídica mutua en asuntos penales del Mercosur*). A complete list of agreements and treaties can be found here: http://www.oas.org/juridico/mla/en/arg/index.html (last consulted May 2008). In addition, Argentina indicates that it is in the process of negotiating and finalising MLA treaties with many other countries.

46 *Ralph, Nelson Eliseo s/ extradición en causa "Jefe de Operaciones Dpto. Interpol s/ captura."*, R 193 XXXV, *Fallos* 323:3055 (Supreme Court 19 October 2000) (extradition case).

reasoning would apply to cooperation under the OECD Anti-Bribery Convention, even if its MLA provisions are less detailed. Thus, according to the Argentine authorities, the Convention may be used as a basis for MLA, with no need for an express offer of reciprocity.

160. Dual criminality is not generally required for granting MLA (art. 68(1) LICCM), but it is required if the request for MLA involves coercive measures such as search and seizure, surveillance and wire-tapping, etc (art. 68(2) LICCM).[47]

161. Because Argentina has not established the criminal liability of legal persons for bribery, the lead examiners consider that there is some uncertainty about the availability of MLA for cases against legal persons. For coercive measures where dual criminality is required, Argentina states that it could nonetheless provide MLA, on the basis of the general principle of broad cooperation laid down in art. 1 of the LICCM[48] and of the Convention itself. (GQ 13.f) Argentina has also emphasised that the dual criminality requirement in art. 68(2) LICCM focuses on whether the act constitutes an offence in Argentina, not on whether the person being investigated (*i.e.* the legal person) would be liable to punishment according to Argentine law. However, no examples could be provided of coercive measures taken against legal persons for purposes of MLA. Argentina cannot provide MLA involving coercive measures for non-criminal proceedings against a legal person (the LICCM only concerns criminal matters).

162. Article 9.3 of the Convention provides that Parties "shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy". No differences were noted in the process for lifting bank secrecy in domestic proceedings and in response to MLA requests. Practitioners confirmed that granting an MLA request for bank information could be done on the basis of the LICCM, and that the same rules apply as for domestic proceedings.

163. The MFA's Division of Legal Affairs (DLA) is the Argentine Central Authority deciding on the action to be taken in response to an MLA request. Requests to or from the United States can also be conveyed directly through the MOJ.[49]

164. Pursuant to art. 70 et seq. LICCM, once the Central Authority has verified that the request meets all the requirements set forth in the applicable rules, it refers the request to the relevant judicial authority. Where the participation of foreign officials is requested in the implementation of the assistance measures, the Central Authority must first obtain the authorization of the MOJ. (SQ 47) The procedure for handling this type of request has one less procedural layer when it is issued by the United States since the designated Central Authority is such cases (the MOJ) is the same authority in charge of providing the authorisation. Argentina indicates that in practice this only has a small impact on the total length of the procedure when compared to requests received from other countries.

165. The Argentine authorities indicate that on average, a request for assistance is processed by the Argentine authorities in six months, although this may take only two months or up to one year (GQ 13.1c). While no statistics could be provided about the number and treatment of MLA requests related to

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47 During the on-site visit, the Argentine authorities confirmed that dual criminality would always be deemed to exist if the facts of the case are within the scope of the Convention, regardless of how the offence is framed in the law of the requesting Party; as required by Art. 9(2) of the Convention and Commentary 32.

48 Art. 1 LICCM provides that Argentina "shall afford the widest possible measure of assistance, to any State requesting it, in the investigation, the prosecution and the punishment of offences that fall within the jurisdiction of the requesting State".

49 This stems from art.2(2) of the bilateral MLA treaty with the United States (1992).

corruption cases,[50] representatives of the Central Authority referred during the on-site visit to a number of recent cases involving domestic officials where Argentina successfully obtained cooperation from a variety of countries, and to a recent high profile corruption investigation in a neighbouring country for which Argentina provided cooperation.[51] On a more informal basis and in relation to a domestic bribery investigation, in 2007 the OA also made a spontaneous report of information to a foreign law enforcement authority (from another Party to the Convention) in order to assist in evaluating the possibility of the involvement of foreign interests in the case. The information included a copy of the indictment for tax fraud of employees of the local branch of a foreign parent company, an internal audit report made by the local branch of the foreign parent company, and communications between local managers and their counterparts in the foreign parent company. The lead examiners commend the proactive approach of the OA in relation to this case.

166. The DLA has disseminated the Convention (along with other international anti-bribery conventions) to the federal criminal courts and the MP, focusing on the sections of the Convention and the 1997 Recommendation dealing with MLA, extradition and international cooperation. (SQ1.a)

Commentary:

The lead examiners note significant MLA activity in relation to corruption cases, including the spontaneous sharing of information with a foreign authority by the OA in a recent case. The Argentine MLA framework generally appeared to be flexible and responsive.

The lead examiners recommend that Argentina ensure it can grant all MLA requests submitted in the context of criminal proceedings within the scope of the Convention and brought by a Party against a legal person. They also encourage Argentina to consider steps that would allow it to grant MLA requests for coercive measures in the context of non-criminal proceedings within the scope of the Convention and brought by a Party against a legal person. They also recommend that the Working Group follow up on whether the Convention is in practice considered a sufficient proof of reciprocity without any additional formal requirement to demonstrate reciprocity in the letter rogatory.

b) Extradition

167. Extraditions in Argentina are governed in the first instance by bilateral, regional and multilateral treaties dealing specifically with extradition.[52] Where there is no treaty the LICCM applies. Pursuant to art. 6 LICCM, extraditable offences are ones punishable under the laws of Argentina and under the laws of the requesting State (dual criminality requirement), by imprisonment or other deprivation of liberty, for such minimum and maximum terms the average of which must be at least one year. Argentine jurisdiction over the offence is not an obstacle to providing legal assistance and extradition, provided that one of the following conditions is met: (i) the offence for which extradition is requested is part of significantly more

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50 At the time of the on-site visit, the MFA was in the process of implementing a computer system to keep track of assistance and extradition requests. The system was expected to be operative and ready to provide statistics by mid-2008.

51 See also GQ B.i.,13 and 13.1a.

52 According to information provided during the on-site visit, Argentina has signed extradition treaties with Australia, Belgium, Brazil, Italy, Korea, the Netherlands, Paraguay, Spain, Switzerland, the United Kingdom, the United States, and Uruguay. Argentina is also Party to the Montevideo Convention on Extradition (1933). A complete list of agreements and treaties can be found here: http://www.oas.org/juridico/mla/en/arg/index.html (last consulted May 2008).

serious punishable conduct which falls under the jurisdiction of the requesting State and not under Argentine jurisdiction; or (ii) the requesting State has better access to the evidence. (art. 5 LICCM)

168. Article 10.3 of the Convention specifies that a Party which declines a request to extradite a person for foreign bribery solely on the ground that the person is its national must submit the case to its authorities for prosecution. The LICCM provides that, upon a request for extradition, an Argentine national can demand to be prosecuted in Argentina. The final decision is made by the Argentine Executive. If the extradition request is denied on this basis, art. 12 LICCM sets forth the obligation to prosecute the Argentine national in Argentina, provided that the requesting State waives its jurisdiction and gives its consent.

169. Argentina has so far not received any extradition requests with regard to Convention offences. But Argentina has addressed some extradition requests for corruption offences (see GQ 14.1a). In a recent high profile corruption investigation in a neighbouring country, the extradition of four suspects was granted. However, civil society representatives met during the on-site visit were critical of a four year delay before reaching the final decision to grant extradition. Argentina indicates that the main reason for delays in securing a final decision in extradition cases is the appeal procedure (ordinary appeals in extradition procedures are lodged with the Supreme Court).

Commentary:

The lead examiners recommend that the Working Group follow up on the time needed for reaching a final decision in extradition procedures related to corruption cases.

c) Denial of co-operation due to "essential public interests"

170. In handling a request for MLA or extradition, the Argentine Central Authority, judicial authorities, and Executive must successively assess whether certain conditions are met, including whether "the request, if granted, would prejudice Argentina's sovereignty, security, public order or other essential public interests" (art. 10 LICCM). If such prejudice is found to exist, the request for MLA or extradition is not granted. While the decisions of the Central Authority and the courts are subject to appeal, the LICCM does not provide for any appeal of the Executive decision in this area.

171. The lead examiners are concerned that in practice this provision could allow the process for granting MLA and extradition to be influenced by factors listed in Art. 5 of the Convention, namely "considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved". The lead examiners consider that Argentina could allay some of these concerns by providing general guidelines clarifying that nothing in art. 10 LICCM permits the handling of extradition or MLA requests in foreign bribery cases being influenced by Art. 5 factors. During the on-site, Argentine officials indicated that art. 10 LICCM had not been used in the recent past as a basis for refusing to grant MLA or extradition.

Commentary:

The lead examiners recommend that the Working Group follow up on the application of art. 10 LICCM in extradition and MLA requests in foreign bribery cases.

8. Jurisdiction

a) Territorial jurisdiction

172. The PC applies to offences "committed in the territory" of Argentina or in areas subject to its jurisdiction.[53] The PC does not expressly provide that a significant physical contact with Argentina is sufficient for jurisdiction. In Phase 1, Argentina indicated that any action performed toward the accomplishment of an offence would be sufficient (including a telephone call, fax or e-mail). After the Phase 2 on-site visit, Argentina provided a 1988 Supreme Court decision finding that an offence is considered to have been "committed" (in the sense of art. 1(1) PC) in all jurisdictions where part of the act took place, as well as where the effects of the offence take place.[54] This 1988 decision contrasted with some views heard during the on-site visit, as some participants were uncertain as to whether Argentina had an effective basis for establishing territorial jurisdiction in foreign bribery cases occurring mainly abroad. Awareness-raising with regard to the offence could usefully focus on the broad scope of territorial jurisdiction.

b) Nationality jurisdiction

173. Article 4.2 of the Convention states that if a Party has nationality jurisdiction for certain offences, the Party shall – according to the same principles – take the necessary measures to establish nationality jurisdiction over foreign bribery.

174. The OA – in its *Observations on the Draft Penal Code* (2006) – states that Argentina "still lacks a proper basis for jurisdiction to apply Argentine penal law when an Argentine person bribes a foreign public official abroad…" and supports the establishment of nationality jurisdiction for the foreign bribery offence.[55] The Draft PC does not introduce nationality jurisdiction.[56]

175. Argentina establishes extraterritorial jurisdiction where the offender is an "agent or employee of the Argentine authorities" in the performance of his/her duties (art. 1(2) PC).[57] Pursuant to this provision, Argentina establishes jurisdiction over any bribery or corruption offence committed by Argentine public officials anywhere in the world. In this context, the lead examiners recommend that Argentina adopt nationality jurisdiction in foreign bribery cases.

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53 See art. 1(1) PC.

54 *Vinakur de Piratto Mazza*, *Fallos* 311:2571 (Supreme Court 1988).

55 See *Observaciones de la O.A. al Anteproyecto del Código Penal*, p. 8-9.

56 Article 2.c) of the Draft PC provides only that Argentine jurisdiction shall apply "to crimes committed abroad prescribed by international treaties or conventions which bind the Argentine Nation to prosecute them pursuant to the universality principle". Under current law Argentina already establishes nationality jurisdiction when this is mandated by an international treaty binding on Argentina, pursuant to the principle that international treaties have a higher status than national statutes. (SQ 21)

57 In the PC, this basis for jurisdiction is not linked to the concept of nationality but to the occupation or function of the perpetrator. In theory, the PC could thus apply to foreign nationals who are "agents or employees of the Argentine authorities". The Argentine authorities have indicated that this basis for jurisdiction could also be used to establish jurisdiction over foreign bribery offences committed abroad by employees of public enterprises. (GQ 4.1b) Unclear, however, is whether all employees and agents of companies directly and indirectly owned or controlled by the Argentine State would be covered, even if they do not clearly participate in "public functions" or have not been appointed directly by the Argentine Executive (*cf.* art. 77(4) PC definition of the terms 'public official' and 'civil servant').

Commentary:

The lead examiners recommend that the Working Group follow up, as case law develops, on the application of territorial jurisdiction in foreign bribery cases. They also recommend that Argentina adopt nationality jurisdiction for the foreign bribery offence.

c) Legal persons and jurisdiction

176. As discussed below in this report, Argentina 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 lack of jurisdiction of the Argentine courts over legal persons that commit foreign bribery. They recommend that Argentina take all necessary measures to provide for jurisdiction over legal persons in cases of foreign bribery in accordance with the provisions of the Convention.

d) Consultation procedures

177. 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. Territorial jurisdiction in Argentina is mandatory and Argentine courts are barred from deferring to the jurisdiction of another Party on legal and constitutional grounds (art. 1 PC, Art. 118 Constitution). The Responses also note that art. 5 LICCM provides that the fact that a criminal case also falls under Argentine jurisdiction shall not constitute an obstacle to cooperation. Argentina reported no "concrete experience on this issue" (SQ 23), but provided a recent positive example of international consultation and cooperation in an ongoing fraud and bribery case.[58]

9. Limitations periods and other time limits

178. Article 6 of the Convention requests that Parties take the necessary measures to ensure that any limitations period applicable to the foreign bribery offence allows "an adequate period of time for the investigation and prosecution" of the offence.

179. In Argentina, pursuant to 62(2) PC, the limitation period for the foreign bribery offence is six years.[59] The period starts running as of the date of the commission of the offence.[60] The article dealing with interruption – art. 67 PC – was reformed in 2005 due to the uncertainty about which acts can have an interrupting effect and to address the prejudice that this uncertainty was causing to the right to obtain a

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58 The Responses report "fluent contact between Anticorruption authorities and magistrates in order to facilitate MLA" in the context of a fraud and bribery investigation which was ongoing at the time of the on-site visit. In this case "the local aspect" of fraud and bribery were being investigated by an Argentine judge, and the foreign elements were being investigated by magistrates form other States Parties. (SQ 23)

59 The time limits for investigations under art. 207 CPC are addressed above in the section on the conduct of the case.

60 Argentina indicates that the offence is considered committed when the act of offering, promising, or giving a bribe takes place (Phase 1, p.15).

quick and fair trial. New art. 67 PC provides that only major procedural acts interrupt the period. More precisely, from the time an offence is committed, Argentine law enforcement authorities first have six years to conduct the first summoning of a person in relation to a specific offence (*declaración indagatoria*), another six years to investigate before filing the indictment (*requerimiento de elevación a juicio*), an additional six years until summoning the accused to appear before the court (*citación a juicio*), and another, final six year period starts running upon conviction (even if appealed) until execution of the sentence begins. No suspension occurs where the accused is a fugitive or in cases where obtaining MLA is necessary.

180. An exceptional regime applies to domestic corruption: art. 67 PC suspends the limitations period while the relevant Argentine public official is holding public office. Where there are several perpetrators, the suspension applies for as long as any of the perpetrators holds public office. The suspension seeks to address the public official's possible attempt to hide the offence while in office. This suspension of the statute of limitations does not generally apply to the foreign bribery offence. The lead examiners are concerned about the fact there is no similar suspension of the limitations period applicable to foreign bribery offences, particularly considering that these are widely recognised as being at least as difficult to detect as domestic corruption offences.

Commentary:

The lead examiners recommend that Argentina ensure that the statute of limitations applicable to the offence of bribery of a foreign public official and possibilities for interruption and suspension allow for an adequate period of time for the investigation of the offence, taking into account the right to quick proceedings but also the difficulties involved in investigating the offence.

10. Reform of the Criminal Procedure Code

181. The MOJ created a working group in November 2005 to conduct preliminary studies for criminal procedure reform. A February 2007 executive decree created a commission charged with rapidly preparing a reform project (the Project), which it presented in September 2007.[61] The Project has been distributed for comment and has been presented by the MOJ to the Secretary General of the Presidency, which is expected to present the Project to Congress.

182. Although the Phase 2 review focused on the existing system, the examiners did have some opportunity to review and discuss the Project. The Project would redesign the investigative phase by giving prosecutors control over the investigation. Judges would not conduct investigations; during the investigations, their role would be to decide on investigative measures where fundamental rights are at stake. The Project would also introduce the principle of prosecutorial discretion as well as redesigned alternative resolutions (mediation, etc.). It would lessen the formalistic and written nature of proceedings and reform the system of appeals and nullities in order to speed up procedures. Although the draft calls for a fundamental shift towards a more prosecutor-based system of investigation, it does not specifically address the structure of the MP, or the co-existence of the MP and FIA; commission members indicated that reform in that area was considered to be primarily a matter for the PGN.

183. The examining team noted that a wide spectrum of panellists expressed strong support for the Project. Although they did not attempt to review the Project generally, the examining team welcomes the efforts to address the systemic problems identified above and urges continued sustained attention to reform efforts.

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61 See *Proyecto de Código Procesal Penal de la Nación*, Ministry of Justice (2007) (containing both a report by the commission at pp. 33-64 and a draft code).

184. The examining team did have a few specific concerns with regard to the potential impact of the changes on the enforcement of the foreign bribery offence. For example, in an effort to limit delays, the Project provides for cases lasting a maximum of two years from the date of the formalisation of the accusation until the conclusion of the case including appeals. (art. 136 draft code) Judges will generally be required to dismiss the case if the case is not resolved at the conclusion of the period. The period would be suspended in limited circumstances, such as where the suspect has fled abroad. Extraordinary review, such as to the Court of Cassation, would not be required to occur in the two year period. For complex cases, a four year period would apply (art. 319 draft code). The lead examiners recognise the importance of and the arguable need for drastic measures to change expectations and practice with regard to the length of cases in Argentina. However, they have concerns about the proposed application of a rigid cut-off, particularly in cases in which MLA is required from abroad.

185. In addition, the Project appears to call for an exception to the principle of prosecutorial discretion for passive domestic bribery cases, but the exception does not appear to apply to foreign bribery cases (or to domestic active bribery cases). (Project at p. 62) As a general matter, the examining team invites the commission and government to consider extending measures applicable to domestic bribery cases to foreign bribery cases as well. The examiners also invite the government to consider how to achieve effective implementation of Art. 5 of the Convention with regard to investigation and prosecution of foreign bribery under the new system.

186. The examining team shared the Commission's concern about the need for changes in the procedural rules being accompanied by "important budgetary, infrastructure, logistical, training and awareness-raising efforts." (Project at p. 64). NGO representatives and a judge indicated that there is some ability for judges to control abusive practices under the existing system and that a significant part of the problem lies in reluctance to aggressively manage cases. The examiners consider that new rules should be accompanied by appropriate training and supervision to ensure that the rules are effectively applied by the relevant personnel in order to expedite the treatment of economic crime cases.

Commentary:

In light of the serious systemic deficiencies that exist in Argentina with regard to enforcement of complex economic crime offences such as foreign bribery, the lead examiners welcome the government's sustained attention to criminal procedure and institutional reform.

D. THE FOREIGN BRIBERY OFFENCE, THE LIABILITY OF LEGAL PERSONS, AND RELATED OFFENCES AND OBLIGATIONS

1. The foreign bribery offence

a) Overview of amendments since Phase 1

187. Law 25.188 of 1999 introduced the foreign bribery offence in art. 258 bis PC. A year later (on 18 October 2000), Argentina approved the OECD Anti-Bribery Convention by Law N 25.319 without making any further change to domestic law. In Phase 1 (April 2001), the Working Group considered that – as concerns certain specific elements of the offence – Argentina did not fully conform to the standards of the Convention. In 2003, in an effort to address these concerns, Argentina enacted Law 25.825 modifying art.

258 bis PC. The majority of the formal legal issues identified in Phase 1 were addressed through Law 25.825, including the criminalisation of the bribery of agents of international organisations and the coverage of bribes paid for the benefit of third parties.

188. While acknowledging these commendable changes, the lead examiners have also found that certain aspects of art. 258 bis PC might not yet be clearly up to the standards of the Convention, notably the definition of foreign public officials. These concerns are described below. More broadly, and in view of the fact that art. 258 bis PC has yet to be applied in practice, the lead examiners consider that the application of the various elements of the offence should be monitored as practice develops.

b) Elements of the offence

(i) Definition of foreign public officials

189. Argentine law does not define a foreign public official. This raises the question of compliance with paragraphs 4(a) and 4(b) of Art. 1 of the Convention, as well as with Commentaries 12-17. The inclusion of an autonomous definition of foreign public official modelled after the Convention was proposed in an early version of the draft bill of Law 25.825, but was ultimately rejected. According to excerpts from the legislative history provided by Argentina after the on-site visit, some of the main reasons for this rejection were: (i) the term "public official" (*funcionario público*) is already defined in art. 77(4) PC and could be extended to public officials from other States and international organisations through art. 258 bis PC without adding a new definition; (ii) the scope of art. 77(4) PC already covers all types of officials covered by Art. 1(4.a) of the Convention;[62] and (iii) using the same basis for defining "domestic" and "foreign" public officials has the advantage of ensuring uniformity in the application of the offence of active bribery.

190. Argentina also provided excerpts from a 2006 decision by the Federal Appeals Court,[63] supporting the view that the definition of "public officials" in art. 77(4) PC is understood broadly, at least in the domestic context. The court mainly underscored the functional criterion used in art. 77(4) PC for defining public officials, thereby making less relevant the type of office, engagement or contract held for determining the public official status of that person.[64]

191. Interestingly, in this decision the Federal Appeals Court also refers to the definition of public officials used in the IACAC and the UNCAC in support of the use of a functional criterion for defining public officials. Argentina argues that in a foreign bribery case, if there is any doubt as to the scope of the definition of "public official" for the purpose of applying art. 258 bis PC, courts would necessarily refer to the OECD Anti-Bribery Convention for guidance.[65] (SQ 4a)

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62 Art. 77(4) PC defines the terms 'public official' and 'civil servant' as "any person who temporarily or permanently participates in public functions, whether as a result of popular election or appointment by the competent authority".

63 *Giani, Jorge s/prescripción*, Case 24.519 (Federal Appeals Court 21 December 2006). Argentina indicates that the Executive has released similar criteria for defining public officials. (SQ 22)

64 In this case, it was found that the manager of a welfare institution, although not formally part of the State structure, could nonetheless be defined as a public official because carrying out public functions.

65 One of the judges met during the on-site visit indicated that international conventions incorporated in Argentine law (like the OECD Anti-Bribery Convention) could be used for the purpose of interpreting the elements of the offence as laid down in domestic law (including the terms "public official from a foreign State or from an international public organisation"). However, such conventions would not be used directly to provide elements absent from domestic law.

192. In spite of the use made by courts of international conventions, there remains a certain level of uncertainty as to whether – in the absence of a specific and autonomous definition of foreign public official – interpretative weight will be given in practice by Argentine courts to foreign law definitions of public officials. For example, at least one of the prosecutors met during the on-site visit considered that the offence would not be autonomous because foreign law would have to be taken into account. Also unclear is the interpretative weight, if any, which will be given in practice to the Commentaries to the Convention as these – unlike the text of the Convention – have not been formally incorporated into Argentine law.

193. In addition to general questions related to the source of the definition, there are two additional specific concerns. The first relates to bribery in government-controlled enterprises. It is unclear whether bribery of "any person exercising a public function for… a public enterprise" (Convention, Art.1.4a) over which a foreign government "directly or indirectly exercises dominant influence" (Commentary 14) is adequately covered by Argentine law. During the on-site visit a government representative indicated that such cases would be covered insofar as the bribed person had been "appointed [to its post in the public enterprise] by the competent authority", in accordance with the definition of domestic public official provided in art. 77(4) PC. The lead examiners consider that this criterion could be interpreted in a manner which is not consistent with the Convention, which does not focus on the procedure by which the person was selected for the post.

194. Second, art. 258 bis PC applies to bribery of a public official "from a foreign State". This wording appears to exclude bribery of a public official of an organised foreign area or entity that does not qualify or is not recognised as a State. (Commentary 18) The lead examiners note that the draft bill to amend art. 258 bis PC had originally suggested that art. 258 bis PC mirror the Convention in this regard, but that this solution was not retained. During the on-site visit, government representatives confirmed that bribery of officials described in Commentary 18 is not covered in Argentine law.

(ii) Undue pecuniary or other advantage / improper advantage

195. Under the Convention, bribery requires that the briber make an "undue" payment or offer to the public official. Article 258 bis PC 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. Because the law is vague about the nature of the prohibited conduct, it could be challenged as unfair.

(iii) In order that the official act/ refrain from acting in relation to the performance of official duties

196. The Convention requires that the offence cover bribery in order that the official act or refrain from acting "*in relation to* the performance of official duties" (Art. 1(1); emphasis added), and that this should be interpreted as including "any use of the public official's position, whether or not within the official's authorised competence" (Art. 1(4.c)). In Phase 1, the Working Group criticised the narrower scope of art. 258 bis PC, as it only covered acts of bribery for acts/omissions "in the exercise of" the public official's duties.

197. The amendments introduced in 2003 by Law 25.825 have brought the language of art. 258 bis PC in line with Art. 1 of the Convention: the offence now applies to bribery for acts/omissions "related to" (*relacionado con*) the performance of the public official's official duties.[66] Because it appears that the

[66] The 2003 amendments have also introduced a new section to the offence by adding language not contemplated under the Convention: art. 258 bis PC also extends to cases where a bribe was offered or given "to use the influence derived from the office" held by the public official.

Convention can be used by Argentine judges in interpreting the elements of the offence, they are expected to refer Art. 1(4.c) for finding that this includes any use of the public official's position, whether or not within the official's authorised competence.

Commentary:

The lead examiners welcome the action taken in 2003 by Argentina to address shortcomings of the offence identified in Phase 1. However, the lead examiners reiterate the Phase 1 concerns about the absence of a clearly autonomous definition of foreign public officials. They recommend that Argentina introduce an autonomous definition of foreign public officials, and take the necessary measures to ensure that the definition covers, in a manner that is consistent with the Convention and Commentaries, (i) officials of public enterprises; and (ii) public officials of organised foreign areas or entities that do not qualify or are not recognised as States. The lead examiners also recommend that Argentina ensure that vagueness with regard to the requirement that the advantage supplied by the bribery be "undue" is eliminated.

The lead examiners further recommend that the Working Group follow up on the application in practice of art. 258 bis PC, including its application to cases where a bribe is paid for an act/omission outside of the official's authorised competence.

c) Defences and exclusions

198. In domestic bribery cases, active bribers are not liable in cases where the public official solicited the bribe. The domestic offence of passive bribery (art. 256 PC) only covers receiving or accepting the promise of an advantage by a public official. It does not concern itself with undue demands by the public official, which are prohibited under arts. 266-268 PC (Illegal Demands). As Argentina has recognised, the active briber is not liable in cases of solicitation or "illegal demand" by the public official: "It is essential that the [active briber] offers the gift freely and at his own will, because if such gift is demanded by the official, the agent will not be the active briber but the victim of unlawful charges or extortion" (GQ 4.1d).

199. During the on-site visit, the Argentine authorities recognised that the defence can apply in domestic bribery cases of ordinary solicitation as well as extortion. The examining team considers that such a broad exemption of liability of the active briber would – in a foreign bribery case – be incompatible with the Convention. The Argentine authorities have argued that the application of this exemption of liability of the active briber would be unlikely in a foreign bribery case because the foreign bribery offence focuses on the active briber and there are no corresponding "foreign" passive bribery or extortion offences in Argentine law. However, the issue has not been resolved in a foreign bribery case.

Commentary:

The lead examiners recommend the Working Group follow up on whether the solicitation or "illicit demand" of an undue payment or other advantage by a foreign public official can exclude the liability of the active briber.

2. The liability of legal persons

200. 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". As discussed further below in the section on Sanctions, Art. 3 of the Convention requires "effective, proportionate and dissuasive" sanctions on legal persons for foreign bribery, including monetary sanctions. In its 2001 Phase 1 report, the Working Group underlined that Argentina had failed to

adequately transpose the requirements of the Convention in these areas and urged the Argentine authorities to implement Arts. 2 and 3 of the Convention as soon as possible.

201. The examining team is seriously concerned because no law has been adopted in Argentina since Phase 1 to establish the liability of legal persons for foreign bribery as required by the Convention. No bill has even been presented to Congress by the government. This represents a major failure by Argentina to implement the Convention and should be promptly rectified. The examiners are concerned about Argentina's political will to implement the Convention in this area given the lengthy period since Argentina ratified the Convention and since the Phase 1 report.

202. The Phase 1 report refers to various forms of civil and administrative liability applicable to legal persons where bribery is connected to other types of misconduct such as competition law violations. These types of laws do not specifically address foreign bribery. Instead, they provide more general liability that could, in certain circumstances, theoretically encompass corruption and other offences. There is no case law showing that these laws have ever been applied to a case of domestic or foreign bribery. Articles 2 and 3 of the Convention require liability and sanctions for bribery as such, and cannot be satisfied by laws that require that bribery co-exist with a different offence or infraction.

203. Prior to briefly reviewing law reform efforts, it is important to note a possible constitutional bar to criminal liability of legal persons in Argentina.

a) Possible constitutional issues

204. The Supreme Court recently considered the issue of criminal liability of legal persons in relation to alleged customs offences.[67] The oral phase tribunal had rejected the request for the indictment of a company, finding that legal persons cannot be the subject of criminal proceedings. This finding was upheld by the First Chamber of the *Cámara nacional de casación penal*. The Supreme Court unanimously denied an application for review, but with two opinions setting forth different reasons. The majority rejected the application on procedural grounds. One judge wrote a separate opinion, dismissing the appeal because he considered that there are constitutional barriers to direct corporate criminal liability.

205. Notwithstanding the decision in this case, a leading criminal lawyer and professor indicated that there was an academic consensus that a "French-type model" could be adopted without creating constitutional difficulties. He considered that a majority of academic commentators (*doctrina*) would agree with Professor Baigún for whom corporate criminal liability is possible although it does not exist today.

206. The Responses indicate that the Argentine authorities largely share these views. They state that "adopting legislation to establish liability of legal persons is only a matter of [a] decision to be taken by Congress". (SQ 13) The Responses also point to the case of *Peugeot Citroën Argentina S.A. s/recurso de casación*, *Cámara Nacional de Casación Penal* (Third Chamber, 16 November 2001), which affirmed as a general matter that it is possible to impose criminal sanctions on legal persons.

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67 See *Fly Machine S.R.L. s/ recurso extraordinario*, (Supreme Court 30 May 2006). The *Fly Machine* case is available in Spanish on the Supreme Court website by entering "Fly Machine" into the "*Partes*" field. See http://www.csjn.gov.ar/documentos/cfal3/cons_fallos.jsp (last consulted May 2008).

b) Law reform efforts

(i) The Draft Penal Code provisions

207. In Phase 1 (2001), Argentina indicated that it intended to introduce criminal liability of legal persons. A proposed bill on the liability of legal persons was prepared, but it was withdrawn by the Executive in favour of a broad approach to Penal Code reform. (SQ11) A Commission created by the Ministry of Justice in 2004 produced the Draft PC which was presented to the public in May 2006. A subsequent public consultation process was cut short in July 2006 when the government indicated that Penal Code reform was not a priority and would be postponed until 2008.[68] The new government that took office in December 2007 has not indicated that general Penal Code reform is a priority. The project is not currently described on the MOJ website.

208. Notwithstanding the uncertain status of the Draft PC, the examining team has briefly reviewed its provisions on corporate liability as provided in the Responses. (See arts. 66-67 of Draft PC, SQ11) Article 67 contains the conditions for applying sanctions to the legal person and provides that the legal person "may receive sanctions for crimes committed by individuals". It is expressly provided that sanctions can be imposed on a company even if those acting on its behalf are not convicted, but the existence of the crime must be established.

209. The provisions would apply to acts by individuals acting on the company's "behalf" or in its "name, interest or benefit". This criterion would appear to broadly capture bribery by employees and agents as well as management. However, "ratification" by the company is required if an individual acted "without capacity". It may be unclear what persons who are acting on the company's behalf or in its interest may be considered to be without capacity. Many companies may claim that employees who break the law were acting "without capacity" even where they were acting to obtain a benefit for the company. The notion of those "without capacity" should be better defined and could perhaps be expressly limited to officious intermeddlers, *i.e.,* those who offer unwanted services to others.

210. The draft contains unusual provisions which would protect shareholders and creditors of publicly listed companies from loss. Thus, for listed companies, sanctions must be applied "without harming stockholders or bond owners who are not liable for the crime". Similarly, for companies under reorganisation, creditors who lent prior to the occurrence of the bribery would be protected from loss. Since any fine paid by a company imposes loss on shareholders and at least marginally harms creditors, these provisions would effectively preclude meaningful financial sanctions on listed companies for bribery and would thus nullify the law. The examining team considers that these provisions would be contrary to the Convention requirement that legal persons that engage in bribery (regardless of whether they are listed or have creditors) must be subject to effective, proportionate and dissuasive sanctions, including financial sanctions.

211. A member of the Commission that prepared the Draft PC briefly addressed the issue of the constitutionality of the draft provisions. He considered that the draft took an "intermediate approach" without fully implementing criminal liability of legal persons, analogizing the approach to that of Spain. This would appear to reflect an absence of direct liability of the legal person as such in the Draft PC. In light of the references to systems in other Working Group countries, the examining team drew the attention

[68] See, *e.g.*, "*Presentaron un anteproyecto para reformar el Código Penal*", Clarín (18 May 2006); Laura Zommer, "*Marcha y contramarcha: el código de la discordia*", La Nación (16 July 2006).

of panellists to the existence of Working Group reports and recommendations with regard to the liability of legal persons in those countries.[69]

(ii) Senate Bill

212. The lead examiners also reviewed a draft bill on the liability of legal persons for foreign bribery prepared by a senator (from the governing party) and presented to the Senate in July 2007. The bill is very short and is addressed specifically to the liability of legal persons for foreign bribery. It expressly seeks to address the unimplemented Working Group recommendation in the Phase 1 report. It is based on the administrative-criminal regime for corporate liability under the Anti-Money laundering law (Law 25.246 of 2000, AML law).[70] The sponsor was aware of the possible constitutional issues and indicated that she proposed an administrative law regime – following the existing AML example – in order to permit accelerated treatment of the issue.

213. While the examining team appreciates the attention to the need for urgent resolution of the issue, they have concerns about adopting the AML approach. First and most important, there is no existing administrative agency to apply the law. Under the AML law, the UIF is responsible for determining liability of legal person and imposing the sanctions, with an appeal possible to the administrative courts (AML law art. 25). The UIF was created as part of an overall AML scheme.

214. The sponsor of the Bill indicated that she had considered a number of possibilities, and in particular the *Inspección General de Justicia* (IGJ), UIF and the OA, but that none were ideal. Accordingly, rather than referring to the UIF as does the AML law, the Bill contains a provision that would require that the Executive determine the relevant administrative agency. It would appear that an administrative system would likely require a new agency to apply the law. The IGJ is principally charged with maintaining the registry of companies and its jurisdiction extends only to the Buenos Aires region. The OA currently acts as a party in corruption proceedings and giving it a role as a sanctioning body for legal persons would substantially change its nature. The UIF is focused on money laundering.

215. Second, the rules for attribution of liability to legal persons are not entirely clear. The bill uses the same terms as the AML law and would make the legal person liable for bribery by its "organ or performer" (*órgano o ejecutor*). With regard to companies, the term "*ejecutor*" does not have a clear meaning. Questioned about the intent of the draft, its sponsor indicated that the intent was to broadly capture actions by those acting on behalf or in the interests of the company, including employees and agents. The sponsor recognised that the wording of the Draft PC provision discussed above – acts by individuals acting on the company's "behalf" or in its "name, interest or benefit" – might better capture this intent than the reference to an "*ejecutor*". As in the case of the AML law (see below section D.4.b of the report), it is also unclear if a previous conviction of a natural person is required for corporate liability.

216. After it was presented to Congress in July 2007, the Bill was submitted to the Committee on Justice and Criminal Affairs. Its sponsor was hopeful that progress could be made on the Bill in 2008 given the absence of elections, but was otherwise uncertain about its future.

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69 See, *e.g.*, Spain Phase 2 Report para. 180(a) (recommending amendment of the law to "ensure that all legal persons can be held directly liable for bribery of foreign public officials").

70 Article 23 of the AML law (Law 25.246) provides that corporations shall be punished with an administrative-criminal fine of two to ten times the value of the laundered assets whenever its "organ or performer" is found to have committed a money laundering offence as defined in art. 278(1) PC. Lesser fines apply where the acts are committed with recklessness or gross negligence by the "organ or performer".

c) Overall status and need for urgent action

217. The Draft PC proposes new approaches in a wide range of areas, including controversial issues such as abortion, euthanasia, the law applicable to minors, and the decriminalisation of certain forms of drug use. If carried forward, it will undoubtedly continue to give rise to significant debate, as its authors expected. There is no significant likelihood of its adoption within the near future. While the examiners recognise the importance of general Penal Code reform in Argentina, they do not consider that the broad Penal Code reform process is a suitable vehicle for the necessary urgent introduction of liability of legal persons in order to achieve compliance with the Convention.

Commentary:

The lead examiners are seriously concerned about Argentina's continuing non-compliance with Arts. 2 and 3 of the Convention with regard to legal persons. The lead examiners underline that although Argentina ratified the Convention in 2001, the government has not taken effective action to introduce the liability of legal persons for foreign bribery. The examiners recommend that Argentina introduce effective and direct liability of legal persons for foreign bribery on a priority basis.

They also recommend that Argentina address other potential barriers to the effective application of liability of legal persons in practice, such as by continuing its efforts to develop a national registry of companies.

3. Sanctions for foreign bribery

a) Natural persons

218. Article 3.1 of the Convention requires that the penalties applicable to the foreign bribery offence shall be comparable to the ones applicable to domestic bribery offences. The sanction for the foreign bribery offence pursuant to Argentine law (art. 258 bis PC) is "reclusion" of one to six years and perpetual disqualification to hold a public office. For domestic bribery (art. 258 and 259 PC), the sanction is "prison" of one to six years for the principal offence ("reclusion" is generally described as marginally more severe than "prison")[71], and slightly higher penalties are available to sanction aggravated offences. Bribery of an Argentine judge or prosecutor is punishable by "prison or reclusion" of two to six years. Temporary disqualification to hold a public office is also imposed for certain types of domestic active bribery offences where the briber is a public official. By contrast, the foreign bribery offence is sanctioned by a perpetual disqualification to hold a public office regardless of whether the active briber is a public official or not.

219. Pursuant to art. 22 bis PC, where a foreign bribery offence is committed "with the aim of monetary gain", a fine up to ARS 90 000 (USD 28 620) may be imposed in addition to the reclusion sentence (this maximum fine is identical to the one applicable to domestic bribery offences).

220. With regard to sentencing in practice, Argentina indicates that courts have not developed "coherent criteria for determining the severity of the sentence concerning bribery cases and similar

[71] "Reclusion" (1) excludes the possibility of home confinement, available in certain circumstances for "prison" sentences of less than six months (art. 10 PC); (2) requires a year to admit parole, compared to eight month in the case of prison (art. 13); (3) excludes conditional sentences (art. 26); and (4) allows less credit for time spent under preventive detention. (art. 24) (SQ 16) During the on-site visit, a judge from the Federal Court of Appeals indicated that there were almost no remaining practical differences between "reclusion" and "prison", and that for instance the distinction had no impact on the availability of investigative means or seizure.

offences". (GQ 6.3) During the on-site visit, civil society representatives and a judge from the Federal Court of Appeals further indicated that the sanctions handed down in white-collar crime cases have generally been low, with the few bribery cases reaching the sanctioning stage often ending in low sentences, suspended sentences or probation with no recognition of guilt (76 bis PC) for the active briber (a recent, specific example of this was provided).[72] Lack of commitment and training of prosecutors and judges were described as some of the causes for this situation. Some investigative judges and prosecutors attributed this situation to the influence and resources available to white-collar criminals, as compared to the resources available to prosecutors and judges.

221. Argentina has also indicated that "the prevalence of bribery in the foreign jurisdiction, and the tolerance of such payments by the foreign authorities", could be taken into account by the judge as a mitigating circumstance pursuant to art. 41 PC ("… circumstances of time, place, occasion and others, which may indicate his greater or lesser dangerousness"). (SQ 10) This approach raises concerns about compliance with the Convention requirement of effective, proportionate and dissuasive sanctions (Art. 3, see also Commentary 7).

Commentary:

The lead examiners recommend that Argentina consider steps to ensure that the sanctions imposed by courts in foreign bribery cases are effective, proportionate and dissuasive. Efforts, including targeted training and resources, should also be made to strengthen the commitment of judges and prosecutors to the fight against active bribery. The lead examiners also recommend that the Working Group follow up on the application of sanctions in foreign bribery cases.

b) Legal persons

222. 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, Argentina has not taken effective action since Phase 1 to introduce liability for legal persons in compliance with the Convention. The absence of effective liability precludes effective sanctions.

223. The Draft PC provides for fines of up to 33% of the entity's net worth together with a range of other penalties. Fines are to be set according to the magnitude of the harm caused and the assets of the entity. The proposed rule could require a complicated analysis of the net worth of the company in cases where a substantial fine is imposed on a non-public company. In addition, basing the fine principally on the harm actually caused may not sufficiently sanction companies that offer large bribes. In some cases where substantial bribery is discovered, there may not be much harm actually caused. For example, an official may denounce the offer of a bribe before it is paid or has any effect. A criterion based on the size of the bribe or expected benefit could be more flexible.

Commentary:

The lead examiners are very concerned about Argentina's continuing non-compliance with the Convention with regard to sanctions on legal persons for foreign bribery. The examiners recommend that Argentina introduce appropriate legislation on a priority basis.

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72 In cases where probation is used defendants do not have to admit their responsibility or guilt. The trial is suspended under the condition of not engaging in other criminal offenses, repairing damages, and, in most cases, doing community work. The court may order this suspension for a period of one to three years. If the conditions imposed by the court are satisfied, there is no criminal record of the case. The procedure is only available for defendants with no previous convictions of any kind. Also probation is never available for public officials who participated in an offence while holding office (art. 76 bis PC, paragraph 7).

c) Confiscation and seizure

(i) Confiscation

224. Article 23 PC provides for the mandatory forfeiture upon conviction of "goods" used in order to commit a crime, as well as the forfeiture of "goods and product or profit obtained from the crime". With respect to the foreign bribery offence, the former would appear to cover the bribe and the latter could cover the proceeds of the bribe. However, the application in practice of this provision does not appear to be fully effective. A judge met during the on-site visit indicated that the application of confiscation measures is inefficient, describing prosecutors as often lacking the capacity to prove the link between the seized assets and the crime. It is unclear whether these provisions have ever been used against an active briber.

225. Article 23(3) PC provides that the product or profit can be confiscated from a principal or a legal person that has benefited from it when the active party or the accessories acted (1) "as somebody's agent"; or (2) as an "organ, member or manager" (*órganos, miembros o administradores*) of a legal person. This provision referring specifically to confiscation from a legal person has only been in place since 2005, and had never been used in practice at the time of the on-site visit. Participants indicated that, in theory, in an active bribery case, judges would have the possibility to confiscate an approximation of the profits made by the active briber if the exact amount could not be known. They also indicated that in order to determine whether a person "acted as an organ, member or manager of a legal person", prosecutors and judges would probably have to rest on the company articles of incorporation or bylaws.

226. The art. 23(3) approach could fail to take account of companies that benefit from bribery through actions by *de facto* managers as well as employees. Article 23(4) PC provides that the product or profit of the crime can be confiscated from a "third party" that has gratuitously benefited from it. It remains unclear whether this notion of "third party" could apply to a legal person.

(ii) Seizure

227. Article 231 CPC and art. 23 PC provide that a judge may order seizure of objects subject to confiscation or that could be used as evidence (and that in urgent cases the police may also take such measures). Article 23 PC also provides that the judge can order seizure to "avoid the consolidation of the benefit" of the crime, or to "prevent the impunity of the offenders". Article 518 CPC states that the judge shall order seizure to guarantee any monetary sanction, civil compensation and costs after the indictment has been approved; but that seizure may also be ordered before the indictment when there is a "risk from delay" and when "sufficient elements for conviction" exist.

228. The Responses describe judges as very hesitant to ordering seizure. (GQ 7.1) Conversely, during the on-site visit a judge indicated that pre-trial seizure was not particularly problematic, and that bigger problems laid in the capacity of prosecutors of proving the link between the seized assets and the crime in order to be able to move the case forward.

229. As with confiscation, experience in ordering seizure against legal persons appeared to be limited. After the on-site visit, Argentina referred to a recent case where seizure was imposed on a legal person.

Commentary:

The lead examiners recommend that Argentina take all necessary measures to ensure that in foreign bribery cases, measures of seizure and confiscation can be effectively applied against both natural and legal persons that benefit from bribery.

d) Non-criminal sanctions

230. Article 3.4 of the Convention provides that "each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official".

(i) Public procurement

231. Paragraph VI(ii) of the Revised Recommendation recommends that "Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials… and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials".

232. According to Decrees 436/2000 (art. 136) and 1023/2001 (art. 28), any person convicted for "fraudulent offences" (*delitos dolosos*) [73] or against which criminal procedures are being brought for offences established by the IACAC (art. 8 covers certain forms of transnational bribery), is debarred for purposes of awarding public contracts with the National Public Administration, including all public works, licenses and public services contracts. (GQ 18) According to information obtained during the on-site visit, acts of transnational bribery that fall within the scope of the Convention and art. 258 bis PC but which are not explicitly covered by the IACAC – such as bribery of an agent of a public international organisation – cannot trigger debarment. Debarment is also only applicable to natural persons, and no similar exclusion measures exist for legal persons. The maximum period for debarment is equal to twice the length of the prison sentence; and equal to the probation period if no prison sentence is applied.

233. On-site visit discussions revealed that debarment for an IACAC offence had never been applied, and that contracting agencies lacked a system for verifying whether a bidder has been convicted or is being prosecuted.[74]

(ii) Export credit agencies

234. At present, neither BICE nor CASCE can impose administrative sanctions on natural or legal persons convicted of foreign bribery. However, after the on-site visit, Argentina indicated that BICE, under CNSGE supervision, is working on developing administrative sanctions that would exclude companies controlled by physical persons convicted of foreign bribery from access to officially supported export credit.

Commentary:

The lead examiners recommend that Argentina extend the grounds for debarment to cover all offences falling within the scope of Art. 1 of the Convention. Argentina should also ensure that an effective exclusion mechanism is in place, and consider extending to legal persons the disqualification from participation in public procurement. The lead examiners also recommend that Argentina consider the imposition of additional civil or administrative sanctions for natural and legal persons convicted of bribery.

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73 The Argentine authorities indicate that the concept of *delitos dolosos* covers foreign bribery offences.

74 A representative of the National Procurement Office (*Oficina Nacional de Contrataciones*, ONC) indicated that it maintains a registry of suppliers which contains information about domestic proceedings. However, the ONC deals only with acquisitions of goods and services, not with public works, a much larger area of public procurement.

4. Other offences and obligations

a) Denial of tax deductibility of bribes and enforcement

235. Argentina indicates that bribes have never been tax deductible in Argentina. (See Phase 1 report, p.29) In the view of the lead examiners the legal basis for this is not entirely clear. Argentine tax law provides for lists of expenses which are deductible and non-deductible, but bribes are not expressly covered by either of them. Tax law addresses the non-deductibility of net losses resulting from "unlawful operations" (art. 88(j) of the Income Tax Law), but no provision in the tax law explicitly determines the tax treatment of expenses which are otherwise considered illegal in criminal law. Argentina's claim that the deductibility of bribes is implicitly prohibited was already a source of concern for the Working Group in Phase 1.

236. A number of deductible items listed in the Income Tax Law could also potentially be misused to obtain tax deductibility of bribes, such as "expenses and other expenditures inherent to the course of business" (art. 87(a)), and "entertainment expenses [for personnel on the company's payroll] up to an amount equivalent to 1.50 % of the total amount of remunerations paid to employees" (art. 87(i)).

237. Argentina indicates that a suspicious deduction, such as an overtly large agent's commission, can be determined by the tax administration to be impermissible on the basis that it does not correspond to "the principle of economic reality" laid down in art. 2 of Law 11.683. (SQ 51) It further indicates that the onus always rests on the taxpayer to prove deductibility with adequate documentation. (GQ 17.1.iii; SQ 50) In addition, art. 37 of the Income Tax Law provides that deduction is to be refused for "expenditure lacking documentation or for which it cannot be proven by other means that because of its nature it must have carried out to obtain, maintain and keep taxed gains" (the expenditure, once deduction is refused, is then subject to a 35% tax rate).

238. The AFIP Instruction issued in July 2007 (see above section B.4 on tax authorities), contributed to further raising awareness of tax inspectors about the implicit prohibition. However, the instruction is an internal document aimed at raising the awareness of tax inspectors about detection techniques, and is not a binding legal instrument for purposes of interpreting the provisions of the Income Tax Law. It also fails to include "a cross reference to… relevant tax legislation concerning the non tax deductibility of bribes to foreign public officials" as recommended by the OECD Bribery Awareness Handbook for Tax Examiners. The lead examiners consider that the instruction is a useful tool, but that the objectives of raising awareness and removing ambiguity surrounding the prohibition of the deduction of bribes could be better served by also clarifying this prohibition through a public and legally binding instrument.

239. During the on-site visit, the lead examiners met with AFIP representatives who indicated that there was no doubt in their minds that bribes were not deductible, even if not explicitly provided in the tax law. Their assertion was based on their practice of systematically challenging every claimed deduction not adequately documented and clearly linked to regular business practices. They also indicated that art. 87(a) of the Income Tax Law was subject to strict interpretation, and claimed that it would not be influenced by what might be considered "usual business practice" in a foreign country if such practice would be considered illegal pursuant to Argentine law. Nevertheless, AFIP representatives agreed that introducing an express prohibition of deduction for bribes would help clarify the situation for taxpayers and their advisers and would assist in raising awareness about foreign bribery issues.

240. In mid-June 2008, Argentina published a new external note (no. 02/08) in the Official Journal that refers to the issue of the deductibility of foreign bribes. Based on an initial impression, it appears that the new document would assist in raising awareness, but it refers only to the requirements of the Convention, and does not explicitly describe Argentine tax law.

Commentary:

The lead examiners recommend that Argentina take appropriate measures to make explicit the prohibition on deducting foreign bribes from taxable revenue either in tax legislation or through another appropriate mechanism that is binding and publicly available.

b) Money laundering

(i) Prevention and detection framework

241. Law 25.246, adopted in 2000 (the AML law), lays the foundations of Argentina's current anti-money laundering system. It amended the criminal offence of money laundering (see below), created the financial intelligence unit (UIF – *Unidad de Información Financiera*, operational since 2003)[75] and describes reporting obligations for suspicious transactions. Persons subject to reporting obligations must report all suspicious transactions to the UIF, irrespective of the amount involved.[76]

242. Article 20 of Law 25.246 (as amended) identifies persons subject to reporting obligations. Legal professions other than notaries are not included in the list: lawyers, including the few company *síndicos*[77] that are also lawyers, are not subject to any money laundering reporting obligations. The Argentine authorities indicate that the issue of extending the list of reporting parties to include legal professions is being considered. A UIF request to a reporting entity for additional information about a suspicious transaction report (STR) cannot be opposed on the basis of bank, professional, legal or contractual secrecy or confidentiality. However, AFIP is only be able to lift tax secrecy at UIF's request if the original STR was made by AFIP, and only in relation to the natural and legal persons involved directly concerned by the STR. In other cases the UIF needs the intervention of a federal criminal judge in order to access tax information, and the decision has to be made within thirty days.

243. The UIF has recently imposed stronger due diligence requirements for the identification of clients and beneficial owners. It has also issued guidelines to assist financial institutions in the detection of unusual or suspicious transactions, including in relation to international or unusually complex transactions and to transactions conducted by "politically exposed persons" (PEPs). In June 2007 the Central Bank issued rules for the application of the "know your customer" principle, including enhanced diligence for clients who are "public officers". However, the definition of "public officers" used does not cover PEPs from foreign countries.[78] The lead examiners were encouraged to hear during the on-site visit that the FIU was working on a project with supervisory agencies (including the Central Bank) to expand the definition to include foreign public officials. The lead examiners also generally welcome the ambitious agenda for the improvement of the anti-money laundering regime approved by the President of Argentina on 11 September 2007.

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75 The UIF, a self-administered unit organised under the jurisdiction of the MOJ, is in charge of the analysis, handling and transmission of information with the purpose of preventing the crime of laundering of assets arising from the commission of certain offences, including domestic and foreign bribery offences.

76 Persons failing to comply with reporting obligations are punishable with a fine one to ten times the amount of the assets or transactions involved in the offence, and where the offender is a natural person an equivalent penalty is to be imposed upon the legal person where this person works. No statistics were provided about the enforcement of reporting obligations and the sanctions imposed.

77 See section B.6 of the report (accounting and auditing) for more information on the role played by *síndicos* in Argentine companies.

78 The list of "public officers" is reproduced from the list of domestic senior public officials under an obligation to submit a declaration of assets pursuant to Law 25.188 (Ethics in the Public Service Law).

244. Corruption has been identified by GAFISUD as one of the main sources of illegal proceeds in Argentina. The lead examiners recommend that the UIF, supervisory bodies, and others involved in the drafting of guidelines for the detection of suspicious and unusual transactions carefully review their content and their application in order to ensure that they provide adequate focus on bribery risks, including foreign bribery.

(ii) Statistics – Detecting bribery through the AML framework

245. Between November 2002 and 30 September 2007, the UIF received a total of 3016 reports of suspicious or unusual transactions (the financial sector accounted for 73% of reports, notaries for 7%, AFIP for 5%, the Central Bank 4%, and accountants and auditors for 0.1%). Of these, 2615 were still in the process of being investigated by the UIF, and 229 had been forwarded to the MP for further investigation. During the on-site visit, it was indicated that only one of the cases forwarded to the MP since 2002 related to an alleged predicate offence of domestic bribery; but that twenty-five of the pending UIF investigations were potentially related to domestic corruption. The UIF has never investigated a suspicious transaction with identified links to a potential foreign bribery offence. (GQ 11)

(iii) The offence of money laundering and associated sanctions

246. Article 278 PC defines the offence of money laundering. It applies only to intentional money laundering; a subparagraph providing for liability based on recklessness or serious imprudence was deleted by decree shortly after the AML law was adopted in 2000. All criminal offences, including active bribery of Argentine and foreign public officials, are predicate offences for the purpose of money laundering. The offence only applies if the laundered assets exceed ARS 50 000 (USD 15 900). For amounts lower than ARS 50 000, Argentina indicates that the offence of concealment (art. 277 PC) could be used. Article 278 PC is sanctioned with two to ten years imprisonment, while art. 277 PC provides for six months to three years imprisonment (punishment is increased from one to six years in cases where the money launderer was a public official and/or acted with a "profitable purpose").

247. While art. 278 PC could cover the laundering of the proceeds, in an active foreign bribery case it would seem that the laundering of the bribe itself would only be covered by the offence of concealment defined in art. 277 PC (as only the latter refers to the instruments of the crime).

248. Article 23 of the AML law provides for sanctions against legal persons. Legal persons are subject to an administrative-criminal fine of two to ten times the value of the laundered assets whenever their "organ or performer" (*órgano o ejecutor*) is found to have committed a money laundering offence as defined in art. 278(1) PC. Where the acts are committed with recklessness or gross negligence by the "organ or performer", the fine is 20% to 60% the value of the assets involved in the crime. This provision remains to be tested. The relationship with the proceedings against the natural persons involved – as well as the possibility to hold a legal person liable in absence of a conviction of a natural person – also remains unclear.[79]

249. Article 279(4) PC provides that for the offences of concealment and money laundering the predicate offence can take place outside the territorial application of the Penal Code, provided that the

[79] The only case expressly provided for in the law is the following: "The crime shall exist whenever the limit of value under such a provision [ARS 50 000 (USD 15 900)] has been exceeded, notwithstanding the fact that the different particular interrelated actions which, as a whole have exceeded such a limit, may have been committed by different natural persons, without prior agreement among themselves and which, hence, may not be submitted to criminal prosecution."

predicate offence is punishable in the jurisdiction where it has taken place.[80] In cases where foreign bribery occurs in a foreign country (country B) other than the one of the foreign public official (country C), and where country B does not criminalise bribery of foreign public officials, the lead examiners are concerned that the concealment and money laundering offences in arts. 277 and 278 might not apply.

250. The money laundering and concealment offences do not cover laundering by persons who have also committed the predicate offence ("self-laundering").[81] The absence of a self-laundering offence may make financial institutions less likely to report suspected bribery proceeds that the briber is attempting to launder and pass-off as licit in origin. More broadly, the introduction of a self-laundering offence could also help fill gaps in the effective reach of the foreign bribery offence: the foreign bribery offence may have been committed wholly abroad (and thus be out of reach for Argentine jurisdiction and/or be difficult to prove), while the self-laundering offence by the Argentine company or individual might well occur within Argentina. The Argentine authorities indicate that the issue of the introduction of a "self-laundering" offence will be considered in the context of the broader program for the improvement of the AML regime mentioned above.

251. The Argentine authorities have indicated that a prior conviction for the predicate offence is not needed to convict someone for money laundering. Nevertheless, the lead examiners are concerned about what were described during the on-site visit as serious difficulties in moving money laundering cases forward unless both the predicate offence and the launderer's specific knowledge of that offence are proven. A specialised prosecutor indicated that there is an ongoing debate about how much evidence is needed about the predicate offence in order for the money laundering offence to be applicable.[82]

(iv) Enforcement of the money laundering offence

252. There have been only two money laundering convictions in Argentina since money laundering was first criminalized in 1989. Both related to drug trafficking offences. Argentina has recently undertaken important institutional changes to strengthen enforcement. For instance, in November 2006 a specialized Anti-money Laundering Unit was created within the MP, to which the UIF reports cases at the end of its own investigations. Another important step was to change the standard used by the UIF in deciding whether to send the case to a prosecutor: since March 2006, art. 19 of the AML law provides that the UIF should report to the prosecutor whenever "sufficient elements of conviction have arisen [in the course of the UIF investigation] to confirm the suspicious character of the operation [with regard to money laundering and terrorist financing offences]". These changes have yielded results, with over 60% of the 229 files sent to the MP in the last six years having been sent since the creation of the MP's specialized AML unit in November 2006. Decisions by the UIF to close a case are not subject to a review process. However, before closing a case, the UIF president is obliged to consult with a Consultation Cabinet (composed of representatives from the Central Bank, AFIP, the CNV, the Drug Agency, the MOJ and the Ministry of the Interior).

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80 The Code actually uses the term "special" (*especial*) rather than "territorial" (*espacial*). In Phase 1, the Argentine authorities stated that this was an error and would be corrected, but the error has not yet been eliminated.

81 GAFISUD has criticised the absence of a self-laundering offence, which it identified as one of the major obstacles to the anti-money laundering regime in Argentina. (See Gafisud, *First Round of Evaluations – Public Summary of the Report on Argentina*, p.3).

82 Police representatives similarly stated that prosecutors and investigative judges always seek to prove a specific predicate offence.

253. The capacity of the MP's specialised AML Unit to effectively manage the recent increase in the number of cases may be crucial in bringing more convictions, but the Responses criticize the limited capacity of the UIF to assist the AML Unit at the preliminary investigations stage. (SQ 39) Upon receipt of the case, the Unit has 60 days to continue the preliminary investigation after which must either initiate criminal action or close the case. But prior to the filing of the case with the judge, the Unit does not have access to information collected by the UIF that is otherwise protected by secrecy (*e.g.* tax and bank information) or to information received by UIF from foreign financial intelligence units.[83]

254. As in other contexts, the MP criticized difficulties in identifying the beneficial owners of companies because of the absence of a national company registry (see "Access to financial, tax and corporate information" under the "Investigation and Prosecution" section of the report).

Commentary:

The lead examiners welcome the general and ongoing efforts to enhance the AML framework, and encourage Argentina to proceed with the implementation of the agenda adopted in September 2007 for the improvement of the anti-money laundering regime.

In this context, the lead examiners recommend that Argentina (i) include foreign PEPs, appropriately defined, in the definition of PEPs in relevant rules and guidelines; (ii) extend money laundering reporting, due diligence and record keeping obligations to lawyers and other legal professionals (subject to appropriate qualifications), including all síndicos; and (iii) provide appropriate training on the foreign bribery offence to reporting entities, as well as supervisory and enforcement authorities.

The lead examiners also recommend that Argentina consider expanding the money laundering offence to include self-laundering. They further recommend that the Working Group follow up on whether foreign bribery is always a predicate offence to money laundering, without regard to the place where the bribery occurred.

c) Foreign-bribery related accounting misconduct

255. The Convention (Art. 8) and the 1997 Revised Recommendation (Para. V) contain important provisions with regard to accounting and auditing (in addition to the provisions relating to the reporting by auditors of suspicions of bribery addressed above in section B.6.b on "detection and reporting obligations of external auditors and *síndicos*"). Among other things, they require the prohibition of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of nonexistent expenditures and the entry of liabilities with incorrect identification of their object as well as the use of false documents, for the purpose of bribing foreign public officials or of hiding such bribery. They also require that Member states provide effective, proportional and dissuasive sanctions for accounting misconduct relating to foreign bribery.

(i) Accounting standards

256. Accounting standards in Argentina are primarily set by FACPCE through its technical body, the Special Committee on Accounting and Auditing Standards (CENCyA). The FACPCE's standard-setting role is recognized in the law governing its activity. As noted above, FACPCE consists of 24 separate *Councils* (one for each province and one for the federal capital), which have all agreed to adopt FACPCE standards without modifications.

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[83] However the UIF does notify the MP that it has such information in its possession at the time of forwarding the case.

257. The National Securities Commission (*Comisión Nacional de Valores*, CNV) issues accounting standards for listed entities pursuant to Law 17.811. It generally uses the professional standards set by FACPCE with some additional requirements and eliminates some alternatives. The Central Bank sets standards for financial institutions and the National Insurance Superintendent (*Superintendencia Nacional de Seguros)* regulates insurance companies. The *Inspección General de Justicia* (IGJ), which supervises companies in Buenos Aires City and which is subject to the oversight of the MOJ, generally accepts FACPCE's accounting standards without modifications. The Financial Administration Law (Law 24.156) provides that state-owned companies are subject to accounting rules developed by the National Accounting Office (*Contaduría General de la Nación*).

258. It remains unclear whether Argentine law effectively prohibits the establishment of off-the-books accounts, slush funds and other accounting misconduct described in Art. 8 of the Convention. As noted in the Phase 1 report, there are a variety of relevant general provisions on accounting requirements. For example, under the Code of Commerce, all "traders" must report their transactions and keep commercial accounts in which a true description and clear justification for each transaction are recorded (art. 43). Traders must keep "books of original entries" and "inventory and balance sheets" (art. 44). All transactions shall be entered in the book of original entries on a daily basis in chronological order and balance sheets must reflect a true and accurate financial situation of the company (arts. 45, 51). In keeping books, insertion, deletion and modification of entries, etc. are forbidden (art. 54). Books "considered as indispensable" under the Code of Commerce must be submitted to the Companies Registry of the domicile (art. 53).

259. However, there are no specific regulations addressed to Art. 8 issues. (SQ 58) Argentina has not supplied any cases demonstrating that the general provisions identified in the Phase 1 report are actually applied in practice to sanction Art. 8 accounting misconduct. (See SQ 41) This gap is particularly worrying because there have been recent examples of the alleged widespread use by companies of false invoices, including in corruption cases.

260. Argentina is only in the early stages of responding to international financial reporting standards (IFRS). Following a November 2007 CNV request, FACPCE developed an implementation plan for the application of IFRS to the presentation of financial statements of certain listed entities. The plan was submitted to CNV in March 2008 and, as of May 2008, was the subject of consultation with interested third parties. A similar process is planned with regard to insurance companies, financial entities and agencies administering pension funds.

261. Argentina requires the reporting of material contingent liabilities.[84] However, the practical effect of these provisions in the fight against bribery would appear to be null at present in light of the absence of corporate liability for bribery.

(ii) External audit requirements and standards

262. Listed companies are required to have an external auditor report on the annual financial statements. The CNV can review the financial statements of listed companies, but a 2005 report to the International Federation of Accountants (IFAC) by FACPCE (the IFAC Report) notes (at para. 108) that active review occurs only in exceptional cases. The CNV can conduct on-site inspections if there are reasons for concern, such as the resignation of an auditor. Unlisted companies are not required to have an external audit. Two regulatory bodies have a mandate to control, inter alia, state-owned companies: the Office of the Comptroller General (*Sindicatura General de la Nación*) which is responsible for internal controls and reports to the presidency, and the Office of the National Auditor General (*Auditoría General*

[84] See FACPCE Technical Standards 8, 9, 17.

de la Nación), which is responsible for external controls and reports to Congress. A recent report by SIGEN found various accounting and auditing irregularities in an Argentine state-owned company with significant international operations.

263. External audit requirements for commercial companies appear to be limited to listed companies. Argentina has indicated that the requirements apply more broadly to all large companies, but has not identified the applicable statutes or rules. There are some partial substitutes for external audits for some unlisted companies. First, a "*síndico*" is mandatory if, inter alia, the capital of the corporation exceeds the sum of ARS 2 100 000 (USD 667 800). As noted above, a *síndico* is a form of statutory auditor, but the law provides that both lawyers and accountants can be *síndicos*. Many lawyers may not be qualified to review the quality of financial statements or to meaningfully test whether accounting standards are respected. Thus, although there is some overlap, the *síndico* function appears to be focussed on controlling the legality of company actions rather than accounting as such.

264. Second, the Company Law (art. 299 of Law 19.550) provides that a wide range of companies are subject to "permanent government supervision". Some panellists suggested that this amounts to a requirement for external audit. However, in practice, it appears that the external review is severely limited due to lack of resources: government agencies are not able to meaningfully review company accounts in the same manner as an auditor retained by a company. The IGJ is charged with "permanent supervision" of approximately 3000 large companies in Buenos Aires City, but an IGJ representative noted that its review pursuant to art. 299 is essentially "formal" because of the lack of resources. Following the on-site visit, the IGJ indicated that its formal monitoring requires the annual provision of accounting, tax and other relevant information, which is assessed according to CENCyA standards.

265. Auditing standards in Argentina are established by CENCyA. The law requires only that auditors have a university degree and register with a Council. There are no professional examinations or practical experience requirements. FACPCE Technical Resolution No. 7 addresses conflicts of interest, but it has a limited scope. It provides for a general requirement of independence, but does not define the concept. It contains a list of cases in which auditors are not independent. The Resolution does not establish any rotation requirements or limits on the supply of services to the company by firms related to the auditor. Auditors can own interests in the audited company provided they are not "significant", a term that is not defined.

266. Executive Decree 677/2001 (art. 14(d)) empowers the CNV to establish criteria for the independence of auditors for listed companies. Recently the CNV has become more active in this area, with regard to companies that issue stock to the public (but not those that issue debt). CNV Resolution 504/2007 created the External Auditor Registry; all auditors of companies issuing stock to the public (and of certain other entities) must be registered. CNV Resolution 505/2007 established auditor rotation requirements for auditors of the same companies and entities. Audit partners must rotate every five years (six years in exceptional circumstances) and not participate in the audit for a minimum of two years after the five-year period. Audit firms with only a single audit partner can avoid rotation by substituting the addition of an independent reviewer of the auditor's work.

267. Resolution 505 has also imposed quality control requirements on audit firms that work for listed companies. Firms are required to establish quality control systems to ensure that their members and staff comply with applicable norms. However, it appears that the CNV norms for auditor qualifications still require only completion of a university degree and registration with a Council. There are no professional examinations or practical experience requirements.

268. The Councils have not yet sought to apply quality control standards to the profession as a whole, but the FACPCE is studying the issue of quality control. Panellists indicated that the Councils have in

theory the power to request to review audit papers to review audit quality but that in practice they do not do so.

269. Article 15 of Executive Order 677/01 provides that companies that issue stock to the public must have an audit committee of at least three members. A majority of the members must satisfy CNV criteria for independence. Neither the audit committee nor the auditor is required to issue a publicly available opinion with respect to the quality of internal controls. CNV has also recently developed a Corporate Governance Code of Good Practice. It generally adopts a "comply or explain" approach.

270. Following the on-site visit, Argentina indicated that the CNV has held and continues to hold meetings with FACPCE in order to analyze the strength of accounting standards, how they might be improved, and to ensure the application of the Convention.

(iii) Enforcement and sanctions

271. Article 300(3) PC sets forth the accounting fraud offence, which can apply to the incorporator, director, administrator, liquidator or *síndico* of a corporation or operating company or another legal person who "knowingly publishes, certifies or authorises an either false or incomplete inventory, balance sheet, profit and loss accounts, or the related reports, minutes, annual reports, or informs at the shareholders' meeting, falsely or reluctantly, on material events to assess the company's financial position, whatever the purpose sought when verifying them may be."

272. There appears, however, to be limited enforcement of art. 300(3). The applicable sanctions (imprisonment of six months to two years) are far lower than those for tax fraud so that most cases are dealt with as tax cases. There are no available statistics on the enforcement of the accounting fraud offence.

273. The CNV can conduct inspections of listed companies. A CNV representative indicated that it imposes sanctions of varying degrees of severity in approximately ten cases a year. The CNV has initiated some proceedings for alleged accounting misconduct, although they were not related to Art. 8 of the Convention. The CNV has never initiated administrative proceedings for accounting misconduct on the basis of a criminal case of domestic corruption or bribery.

274. Article 12 of the Organic law of the IGJ provides that the IGJ "shall impose" penalties on the corporations, associations and foundations, on their directors, *síndicos* or administrators and to every individual or entity that does not fulfil its obligation of furnishing information, provides false data or that in any way, infringes the obligations established by law, the by-laws or regulations, or hinders the performance of their duties." The Phase 1 report notes that the Argentine authorities considered that such penalties are applicable to omissions and falsifications in respect of the books, records, accounts and financial statements in accordance with Art. 8(2) of the Convention. The Responses, however, do not refer to the IGJ with regard to the enforcement of accounting standards. (SQ 42) An IGJ representative at the on-site visit recognised that the agency was principally a registry office and "not really an enforcement agency". Even where there are exceptional events, such as the resignation of an auditor, the IGJ would be unlikely to take action. Following the on-site visit, the IGJ indicated that where it observes a breach of law or accounting requirements, it begins proceedings to apply sanctions. However, no statistics or examples have been supplied.

275. The individual Councils that compose the FACPCE are responsible for licensing, investigating and disciplining auditors. Licensed auditors are required to abide by CENCyA's auditing standards. Failure to do so can result in civil action by the Councils, ranging from a warning to the withdrawal of the licence to act as an auditor. The Councils monitor auditing practices through random compliance checks and also investigate issues brought to their attention. As noted above, however, they rarely actually review audit

papers. A representative of the Buenos Aires Council indicated that it has an active disciplinary program. It dealt with 1514 cases in its most recent year; while many were found to lack merit, a variety of sanctions were imposed. The CNV also has enforcement powers with regard to auditors with regard to CNV requirements. It can apply the fines and other sanctions set forth in art. 10 of Law 17.811 and/or exclude the auditor from the External Auditor Registry.

Commentary:

The lead examiners note with concern that Argentina has not supplied any cases demonstrating that the general provisions on accounting requirements identified by Argentina are actually applied in practice to sanction the accounting misconduct defined in Art. 8 of the Convention. The lead examiners recommend that the Argentine authorities, in conjunction with relevant bodies such as FACPCE and CNV, continue to strengthen accounting standards in order to ensure that the Art. 8 requirements are fully addressed in practice. The examiners also urge Argentina to accelerate its efforts to adopt IFRS for large companies.

The lead examiners recommend that Argentina consider whether requirements to submit to external audit are adequate, in particular with regard to large companies. The examiners also recommend that the Argentine authorities, in conjunction with FACPCE and CNV, continue their efforts to improve audit quality standards, including with regard to certification, independence and quality control. In addition, the lead examiners recommend that Argentina take measures to ensure that state-owned companies active in international markets are subject to effective accounting and auditing requirements. Argentina should also take measures to enforce the accounting fraud offence and other accounting requirements more effectively in bribery cases, including by increasing applicable sanctions where appropriate.

E. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW UP

276. The Working Group appreciates the significant efforts by Argentina to address a number of concerns expressed by the Working Group in Phase 1. The Working Group also acknowledges the generally very good cooperation of the Argentine authorities throughout the Phase 2 process.

277. The Working Group has two overriding concerns in relation to Argentina's implementation of the Convention. First, Argentina has not adopted liability of legal persons for foreign bribery as required by Article 2 and 3 of the Convention. The Working Group is seriously concerned about the lack of any progress with regard to this issue since Phase 1 and strongly urges Argentina to proceed as promptly as possible to adopt legislation providing for both liability and sanctions on legal persons that fully complies with the Convention. Second, for a number of reasons, it appears that Argentina is rarely able to effectively investigate and prosecute serious economic crimes to a resolution on the merits, in particular because of lengthy delays in getting to a decision due, *inter alia*, to the applicable rules of procedural law. In addition, certain allegations of foreign bribery that appeared in the public domain in 2002 were not investigated until 2006. These issues raise fundamental concerns, but the Working Group notes that the Argentine government has commenced reform to improve the federal criminal justice system. A new draft Criminal Procedure Code, based on an accusatorial system, was recently published by a commission mandated by the Ministry of Justice.

278. In this context, the Working Group will conduct a supplementary Phase 1 bis review of Argentina one year from now to evaluate Argentina's efforts with regard to corporate liability and sanctions, and to establishing nationality jurisdiction in foreign bribery cases. The review will also report on the status of legal changes with regard to broad criminal procedure and institutional reform (Recommendation 3(c)). Depending on its conclusions concerning progress in these areas (as well as with regard to its specific recommendations below), the Working Group will also decide whether to conduct a supplementary on-site evaluation (Phase 2 bis review) of Argentina or take other appropriate action.

279. Based on its findings regarding Argentina's implementation of the Convention and the Revised Recommendation, the Working Group also (1) makes the following recommendations to Argentina under part I; and (2) 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

1. 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 Argentina:

a) provide further training to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that can play an important role preventing and detecting foreign bribery by Argentine companies active in foreign markets, including trade promotion and diplomatic personnel and tax inspectors (Revised Recommendation, Paragraph I);

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 BICE to adopt, and ensure CASCE adopts, anti-bribery policies with regard to export credit operations; and seriously consider adhering to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits (Revised Recommendation, Paragraph I).

2. With respect to the detection and reporting of suspected foreign bribery to the competent authorities, the Working Group recommends that Argentina:

a) remind public officials, including diplomatic missions, trade promotion, export credit and tax administration personnel, of their obligation under art. 177(1) CPC and art. 2 of the Reporting

Decree to report alleged offences of foreign bribery directly to competent law enforcement officials; ensure that administrative reporting duties laid down in other instruments reflect and are compatible with the CPC and Reporting Decree; and consider whether sanctions for non-reporting of alleged foreign bribery are appropriate and effective (Revised Recommendation Paragraph I);

b) adopt comprehensive measures to protect public and private sector whistleblowers in order to encourage employees to report suspected cases of foreign bribery without fear of retaliation. (Revised Recommendation Paragraph I).

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

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

a) continue and accelerate its efforts to address systemic deficiencies in enforcement with regard to serious economic crime such as foreign bribery (Convention, Article 5; Revised Recommendation Paragraph I);

b) take all necessary measures to ensure that foreign bribery allegations are promptly detected, investigated and prosecuted as appropriate (Convention, Article 5, Revised Recommendation Paragraphs I and II);

c) ensure that adequate resources, including specialised and experienced investigative judges, are made available for foreign bribery investigations and prosecutions; and take measures to provide increased continuity of investigative personnel for particular cases, including judges and prosecutors, to the greatest degree possible (Convention, Article 5; Revised Recommendation Paragraph I);

d) ensure that factors listed in Article 5 of the Convention do not influence investigation or prosecution in foreign bribery cases; and consider further measures to limit the disclosure of confidential information about individual cases to government agencies or officials not involved in the investigation (Convention, Article 5; Revised Recommendation Paragraph I);

e) review applicable rules to ensure that *incidentes* and appeals can be efficiently resolved in complex foreign bribery cases, and provide adequate training to judges and prosecutors concerning the management of such cases (Convention, Article 5; Revised Recommendation Paragraph I);

f) accelerate efforts to create an effective national register of information relating to all Argentine companies (Revised Recommendation Paragraphs I, II);

g) ensure tax information continues to be promptly provided to judges in appropriate cases (Revised Recommendation Paragraphs I, II).

4. With respect to the offence of foreign bribery, the Working Group recommends that Argentina (a) introduce an autonomous definition of foreign public officials; (b) ensure that this definition covers, in a manner consistent with the Convention, officials of foreign public enterprises and public officials of organised foreign areas or entities that do not qualify or are not recognised as States; and (c) ensure that

vagueness with regard to the requirement that the advantage supplied by the bribery be "undue" is eliminated. (Convention, Article 1)

5. With respect to the liability of legal persons for foreign bribery, the Working Group recommends that Argentina adopt legislation on a priority basis to ensure that legal persons can be held liable for foreign bribery. (Convention, Articles 2 and 3)

6. With respect to jurisdiction, the Working Group recommends that Argentina adopt nationality jurisdiction in foreign bribery cases in order to strengthen enforcement of the offence. (Convention, Article 4)

7. With respect to the limitations period for prosecuting foreign bribery, the Working Group recommends that Argentina ensure that the statute of limitations applicable to the foreign bribery offence and possibilities for interruption and suspension allow for an adequate period of time for the investigation of the offence. (Convention, Article 6)

8. With respect to mutual legal assistance, the Working Group recommends that Argentina (a) ensure it can grant all MLA requests submitted in the context of criminal proceedings within the scope of the Convention and brought by a Party against a legal person; and (b) consider steps that would allow it to grant MLA requests for coercive measures in the context of non-criminal proceedings within the scope of the Convention and brought by a Party against a legal person. (Convention, Article 9)

9. With respect to sanctions for foreign bribery, the Working Group recommends that Argentina:

a) amend the law to provide that legal persons shall be subject to effective, proportional and dissuasive sanctions for foreign bribery, including fines or monetary sanctions (Convention, Articles 2, 3);

b) take all necessary measures to ensure that seizure and confiscation can be effectively applied against the active briber, including against all legal persons that benefit from foreign bribery (Convention, Article 3);

c) consider steps to ensure that the sanctions imposed by courts in foreign bribery cases are effective, proportionate and dissuasive (Convention, Article 3; Revised Recommendation Paragraph I);

d) extend the grounds for debarment from public tenders to cover all offences falling within the scope of Article 1 of the Convention, ensure the effectiveness of the exclusion mechanism and, in conjunction with reform of the liability of legal persons for bribery, extend the disqualification to legal persons engaged in foreign bribery where appropriate (Convention, Article 3; Revised Recommendation Paragraph VI).

10. With respect to accounting, auditing and internal controls relating to the fight against foreign bribery, the Working Group recommends that Argentina:

a) continue to strengthen accounting standards, take measures to enforce the accounting fraud offence and accounting requirements more effectively in bribery cases, and increase applicable sanctions where appropriate (Convention, Article 8; Revised Recommendation Paragraph V.A);

b) consider whether requirements to submit to external audit are adequate, in particular with regard to large companies; and continue efforts to improve audit quality standards, including

with regard to certification, independence and quality control (Revised Recommendation Paragraph V.B);

c) ensure that auditors and *síndicos* are required to report all suspicions of foreign bribery by employees or agents of the company to management and, as appropriate, to corporate monitoring bodies; and consider requiring auditors and *síndicos*, notably in the face of inaction after appropriate disclosure within the company, to promptly report suspicions to the competent authorities (Revised Recommendation Paragraph V.B).

11. With respect to related tax offences and obligations, the Working Group recommends that Argentina take appropriate measures to make explicit the prohibition on deducting foreign bribes from taxable revenue either in tax legislation or in another manner that is binding and publicly available. (Revised Recommendation Paragraphs I, II and IV)

12. With respect to related anti-money laundering obligations, the Working Group recommends that Argentina maintain ongoing efforts for the improvement of the anti-money laundering regime, and, in this context:

a) include foreign politically exposed persons, appropriately defined, in the definition of politically exposed persons in relevant rules and guidelines, and raise awareness about foreign bribery as a predicate offence to money laundering (Convention, Article 7; Revised Recommendation Paragraph I);

b) extend money laundering reporting, due diligence and record keeping obligations to lawyers, *síndicos* and other legal professionals (subject to appropriate qualifications) (Convention, Article 7; Revised Recommendation Paragraph I);

c) consider expanding the money laundering offence to include self-laundering (Convention, Article 7).

Part II. Follow-up by the Working Group

13. The Working Group will follow up on the issues below, as practice develops, in order to assess:

a) the application of sanctions against natural and legal persons in foreign bribery cases (Convention, Article 3)

b) the application of territorial jurisdiction in foreign bribery cases (Convention, Article 4)

c) whether the solicitation or "illicit demand" of an undue payment or other advantage by a foreign public official can exclude the liability of the active briber (Convention, Article 1)

d) the application in practice of art. 258 bis PC, including its application to cases where a bribe is paid for an act/omission outside of the official's authorised competence (Convention, Article 1)

e) whether foreign bribery is always a predicate offence to money laundering, without regard to the place where the bribery occurred (Convention, Article 7)

f) whether Argentine authorities consider the factors listed in Article 5 of the Convention when denying extradition or MLA in a foreign bribery case (Convention, Articles 5, 9)

g) the time needed to reach a final decision in extradition procedures related to corruption cases (Convention, Article 10)

h) the functioning of the modified Judicial Council with regard to any disciplinary proceedings arising out of foreign bribery cases (Convention, Article 5).

ANNEX 1 – PARTICIPANTS IN THE ON-SITE VISIT

- Ministry of Foreign Affairs, International Trade and Worship
  - Directorate of Legal Affairs
  - Secretariat for Foreign Relations
  - General Direction for Exports Promotion
  - General Direction for International Cooperation
- Ministry of Justice and Human Rights
  - Anticorruption Office
  - General Inspection (IGJ)
  - Office of National Coordination & Representation to the FATF, GAFISUD and LAVEX-CICAD-OAS (CRN)
- Public Ministry (*Ministerio Público Fiscal*)
  - Attorney General's Office, Office for International Cooperation
  - National Prosecution Office of Administrative Investigations (FIA)
  - Specialised unit for the investigation of money laundering and terrorism financing
  - Specialised unit for the investigation of tax and smuggling offences
- Ministry of Economy
- *Fundación Export.Ar* (export promotion agency)
- Federal Tax Administration
- Judges, including investigative judges
- Member of Congress (Senator)
- Advisory Commission for the Reform of Criminal Procedure Law
- Advisory Commission on Penal Code Reform
- National Office of the General Syndic (SIGEN)
- National Office of the Auditor General (AGN)
- National Securities Commission
- National Superintendent for Insurance
- Central Bank of Argentina
- *Banco de Inversión y Comercio Exterior* (state-owned financial institution)
- CASCE S.A. (export credit agency)
- *Banco de la Nación Argentina* (state-owned financial institution)
- Commercial banks
- Banking and financial institutions associations
- Criminal and corporate lawyers
- Large companies and SMEs
- Business and exporters associations
- Local and international accounting and auditing firms
- Associations of accountants, external auditors and internal auditors
- Academics
- Non-governmental organisations
- Media representatives
- Trade union representatives

ANNEX 2 – EXCERPTS FROM RELEVANT LEGISLATION

[*Unofficial English translation*]

PENAL CODE

Volume One - General Provisions

Article 1

This Code shall be applied to:
1. Crimes committed, or the effects of which are produced in the territory of the Argentine Nation, or in a place subject to her jurisdiction.
2. Crimes committed abroad by agents or employees of the Argentine authorities while in the performance of their duties.

Article 77

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

Volume Two - Crimes

Chapter VI: Bribery and Improper Lobbying

[…]

Article 258

Any person who personally or through an intermediary gives or offers any gift for the purpose of obtaining any of the conducts punished by arts. 256 and 256(1) bis shall be punished with prison from one to six years. If the gift is given or offered with the purpose of obtaining any of the conducts described in arts. 256(2) bis and 257, the punishment shall be reclusion or prison from two to six years. If the perpetrator is a public official, special disqualification from two to six years shall also be imposed in the first case, and from three to ten years in the second case.

Article 258 bis

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

Article 259

Any public official who, while in public office, accepts any gift by reason of that office, shall be punished with prison from one month to two years and complete disqualification from one to six years.
The person who presents or offers the gift shall be punished with prison from one month to one year.

Chapter XIII: Concealment and Money Laundering

Article 277

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

(a) Helps any criminal to elude the investigations of the authority or to avoid its actions;

(b) Hides, alters or procures the disappearance of traces, evidence or instruments of the crime, or helps the perpetrator or accomplice to hide, alter or make them disappear;

(c) Acquires, receives or hides money, things or goods derived from a crime;

(d) Fails to denounce the execution of a crime or to individualize the perpetrator or accomplice of a known crime, whenever he is compelled to promote the criminal prosecution of a crime of such nature;

(e) Assures or helps the perpetrator or accomplice to assure the products or benefits of the crime.

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

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

(a) The preceding act is an especially serious crime. Any act which minimum term of punishment exceeds three years prison shall be deemed as a serious crime.

(b) The perpetrator acted with a profitable purpose.

(e) The perpetrator habitually harbors criminals.

(d) The perpetrator is a public official (text incorporated, Law 25.815).

[…]

Article 278

1(a) Any person who converts, transfers, manages, sells, disposes or in any other manner whatsoever makes use of money or any other type of asset from a crime in which he was not taken part, in order to make the original or subrogated assets acquire the appearance of being from a legitimate source, and provided that the value thereof exceeds the amount of fifty thousand pesos, whether by a single act or by repeated different acts that are related to one another, shall be punished with prison from two to ten years and a fine of two to ten times the amount of the operation;

1(b) The minimum sentencing range will be a jail term of five years if the perpetrator habitually commits the crime or is a member of an organization or gang formed for the ongoing commission of crimes of this nature;

1(c) If the value of the assets does not exceed the amount mentioned in subsection a) under this paragraph, the perpetrator shall be punished as appropriate, pursuant to the regulations under art. 277.

2. Any person who by recklessness or serious imprudence commits any of the acts described in the previous subsection, first sentence, shall be punished with a fine from twenty to one hundred and fifty percent of the value of the goods produced by the crime.

3. Any person who receives money or other goods resulting from a crime, with the purpose of applying them in any operation that may give them the appearance of being from a legitimate source, shall be punished in accordance

4. The objects referred to in subsections 1, 2 or 3 of this article may be seized with art. 277.

[…]

Article 279

[…]

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

Chapter V: Fraud in Commerce and Industry

Article 300

Prison from six months to two years shall be imposed on:

[…]

3. Any incorporator, director, manager, liquidator or receiver of any corporation or cooperative or any other partnership who publishes, certificates or approves an untrue or incomplete balance sheet, profit and loss statement, or their respective reports, minutes, annual reports, or informs the meeting of members distorting the truth or with

reticence regarding facts which are important for the appreciation of the economical situation of the company, regardless of the purpose he had to inform it.

Article 301

Any director, manager, administrator or receiver of any corporation or cooperative or partnership of any kind, who knowingly aids or gives his consent to perform acts contrary to the laws or the by-laws, from which any harm may result, shall be punished with prison from six months to two years. If the act implies the issue of shares, the maximum punishment shall be raised to three years, provided that the act does not constitute a crime more severely punished.

CRIMINAL PROCEDURE CODE

Article 174. Right to Report

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

Article 177. Obligation to Report

The following persons shall be under an obligation to report crimes prosecutable ex officio:
1°) Officials or public servants who learn of such crimes in the course of their duties.
[…]

Commencement

Article 195

The investigative proceedings shall be commenced on the prosecutor's request, or as a result of a preliminary investigation or report by the police, as provided in arts. 188 and 186, respectively, and shall be limited to the events detailed in such request, preliminary investigation or report.
The court shall deny the prosecutor's request or shall order that the police proceedings be closed, through a ruling, where the event reported does not constitute a crime or where no action can be taken. The decision may be appealed by the prosecutor or the complainant.

Article 196

The investigating court may decide that the investigation of a crime prosecutable *ex officio* under criminal law be conducted by the prosecutor, who shall act in accordance with the rules set forth in Section II of this Title.
In the cases where the report of a crime prosecutable *ex officio* is filed directly with the prosecutor, or where the prosecutor files criminal proceedings on its own initiative, he shall immediately notify the investigating court of such report, he shall take any essential investigative measures, and he shall request the investigating court, where applicable, to take the accused person's statement, in accordance with the rules set forth in Section II of this Title, after which the investigating court shall immediately decide whether to take charge of the investigation or to order the prosecutor to proceed.
The courts with jurisdiction over correctional, economic criminal, juvenile, criminal and correctional matters in and for the city of Buenos Aires and the federal courts with jurisdiction over such matters sitting in the provinces shall have the same powers granted to national courts with jurisdiction over criminal investigation matters by the first paragraph of this article.

EXECUTIVE DECREE 1162/00 [*reporting corruption and other offences by public officials*]

Article 1

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

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

Article 2

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

Article 3

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

[…]

LAW 25.246 [ANTI-MONEY LAUNDERING LAW]

Chapter IV – Administrative Criminal Regime [money laundering]

Article 23

1. Legal persons, the agency or performer of which may have applied assets of criminal origin purporting to be licit according to art. 278(1) PC shall be punished with a fine of two (2) to (10) times the value of the assets involved in the crime. The crime shall exist whenever the limit of value under such a provision has been exceeded, notwithstanding the fact that the different particular interrelated actions which, as a whole have exceeded such a limit, may have been committed by different natural persons, without prior agreement among themselves and which, hence, may not be submitted to criminal prosecution.

2. Whenever the same act has been committed because of recklessness or gross negligence by the agency or performer of a legal person or by several agencies or performers thereof in accordance with art. 278(2) PC, the fine for the legal person shall be of twenty per cent (20%) to sixty per cent (60%) of the value of the assets involved in the crime;

3. Whenever the agency or performer of a legal person may have committed in such capacity the crime referred to under art. 22 of this Act, the legal person shall undergo a fine of ten thousand pesos to one hundred thousand pesos.

Article 10. Anticorruption

Any offering or tender at any stage of a bidding process shall be denied without any further proceeding, and any contract shall be rescinded in full right if money or any other undue advantage is given or offered so that:

a) Public officials or employees acting in their capacities in a bidding or procurement process act or refrain from acting in connection with their duties.

b) Public official or employees use their influence on others public officials or employees, acting in such capacity, in order that they act or refrain from acting in connection with their duties.

c) Any other person use their relation or influence on others acting in such capacity, in order that they act or refrain from acting in connection with their duties.

Those persons who have acted in the interest of the hiring party, whether directly or indirectly, either as management representatives, partners, agents, managers, factors, employees, hired employees, business brokers, trustees, or any other natural or legal person shall be considered participants in the crime.

The attempt of such illicit acts shall suffer the same consequences as if they had been consummated.

ANNEX 3 – PRINCIPAL ABBREVIATIONS

Abbreviation	Spanish	English
1997 Revised Recommendation		1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions
AFIP	Administración Federal de Ingresos Públicos	Federal Tax Administration
AFIP Instruction		AFIP General Instruction 794/07 (*Guidelines for Detection of Bribe Practices in Favour of Foreign Public Officials*).
AML		anti-money laundering
AML law		Law 25.246 (anti-money laundering law)
ARS		Argentine pesos
Art(s).		Article(s)
BCRA	Banco Central de la República Argentina	Central Bank of Argentina
BICE	Banco de Inversión y Comercio Exterior	(state-owned bank)
CASCE	Compañía Argentina de Seguros de Crédito a las Exportación S.A.	(export credit agency)
CIPCE	Centro de Investigación y Prevención sobre la Criminalidad Económica	
CM	Consejo de la magistratura	Judicial Council
CNV	Comisión Nacional de Valores	National Securities Commission
Convention or "OECD Anti-Bribery Convention"		Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
CPC	Codigo Procesal Penal	Criminal Procedure Code
CPCECABA	Consejo Profesional de Ciencias Económicas de la Ciudad Autónoma de Buenos Aires	"Consejo Profesional de Ciencias Económicas" of the Buenos Aires Province
CSR		corporate social responsibility
DLA		Division of Legal Affairs of the Ministry of Foreign Affairs, International Trade and Worship
Draft PC		Draft Penal Code
FACPCE	Federación Argentina de Consejos Profesionales de Ciencias Económicas	Argentine Federation of Expert Councils on Economics
FIA	Fiscalía de Investigaciones Administrativas	National Prosecutor of Administrative Investigations
GAAP		Generally accepted accounting principles
GAAS		Generally accepted auditing standards
GQ		Argentina's Responses to the General Questionnaire

IACAC	Convención Interamericana Contra La Corrupción	Inter-American Convention against Corruption
IADB		Inter-American Development Bank
IFAC		International Federation of Accountants
IGJ	Inspección General de Justicia	
ISA		International Standards on Auditing
LICCM	Ley de Cooperacion Internacional en Materia Penal	Law 24.767 on International Cooperation in Criminal Matters (1997)
LOMP		Organic Law of the Public Ministry, Law 24.946
MFA	Ministerio de Relaciones Exteriores, Comercio Internacional y Culto	Ministry of Foreign Affairs, International Trade and Worship
MLA		mutual legal assistance
MOE		Ministry of Economy and Production
MOJ	Ministerio de Justicia y Derechos Humanos	Ministry of Justice and Human Rights
MP	Ministerio público	Public Prosecutor's Office
NCP	Normas contables profesionales	professional accounting standards
NGO		non-governmental organisation
OA	Oficina Anticorrupción	Anticorruption Office
OECD Handbook		OECD Bribery Awareness Handbook for Tax Examiners
ONC	Oficina Nacional de Contrataciones	National Procurement Office
para		paragraph
PC	Código penal	Penal Code
PEPs		politically exposed persons
PGN	Procurador General de la Nación	Attorney General
Reporting Decree		Executive Decree 1162/00
SAS		Statement on Auditing Standards (US)
SME		small and medium-size enterprise
SQ		Argentina's Responses to the Supplementary Questionnaire
STR		suspicious transaction report
UIF	Unidad de Información Financiera	Financial Intelligence Unit
UNCAC	Convención de las Naciones Unidas contra la Corrupción	United Nations Convention on Corruption
Working Group		OECD Working Group on Bribery