



IMPLEMENTING THE OECD ANTI BRIBERY CONVENTION

PHASE 4 REPORT: **Chile**



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Chile Phase 4 Report



This Phase 4 Report on Chile by the OECD Working Group on Bribery evaluates and makes recommendations on Chile's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the OECD Working Group on Bribery on 13 December 2018.

The report is part of the OECD Working Group on Bribery's fourth phase of monitoring, launched in 2016. Phase 4 looks at the evaluated country's particular challenges and positive achievements. It also explores issues such as detection, enforcement, corporate liability, and international cooperation, as well as covering unresolved issues from prior reports.

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EXECUTIVE SUMMARY

This Phase 4 report by the OECD Working Group on Bribery evaluates and makes recommendations on Chile's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report tracks progress that Chile has made since the 2014 Phase 3 evaluation. It also details Chile's achievements and challenges, including with respect to enforcement of its foreign bribery laws, corporate liability and detection of foreign bribery.

Since Phase 3, Chile has increasingly resolved corruption cases through conditional suspensions and abbreviated procedures. This has contributed to increasing foreign bribery enforcement. However, some aspects of these resolutions are insufficient to ensure proper transparency and accountability. Chile is recommended to ensure these instruments remain available in all corruption cases while issuing guidance to prosecutors on when and how to use them, and on the appropriate terms of a resolution. Sufficient information including the reasons for the resolutions and the choice of terms should be published to let the public determine the appropriateness of these decisions. Judicial oversight of the resolution process needs to be increased.

Chile's corporate liability regime continues to present serious deficiencies. The defence of offence prevention models (*i.e.* corporate compliance programmes) is available even when senior corporate managers commit foreign bribery. Guidance on the elements of an effective model is inadequate, while the certification of models is seriously under-regulated. As a result, models are likely of uneven quality in practice. Of particular concern is that some prosecutors unduly presume that certification of a model equates to compliance. Chile must urgently amend its legislation and issue guidance to address these concerns.

Also of concern is that a majority of the Working Group recommendations from the previous evaluation remain outstanding. Confiscation of the proceeds of corruption continues to be deficient in practice. Enforcement has increased but concerns over the premature termination of a case linger. Requests for bank information and for mutual legal assistance are often delayed. The detection of corruption continues to be hampered by whistleblower protection that is weak in the public sector and non-existent in the private sector.

On a positive note, Chile has obtained its first foreign bribery conviction against a natural person in November 2016. Foreign bribery charges in another case against a company and its manager were successfully resolved without trial in October 2015. The creation of specialised prosecutor and police units to support corruption investigations is commendable, as is the assignment of Regional Prosecutors to foreign bribery cases. Recent legislation significantly improved the general anti-corruption framework including the foreign bribery offence, sanctions and limitation period. The reporting of suspicious money laundering transactions has indirectly contributed to unveiling corruption cases. Measures have been adopted to prevent and detect corruption when delivering official aid abroad.

The report and its recommendations reflect the findings of experts from Greece and Spain and were adopted by the Working Group on 13 December 2018. It is based on legislation, practice data and other materials provided by Chile, as well as research conducted by the evaluation team. Information was also obtained during an on-site visit to Chile in July 2018, during which the evaluation team met representatives of Chile's public and private sectors,

judiciary, media, and civil society. Chile will submit a written report to the Working Group in two years on the implementation of all recommendations and its enforcement efforts.

INTRODUCTION

1. In December 2018, the Working Group on Bribery in International Business Transactions (Working Group) discussed its fourth evaluation of Chile's implementation of the [Convention on Combating Bribery of Foreign Public Officials in International Business Transactions](#) (the Convention), the [2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions](#) (2009 Recommendation) and related instruments.

1. Previous Evaluations of Chile by the Working Group on Bribery

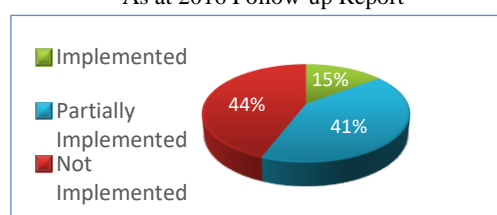
2. The Working Group monitors the implementation and enforcement of the Convention and related instruments through successive phases of a rigorous peer-review evaluation and monitoring system. This monitoring process is compulsory for all Parties. Beginning with Phase 2, the process includes an on-site visit to obtain insights from governmental and non-government actors in the evaluated country. After discussing and revising the draft evaluation report during its plenary meeting, the Working Group adopts the report and recommendations. Following its "consensus minus one" approach, the evaluated country can comment on the draft evaluation report and recommendations, but cannot block them from being adopted. The main evaluation and follow-up monitoring reports are systematically published on the OECD website.

Box 1. Prior Working Group Evaluations of Chile

2016	Phase 3 Follow-up
2014	Phase 3 Report
2009	Phase 1ter Report
2009	Phase 1bis Report
2009	Phase 2 Follow-up
2007	Phase 2 Report
1999	Phase 1 Report

3. Chile's last full Working Group evaluation in Phase 3 in March 2014 yielded 34 recommendations. In 2016, the Working Group concluded that Chile had fully implemented 5 recommendations, partially implemented 14, and not implemented 15.¹

Figure 1. Chile's Implementation of Its Phase 3 Recommendations
As at 2016 Follow-up Report



2. Phase 4 Process and On-Site Visit

4. Phase 4 evaluations focus on three key cross-cutting issues – enforcement, detection and corporate liability. They also address the implementation of outstanding recommendations from previous phases and changes to domestic legislation or the

¹ See Annex 1 for a list of Chile's Phase 3 recommendations and the Working Group's assessment of their implementation, based on Chile's Phase 3 Follow-up Report.

institutional framework.² Phase 4 takes a tailored approach, considering each country's unique situation and challenges, and reflecting positive achievements. For this reason, this report does not revisit issues that were not deemed problematic in previous phases and have not been affected by subsequent developments.

5. The evaluation team for this Phase 4 evaluation of Chile was composed of lead examiners from Greece and Spain, as well as members of the OECD Anti-Corruption Division.³ After receiving Chile's responses to the standard Phase 4 questionnaire and country-specific supplementary questions, the evaluation team conducted an on-site visit to Santiago on 2-6 July 2018. The team met over 200 representatives of the Chilean government, Congress, law enforcement and judiciary, the private sector (business associations; companies in mining, fishing, fruit, retail, energy and banking; lawyers; and external auditors), as well as civil society (non-governmental organisations, academia and the media).⁴ The evaluation team expresses its appreciation to the several high-level officials who attended, and to all on-site visit participants for their openness and contributions. The evaluation team also thanks the Ministry of Foreign Affairs and the National Group of Experts against Corruption for their high level of engagement, organisation of a well-planned on-site visit, and the provision of extensive additional information after the visit.

3. Chile's Economic Situation and Foreign Bribery Risks

6. Over the past decades, Chile has substantially improved its citizens' quality of life. Some measures of well-being – jobs and earnings, work-life balance, health and subjective well-being – approach the OECD average. In 2017, Chile was the 28th largest economy among the 44 Working Group members. The rise in GDP per capita has been among the most rapid in the OECD in the last few decades. That said, growth stalled by 2014 with the end of the commodity boom and weaker global trade. Inequality has been substantially reduced but remains high.⁵

7. The improvement in growth and well-being owes much to the Chilean export sector. Despite tripling its trade in monetary terms in the past 15 years,⁶ Chile ranks in the middle among Working Group members in terms of exports, and was the 29th biggest exporter of merchandise in the Working Group in 2017. Exports contribute to 28.7% of GDP, which is near the OECD average but places Chile 30th among the 35 OECD countries.

² See Working Group [Phase 4 evaluation procedures](#).

³ **Greece** was represented by Dimosthenis Stingas, Appellate Judge and Counsellor for Justice Affairs, Permanent Representation of Greece to the European Union; and Efstathios Tsirmpas, Director of the Hellenic Financial Intelligence Unit and Senior SDOE Customs Officer/Special Investigative Officer. **Spain** was represented by Alazne Basáñez, Senior Judge, First Instance No. 2 in Alcobendas (Madrid); and Isabel Serantes, Public Auditor, Institute of Accounting and Accounts Auditing, Ministry of Finance. The **OECD** Anti-Corruption Division was represented by William Loo, Deputy Head and Senior Legal Analyst; Catherine Marty, Legal Analyst; and Elisabeth Danon, Legal Analyst.

⁴ See Annex 2 at p. 70 for a list of participants in the on-site visit.

⁵ OECD (2018), [Economic Survey – Chile](#), pp. 14-16.

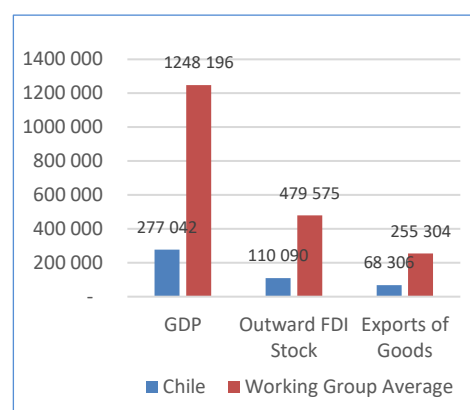
⁶ General Directorate of International Economic Relations (DIRECON), Ministry of Foreign Affairs, Chile, based on data from Chilean Central Banks and Customs Service.

Approximately 95% of the exports are to the 64 economies that are covered by the 26 free trade agreements to which Chile is party. The major export destinations in 2017 were China (27.6%), US (14.4%), European Union (12.7%), Japan (9.3%) and South Korea (6.2%). Services as a proportion of overall exports is the lowest in the OECD.⁷

8. Chile also ranks in the middle among Working Group members in terms of outward foreign direct investment (FDI). In 2017, Chile had the 25th largest outward stock of FDI among Working Group members. The top destinations were Brazil (15%), Panama (14%), US (10%), Peru (9%), Argentina (8%) and the British Virgin Islands (8%).⁸

9. Goods exports are highly concentrated in a few key sectors and markets. Minerals – mainly copper – account for approximately 50% of exports, well ahead of fruits (7%), fish (7%), pulp and paper (4.5%), and wine (3%). The main destinations for minerals differ from other exports. In 2017, China was the biggest importer of Chilean minerals (41%), followed by Japan (11%), US (10%), South Korea (9%), India (5%) and Brazil (4%). Processed foods are exported mainly to the US (26%), Japan (15%), EU (11%), Brazil (8%), China (7%) and Russia (5%). Forest and wood products are exported to China (28%), US (16%), EU (9%), South Korea (8%), and Japan (7%). Growth rates in all of the export sectors, with the exception of fruit and wines, have fallen sharply over the past decades before rebounding somewhat in 2017 and 2018.⁹

Figure 2. Comparison of Chile's Economic Data against Working Group Average



2016 data; millions of current USD
Source: OECD, IMF, UNCTAD and WTO

10. Companies in the extractive sector do more than just extract and export minerals from Chile. Major Chilean companies in this sector have conducted or are conducting explorations in Argentina, Australia, Brazil, Canada, Ecuador, Finland, Mexico, Portugal, and Zambia. Mining-related goods and services constitute a small but growing percentage of overall exports. Exports of engineering services alone increased 20-fold in the decade to 2011. The major export partners are Peru (43%), US (28%) and Mexico (6%).¹⁰ Chile states

⁷ OECD (2018), [Economic Survey – Chile](#), p. 75; [OECD iLibrary](#); OECD (2016), [Trade in Goods and Services](#); [UNCTADStat](#); [International Monetary Fund](#); [World Trade Organisation](#); [General Directorate of International Economic Relations \(DIRECON\)](#), Ministry of Foreign Affairs, Chile.

⁸ [OECD iLibrary](#); [UNCTADStat](#); [International Monetary Fund](#); [World Trade Organisation](#); OECD (2017), [Chile: Trade and Investment Statistical Note](#), pp. 1, 4 and 8.

⁹ OECD (2018), [Economic Survey – Chile](#), pp. 30, 75, 81-85; World Bank (2016), [World Integrated Trade Solution \(WITS\)](#), [Chile Minerals Exports by Country](#).

¹⁰ OECD (2013), [Trade Policy Paper No. 145](#), p. 38; Fundación Chile (2014), [Proveedores de la Minería Chilena: Estudio de caracterización](#), p. 8; Fundación Chile (2016), [Desde el cobre a la innovación: Roadmap Tecnológico 2015-2035](#), p. 20; Atla Ley (2017), [Proveedores de la Minería Chilena: Reporte de Exportaciones, 2012-2016](#), p. 7.

that services exports are also growing in architecture, film, special interest tourism, education, finance, logistics, information technology, as well as research and development.

11. A relatively few large firms dominate the export of goods. The production of main export products, such as food and machinery and equipment, are highly concentrated across establishments. The share of small- and medium-sized enterprises (SMEs) in exports is particularly low. Only about 2% of SMEs participate in international trade compared to around 25% in the European Union.¹¹ That said, some 24 000 Chilean SMEs are exporters.

12. Chile's state-owned enterprise (SOE) sector is visible but its book value and market capitalisation is small compared to the overall economy. Several SOEs play a major and strategic role including in mining, energy, ports and banking. The Public Enterprise System (SEP) oversees most SOEs on behalf of the state. Many of the larger or more prominent SOEs have separate legal and institutional arrangements but are still responsible to separate government agencies. Many SOEs are also subject to the same requirements as private listed companies to report to the securities regulator and to undergo external auditing.¹² Some requirements are even more stringent than those for the private sector, according to Chile. For example, senior management must declare their assets and financial interests periodically. Their remuneration is also published.

4. Cases of Foreign Bribery in Chile

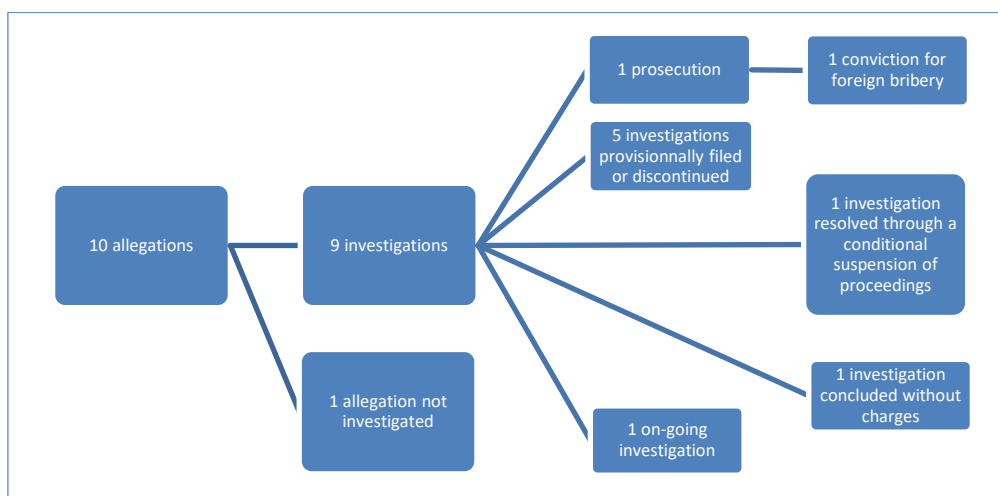
13. The March 2014 Phase 3 Report expressed concerns about insufficient foreign bribery enforcement and inadequate investigations in Chile. At that time, seven allegations of Chilean individuals and/or companies bribing foreign public officials had surfaced. None had resulted in a conviction. Charges had been laid in one case. The remaining six allegations had not been investigated or had been "provisionally filed". Following the on-site visit, Chile opened an investigation into one allegation, and re-opened investigations into two allegations that had previously been filed.

14. The level of enforcement has increased since Phase 3. The case in which charges had been laid in Phase 3 has resulted in the conviction of an individual for foreign bribery. One of the re-opened investigations was resolved without trial through a "conditional suspension of proceedings" against a company and an individual. Prosecutors appear to be generally willing to pursue foreign bribery cases. Chile's foreign bribery enforcement actions are discussed in Sections B.4-B.5 and described in detail in Annex 3.

¹¹ OECD (2018), [Economic Survey – Chile](#), pp. 86-88.

¹² OECD (2011), [Corporate Governance in Chile](#), pp. 1, 27-28 and Annex B; OECD (2011), [State-Owned Enterprise Governance Reform](#), pp. 36-37, 47-49; US Department of Commerce (2017), [Chile - 7-State Owned Enterprises](#).

Figure 3. Chile's Foreign Bribery Cases since 2001



Note: Cases may include multiple defendants.

15. Yet concerns remain despite increased enforcement. As described at Section B.5.b.ii at p. 40, resolutions in the form of conditional suspensions and abbreviated procedures are widely used to resolve corruption cases, but some aspects of these resolutions are insufficient to ensure proper transparency and accountability. High profile domestic corruption cases resolved through these measures have raised allegations of bias and political interference. Furthermore, one of the three new allegations that surfaced after Phase 3 was not investigated until just before this report was adopted.

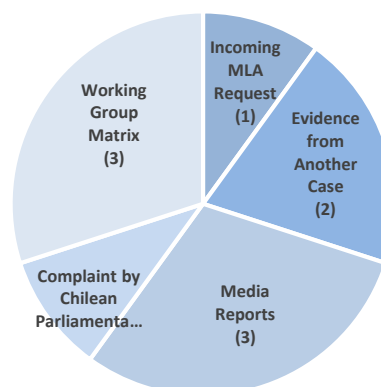
Commentary

The lead examiners commend Chile for increasing its foreign bribery enforcement since Phase 3. Nevertheless, the lead examiners have serious concerns about the framework for resolving corruption cases through conditional suspensions and abbreviated procedures. Furthermore, one of the three new allegations that surfaced after Phase 3 was not investigated until just before this report was adopted.

A. DETECTION OF THE FOREIGN BRIBERY OFFENCE

16. Media reports and the Working Group Matrix of Foreign Bribery Allegations (which also draws largely from media information)¹³ are the most frequent sources of information for foreign bribery investigations in Chile. This was already the case in Phase 3. Other sources include evidence emerging from investigations of unrelated offences detected by the Financial Analysis Unit (UAF); a complaint from a Chilean parliamentarian; and an incoming mutual legal assistance request.

Figure 4. Sources of Foreign Bribery Cases



17. Based on an admittedly very limited sample size, an examination of these cases shows that several potential sources of detection may not have been fully tapped. This could be partly due to insufficient regulation in areas such as whistleblower protection, and suspicious money laundering transaction reporting by professionals such as lawyers, auditors and accountants. Better monitoring of the media by diplomatic missions and the Public Prosecutor's Office (PPO) could also help.

A.1. Detection through Media Information

18. Chile relies heavily on information in the media to detect foreign bribery. Such information can be used to open investigations *ex officio* (Phase 3 Report para. 82). The PPO learned of the allegations in the *Asfaltos Chilenos*, *Gildemeister* and *Lucchetti* cases through the media. Information from the Working Group Matrix, which also derived from media reports, led to investigations in the *Oil Company*, *Thetyan Copper* and *Uniq IDC* cases. The Specialised Anti-Corruption Unit (*Unidad Especializada Anticorrupción*, UNAC) within the PPO now monitors the Chilean media daily. The international media, which is obviously an important source of transnational bribery allegations, is not monitored by the PPO or other Chilean authorities.

19. Moreover, much of the media information derives from the Working Group's Matrix. While this is a positive development, Parties to the Convention are expected to proactively detect foreign bribery allegations in the media instead of passively relying on the Matrix. As the Working Group has noted in evaluations of other countries,¹⁴ Chile should enhance the PPO's capacity to detect foreign bribery cases by allocating, for instance, appropriate human resources, expertise, foreign language skills, training, and software to monitor and act upon media reports in Chile and abroad.

¹³ The Matrix is a collation of foreign bribery allegations prepared by the OECD Secretariat based on public information. The Working Group uses the Matrix to monitor enforcement actions in Parties to the Convention.

¹⁴ For example, see Czech Republic Phase 4, para. 47 and Recommendation 1(f).

Commentary

Chile has learned of foreign bribery allegations through media reports and has begun to monitor the Chilean media, which are positive developments. That said, two of the three foreign bribery allegations that have surfaced since Phase 3 were detected through the Working Group Matrix. Chile's efforts to monitor the press failed to locate these allegations. The lead examiners therefore recommend that Chile enhance the PPO's capacity to detect foreign bribery cases. Furthermore, Chile should monitor not only the Chilean but also the international media for foreign bribery allegations involving Chilean companies or individuals.

A.2. Detection through Reporting by Public Officials

20. Government agencies can play a role in detecting foreign bribery. This section discusses the general duty of Chilean public officials to report crimes, including foreign bribery. Later sections of the report describe in further detail the reporting obligation and procedure for overseas diplomatic missions (p. 19), tax authorities (p. 61), official development agency (p. 63), and export credit agency (p. 65).

21. Chilean public officials are subject to at least three separate provisions dealing with the reporting of crimes. First, pursuant to Criminal Procedure Code (CPC) Art. 175(b), civil servants are required to report any crimes of which they become aware in the course of their duties. Second, the Administrative Statute (AS) (Law 18 834) Art. 61(k) requires public officials to report crimes or simple crimes. They must also report to the competent authority “facts of an irregular nature”, especially those that contravene the principle of administrative probity in Law 18 575.

22. A third provision was introduced in February 2015 when Law 19 913 was amended by Law 20 818, which required more than 300 public bodies to report suspicious money laundering and terrorist financing transactions (STRs). The obligation would cover the laundering of proceeds of foreign bribery. Public bodies are required to implement reporting procedures, adopt an anti-money laundering and terrorist financing system, and train officials responsible for reporting suspicious activities.¹⁵ Chile reports that from February 2015 to December 2017, 5 903 officials from 446 public institutions were trained. During the same period, public institutions filed 145 STRs, of which 17 “showed evidence of” money laundering.

23. These three provisions *prima facie* differ in many respects:

- (a) **Officials subject to obligation:** The CPC applies to “prosecutors and other public employees”. The AS applies to a large number of personnel but not non-permanent employees (*e.g.* consultants) or employees of state-owned enterprises (SOEs). STR reporting under Law 19 913 applies to “Superintendencies and other public services and bodies indicated in the second paragraph of Article 1 of Law 18 575.” Some SOEs are included.
- (b) **Offences covered:** The CPC and AS reporting obligations cover all crimes. STRs cover only money laundering and terrorist financing. Nevertheless, many foreign bribery allegations will involve money laundering (*e.g.* mere transfer of a bribe) and hence would fall within all three obligations.

¹⁵ UAF Circular Letters 20/2015 and 14/2016.

- (c) **Reporting threshold:** The CPC and AS require reporting when there is a “degree of conviction” that a crime has been committed, though conclusive proof is not required.¹⁶ Law 19 913 only requires the reporting of a “suspicion” of money laundering predicated on, among other things, foreign bribery.
- (d) **Exemptions:** CPC Art. 177 has an exemption for reporting crimes committed by a close relation etc. There is no such exemption in the AS or Law 19 913.
- (e) **Recipient of the report:** The CPC does not specify the recipient of the report. Reports of crimes under the AS are made to the prosecutor (or the police if there is no prosecutor’s office). STRs are made to the *Unidad de Análisis Financiero* (UAF), Chile’s financial intelligence unit.
- (f) **Time for reporting:** Under the CPC (Art. 176), reporting must take place within 24 hours of learning of the suspected crime. Under the AS, the report must be made “with due promptness”. Law 19 913 does not prescribe a deadline for filing STRs.
- (g) **Procedural requirements:** Reports under the AS must be signed, in writing, and grounded (containing reasonable grounds) although the discloser is not required to prove wrongdoing. The discloser can request that his/her identity be kept confidential.
- (h) **Sanctions for failure to report:** Failure to report under the CPC is punishable by a fine of one to four UTM.¹⁷ This translates to a maximum fine of CLP 190 152 or USD 287. Under the AS, failure to report is punishable by a range of disciplinary measures including a reprimand, fine of 5-20% of the official’s monthly salary, suspension or dismissal. Failure to file an STR is punishable by a warning and a maximum fine for a first offence of UF 5 000 (CLP 136 million or USD 206 000).¹⁸ The maximum fine is tripled for a repeat offender. Chile states that there have not been cases of public officials who have been sanctioned for breaching any of the reporting obligations.

24. There are pros and cons to having multiple, overlapping reporting provisions. The multitude of provisions in principle increases the likelihood that foreign bribery will be reported to law enforcement for investigation. This is especially the case for STRs under Law 19 913, which applies to entities that may not be covered by the CPC and AS. However, these obligations prescribe different reporting channels to the prosecutor, police and the UAF. It is therefore vital that these bodies are well co-ordinated and share the information that they receive. In practice, the different requirements under the three reporting obligations also make them more challenging to apply, and should be streamlined to the extent possible.

25. Chilean authorities do not believe that there is duplication or overlap but a plain reading of the provisions and their application in practice belie this position. Chile states that these provisions are not overlapping, but one or more of these provisions could require reporting of a particular foreign bribery allegation. Chile also states that these provisions

¹⁶ Comptroller General of Chile Opinions 28 721/1999, 32 685/2008, 62 277/2013, 28 833/2016, and 481/2018.

¹⁷ The value of one *unidades tributarias mensuales* (UTM) was CLP 47 681 in July 2018.

¹⁸ The value of one *unidades de fomento* (UF) was CLP 27 266.49 on 25 August 2018.

are complementary and “harmonious”. But as shown above, these provisions differ in many respects ranging from the reporting entities, thresholds and deadlines to the report recipients and sanctions. This has led Chilean authorities such as SII and AGCID to create inconsistent reporting channels and procedures when implementing these provisions (see paras. 201 and 211).

Commentary

Chile has extended to public officials the obligation to report suspected laundering of the proceeds of qualifying predicate offences, which is commendable. However, Chilean public officials have not reported any foreign bribery cases despite being well-positioned to do so. The lead examiners therefore recommend that Chile make efforts to increase its public officials’ reporting of foreign bribery by (a) making the reporting obligations under the CPC, AS and Law 19 913 more consistent, and (b) enforcing the obligation of public officials to report suspicions of crimes and imposing sanctions on those who breach this obligation.

The lead examiners also recognise that Chile provided substantial training on reporting under Law 19 913 when this measure was enacted. Nevertheless, additional training that covers all reporting provisions would be useful, especially if Chile revises and makes these provisions more consistent. The lead examiners therefore recommend that Chile train its officials on and raise their awareness of all mechanisms for reporting foreign bribery, such as by providing guidelines.

A.3. Detection through Whistleblowers and Their Protection

26. Given the hidden nature of foreign bribery, whistleblowers are a valuable source of detection. It is therefore important for countries to ensure that whistleblowers are free to report this crime without fear of retaliation. Chile has not implemented Phase 3 (Recommendation 11(c)) on this topic. The rules applicable in the public sector remain far below international standards, while the protection of whistleblowers in the private sector are non-existent. To date, whistleblowers have not brought any foreign bribery allegations to Chilean authorities’ attention.

a. Whistleblower Protection in the Public Sector: A Framework in Need of Improvement

27. Limited protection is afforded to whistleblowers in the public sector who report crimes under the Administrative Statute Art. 61(k).¹⁹ Whistleblowers are only protected from transfers without consent, suspensions and dismissals. The provision does not protect against other forms of reprisals such as admonishments, demotions, change of responsibilities, denial of privileges *etc.* Protection is also limited in time. It ends when the report is rejected, or up to 90 days after the completion of the investigation or proceeding triggered by the report. Unfounded reports that are proven false or made with the deliberate intention of harming the person reported are punishable by dismissal from office. Less serious disciplinary penalties are not available.²⁰

¹⁹ Law 18 834 Arts. 90A and 90B as amended; Law 18 883 Arts. 88A and 88B.

²⁰ Law 18 834 Art. 125(d).

28. Since 2012, employees are protected against “workplace harassment” under the Labour Code and Administrative Statute. However, such provisions are unlikely to be useful in whistleblower reprisals since harassment requires “repetitive” conduct (Phase 3 Report paras. 183-184).

29. Chilean authorities referred to recent provisions that do not squarely address whistleblowing. Labour Code Art. 485 was amended in 2016 to prohibit reprisals by an employer against an employee (a) who has taken legal action against the employer, (b) who is or will be a witness in legal action against the employer, or (c) as a result of a Labour Directorate audit. However, whistleblowing seldom involves legal proceedings taken against an employer, which is the main focus of these provisions. An employee who suffers reprisal is entitled to compensation of 6-11 months’ of remuneration; other types of protection or redress are not available.

b. Whistleblower Protection in the Private Sector: Urgent Need for a Legal Framework

30. Chile does not have legislation to protect whistleblowers in the private sector. Only the Labour Code workplace harassment provisions apply. Law 20 393 states that an effective offence prevention model (OPM) must include a channel for reporting violations. Rule 341/2012 issued by the *Comisión para el Mercado Financiero* (CMF) requires companies under its supervision to provide information on their corporate governance frameworks, including channels to report wrongdoing. However, these provisions do not address whistleblower protection. Companies are also not obliged to have OPMs.

31. Participants at the on-site visit expressed concern over the absence of whistleblower protection. The PPO and several civil society representatives stated that the current lack of framework discourages the reporting of corruption and bribery. Discussions with the private sector showed that many companies do little beyond providing for anonymous or confidential whistleblowing, as was the case in Phase 3. Panellists stressed the difficulty in practice of deploying effective protection mechanisms against retaliation. They agreed on the importance of raising awareness within companies and with contractors about reporting systems.

32. In the face of legislative inactivity, the PPO has taken two initiatives to lessen the impact of these deficiencies. First, the PPO has conducted an “Analysis of Good Practice in Whistleblower Protection Legislation”. The study examines the protection that exists in Chile and abroad with a view to proposing a model suitable for Chile in both the public and private sectors. The document highlights the need for improving Chilean legislation so that it covers a broader range of whistleblowers, better protects against reprisals, compensates victims, and imposes penalties that dissuade bullying and victimisation. But the document does not set out a concrete plan for reaching these goals. Second, in 2017 the PPO and *Chile Transparente* (Transparency International Chile) set up the Anti-Corruption Legal Assistance Centre. The Centre is a complaints desk that provides free legal services and assistance to victims and witnesses of corruption. To date, the Centre has not received any reports or generated any investigations.

33. Regarding citizen reporting, the Comptroller General has also implemented “Comptroller and Citizen”, a web-based platform for any person to report possible irregular situations committed by an official or an agency subject to the Comptroller’s oversight. Citizens may also provide suggestions for the oversight of state administration bodies. In the first nine months of 2018, the platform received just under 10 000 complaints and suggestions, 65% of which were anonymous.

Commentary

Chilean authorities state that whistleblower protection is a priority issue. Nevertheless, the lead examiners are very concerned that the legal framework to protect whistleblowers in Chile continues to be inadequate, despite several calls for legislative action by the Working Group since 2007. They reiterate Phase 3 Recommendation 11(c) and recommend that Chile adopt as a matter of priority an appropriate regulatory framework to protect private sector employees who report suspicions of foreign bribery from discriminatory or disciplinary action. They also recommend that Chile provide comprehensive and adequate protection to whistleblowers in the public sector.

A.4. Detection through the Anti-Money Laundering System

34. This section concerns the detection and reporting of money laundering by entities in the private sector. Similar efforts by public bodies are described above at p. 13.

35. In 2018, Chile developed a National Strategy and an Action Plan 2018-2020 against money laundering and terrorism financing. The Action Plan is based on the 2017 National Risk Assessment which identified corruption as the second most serious money laundering threat after drug trafficking. The Plan does not specifically address the laundering of the proceeds of foreign bribery, but Chile explained that the term “corruption” encompasses foreign bribery and that the Plan covers all predicate offences.

36. The anti-money laundering system has generated more suspicious transaction reports (STRs) since Phase 3. The UAF receives STRs filed by private sector bodies as required under Law 19 913. According to UAF’s [annual report](#), the banking sector contributes the most STRs, accounting for 1 190 in 2017, some 30.5% of the total. To further add to the UAF’s workload, public entities also began filing STRs in 2015. UAF has 73 staff including 24 in the Financial Intelligence Division, 9 of which were hired since 2016 to cope with the increased workload. A breakdown of the staff by their functions was not provided.

37. The increased STRs have led to the detection of cases of corruption but unfortunately not foreign bribery. UAF states that it forwarded 25 reports to the PPO from January 2014 to March 2018 that could relate to corruption. This represents an increase from Phase 3, when only 8 reports were referred to the PPO in 2009-2012. However, none of the recent 25 reports related to foreign bribery. That said, the foreign bribery allegations in the *Serlog* and *University del Mar (No. 1)* cases were discovered during investigations of unrelated offences that originated from UAF reports.

38. Focusing the UAF’s efforts more specifically on foreign bribery would therefore be useful. In Phase 3, the two money laundering typologies that had been prepared by UAF did not specifically address foreign bribery or foreign politically exposed persons (PEPs). In March 2014 when the Phase 3 Report was adopted, UAF published a list of red flag indicators for detecting foreign bribery ([Señales De Alerta Para Prevenir El Cohecho A Funcionarios Públicos Extranjeros](#)). The list was not integrated into UAF’s typologies or guidance, however. Phase 3 Recommendation 7(b) therefore asked Chile to develop typologies on money laundering related to foreign bribery, and further encourage reporting entities to make STRs.

39. UAF has taken several steps since Phase 3. It states that it has increased the number of training and e-learning courses for reporting entities, and that some of these courses refer to foreign bribery. A third typology in 2007-2015 analyses 81 cases of money laundering

in Chile, including six cases predicated on domestic corruption. A fourth report on typologies and red flag indicators of money laundering in Chile reviewed money laundering convictions issued by Chilean courts in 2007-2017. A “Red Flag Indicators for Money Laundering and Terrorism Financing Guide” includes a chapter on PEPs and a section on red flags regarding public officials.

40. These steps are commendable but there remains no typologies that specifically address money laundering predicated on foreign bribery. UAF insists on typologies that are based on money laundering convictions, presumably because otherwise the allegations are unproven. This overlooks the fact that cases may not yield convictions for reasons other than merit. For example, in the *Serlog* foreign bribery case, money laundering was committed by the bribed foreign official who was not prosecuted in Chile, and by a co-accused who died before trial. Many foreign bribery cases (*e.g. Asfaltos*) are also likely to be resolved via conditional suspensions of proceedings which do not result in a conviction (see para. 125). UAF also restricts its typologies to money laundering convictions in Chilean courts. Yet there is no reason why cases from other jurisdictions would not illuminate how foreign bribery-related money laundering is committed in Chile. Chile also argues that typologies based on foreign cases have been developed by several international organisations. Nevertheless, the Working Group has recommended that countries develop their own typologies that are adapted to their national contexts.²¹ Furthermore, Chile has taken these typologies into account but has nevertheless not developed foreign bribery-specific typologies.

41. A longstanding recommendation since Phase 2 to extend reporting obligations to accountants, auditors and lawyers is also unimplemented. The Working Group has observed that these professionals are key to identifying and detecting foreign bribery.²² They can also be facilitators of money laundering, as the representative of a bank at the on-site visit observed. Nevertheless, Chile does not intend to address this deficiency.

Commentary

The lead examiners welcome the increase in the detection of corruption cases through Chile’s suspicious transaction reporting system. UAF’s improved capacity to detect and report corruption is also a positive development. To extend these achievements to the detection of foreign bribery, the lead examiners reiterate Phase 3 Recommendation 7(b) and recommend that Chile (a) develop typologies of money laundering that specifically address foreign bribery, drawing on successfully concluded enforcement actions in Chile and material from foreign sources; and (b) further train UAF staff and reporting entities specifically on detecting foreign bribery.

The lead examiners are concerned that Chile continues to depart from established international standards by not requiring appropriate non-financial entities including lawyers, accountants and auditors to report suspected money laundering transactions related to foreign bribery. The lead examiners therefore reiterate Phase 3 Recommendation 7(b) and recommend that Chile urgently remediate this deficiency.

²¹ For example, see Argentina (Phase 3 Recommendation 9(c) and Phase 3bis Recommendation 8(d)); Brazil Phase 3 Recommendation 10(c); Mexico Phase 3 Recommendation 8. This list is not exhaustive.

²² Working Group on Bribery (December 2017), [The Detection of Foreign Bribery](#), Chapter 10.

A.5. Detection through Overseas Missions

42. Chilean overseas missions are well-positioned to detect and report foreign bribery allegations because of their knowledge of and contact with the local environment and media. The Phase 3 Report noted that the Ministry of Foreign Affairs (MOFA) had issued Instruction 4189/2010 to remind officials in Chilean embassies and consulates to report foreign bribery to the competent authorities in Chile. Nevertheless, these diplomatic missions did not report any of the seven foreign bribery allegations that had surfaced, even though foreign media widely reported some of the cases. Recommendation 11(b)(i) therefore asked Chile to analyse why Chilean overseas missions had failed to report foreign bribery allegations.

43. Since Phase 3, MOFA has continued to raise awareness of the Convention and the duty to report. Annual training for officials posted abroad covering these topics has been provided by MOFA's Directorate of International and Human Security (DISIN) and Training Department, in co-operation with UNAC. In addition, DISIN issued instructions to all overseas missions referring to the Convention and the duty to report outlined in Instruction 4189/2010. It also circulated additional documents, booklets, brochures and guides on the Convention. Additional MOFA efforts to raise awareness and to engage the private sector are described at para. 188. In October 2018, the General Directorate of International Economic Relations (DIRECON) created an "Information Platform for the Prevention of Money Laundering and Public Official Offences". The objective was to inform DIRECON officials about measures to prevent and report offences, including foreign bribery. A circular note on reporting foreign bribery was expected to be again updated and sent to overseas missions in November 2018.

44. These efforts, however, have not led to actual reports. Embassies have provided press information to the PPO in the *Asfaltos Chilenos*, *Thethyan Copper*, *Uniq* and *Oil Company* cases, but only after the cases had been detected. Diplomatic missions did not detect the three foreign bribery allegations that surfaced after Phase 3, similar to the seven that arose before.

Commentary

The lead examiners are encouraged that MOFA has continued to train its officials and raise their awareness of the Convention. However, the Phase 3 Report observed that similar efforts had not led to actual detection of foreign bribery allegations. To date, MOFA still has not detected any foreign bribery allegations and brought them to the attention of the PPO.

Towards the end of this evaluation, Chile stated that it has analysed why the MOFA's earlier efforts failed to result in actual reporting, and intends to re-issue a circular to remind MOFA staff to report. However, Chile did not identify why reports were not made in specific cases, for example by interviewing staff located in the embassies at the relevant time. There remains no information on why Chile's diplomatic missions did not report any of the previous foreign bribery allegations that had surfaced.

For these reasons, the lead examiners reiterate Phase 3 Recommendation 11(b)(i) and recommend that Chile (a) analyse why Chilean overseas missions have failed to report specific foreign bribery allegations and take appropriate remedial action that address these failures, (b) take steps to ensure that the instructions in the new Circular are properly implemented, and (c) ensure that its overseas missions actively monitor the local media for allegations of foreign bribery involving Chilean individuals and companies.

A.6. Detection through Information from Foreign Jurisdictions

45. As mentioned in Phase 3, Chile learned of one foreign bribery allegation (*Marambio* case) through a mutual legal assistance request from foreign authorities. Informal communication between prosecutors from different countries can also be a useful source of detection. As stated at para. 143, Chile should increase its participation in the Working Group's Informal Meetings of Law Enforcement Officials. This could help Chile detect foreign bribery cases, among other things. The PPO states that it is fully committed to attending future meetings.

A.7. Detection through Accounting and Auditing

46. The Phase 3 Report made four recommendations to Chile to improve the detection and reporting of foreign bribery by external auditors. Unfortunately, Chile has not taken steps to implement any of the recommendations.

47. The relevant external audit requirements and standards have not changed since Phase 3 (paras. 145-146). "External audit firms" audit listed companies and "special" corporations, which include certain types of financial institutions, such as insurance companies, and enterprises authorised by the *Comisión para el Mercado Financiero* (CMF). All other companies are "closed" corporations and can be audited by "external auditors", "account inspectors", or external audit firms. External auditors, account inspectors and external audit firms apply Generally Accepted Auditing Standards (GAAS), which have incorporated International Standards on Auditing since 2012. External auditors and account inspectors who audit "closed" companies, as well as external audit firms, are required to detect material misstatements in a company's financial statements that are caused by fraud (GAAS AU 240) or non-compliance with laws (AU 250).

48. At the time of Phase 3, few external auditors and external audit firms took account in their audits the risks of foreign bribery such as operations in risk countries or sectors, or the extensive use of agents. Phase 3 Recommendation 8(b)(iii) therefore suggested that Chile take steps to encourage external auditors to take greater account of these risks in their work.

49. Chile has not taken any steps in this direction. Some Chilean authorities stated that existing standards, if properly applied, should enable auditors to detect foreign bribery. The CMF recognised that foreign bribery has never been detected through external audit to date. They suggested at the on-site visit that this was because the audited companies did not commit the offence, and not because external auditors failed to consider foreign bribery risks sufficiently.

50. Insights shared by external audit firms suggest otherwise. External auditors still do not actively look for material misstatements in a company's financial statements that could be caused by foreign bribery. According to on-site panellists, the auditing process includes the review of potential red flags of fraud, which could reveal foreign bribery. However, fraud is not the main focus of financial accounts auditing.

51. Even more concerning is Chile's failure to implement Phase 3 Recommendation 8(b)(i) to require external audit firms to report crimes. External auditors and account inspectors are required to report crimes (*delitos*) (Company Regulations (Decree 702) Art. 100). External audit firms, however, are only required to report deficiencies (*deficiencias*) (Securities Market Law 18 045 Art. 246(b)). This is a setback from Phase 2, when auditors and audit firms of all companies were required to report

suspicions of crime. CMF Regulation 275 requires external audit firms to design and implement reporting systems, but does not require them to report crimes to the authorities. Chile has not amended this Regulation to require reporting, contrary to its statement in the 2016 Written Follow-Up Report (para. 10). Chilean authorities also referred to Law 20 818 which amended Law 19 913 in 2018, but this only applies to public sector auditors, and only requires the reporting of suspected money laundering.

52. Chile also has not taken steps to implement Phase 3 Recommendation 8(b)(ii) to protect from legal action auditors who report suspected wrongdoing reasonably and in good faith. Chile explains that action cannot be taken against auditors who comply with a professional obligation.²³ Applying this reasoning, one could infer that external auditors who report a crime are not necessarily protected since they are not legally required to report.

53. Finally, Chile has not implemented Phase 3 Recommendation 8(b)(iv) regarding auditor certification and independence. The qualification requirements of external auditors have not changed since Phase 3. External auditors and account inspectors of closed corporations continue to be allowed to own up to 3% of the capital of companies that they audit, which falls below international best practice. The CMF states that it now remotely inspects external audit firms on issues such as external audit firm structures and the professional qualification of partners. It also requires firms to submit information annually on services provided to assess their independence. These are commendable measures, but they do not address the crux of the Working Group's Recommendation.

Commentary

The lead examiners are concerned that Chile does not perceive the need to encourage external auditors to detect foreign bribery, even though external audits have yet to detect this offence. Without tangible measures in this direction, it is unlikely that external auditors will successfully detect foreign bribery while applying the auditing standards currently in force. This is all the more unlikely as fraud, by auditors' own admission, is not the main focus of financial accounts audits.

The lead examiners are also concerned that only external auditors of closed corporations are required to report crime to the authorities, and those of listed companies and "special" companies are not. This loophole, identified in Phase 3, is a significant setback from Phase 2, when all external auditors were required to report. This shortcoming is all the more concerning because listed and "special" companies are more likely to do business overseas and be exposed to the risk of foreign bribery.

Finally, the CMF's supervision of external auditing firms is a positive step. Nevertheless, the lead examiners regret that Chile has not taken further steps to improve audit quality standards, including with regard to certification and independence.

For these reasons, the lead examiners reiterate Phase 3 Recommendation 8(b) and recommend that Chile (i) encourage external auditors to take greater account of the risks of foreign bribery in the companies that they audit; (ii) align the reporting obligations that apply to the external audit profession by requiring external audit firms to report crimes to competent authorities; (iii) ensure that auditors who report suspected wrongdoing reasonably and in good faith to competent authorities are protected from

²³ Decree 702 for external auditors and account auditors, and Law 18 045 and CMF Regulation 275 for external audit firms.

legal action; and (iv) improve audit quality standards, including with regard to certification and independence.

A.8. Self-Reporting

54. Self-reporting by a company has not led to the detection of a foreign bribery case and there is no clear framework for a company to do so. Self-reporting may be considered a mitigating factor at sentencing (Law 20 393 Art. 6(2)). As further explained at p. 49, a company may escape liability if it had implemented an effective offence prevention model (OPM) at the time of the offence. Law 20 393 Art. 4(3)(d) states that the OPM must have a procedure for reporting offences. It is unclear whether this covers reporting not only to company management but also to law enforcement. UNAC states that it considers self-reporting when deciding whether to resolve corruption cases through conditional suspensions and abbreviated procedures. This is not a formal written policy, however. As discussed at p. 40, there is no policy on resolving foreign bribery cases through conditional suspensions and abbreviated procedures that would encourage offenders to self-report wrongdoing, co-operate with law enforcement authorities in their investigations, and thereby increase the level of enforcement.

Commentary

The lead examiners recommend that Chile establish a policy for companies to self-report foreign bribery, including by considering whether to offer conditional suspensions and abbreviated procedures as an incentive for self-reporting.

B. ENFORCEMENT OF THE FOREIGN BRIBERY OFFENCE

55. This section considers Chile's enforcement of its foreign bribery offence. It begins by examining Chile's relevant legislative framework for fighting foreign bribery, including changes introduced by Law 21 121. This Law was enacted on 1 November 2018 and entered into force 20 November 2018 after a protracted process that prompted the Working Group to issue a [public statement](#) of exhortation in October 2017. This development is welcome, though the Law unfortunately addresses only some and not all of the legislative deficiencies identified by the Working Group. The section then examines the enforcement of actual foreign bribery cases, followed by the conclusion of these cases, including sanctions and resolutions through conditional suspensions of proceedings and abbreviated procedures. Issues concerning corporate liability are covered in Section C at p. 48.

B.1. Foreign Bribery Offence

56. In previous evaluations, the Working Group decided to follow up four issues concerning Chile's foreign bribery offence in Penal Code (PC) Arts. 251bis and 251ter. (See p. 89 for the text of the offence.)

57. Jurisprudence has eliminated concerns about the definition of a foreign public official. In Phase 3, prosecutors in the *Serlog* case stated that proof of the bribed recipient's status as an official under foreign law was essential to securing a conviction. In other words, the definition of a foreign public official was not autonomous, contrary to Art. 1(4) of the Convention. The Chilean Court of Appeal in the *Serlog* case has since rejected this position. Instead, the Court adopted a functional approach and considered factors such as the bribe

recipient's day-to-day duties and relationships with other individuals. The recipient's legal status as an official under foreign law was relevant but not determinative.

58. Unfortunately, practitioners may not be applying the law on this issue correctly. When discussing the *Serlog*, *LAN Airlines* and *University del Mar (No. 1)* cases, several prosecutors at the on-site visit continued to take evidence of the individuals' legal status as conclusive proof of whether they were foreign public officials. They did not further inquire whether these individuals in fact performed public functions.

59. A second issue has also been clarified. The Phase 2 Report (para. 147) noted that Chile's then Foreign Affairs Minister stated that the prevalence of bribery in a foreign jurisdiction could be a defence or "at least a mitigating factor". This position was contrary to Commentary 7 of the Convention, which prohibits the consideration of local custom or tolerance of bribery. In Phase 3, Chile stated that the Minister's "supposed declaration" was not an official government statement. Chile repeats this position in Phase 4 and adds that "political opinions" do not bind prosecutors. More importantly, these factors were not considered in Chile's concluded foreign bribery enforcement actions (*Serlog*, *Asfaltos Chilenos* and *LAN Airlines* cases).

60. A recent legislative amendment clarified a third issue. Art. 1 of the Convention prohibits bribery to obtain or retain "business or other improper advantage". However, in Phase 3 PC Art. 251bis covered only "improper business or advantage". The Working Group was thus concerned that the offence would not cover bribery to obtain proper business, such as when bribes are paid to induce an official to perform his/her duties. Law 21 121 dispelled this concern by deleting the word "improper" from the foreign bribery offence. Before this amendment, the accused in the *Serlog* case was also convicted of bribing a foreign official to provide an advantage that related directly to the performance of his official duties.

61. There have not been developments on one final issue. Unlike the Convention, Chile's foreign bribery offence is not expressly limited to "undue" pecuniary or other advantages given to a foreign public official. The Working Group was thus concerned that the offence criminalises legitimate payments seeking proper official action. Since Phase 3, neither jurisprudence nor Law 21 121 has addressed this issue.

62. Law 21 121 extended Chile's foreign bribery offence in one respect. The amended PC Art. 251bis will cover not only bribery to obtain or retain business "in the field of any international transactions" but also in "an economic activity carried out abroad". According to Chilean authorities, this ensures that the offence covers situations beyond international trade transactions.

Commentary

The lead examiners welcome the enactment of Law 21 121 which addresses some of the issues concerning Chile's foreign bribery offence. They recommend that Chile take steps to ensure that prosecutors and judges apply the autonomous definition of a foreign public official under Chilean law.

B.2. Offences Related to Foreign Bribery

a. Money Laundering Offence and Enforcement

63. Prior Working Group evaluations did not identify deficiencies with Chile's money laundering offence. Domestic and foreign bribery qualify as predicate offences. The

offence covers the laundering of proceeds of offences committed outside of Chile if the conduct underlying the offence is a crime at the place where it occurred (dual criminality). A conviction for the predicate offence is not required. Natural persons are punishable by imprisonment of 5 years plus a day to 15 years, and a fine of UTM 200 to 1 000 (CLP 9.5-48 million or USD 14 000-72 000). Legal persons are punishable by a fine of up to UTM 20 000 (CLP 950 million or USD 1.4 million). Confiscation and publication of the judgment are mandatory. Other sanctions include dissolution, cancellation of status, debarment, and loss of fiscal benefits (e.g. tax breaks).

64. The Phase 3 Report (paras. 136-137) noted that there were “strikingly few money laundering convictions, and even fewer convictions predicated on corruption offences.” There had been only 57 money laundering convictions, 2 of which were predicated on domestic bribery and none on foreign bribery. According to Chilean authorities, judges had “a certain tendency” to convict an accused only for bribery which carried a lighter sentence.

65. There have been improvements since Phase 3 but room for more remains. There were seven convictions for money laundering predicated on domestic bribery in 2014-2017, including two in the *Serlog* case. In the *University del Mar (No. 2)* domestic bribery case, one individual was convicted of passive bribery and money laundering. These figures reflect an increase since Phase 3. However, the overall number is still very low considering that there were at least 226 domestic corruption convictions from 2014 to June 2018 (see para. 120). There remains no convictions for money laundering predicated on foreign bribery. At the time of the on-site visit, six investigations for laundering the proceeds of domestic bribery were ongoing.

66. Information on specific cases paint a similar picture. The prosecutor in the *SQM* case stated at the on-site visit that money laundering charges had not been laid because the sanctions for the offence would have been lower than for bribery. Chile stated that in the *Serlog* and *Asfaltos Chilenos* cases, the accused were not charged with money laundering because they did not obtain any proceeds from their offences. Another accused in the *Serlog* case (Ibieta) was charged with money laundering but died before trial. Chile also stated that there has been an increase in money laundering investigations and hopes that a corresponding increase in convictions will soon follow.

Commentary

The lead examiners are encouraged that since Phase 3 Chile has increased the number of convictions for laundering of the proceeds of corruption. Nevertheless, the number remains low. Since Phase 3, there have been 226 domestic corruption convictions but only 7 for money laundering. Chile argues that more evidence is needed to obtain convictions for money laundering than corruption. Even if this is true, the fact that convictions for corruption outnumber money laundering by 32 to 1 strongly suggests that money laundering charges in corruption cases have not been sufficiently pursued. As the Working Group has noted, barring simultaneous convictions of money laundering and foreign bribery is not justified by fundamental principles of law. It also weakens the effective application of foreign bribery legislation.

The lead examiners therefore reiterate Phase 3 Recommendation 7(a) and recommend that Chile take measures to enforce the money laundering offence more effectively in connection with foreign bribery cases, and ensure that in practice, an individual is simultaneously convicted of money laundering and foreign bribery where appropriate.

b. False Accounting Offence and Enforcement

67. Chile has not amended its legislation to prohibit the full range of accounting misconduct described in Art. 8(1) of the Convention. In Phase 3 (para. 143), Chile referred to five different provisions,²⁴ none of which covered all forms of false accounting. Some required proof of elements beyond those required in Art. 8(1). Others applied to a limited group of individuals. In Phase 4, Chile refers to four additional provisions to implement the false accounting offence that again present significant limitations:

- **Law 20 780** adds seven new “hypotheses” that constitute false tax declaration and establishes a general tax avoidance rule. However, these offences are not directly related to false accounting, and only cover false accounting with tax consequences.
- **Law 20 818** makes filing a false tax declaration a predicate offence for money laundering, and thus has the same restrictions as Law 20 780.
- **Securities Market Law (18 045) Art. 59(d)** makes it an offence for accountants and auditors to give false opinions, but does not apply to corporate officers or employees.
- **Securities Market Law (18 045) Art. 60(j)** creates an offence of eliminating, altering, modifying, concealing or destroying records or documents, but only if the act impedes or hinders supervision by the CMF.

68. The *LAN Airlines* case demonstrates these provisions’ shortcoming. The company LAN’s accounting records misstated the purpose of payments to an external consultant. Chilean authorities considered but declined to charge the company for submitting false information to the financial markets because the payments did not materially alter the company’s financial statements. By contrast, the US authorities had no difficulties laying charges in the case under the books and records provisions in the Foreign Corrupt Practices Act. Details of the *LAN Airlines* case are at p. 82.

69. Two other Phase 3 recommendations are also outstanding. Chile has not amended Law 20 393 to allow corporate liability for false accounting. It also does not report any information or statistics on enforcement, thus suggesting that the weak implementation of the false accounting offence observed in previous evaluations endures in Phase 4.

Commentary

The lead examiners are concerned with Chile’s lack of effort to address the Phase 3 Recommendations pertaining to the false accounting offence. The new provisions mentioned in Phase 4 exacerbate the patchwork of legislation which do not cover the full range of accounting misconduct in Art. 8 of the Convention. The lack of information suggests weak enforcement of the offence persists.

The lead examiners therefore reiterate Phase 3 Recommendation 6(ii) and 8(a) and recommend that Chile (a) amend its legislation to prohibit both natural and legal persons from engaging in the full range of conduct described in Art. 8(1) of the Convention, and subject such conduct to effective, proportionate and dissuasive sanctions, (b) vigorously

²⁴ PC Art. 197, Company Law Art. 133, Securities Market Law 18 045 Art. 59(a), Banking Law 1 102 Art. 157 and Law 830 (Tax Code) Art. 97(4). See also SII Circular 38 of 9 July 2018 which confirms that the offence in Tax Code Art. 97(4) only covers cases of foreign bribery-related false accounting that have tax consequences.

pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate, and (c) maintain enforcement statistics.

B.3. Investigative and Prosecutorial Framework

a. Bodies Responsible for Investigating and Prosecuting Foreign Bribery

70. The Public Prosecutors' Office (PPO) (*Ministerio Público* or *Fiscalía de Chile*) is responsible for investigating and prosecuting natural and legal persons for crimes, including foreign bribery. The PPO is headed by the National Prosecutor (*Fiscalía Nacional*). It is divided into regions headed by Regional Prosecutors and staffed by Assistant Prosecutors.

71. One specialised unit in the PPO may provide additional support in foreign bribery cases. The Specialised Anti-Corruption Unit (*Unidad Especializada Anticorrupción*, UNAC) gives advice and expertise in complex corruption cases on request. It trains prosecutors in regional offices, and approves conditional suspensions of corruption cases (see para. 130). The Specialised Unit for Money Laundering, Economic, Environmental Crimes and Organised Crime (*Unidad Especializada en Lavado de Dinero, Delitos Económicos, Medioambientales y Crimen Organizado*, ULDDECO) may perform a similar function as UNAC in money laundering cases related to foreign bribery. Also, the International Co-operation and Extraditions Unit (*Unidad de Cooperación Internacional y Extradiciones*, UCIEX) handles MLA requests.

72. Prosecutor Instruction 699/2014 applies to corruption offences and replaces Instruction 39/2013 referred to in the Phase 3 report. Unlike its predecessor, Instruction 699/2014 applies unambiguously to foreign bribery cases and assigns them to Regional Prosecutors (who are considered more experienced than local prosecutors).

73. Prosecutors direct the police to conduct criminal investigations. Since Phase 3, two new police units specialise in bribery and corruption cases. The *Policía de Investigaciones de Chile* (PDI) is the main police force for investigating crimes. Within the PDI, the *Brigada Investigadora de Delitos Funcionarios* (BRIDDEF) investigates complex financial crimes including corruption, foreign and domestic bribery, tax fraud, and embezzlement. Additional specialised brigades deal with economic crimes (BRIDEC) and money laundering (BRILAC). A second police force, the *Carabineros de Chile*, deals mainly with crime prevention but could also investigate a crime at a prosecutor's request (CPC Art. 79). In practice, it investigates only alongside the PDI. Since June 2016, the Economic Crimes and Anti-Corruption Section of the *Carabineros* has been responsible for investigating financial crimes including bribery, money laundering, tax crimes and crimes committed by public officials.

b. Resources Have Increased but Training and Expertise Are Still Lacking

74. Chile has strengthened the PPO's resources, including through the 2015 *Ley de Fortalecimiento* (Law 20 861). In 2014-2018, the PPO's staffing budget increased by 45%. The PPO has hired 122 prosecutors since 2016 and now has 788 prosecutors and 3 576 officials. Art. 37bis of the Law created new units to support investigations with analytical data, guidelines and standardised management procedures. However, these units focus on property crimes and do not impact foreign bribery cases, according to Chile. A new UNAC database of the PPO's foreign bribery cases includes each case's status and facts. Regional prosecutors were informed of the database and reminded of their obligation to report

foreign bribery investigations to UNAC. In practice, co-ordination among the regional prosecutors' offices takes place via UNAC. According to Prosecutor Instruction 699/2014, regional prosecutors are also responsible for ensuring the uniform application and interpretation of anti-corruption provisions.

75. The police has also increased its resources and specialisation. BRIDEF was created in January 2016. It has 26 investigative officers with professional backgrounds (lawyers, accountants, engineers, etc.) who review evidence such as banking and financial information, and produce technical and analytical reports. At the time of this report, BRIDEF was involved in more than 40 on-going corruption-related investigations, some involving high-level officials. Protocols and flow models help optimise BRIDEF's human resources and investigative capacity. The Economic Crimes and Anti-Corruption Section of the *Carabineros* has 21 staff, including 3 "commercial engineers" (business graduates) and 1 general accountant. All investigate crimes and have been trained by the UAF. The Section investigated 66 domestic bribery cases in 2017 and has 18 investigations at the time of this report.

76. Some training in relevant areas has been provided. Regional and other prosecutors received regular training on managing and investigating financial crime cases. In 2014-2015, Chile held numerous workshops and seminars for law enforcement and public officials, some of which covered corporate offence prevention models. In July 2016, one panel of a UNAC-organised seminar addressed foreign bribery and Chile's enforcement actions. Other events referred to foreign bribery or corporate liability. BRIDEF has received training from domestic and foreign experts but needs more on corporate investigations, money laundering, forensic accounting and information technology, according to Chile. Workshops on corruption for *Carabineros* investigators did not explicitly cover foreign bribery. Some events covered forensic accounting, but not on corporate investigations or offence prevention models. The 2014 UNAC [Practical Guide on Good Investigation Practices Criminal Responsibility of Legal Persons](#) has not been used for training because it is intended for prosecutors, according to Chile.

Commentary

The lead examiners welcome new police units that specialise in economic crime cases. The transfer of foreign bribery investigations to more experienced Regional Prosecutors is also positive. However, training remains insufficient, especially in very technical areas such as forensic accounting, information technology, corporate investigations and offence prevention models.

The lead examiners therefore reiterate Phase 3 Recommendations 1(a) and 4(h) and recommend that Chile take steps to ensure that expertise in forensic accounting and information technology is available in foreign bribery investigations. Chile should also further train prosecutors on corporate investigations and corporate offence prevention models.

B.4. Conducting Foreign Bribery Investigations and Prosecutions

77. This section concerns how foreign bribery investigations and prosecutions are conducted in Chile. It begins with an overview of the rules for commencing criminal investigations and the statute of limitations. The section then examines the investigation and prosecution of actual foreign bribery allegations. The last sections cover the available investigative tools, the lifting of bank secrecy, and jurisdiction to prosecute natural persons for foreign bribery. The details of Chile's foreign bribery cases are in Annex 3 at p. 80.

a. Stages of an Investigation and Prosecution

78. The rules and principles that govern the conduct of a foreign bribery investigation and prosecution have not changed since Phase 3. The CPC applies to proceedings against natural persons. Proceedings against legal persons are governed by Law 20 393 complemented by the CPC.

79. A prosecutor who receives information about foreign bribery must generally open a preliminary investigation. Exceptions include when the matter is time-barred, or if the information does not disclose an offence. In corruption cases, prosecutors are directed to “zealously weigh” the information before deciding not to open a preliminary investigation. Minimum inquiries must be made to confirm that the allegation does not disclose an offence. Prosecutors do not have discretion not to open an investigation based on the public interest in foreign bribery cases involving natural or legal persons.²⁵

80. The prosecutor may provisionally file (*archivo provisional*) a preliminary investigation if there is not enough information to continue a preliminary investigation, and a guarantee judge has yet to be involved in the case.²⁶ The matter may be reopened if new information later surfaces (CPC Art. 167).

81. A preliminary investigation is converted into a formal one when the prosecutor, in the presence of a guarantee judge, informs the accused that he/she is under investigation (*formalización de la investigación*, CPC Art. 229). An investigation must be formalised when, among other things, the prosecutor seeks judicial authorisation for investigative measures that affect an individual’s constitutional rights (CPC Art. 230). However, these investigative measures may be available during a preliminary investigation if the measure is indispensable to the investigation, having regard to the gravity of the offence and the nature of the measure (CPC Art 236). Chile states that mutual legal assistance (MLA) may be sought during a preliminary investigation.

82. The formal investigation ends after the prosecutor has carried out the necessary investigative acts to establish the alleged crime and its perpetrators, accomplices or accessories. If the prosecutor considers that there are serious grounds to prosecute the individual against whom the investigation has been formalised, then the prosecutor files an accusation with a guarantee judge. Otherwise, the prosecutor requests the guarantee judge to dismiss the case definitively or temporarily, or communicates the PPO’s decision to discontinue the proceedings due to insufficient evidence for an accusation (CPC Arts. 248-252).

b. Limitations Periods for Investigation and Prosecution Remain Too Short

83. Two limitation periods in Chile’s criminal procedural system apply to foreign bribery cases. In Phase 3, a foreign bribery investigation and prosecution had to be concluded within five years from the date of the offence (PC Arts. 93-105; Law 20 393 Art. 19). (As explained below, this period has since been extended to ten years.) The limitation period is suspended for a maximum of five years if the alleged offender is abroad. It is also suspended when a preliminary investigation is formalised, *i.e.* when an indictment is filed (PC Art. 96). However, the formal investigation must then be concluded within two

²⁵ CPC Arts. 168 and 170; Prosecutor Instruction 699/2014 Sections 7.3-7.4; Law 20 393 Art. 24.

²⁶ As opposed to a trial judge, in general terms a guarantee judge hears applications for judicial orders during investigations and pre-trial proceedings.

years (CPC Art. 247). This two-year limitation period is suspended under limited circumstances, e.g. if the proceedings have been temporarily dismissed because the defendant has absconded or become insane; related civil proceedings are pending; the proceedings have been conditionally suspended; or the defendant has agreed to but has yet to pay reparations to a victim (CPC Art. 252).

84. Since Phase 2 in 2007, the Working Group has expressed serious concerns that the two-year period for formal investigations is insufficient and “ill-adapted” to foreign bribery cases. The limitation period continues to run, for example, while a mutual legal assistance request to a foreign country is outstanding. Phase 3 Recommendation 4(a) therefore asked Chile to “take steps to ensure that the overall limitation period for the foreign bribery offence, including the two-year period for formalised investigations, is sufficient for proper investigation and prosecution”.

85. Since Phase 3, the *LAN Airlines* foreign bribery case may have been terminated because of the statute of limitations (see p. 82). At the on-site visit, the case’s former lead prosecutor stated that the limitation period was too short and called for a revision. A second prosecutor acknowledged that the two-year limit on investigations could be problematic. Despite these views, Chile reiterates its position from Phase 3 that it is obliged under Article 7(5) of the American Convention on Human Rights to conclude investigations within a reasonable time. But as the Working Group has observed, this obligation can be met while still ensuring that adequate time is allowed for proper investigations. Statistics on corruption cases that have been time-barred could have assuaged concerns but were unfortunately unavailable.

86. The recent Law 21 121 only addresses these concerns in part. The Law amends the Penal Code to re-classify foreign bribery as a felony instead of a misdemeanour, and thereby increases the applicable statute of limitations to ten years. This is a positive development. However, the Law leaves the two-year limitation period for investigations unchanged. If so, then this would be a significant deficiency since many investigative measures in foreign bribery cases affect the constitutional rights of an individual. They hence require the approval of a guarantee judge and can only be conducted during a formal investigation. Just before the adoption of this report, Chile stated that all investigative measures that require the approval of a guarantee judge are available during a preliminary investigation and before formalisation, citing CPC Arts. 9, 230, and 236.

87. Law 21 121 also modifies the limitation period with possibly undesirable consequences. Chile stated that the two-year limitation period may be suspended, but as noted at para. 83, the grounds for suspension are extremely limited. In addition, under a new PC Art. 260bis, the limitation period for corruption offences (including foreign bribery) would begin to run when the bribed official leaves his/her position or office. Proving this fact could be more difficult in cases of foreign bribery where the necessary information is not as readily available as in domestic bribery cases. Furthermore, suspending the limitation period may be sensible for passive bribery offences since the corrupt official may have immunity while in office. It may be less reasonable for active bribery offences since Chile is unlikely to prosecute the bribed foreign official.

Commentary

The lead examiners welcome the increase in the limitation period for Chile’s foreign bribery offence. They note that just before the adoption of this report, Chile stated that all investigative measures that require the approval of a guarantee judge are available during a preliminary investigation and before formalisation. The lead examiners

therefore recommend that the Working Group follow up whether the two-year period starting from the formalisation of the investigation is sufficient for proper investigation and prosecution.

c. Actual Enforcement Has Increased but Concerns over Premature Terminations Linger

88. In Phase 3, the Working Group expressed concerns about insufficient foreign bribery enforcement and inadequate investigations in Chile. There had not been any convictions for foreign bribery. Several of the seven allegations of Chilean individuals and/or companies bribing foreign public officials had been prematurely filed. This led the Working Group to recommend that Chile thoroughly investigate foreign bribery allegations and gather information from diverse sources to enhance investigations.

89. Chile has now obtained its first conviction for foreign bribery. At the time of Phase 3, the prosecution in the *Serlog* case was on-going. In November 2016, the Court of Appeal convicted Victor Lizárraga for bribing a Korean advisor of a military attaché. In return, the bribed official introduced Lizárraga to Korean companies that were seeking contracts from the Chilean military. The conviction is under appeal before the Supreme Court. Lizárraga's sentence is discussed at para. 117.

90. A second foreign bribery case was successfully resolved through "conditional suspensions of proceedings". In response to the concerns expressed in Phase 3, Chile began investigating one allegation and reopened two cases. One of the reopened investigations, the *Asfaltos Chilenos* case, involved two agents of a Chilean company allegedly providing kickbacks to themselves and a Bolivian official. In October 2015, proceedings against the company and one of its managers were conditionally suspended. Financial penalties were imposed against both parties. The terms of the resolution are discussed at para. 183.

91. Chile has also made some inquiries that clarified two allegations which surfaced after Phase 3. In the *University del Mar (No. 1)* case, media articles alleged that a Chilean university rector bribed Panama's General Consul in Chile. In return, the General Consul would promote the university's activities and recruit students from Panama and Central America. After obtaining MLA from Panama and witness statements, Chilean authorities confirmed just before the on-site visit that the General Consul had resigned from her post before beginning her work for and receiving remuneration from the university. In the *Tethyan Copper* case, media reports alleged that a mining concession partly held by a Chilean company may have been tainted by corruption. Chilean authorities obtained information from public sources which clarified that the allegations did not involve bribery. The concession had also been awarded to another (non-Chilean) company some 12 years before it was acquired by the Chilean company.

92. A third allegation, the *Oil Company* case, also emerged after Phase 3. Oil Company is a fuel and petroleum product trading company with offices in several jurisdictions including Chile and Guatemala. A Chilean-Peruvian businessman is the company's founder and a member of the board of directors. In 2016, media reports alleged that Oil Company made payments in 2011 to a political party in Guatemala to finance the party's campaign. The party won the national election in 2012 and its candidates became the country's President and Vice-President. But by 2015, both had resigned and were arrested for corruption. In June 2016, Guatemalan authorities arrested a former Oil Company employee and manager.

93. Unfortunately, Chile's efforts to investigate the *Oil Company* case were initially not sufficient. Chile's PPO informally contacted its Guatemalan counterpart who stated that they were not investigating Oil Company's Chilean-Peruvian founder/director. By searching open sources and government databases in Chile, the PPO confirmed the individual had few connections to Chile apart from his citizenship. Instruction 699/2014 directs prosecutors to be "especially careful" when deciding not to open a preliminary investigation (see para. 79). Nevertheless, the case was initially not opened even though a connection between the allegation and Chilean individuals or companies had not been excluded. For example, the PPO did not inquire with Guatemala about Oil Company's ownership and management structure, which could have shown whether the founder/director or other Chilean individuals knew or authorised the payments. The testimony of the former Oil Company employee and manager who is in custody in Guatemala was not sought. There was also no information on the founder/director's location or attempts to take his statement. But just before the adoption of this report, Chile stated that it has opened an investigation into the case and sent MLA requests to Guatemala and Peru.

94. The *Uniq IDC* case may also have been insufficiently investigated. According to media reports, in 2004 Uniq allegedly bribed a Venezuelan official to obtain a 20-year concession to improve and operate two airports. The Venezuelan authorities ultimately revoked the contract and prosecuted its officials. In early 2014, Chilean authorities opened an investigation into the allegation after Working Group criticism in Phase 3. But in Phase 4, they stated that the case has been "temporarily dismissed and filed" in October 2014. There was no explanation of any efforts to gather evidence or why the case was filed. The PPO stated that it was not involved in the case because an investigative judge conducted the investigation under a now-replaced criminal procedural system.

95. Unlike the *Oil Company* and *Uniq* cases, extensive efforts were made to investigate the *LAN Airlines* case. The case involved payments by the Chilean company LAN to Vazquez, who was an Argentine ministerial advisor. After criticism in Phase 3, Chile reopened the case and undertook a significant investigation. According to Chile's Phase 4 questionnaire responses, the case was terminated without charges because the investigation revealed that LAN's payments were destined for Argentine union officials to resolve a labour dispute. As the union officials were not foreign *public* officials, LAN did not commit foreign bribery. A prosecutor at the on-site visit reiterated this view, though another prosecutor later stated that the case was terminated because it was time-barred (see p. 82 for details).

96. The position that LAN's payments were not to public officials indicates that certain avenues of liability may have been overlooked. LAN transferred funds to Vazquez, who was an Argentine public official and who may have retained part of the payments for his services. Indeed, LAN admitted that Vasquez had "made it clear that he would expect compensation" for negotiating with the unions.²⁷ Yet, there is no indication that the Chilean authorities verified that none of LAN's funds stayed in bank accounts controlled by Vazquez or his family for their benefit. The failure to consider this alternative theory of

²⁷ *In the Matter of LAN Airlines S.A.*, Securities and Exchange Commission, Administrative Proceeding 3-17357, [Cease-And-Desist Order](#) (25 July 2016), para. 18; *In the Matter of Ignacio Cueto Plaza*, Securities and Exchange Commission, Administrative Proceeding 3-17100, [Cease-and-Desist Order](#) (4 February 2016), para. 19.

liability may have been due to a lack of experience in prosecuting the foreign bribery offence.

97. A further example of inadequate expertise in and familiarity with the foreign bribery offence concerns the definition of a foreign public official. As discussed at para. 58, jurisprudence since Phase 3 has clarified that the definition is autonomous. Nevertheless, several prosecutors at the on-site visit continued to apply a non-autonomous definition.

Commentary

The lead examiners congratulate Chile on its first two successful conclusions of foreign bribery enforcement actions. They also commend the PPO for reopening the LAN and the Asfaltos Chilenos cases, and actively gathering evidence in both cases in Chile and abroad. This is a positive development that shows the PPO's capacity to reach out to its counterparts abroad and to collect information domestically.

That said, some foreign bribery allegations have not been fully investigated. Certain lines of inquiry have not been pursued in the Oil Company case until just before the adoption of this report, and there is no indication that the Uniq IDC case has been investigated. The lead examiners therefore recommend that Chile (a) ensure that it assesses credible allegations of foreign bribery when they surface, and seriously investigate this offence in Chile and abroad; and (b) use proactive steps to gather information from diverse sources to increase sources of allegations and enhance investigations.

Chile's enforcement actions also show that there is room for improving some aspects of prosecutors' expertise in and knowledge of foreign bribery prosecutions, e.g. on the different bases of liability for the offence and the definition of a foreign public official. Prosecutors should also be reminded that Instruction 699/2014 directs them to be "especially careful" when deciding not to open a preliminary investigation. The lead examiners therefore recommend that Chile further train prosecutors on foreign bribery investigations and prosecutions. As discussed at p. 26, Chile should also train prosecutors on corporate investigations and corporate offence prevention models.

d. Certain Investigative Tools Are Still Unavailable in Foreign Bribery Investigations

98. Documents and testimony are the main evidence that has been used in Chile's foreign bribery cases. These types of evidence are often obtained through co-operation by the company under investigation and/or mutual legal assistance requests. The PPO states that obtaining evidence from abroad is a major challenge (see p. 45). In several cases, the PPO also sought information held by other Chilean public bodies such as the UAF, CMF and Civil Registry. A wiretap was used in the *Serlog* case to investigate not foreign bribery *per se* but money laundering predicated on foreign bribery. Precautionary measures over things (*medidas cautelares reales*, CPC Art. 157) are available but have never been used in a foreign bribery case. Similar measures in money laundering cases are provided by Law 19 913 Arts. 32-33.

Table 1. Main Tools Used in Foreign Bribery Investigations

Investigative Tool \ Foreign Bribery Case	Serlog	Asfaltos Chilenos	LAN	UNIQ	Univ. del Mar	Oil Company	Marambio	Thetyan Copper	Gildemeister	Lucchetti	Total
Internet and public sources	✓	✓	✓		✓	✓	✓	✓			7
Search and Seizure											0
Seizing / processing electronic evidence	✓										1
Intercepting communications	✓										1
Interviews	✓	✓	✓		✓						4
Forensic audits	✓										1
Self-reporting and co-operation by companies	✓	✓	✓								3
Co-operation with domestic counterparts		✓	✓				✓				3
Bank enquiries	✓				✓						2
Tracing assets internationally					✓						1
Mutual legal assistance (MLA)	✓	✓	✓		✓	✓	✓				6
Other international co-operation (e.g. visits, informal contacts)			✓			✓			✓		3

99. Chile has taken steps to make beneficial ownership information available in investigations. In July 2017, the UAF issued Circular 57 requiring financial institutions to identify and register beneficial ownership information for all of their clients as part of customer due diligence. The information must be available to public institutions upon demand. Financial institutions had until 1 October 2018 to comply. Banks at the on-site visit stated that they were making efforts to meet the new requirements. To ensure compliance with the new requirement, the UAF started on-site audits in January 2018. In May 2018, discussions began on the creation of a central register of beneficial ownership information on companies incorporated in Chile. At the time of this report, Chile had started exploring options for the registry.

100. Chile has not implemented the Working Group's recommendation to align the investigative tools available in investigations of foreign bribery and money laundering. Wiretapping became available in foreign bribery investigations after Law 21 121 elevated the offence from a misdemeanour to a felony (CPC Arts. 222 and 226). Techniques such as undercover agents, informants and watched deliveries continue to be available in money laundering but not foreign bribery investigations. In 2015, a Presidential Commission concurred with the Working Group's recommendation.²⁸

Commentary

The lead examiners reiterate Phase 3 Recommendation 4(g) and recommend that Chile align the investigative tools available in investigations of foreign bribery and money

²⁸ [Presidential Advisory Council against Conflicts of Interest, Influence Peddling and Corruption](#), pp. 45-46.

laundering, so that basic, special and covert investigative techniques are available and used in foreign bribery investigations.

e. Bank Secrecy Rules Are Stricter in Investigations of Foreign Bribery than Other Offences

101. The general rules for lifting bank secrecy in foreign bribery cases have not changed since Phase 3 (paras. 119-127). “Bank secrecy” covers a broad range of accounts (current and savings accounts, time deposits, etc.) and information such as balances and movements. Under the General Banking Law Art. 154, secrecy is lifted if (i) a “formal investigation” has been opened, (ii) the request relates to “specific transactions” performed by the accused, and (iii) the operation has a “direct relationship” with the investigation. Art. 1 of the Bank Current Accounts and Cheques Law further authorises disclosure of only “determined financial items” of a current account. Substantial time and supporting evidence from prosecutors are required before a guarantee judge can lift bank secrecy. Practitioners have found this process cumbersome since at least Phase 2. Civil society, including a journalist and a trade union at the on-site visit, has also criticised the procedure.

102. Legislative amendments have lessened this burden for the investigation of several crimes but not foreign bribery. The Phase 3 Report (para. 123-124) noted that a guarantee judge may lift bank secrecy in investigations of offences committed by Chilean public officials (*e.g.* domestic bribery) and tax offences. The requirements of “specific transactions”, “direct relationship” and “determined financial items” no longer applied. Since Phase 3, these reduced requirements for lifting bank secrecy have been extended to investigations of financial crimes by the Financial Market Commission (CMF), and of money laundering by the PPO.²⁹ Chile argues that the rules for money laundering cases will apply to foreign bribery cases, since foreign bribery can be a predicate offence for money laundering. However, some foreign bribery cases may not involve money laundering, as the *Serlog* and *Asfaltos Chilenos* cases show (see para. 66).

103. Access to other bank information supposedly not covered by bank secrecy often faces the same restrictions in practice. Any bank information not covered by bank secrecy is subject to “banking restraints” (General Banking Law Art. 154). Access to such information does not require judicial authorisation if: (1) the person seeking the information has a “legitimate interest”, and (2) the request does not “cause monetary damage to the client”. The Phase 2 Report (para. 116) noted that banks feared liability and tended to decline requests for such information in the absence of judicial authorisation. In Phase 4, prosecutors stated that this continues to be the case. Furthermore, the Superintendent of Banks and Financial Institutions (SBIF) is required to maintain a register of the banks with which an individual has an account as well as the type and number of the account. But SBIF takes the view that prosecutors must also have judicial authorisation to obtain this information.

104. Banks add further concerns. The Phase 3 Report (para. 127) noted delays between one to three months for banks to comply with court orders to provide information. In Phase 4, Chile stated that in the *Serlog* case, the bank provided bank statements and cheques in approximately one month. Data provided by Chile on 21 cases in which bank information was sought in the MLA context also showed that financial institutions took on average 2.7 months to produce the requested information, and 3.3 months where the

²⁹ Law 21 000 and Law 19 913 as amended by Law 20 818.

information was covered by bank secrecy. Prosecutors at the on-site visit described several concerns, including lengthy delays; incomplete information provided by banks; information provided in print rather than electronic format; fragmented information from different branches of the same bank; and lack of measures to maintain confidentiality. A circular urging banks to respond to requests promptly was issued in 2005, obviously to no avail.³⁰ Chilean authorities stated that judges could set a deadline for a bank to provide the information. However, this has little impact unless banks are meaningfully penalised for non-observance.

Commentary

The lead examiners reiterate Phase 3 Recommendation 4(f) and recommend that Chile (a) align the rules for lifting bank secrecy in foreign bribery cases with the rules applicable in domestic bribery cases, tax offences and money laundering; (b) ensure that the information subject to banking restraints are readily available to prosecutors and not subject to bank secrecy rules, and (c) take measures to reduce delay and improve the co-operation of financial institutions when providing the required financial information.

f. Jurisdiction to Prosecute Natural Persons

105. Chile has territorial and nationality jurisdiction to prosecute natural persons for foreign bribery. Natural persons may be prosecuted for foreign bribery that takes place wholly or partly in Chile.³¹ Under Law 7 421 (Organic Court Code) Art. 6(2), Chile may also prosecute “a Chilean or a person who has habitual residence in Chile” for extraterritorial foreign bribery. Jurisdiction to prosecute legal persons is discussed at p. 56).

B.5. Concluding and Sanctioning Foreign Bribery Cases

106. In Phase 3, the Working Group decided to follow up sanctions against natural and legal persons (Follow-up Issue 13(c)). This section considers the two categories of successful conclusions of foreign bribery cases in Chile against natural persons: (1) convictions after trial, as in the *Serlog* case, and (2) resolutions through conditional suspension of proceedings (SCPs) as in the *Asfaltos Chilenos* case and through abbreviated procedures (ABPs). Sanctions against legal persons are discussed at p. 56.

a. Sanctions and Confiscation against Natural Persons upon Criminal Conviction

107. This part of the report addresses three issues regarding criminal sanctions against natural persons that are imposed upon conviction, namely (i) the maximum sanctions available, (ii) sanctions imposed in practice, and (iii) confiscation.

(i) Sanctions Available Are Largely Compatible with the Convention

108. In Phase 3, foreign bribery was punishable in Chile by:

- (a) Confinement of 61 days to 3 years if the bribe was solicited by a foreign public official, and 541 days to 5 years for unsolicited bribery (PC Arts. 56 and 251bis);

³⁰ SBIF Circular 3.311 of 2 May 2005.

³¹ PC Art. 5; Phase 2 Written Follow-Up Report para. 4.

- (b) Maximum fine of once to twice the value of the advantage, or UTM 100-1 000 (CLP 4.7-47 million or USD 7 200-72 000) when the bribe is of a non-economic nature; and
- (c) Partial or absolute disqualification from public office for a fixed or indefinite period (PC Arts. 248bis and 251bis).

109. Since Phase 2 in 2007, the Working Group has voiced concerns about two aspects of these sanctions for foreign bribery. First, the maximum fines for domestic bribery are higher, namely three times the value of the advantage (PC Arts. 249 and 250(4)). Second, the maximum jail term is substantially lower if the bribe was solicited. Offenders will frequently, if not invariably, claim solicitation. Disproving this claim could be difficult because – unlike in domestic bribery cases – the foreign official is often unavailable.

110. The recent Law 21 121 increased the penalties applicable to foreign bribery to:

- (a) Confinement of 3 years and 1 day to 10 years. A sentence of less than 5 years may be substituted with intensive probation (*libertad vigilada intensiva*) (Law 18 216 Art. 15bis);
- (b) Fine of two to four times the advantage, or UTM 100-1000 (CLP 4.7-47 million or USD 7 200-72 000) when the advantage is of a non-economic nature;
- (c) Disqualification from public office of 7 years and 1 day to 10 years.

111. Law 21 121 introduced further sanctions under CC Art. 251 quarter in the form of a disqualification, in any of its degrees, to hold positions, jobs, trades or professions in companies that contract with the State or with companies or associations in which the State has a majority participation; or in companies that participate in concessions granted by the State or whose purpose is the provision of public utility services. A new CC Art. 260 quarter introduced some mitigating circumstances and a reduction of penalties of up to two degrees for defendants who provide accurate, truthful and verifiable information that contribute to detecting the offence and facilitating confiscation, among other purposes.

112. The amendments introduced by Law 21 121 addressed almost but not all of the Working Group's concerns. The same sanctions now apply to solicited and unsolicited foreign bribery. The same maximum fines apply to foreign and domestic bribery (PC Art. 250(4)) when the advantage obtained by the briber is economic in nature. However, when the advantage is non-economic, fines remain higher for domestic bribery (up to UTM 1 500 *i.e.* CLP 71 million or USD 107 000).

113. The Working Group has also expressed concerns in earlier evaluations about *media prescripción*. This provision further reduces the maximum penalties when an accused surrenders to the authorities or is apprehended after the halfway point in the statute of limitation for the offence (PC Art. 103). Applied to foreign bribery, the maximum sanction in Phase 3 for solicited and unsolicited foreign bribery was lowered to 60 and 540 days respectively if an accused surrenders or is apprehended more than two-and-a-half years after the offence. Most, if not all, cases will qualify for this reduction, given how long foreign bribery allegations take to come to light and to investigate. This indeed occurred in the *Serlog* case, Chile's first and only foreign bribery conviction (see para. 117).

114. The amendments introduced by Law 21 121 did not eliminate *media prescripción*. As mentioned at para. 86, the Law doubled the limitation period for foreign bribery to ten years, and suspended the period while the bribed official is in office. This increased the time before *media prescripción* applies to five years after the bribed official leaves office.

Media prescripción would therefore likely apply to many foreign bribery investigations and prosecutions because of these cases' complexity. Chile stated that this would generally reduce sanctions for foreign bribery to 1.5 to 3 years, which are too low.

115. Moreover, the suspension of the limitation period while the bribed official is in office raises two concerns. First, arbitrary sentence reductions could result. Two persons who have committed the same offence under identical circumstances (*i.e.* with same mitigating and aggravating factors) could be subject to different sentences: one benefitting from a sentence reduction and the other not, merely because the official in one case stayed in his/her job longer, a factor that is unrelated with the crime or the offender. Second, the suspension could be difficult to apply. Foreign bribery allegations often require a long time to detect, by which time the bribed official could have changed positions. Determining whether an individual is a public official over such a long period of time can be challenging. That the official is in a foreign country renders the task even more difficult.

Commentary

The lead examiners welcome the enactment of Law 20 121 which eliminated discrepancies in the maximum penalties between solicited and unsolicited foreign bribery, and between most types of domestic and foreign bribery. They note, however, that the principle of media prescripción would continue to be able to be applied in many foreign bribery cases. The lead examiners therefore recommend that Chile continue to take steps to ensure that sanctions against natural persons are effective, proportionate and dissuasive in all foreign bribery cases in practice.

(ii) Actual Sanctions against Natural Persons for Foreign Bribery Are Inadequate

116. The Working Group has expressed concerns in previous evaluations over the sufficiency of sanctions in practice. In Phase 2, on-site visit participants stated that there was “no chance” that an average first offender would receive a prison sentence for foreign bribery in Chile. The Phase 3 Report referred to very low sanctions that were imposed against several individuals for domestic corruption. Furthermore, a large proportion of corruption cases are resolved through conditional suspensions of proceedings, which do not result in jail sentences (see para. 125). A court may also replace a jail sentence with various non-custodial penalties (see para. 110). Phase 3 Recommendation 3(c) therefore asked Chile to take steps to ensure that sanctions against natural persons are effective, proportionate and dissuasive in all foreign bribery cases in practice.

117. Since Phase 3, only one individual has been convicted of foreign bribery. In the *Serlog* case, Victor Lizárraga, a retired Chilean military general, was convicted of five counts of bribing a Korean official to arrange introductions with Korean companies. The payments totalled CLP 5.4 million (USD 8 200). The cheque for a further payment was not cashed. Lizárraga co-operated substantially with the investigation and benefited from *media prescripción* (see para. 110). He did not have a criminal record at the time of the offence. (A sentence for homicide that he was serving at the time of his trial had been imposed after he committed the foreign bribery offence.) The court sentenced Lizárraga to 205 days' imprisonment, a fine of CLP 3 million (approximately USD 4 500), and 7 years plus one day of absolute disqualification from temporary positions and public offices. The court rejected a request to suspend the jail sentence or substitute it with community service.

118. The jail sentence in the *Serlog* case could be the exception rather than the norm. As in Phase 3, recent domestic corruption cases suggest that jail sentences are indeed rare and

finances are low. In the *Pehuenche* case,³² a construction company paid CLP 1.5 million (USD 2 300) in bribes to avoid CLP 188 million (USD 284 000) in fines for failing to complete work on time. The briber, who was a first offender, was given a suspended jail sentence of 818 days, a fine equal to the value of the bribe, and a permanent ban on holding public office. In the *University of Del Mar (No. 2)* case,³³ a rector paid a CLP 45 million (USD 68 000) bribe for his university to be accredited. The accreditation allowed the university to obtain a credit guarantee from the government of CLP 6.2 billion (USD 9.3 million). The briber, who also did not have a criminal record, was sentenced to five years' imprisonment substituted with probation, a fine of CLP 73 million (USD 110 000), disqualification from political rights, and a 10-year ban on holding public office.

119. Comprehensive statistics on sanctions for domestic bribery could have offered further insights into the adequacy of sanctions imposed in practice. However, Chile states that this information is unfortunately not available because there are too many cases.

Commentary

The lead examiners note that Chile has enacted Law 21 121 which increased the statutory penalties for foreign bribery. Nevertheless, the Law's impact on the sanctions imposed in practice can be evaluated only after sufficient practice has developed. The lead examiners therefore recommend that the Working Group follow up whether sanctions imposed against natural persons are effective, proportionate and dissuasive in all foreign bribery cases. They also recommend that Chile maintain detailed statistics on sanctions imposed in domestic and foreign bribery cases.

(iii) Confiscation Law and Practice Are Both Deficient

120. Confiscation is rarely imposed in corruption cases. In theory, the confiscation of the instruments and proceeds of foreign bribery is mandatory upon conviction.³⁴ It was not ordered in the *Serlog* case because Lizárraga did not gain monetarily from the offence. However, UNAC provided support in cases that resulted in 226 sentences for domestic corruption from January 2014 to June 2018. Confiscation was ordered merely 12 times (*i.e.* 5%) in these cases. In the *Pehuenche* and *University del Mar (No. 2)* cases, confiscation against the briber or the bribed official was not sought by the prosecutor or ordered by the court. As noted below at p. 57, confiscation has also not been imposed against legal persons.

121. Chile provides value confiscation only under certain conditions. When confiscation against a legal person cannot be ordered (*e.g.* because the proceeds of crime have been spent), it is possible to confiscate property whose value corresponds to the instruments or proceeds (Law 20 393 Art. 13(2) as amended by Law 21 121). The same measure is available against a natural person in money laundering but not foreign bribery cases (Law 19 913 Art. 37).

Commentary

The lead examiners reiterate Phase 3 Recommendation 3(e) and recommend that Chile amend its legislation to provide for the confiscation against natural persons of property,

³² 7th Guarantee Court, Santiago (19 August 2015), RUC 1400129785-7.

³³ 8th Guarantee Court, Santiago (2 June 2016), RUC 1200084351-0.

³⁴ PC Art 31; CPC Arts. 348, and 413.

the value of which corresponds to that of the proceeds of a foreign bribery offence, or provide for monetary sanctions of comparable effect, in cases where the bribe and the proceeds of foreign bribery cannot be confiscated.

The lead examiners also remain concerned that confiscation is rarely imposed in practice. Chile states that Law 21 121 amends CC Art. 251bis and requires the bribe to be confiscated in foreign bribery cases. However, the provision only requires confiscation against the bribed official, not the briber. Furthermore, a statutory provision requiring mandatory confiscation against the briber existed before the amendment but did not result in actual confiscation. The lead examiners therefore recommend that Chile take further steps to ensure that confiscation is routinely sought and imposed in corruption cases where appropriate.

b. Resolutions of Foreign Bribery Cases through Conditional Suspension of Proceedings and Abbreviated Procedures

122. This section examines resolutions of cases through conditional suspension of proceedings (SCPs) and abbreviated procedures (ABPs), which was the subject of Phase 3 Follow-up Issue 13(d). Given the limited number of foreign bribery cases, the section will also take into account SCPs and ABPs in domestic corruption cases involving both natural and legal persons.

(i) Framework for SCPs and ABPs

123. Two types of resolutions resulting from negotiations with prosecutors and their exercise of discretion may apply to foreign bribery cases in Chile:

- (a) **Conditional suspension of proceedings** (*suspensión condicional del procedimiento*, SCP):³⁵ An SCP is available after an investigation has been formalised (*i.e.* the accused has been indicted). For both natural and legal persons, an SCP is available if the accused does not have a previous conviction or conditional suspension. For natural persons, there is a further condition that the offence be punishable by confinement of 61 days to 3 years. SCPs are thus available to natural persons only for solicited foreign bribery.

If these conditions are met, then the prosecutor and the accused may negotiate and agree on one or more conditions that the accused shall meet over a period of one to three years. The agreement is then presented to a guarantee judge for approval. If the accused meets the agreed conditions, then the charges are dropped and the proceedings are terminated without a criminal conviction. SCPs thus resemble deferred prosecution agreements in other jurisdictions.

- (b) **Abbreviated procedure** (*procedimiento abreviado*, ABP):³⁶ ABPs are available after the investigation has been formalised (*i.e.* indictment) and before an oral trial of the charges. They are available to all legal persons charged under Law 20 393. For natural persons, the option is available if the prosecutor seeks a sentence of imprisonment of 5 years or less in the specific case. For both natural and legal persons, the accused's consent to the procedure is required. If these prerequisites are met, then the prosecutor and the accused agree on a written

³⁵ CPC Arts. 237-240 and Law 20 393 Art. 25.

³⁶ CPC Art. 406-415; Law 20 393 Art. 27. Known as "expedited procedures" in the Phase 3 Report.

statement of facts. A guarantee judge then holds a trial based on the statement. Upon conviction, the judge cannot impose a penalty that is more severe than the one sought by the prosecutor.

Like SCPs, ABPs also provide the prosecutor and the accused with some flexibility to negotiate. The prosecutor can agree to proceed with an ABP on a charge different from the one in the indictment. The parties can agree to include or omit certain facts that would be placed before the court. The accused can also agree to admit liability and only contest his/her sentence, in which case an ABP is somewhat similar to a plea agreement in other jurisdictions.

(ii) Some Aspects of Resolutions through SCPs and ABPs Are Insufficient to Ensure Proper Transparency and Accountability

124. Beyond these statutory requirements, there is only one further guidance on when SCPs and ABPs can be used. Prosecutor Instruction 699/2014 asks prosecutors to apply SCPs on an “exceptional, limited and prudent basis”. They must “weigh, on a case by case basis, the circumstances surrounding the commission of the offense, the nature, means and motive thereof, and proceed with its criminal prosecution where necessary due to its seriousness and the significance of the events in a specific case”. However, this Instruction only applies to SCPs, not ABPs. It also only applies in corruption cases. It would not apply if the prosecutor, as a result of negotiations with the accused, amends the indictment and replaces a charge of corruption with another offence.

125. In practice, the Instruction 699/2014 to apply SCPs on an “exceptional, limited and prudent basis” does not appear to have been observed. Though not covered by Instruction 699/2014, ABPs also appear widespread. In 2012-16, 25% of successful conclusions of domestic bribery cases involved SCPs, and 32% ABPs.³⁷ SCPs were used in one of the two successful foreign bribery enforcement actions in Chile (*Asfaltos Chilenos*). SCPs and ABPs were also used in recent high-profile cases of domestic corruption and related tax offences such as *Penta*, *Moreira*, *Wagner*, *SQM* and *Caval*, as well as cases other corporate prosecutions like *Ceresita*, *University del Mar (No. 2)* and *Pehuenche*.

126. In the absence of more detailed guidance on SCPs/ABPs, prosecutors have applied their own criteria. At the on-site visit, prosecutors explained why they used or did not use SCPs and ABPs in specific corruption cases. Reasons ranged from the strength of the case (*Asfaltos*, *Moreira* and *Wagner*), co-operation by the offender (*Asfaltos Chilenos*, *Ceresita* and *SQM*) and willingness of the offender to pay a penalty (*Moreira* and *Caval*) to the presence of an offence prevention model (*i.e.* compliance programme) (*SQM*), statute of limitations (*SQM*), likely penalty imposed after trial (*Moreira*), and the beneficial impact of an SCP/ABP on the community (*Ceresita*). First offenders in corruption cases almost always receive SCPs, according to prosecutors.

127. These factors mentioned by prosecutors are largely relevant and reasonable, but the lack of explicit written guidance listing the criteria for using SCPs/ABPs has significant drawbacks. Prosecutors cannot point to a pre-defined official policy to defend their reasons for using an SCP/ABP. Their decisions are then more vulnerable to criticism of being arbitrary or improperly motivated. Moreover, the lack of written guidance increases

³⁷ According to data provided by Chile, in 2012-16 there were on average 188 resolved cases of domestic bribery annually, of which 38 were resolved through SCPs (without convictions), 60 through ABPs (with convictions) through ABPs, and 90 by trial (also with conviction).

inconsistency. For example, the presence of multiple offences was cited as the reason against an SCP in the *Corpesca* case but did not prevent the same measure in the *SQM* case. Written guidance also ensures that all relevant factors are considered. At the on-site visit, UNAC rightly stated that taking a case to trial has deterrent and preventive effects. But none of the other prosecutors mentioned that they had considered this factor when deciding whether to use an SCP/ABP. In *Moreira*, the prosecutor considered the *presence* of factors in favour of an SCP/ABP. There was no mention of the *absence* of such factors like the accused's co-operation with the authorities.

128. The absence of written criteria is compounded by concerns about transparency over the entire SCP/ABP process. The reasons why an SCP/ABP is used in a particular case are not systematically communicated to the public. Nor are the reasons for changing a charge or omitting certain facts from an indictment after negotiations between the prosecutor and the accused. For ABPs, a judge publishes detailed reasons for sentence. But for SCPs, only a short document listing the charges and the conditions imposed on the accused is published. There is no information on why or how the conditions were chosen, or on the facts underlying the case. The public thus cannot satisfy themselves that the use of an SCP/ABP is justified, or that the penalties imposed are effective, proportionate and dissuasive. Court hearings are generally open to the public, but it would not be reasonable to require interested citizens to attend in person to obtain information about a case. Important aspects of the negotiations and resolution described above are also not necessarily disclosed in court, given the limited judicial oversight of the process (see para. 130).

129. Actual cases demonstrate the opacity in the terms of SCPs. In the *Asfaltos Chilenos* case, the bribers and the foreign official allegedly intended to pocket an increase in the price of a cement contract from USD 15 to 25 per tonne as kickbacks. The crime was uncovered before the contract was executed. Under the SCP, the company and its manager agreed to pay USD 15 000 and USD 1 500 respectively. But there was no explanation of how these sums were arrived at. How the amounts of the SCPs in *Ceresita*, *SQM*, and *SEK University* were determined is also unclear (see para. 185 for more details).

130. The absence of meaningful judicial oversight further erodes confidence in the resolution process. For both SCPs and ABPs, the judge does not inquire into why an SCP/ABP was used but only verifies that the pre-conditions in the CPC for using these measures are met. For an ABP, the judge gives detailed reasons for the sentence. For an SCP, a judge is supposed to determine the terms (CPC Art. 237). In practice, the accused and the prosecutor agree on the terms; the judge does not question whether the terms of the resolution are appropriate. Instruction 699/2014 requires a prosecutor to seek UNAC's approval but only for SCPs in corruption cases. This requirement was not observed in the *Caval* case *viz.* a corporate accused. In any event, the requirement does not apply to ABPs or to cases where a corruption charge has been changed to a non-corruption one. UNAC is also a prosecutorial body, and hence its review of an SCP would not be as independent as a court's.

131. The *Penta*, *Moreira* and *Wagner* cases vividly illustrate how these deficiencies in the resolution process can undermine public confidence in the wider justice system. Executives of the company Penta allegedly made payments to Wagner, a senior Chilean official, and also contributed to the election campaign of Senator Moreira. Wagner and the executives were charged with bribery after a two-year investigation. Several months later, a Regional Prosecutor assumed conduct of the case, replaced the bribery charges with less serious tax and unjust enrichment offences, and resolved the cases through ABPs. At the

on-site visit, the Regional Prosecutor explained that there was insufficient evidence for the bribery charges. The Regional Prosecutor also resolved tax fraud charges against Moreira through an SCP.

132. A major controversy ensued. The two prosecutors who initially led the Moreira investigation resigned in protest. At the on-site visit, some representatives of civil society criticised the lack of oversight over the prosecutorial decisions in the cases. Some participants alleged that the resolution process was politicised. One lawyer accused prosecutors of using SCPs because they “prefer a paper win to a loss”. Another said SCPs are an “easy way out” for offenders. Further criticism was found in media reports, ranging from attacks on the credibility of the Public Prosecutor’s Office to concerns about impunity for corruption, favourable treatment and political influence.³⁸ Chile states that these remarks at the on-site visit and in the press are contentious. However, the more important point is not whether these comments are true, but that they indicate a substantial loss of public confidence in the administration of justice.

133. Chile’s response does not address all of these concerns. As mentioned at para. 114, Law 21 121 raised sanctions for corruption crimes. One effect of doing so was to make more corruption offences committed by natural persons ineligible for SCPs unless mitigating factors reduce the actual sentence to three years or less. However, SCPs remain available as before for legal persons in all foreign bribery cases. ABPs also continue to be available. The amendments therefore do not prevent the problems in the *Penta* and *Wagner* cases from recurring. More importantly, making SCPs unavailable for natural persons in most corruption cases denies prosecutors a very important enforcement tool in foreign bribery cases.

134. Chile raised two further objections just before the adoption of this report. It argued that the criticisms in the report “are structural to the Chilean criminal procedure system, without considering that both SCPs and ABPs are the criminal policy tools defined by the Chilean legislator as alternatives to oral trials.” In evaluations of other countries, however, the Working Group has made recommendations concerning the framework for case resolutions that apply to not only foreign bribery but also other types of cases.³⁹ Chile also argues that much of the criticism of SCPs and ABPs derives from domestic corruption cases, and that these measures have not been frequently used in foreign bribery cases. However, an SCP was used in one of the two successfully concluded foreign bribery cases in Chile for one natural person and on legal person. The practice of the Working Group is also to consider domestic corruption cases, especially when the same rules and practice apply equally to foreign bribery cases.

Commentary

The lead examiners are seriously concerned that some aspects of the use of conditional suspension of proceedings (SCPs) and abbreviated procedures (ABPs) in corruption cases in Chile are insufficient to ensure proper transparency and accountability. There

³⁸ La Izquierda Diario (17 January 2018), “[Iván Moreira evita juicio oral en Caso Penta y volverá al Senado](#)”; Clarín (18 January 2018), “[Fiscal Guerra dinamitó la credibilidad del Ministerio Público](#)”; Publimetro (23 January 2018), “[Situación de Fiscalía Nacional: Entidad estaría perdiendo credibilidad, según expertos](#)”; Pressenza (11 May 2018), “[Chile: El Fiscal Abbott no detiene la corrupción](#)”.

³⁹ [Belgium Phase 3](#) (paras. 85-90); [Denmark Phase 3](#) (paras. 77-81); [UK Phase 3](#) (paras. 62-73 and 105-108); [US Phase 3](#) (paras. 108-128 and Commentary after para. 128).

is almost no guidance to prosecutors on the criteria for deciding whether an SCP/ABP should be used. In practice, decisions have been inconsistent and have not taken into account all relevant factors. The public is not systematically informed of important information such as why an SCP/ABP has been used, the reasons for changing a charge, and (in the case of an SCP) the facts of the case. Chile argues that SCPs/ABPs are decided in open courts, but it would not be reasonable to require interested citizens to attend in person to obtain information about a case. High profile cases have been televised, but this would not apply to all cases. The judgements of the court are available for ABPs but not SCPs. But even judgements in ABPs would not include matters like why a more serious corruption charge had been substituted for a lesser one as in the Wagner case. Judicial oversight in SCPs and ABPs is largely limited to verifying formal compliance with statutory prerequisites. Matters such as the reasons why SCPs/ABPs are used, the choice of less serious charges, and the selection of the terms of a resolution are not questioned, according to prosecutors and judges at the on-site visit.

These deficiencies can undermine the public's confidence in the justice system. SCPs and ABPs in high profile corruption cases have been perceived as unfair and favouring certain groups. Offenders are seen to escape with little punishment or total impunity. Prosecutors are perceived to be unaccountable to the judiciary for their decisions. Some have alleged that the prosecutors are motivated by personal or political considerations, thereby implying that they lack the impartiality and independence required of them under Article 5 of the Convention. The lead examiners do not opine on the veracity of these allegations, but the fact that such claims have been widely made by civil society and the media demonstrates the public's loss of confidence in the justice system.

Chile's response to limit the use of SCPs for natural persons in more serious corruption cases risks throwing out the good with the bad. Resolution of corruption cases through SCPs and ABPs is a vital enforcement tool. When used judiciously, it can allow justice to be served in a cost-effective manner. A clearly articulated policy on SCPs and ABPs can also encourage offenders to self-report wrongdoing, co-operate with investigations and thereby increase enforcement. The trend among Working Group members has therefore been to introduce this measure into a prosecutor's arsenal, rather than to take it away.

For these reasons, the lead examiners recommend that Chile, as a matter of priority, (a) ensure that SCPs and ABPs remain available in foreign bribery cases; (b) establish more detailed criteria that prosecutors must consider when deciding whether to use an SCP/ABP. As discussed at p. 22, Chile should consider whether self-reporting should be a criterion for using an SCP/ABP; (c) make public, as necessary and in compliance with the relevant rules, the essential elements of resolutions through SCPs/ABPs, in particular the reasons for using an SCP/ABP, the main facts of the case, the party(s) to the agreement, and the sanctions; and (d) increase judicial oversight of SCPs/ABPs, including the decision to use these measures and the terms of a resolution.

(iii) Terms of a Conditional Suspension of Proceedings

135. Statutory provisions prescribe the terms that may be imposed as part of an SCP.⁴⁰ For natural persons, the available terms include restrictions on places of residence or visit; medical treatment; employment; compensating a victim; and periodic reporting. For legal persons, possible terms include making a payment for "fiscal benefit" (*i.e.* fine);

⁴⁰ PC Art 238 and Law 20 393.

performing community service; reporting its financial statement regularly; and implementing an offence prevention model (OPM), *i.e.* a compliance programme. For both natural and legal persons, a “catch-all” provision allows the court to impose “any other appropriate condition proposed by the prosecutor”.

136. The sanctions available under an SCP are different from those after conviction, which can have undesirable effects. For example, confiscation is not available under an SCP. On the other hand, a legal person can be ordered to implement an OPM under an SCP but not upon conviction. In the *Ceresita* case, the company was required to donate land to the government and built a recreational park that benefited the community. A prosecutor who wishes to impose these types of terms on an offender would have no choice but to seek an SCP, even if the gravity of the case justifies a trial and criminal conviction. The “catch-all” provision has also been used to require the offenders in *Ceresita* and *SQM* to pay penalties in excess of the maximum that would have been available upon conviction. This leaves the impression that the prosecutor is circumventing the legislation, and that an offender with abundant means can pay its way out of a conviction.

137. The use of charitable donations as a term of an SCP raises additional concerns. In cases such as *Asfaltos Chilenos*, offenders have been required to make donations to charity instead of paying a fine. Requiring donations is not inherently objectionable. Indeed, foreign bribery enforcement actions in some Parties to the Convention have resulted in donations to charities, multilateral development banks and projects in developing countries.⁴¹ However, a donation is a less severe sanction than a fine of the same monetary amount because it carries less stigma. A charitable donation may also be tax deductible in some cases (see para. 194), which lessens the financial impact. Prosecutors, however, do not appear cognisant of these factors.

138. A last issue is verification. There is no guidance on the choice of the charity receiving the donation, or an express requirement to check whether the charity is appropriate. When a legal person is required to implement an OPM, the responsibility for verifying the adequacy of the OPM is delegated to a certifier. But as explained at p. 53, there are questions about the robustness of the certification process.

Commentary

The lead examiners recommend that Chile, as a matter of priority, (a) amend its legislation to ensure that all appropriate measures (especially the requirement that a legal person implement an OPM) and confiscation are equally available under an SCP and a conviction, (b) provide guidance on the choice of terms for an SCP, including on the use of charitable donations, and (c) take greater steps to verify that OPMs implemented by companies pursuant to an SCP are adequate.

Where conditions of an SCP for foreign bribery include donations, the lead examiners further recommend that Chile (a) ensure that such conditions are effective, proportionate and dissuasive, (b) include as a term of the SCP that the offender shall not seek a tax deduction with the donation, and (c) verify in all cases the appropriateness of charities that receive donations.

⁴¹ For example, see UK Phase 3 (para. 80 and footnote 44) and Switzerland Phase 4 (para. 86) in which companies paid funds to a foreign country for educational purposes, and to non-profit NGOs in the anti-corruption and humanitarian fields.

B.6. International Co-operation

139. This section discusses general and systemic issues concerning mutual legal assistance (MLA) and extradition in foreign bribery cases. Additional information concerning the use of MLA in specific enforcement actions is at p. 29.

a. Change in Responsible Authorities

140. The responsible authorities for international co-operation under the Convention have changed. Chile has designated the International Co-operation and Extradition Unit (UCIEX) and UNAC in Public Prosecutor's Office as the responsible authorities for Art. 9 MLA and Art. 4(3) consultations respectively. The responsible authority for extradition (Art. 10) continues to be the Ministry of Foreign Affairs. Chile has not adopted specific procedures for Art. 4(3) consultations. Chile's treaty and legislative framework for extradition and MLA also remain the same as described in the Phase 3 Report (paras. 161-170).

b. Delay in Obtaining MLA Is a Major Challenge to Foreign Bribery Enforcement

141. A survey of Working Group members in early 2018 did not indicate concerns about the quality of Chile's MLA requests, though the sample size was very small. Between 2014 to early 2018, one country received 20 requests from Chile. All were reportedly of good quality and contained relevant information. Two other countries stated that they did not have concerns but did not provide supporting data. Six other survey respondents either had not received requests from Chile or had no opinion on the requests' quality.

142. Chile states that the major challenge to its foreign bribery enforcement is delay in obtaining MLA, especially from countries that are not Parties to the Convention. It provided data on eight outgoing MLA requests in 2014-2017 in foreign bribery cases (see Table below). The data do indeed reflect delay. The response times for requests to non-Parties were long. There was no response to one request at all. The response times for the five requests to Parties were shorter but still somewhat lengthy, *e.g.* 16 months to obtain only witness statements (request 6). One request to a Party did not generate a response.

Table 2. Outgoing MLA Requests in Foreign Bribery Cases

Request	Year	Evidence Sought	Party to Convention	Response Time (Months)
1	2014	Migratory Movements Confidential Documents	Party	10
2	2014	Asset Freezing Public Documents Witness Statement	Non-Party	20
3	2014	Confidential Documents	Party	No response
4	2014	Prosecutor Statement Witness Statement	Party	7
5	2014	Court Judgment Migratory Movements	Non-Party	8
6	2015	Witness Statement	Party	16
7	2015	Lifting Bank Secrecy Documentation	Non-Party	No response
8	2017	Private Documents Migratory Movements Acts of Investigation	Party	6

143. Chile could do more to pursue its MLA requests and speed up their execution. For example, an MLA request from Chile in the *Serlog* case had been outstanding for two years. A Chilean prosecutor discussed the request with a prosecutor from the requested state in the margins of the Working Group’s Informal Meeting of Law Enforcement Officials (LEO). The requested assistance was then provided within two months. This shows the usefulness of the LEO meeting, but Chile has not availed itself of this opportunity in other cases because it has only attended one LEO meeting since 2014. In the *LAN Airlines* case, a prosecutor visited Argentina to obtain witness statements. Apart from these two cases, Chile did not recount any other examples of communication outside formal channels to help secure MLA. Chile’s questionnaire responses state that “The Minister of Foreign Affairs has sent Official Notes asking for information regarding the execution of the MLAs. Additionally, *in some cases*, the Public Prosecutor’s Office (PPO) contacted its counterpart informally.” Making informal contact is a good practice that should be taken regularly and not only in some cases.

Commentary

The seeking of MLA is a challenge to foreign bribery enforcement in Chile as in other Working Group members. However, this difficulty also underscores the importance that all members, including Chile, make utmost efforts to pursue their MLA requests diligently and persistently. Just before the adoption of this report, Chile stated that its Central Authority has begun periodic communications with their counterparts regarding outstanding requests. This is encouraging. Nevertheless, the lead examiners recommend that Chile (a) continue to be proactive when following up outstanding MLA requests, including by routinely contacting foreign authorities through informal channels and the Working Group, and (b) provide training to prosecutors on seeking MLA in foreign bribery cases.

c. Issues Concerning Incoming Requests Still Unresolved

144. There are too few data on Chile's provision of MLA in foreign bribery cases to draw definitive conclusions. Chile states that it has received only two foreign bribery-related MLA requests since 2014. The requests were in 2016 for court records, copies of investigation files, and accounting records. Chile executed the requests in four months on average because the PPO already had the information sought. (The average response time for all MLA requests is eight months.) In the 2018 survey of Working Group members referred to above, one country stated that it had sent 54 MLA requests to Chile since 2014. As of January 2018, 9 (17%) of the requests had been refused and 28 executed (75%) with an average response time of 7.5 months. The quality of the responses was positive. Two other countries reported that there were no concerns, while six other respondents did not provide relevant information. Chile stated that it does not have any record of refusing MLA in corruption cases in 2018, and that any refusals of requests may have been due to a lack of information or an inability to locate a suspect.

145. Chile has not implemented Working Group recommendations on providing value confiscation and lifting bank secrecy as MLA (Phase 3 Report paras. 163-165). The rules for using a particular investigative tool in a domestic criminal investigation apply equally to the use of that tool to provide MLA. Hence, Chile cannot provide value confiscation as MLA (see para. 121). Law 21 121 only provides value confiscation against legal but not natural persons. The problems with lifting bank secrecy described at p. 34 also arise in the MLA context.

146. Data provided by Chile indicates that the execution of requests to obtain information from financial institutions has seen delay. Since 2014, Chile received 21 incoming MLA requests of this nature. After receiving the requests, the central authority quickly forwarded them the PPO. But thereafter the PPO took an average of 10.3 months to execute the request. This included an average of 2.7 months for financial institutions to provide the requested information, and 3.3 months if the information was covered by bank secrecy.

147. The Phase 2 and 3 Reports also noted some doubts over whether Chile can provide confiscation as MLA without a treaty. Chile argued that this problem would not arise in foreign bribery cases because the Convention can be used a treaty basis for requesting confiscation. Since Phase 3, Chile has not received an MLA request for confiscation under the Convention. It referred to an example in which confiscated assets were repatriated to a foreign country under a different multilateral treaty.

Commentary

The lead examiners reiterate Phase 3 Recommendations 10(a) and (b) and recommend that Chile (a) take all necessary measures to ensure that it will not deny MLA in foreign bribery cases on grounds of bank secrecy, (b) ensure that it can provide MLA for confiscation of property the value of which corresponds to the bribe and the proceeds of foreign bribery, and (c) take steps to reduce the time that the PPO takes to execute incoming MLA requests, especially when financial information is sought. The lead examiners also reiterate Phase 3 Follow-up Issue 13(e) and recommend that the Working Group follow up whether Chile can use the Convention as a treaty basis to provide confiscation as MLA in foreign bribery cases.

C. RESPONSIBILITY OF LEGAL PERSONS

148. Law 20 393 was adopted in 2009 to create corporate liability for domestic and foreign bribery, money laundering, and terrorism financing. Art. 3 of the Law sets out the three cumulative elements that must be satisfied in order to hold a legal person liable:

- (a) The offence is committed by a person with high level managerial authority or someone under his/her direction and supervision,
- (b) The offence is committed “directly and immediately” in the interest and for the benefit of the legal person, and
- (c) The offence results from a breach of the legal person’s direction and supervisory duties. A legal person may fulfil these duties if at the time of the offence it had adopted and implemented an offence prevention model (OPM).

149. Law 20 393 also provides for “successor liability”. Article 18 provides that in “cases of transformation, merger or absorption of a legal person, the resulting legal person shall be responsible for the total quantum” of any fine imposed. The provision has yet to be applied in practice.

150. The Working Group has identified issues with this corporate liability regime since Phase 1ter in 2009. In 2015, a Presidential Commission in Chile adopted many of the Working Group’s Phase 3 recommendations on corporate liability.⁴² But since Phase 3, these issues have not been resolved through legislative amendments or case law. The sole corporate foreign bribery prosecution (*Asfaltos Chilenos* case) was resolved without trial and is hence of limited jurisprudential value.

C.1. “Directly and Immediately”

151. The Working Group has two concerns with the requirement that an offence must be committed “directly and immediately” in the interest or for the benefit of the legal person. First, a parent company may not be liable for bribery committed by a subsidiary, since the crime is arguably in the interest or for the benefit of the subsidiary and not the parent. In Phase 3, Chile asserted that the prosecution would have to prove that there was a “direct hierarchical link” between the parent company’s managers and persons acting for the subsidiary. In Phase 4, it stated that the parent would be liable if it breached a duty to supervise the subsidiary. A benefit obtained by the subsidiary is then also considered a benefit to the parent. There is no case law to support any of these propositions.

152. Second, a company may escape liability by arguing that the individual who commits foreign bribery did so principally in his/her own interest. In response, Chile issued Prosecutor Instruction 440/2010 stating that an offence committed in the “shared or dominant interest” of the individual but which benefited the company would trigger corporate liability. In Phase 4, Chile put forward a similar position at length, and added that the “private motivation” of the person who committed the offence is irrelevant. There is again no jurisprudence to support these positions.

⁴² [Presidential Advisory Council against Conflicts of Interest, Influence Peddling and Corruption](#), pp. 48-49.

Commentary

In the absence of jurisprudence, the lead examiners reiterate Phase 3 Follow-up Issue 13(b) and recommend that the Working Group continue to follow up the interpretation of the term “directly and immediately” in Law 20 393.

C.2. The Offence Prevention Model

153. A legal person will escape liability if it has adopted and implemented an effective offence prevention model (OPM) at the time of the offence. The OPM is essentially a compliance defence. OPMs are not mandatory. They appear to be common in large Chilean companies and SOEs. However, OPMs are largely non-existent in small- and medium-sized enterprises (SMEs), apart from possibly some medium-sized mining and construction companies, according to business organisation representatives. Chile argues that SMEs are unlikely to commit foreign bribery since only 2% of SMEs export. This is not borne out by statistics which show that some 24 000 SMEs are exporters.⁴³

a. Liability for Bribery Committed by Persons with the “Highest Level Managerial Authority”

154. The 2009 Anti-Bribery Recommendation Annex I.B.b states that when a person with the highest-level managerial authority commits bribery him/herself, then the liability of the legal person should be triggered. Whether the company had an adequate compliance programme is immaterial:

Member countries’ systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should take one of the following approaches:

[...]

b. the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:

A person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;

A person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and

*A person with the highest level managerial authority **fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.***

⁴³ Chile has 1.2 million enterprises (see [SII website](#)), 98.7% of which, according to Chilean authorities, are SMEs.

155. Chile's Law 20 393 is inconsistent with Annex I.B.b. If a senior corporate officer commits foreign bribery, the legal person is liable only if the offence resulted from a breach of direction and supervision:

*Article 3. Attachment of criminal responsibility. Legal persons shall be responsible for the offences listed in Article 1, when directly and immediately committed in their own interest or for their own benefit by their owners, controllers, responsible officers, principal executives officers, representatives or those conducting activities of administration and supervision, **provided that the commission of the offence results from the breach of the legal person's direction and supervisory functions.***

[...]

It shall be considered that the functions of direction and supervision have been met if, before the commission of the offence, the legal person had adopted and implemented organization, administration and supervision models, pursuant to the following article, to prevent such offences as the one committed.

156. The OPM defence in Law 20 393 appears overbroad. A legal person can use a compliance defence even in cases where senior corporate officers commit foreign bribery. On-site visit participants accordingly stated that a company is unlikely to be convicted for bribery committed at its highest levels. A compliance officer cannot reasonably be expected to oversee the most senior corporate officers.⁴⁴

157. Chile's response does not alleviate these concerns. It states that there is no need for legislative change since owners and high executives of legal persons were convicted in the *Asfaltos Chilenos*, *Aridos Maggi*, *Pehuenches* and *University Del Mar* cases. This misses the point, since the concern is not the conviction of senior corporate officials, but the liability of legal persons when these individuals commit bribery. Although legal persons were also found liable in at least some of these cases, the OPM defence was not raised. Chile also argues that denying the OPM defence would create strict liability which would be contrary to its Constitution. This may be debatable, since there are other defences when bribery is not committed "directly and immediately" in the interest or for the benefit of the legal person. Chile also has not provided any jurisprudence to support this position.

Commentary

The lead examiners recommend that Chile bring Law 20 393 in line with Annex I of the 2009 Anti-Bribery Recommendation by eliminating the OPM defence where bribery is committed by an individual with the highest-level managerial authority in a legal person.

⁴⁴ Applying similar reasoning, a court recently acquitted a legal person of bribery committed by its owner. The company was a sole proprietorship and hence could not have had a meaningful compliance programme that could have prevented the offence (Oral Criminal Trial Court of Arica (2 July 2015), RUC No. 1100770074-3).

b. Lack of Guidance on an Effective Offence Prevention Model

158. Law 20 393 Art. 4 describes the minimum requirements of an OPM. For the defence to succeed, an OPM “shall contain at least the following elements”:

- (a) A prevention officer (i) appointed to renewable terms of up to three years, (ii) with sufficient means and faculties to perform his/her duties, and (iii) with direct access to the legal person’s administration;
- (b) An assessment of the risks of the company committing offences;
- (c) Rules and procedures to allow persons involved in risk areas to prevent offences;
- (d) A system of financial administration and audit;
- (e) Procedures for reporting and punishing breaches of the model; and
- (f) Communication of the offence prevention system to all workers and in contracts with the company’s service suppliers.

159. Past Working Group reports noted concerns about the burden of proving an OPM. The prosecution has to prove all elements of the offence, including a breach of the legal person’s direction and supervisory duties. If the legal person has an OPM in place, then the prosecutor must prove that the OPM’s design and/or implementation was flawed. This could be challenging, especially with complex corporate groups, since the legal person, not the prosecutor or the judge, is much more familiar with its internal organisation. There has not been sufficient practice since Phase 3 to clarify this issue.

160. The Phase 3 Report also noted the need for more guidance on how to create an effective anti-foreign bribery corporate compliance programme. Law 20 393 Art. 4 required an OPM to have elements such as risk assessments and reporting procedures, but did not indicate the features that these measures must have to be effective. Moreover, the provision specified the minimum elements of an OPM but not what additional elements were needed. It also did not mention measures that specifically prevent foreign bribery, such as corporate policies on gifts, facilitation payments *etc.*

161. Chile’s response to this concern has been fragmented. The Ministry of Justice (MOJ) continues to maintain that guidance is not necessary. Other Chilean authorities clearly do not share this view. In 2018, the Government General Internal Audit Council (CAIGG) issued [Technical Document 78](#) to help SOEs design and implement OPMs. In 2014, UNAC issued a [Practical Guide on Good Investigation Practices Criminal Responsibility of Legal Persons](#). Both documents go further than Law 20 393 Art. 4 and describe elements of an OPM for preventing corruption. UNAC, CAIGG and MOJ did not consult one another before the documents were issued. After reviewing a draft of this report, Chile stated that the CAIGG and UNAC documents were not intended for the private sector. This, however, contradicts Chile’s earlier statements when asked about guidance on OPMs. In any event, both documents have been published and are readily available to the private sector.

162. A further problem is that the guidance which has been produced has shortcomings. The UNAC Guide stresses that OPMs should be effective and effectively implemented. “Windows-dressing compliance programmes” are not enough. Elements such as a code of conduct, an internal reporting system and the identification of bribery risk areas are mentioned. Technical Document 78 analyses the OPM elements described in Law 20 393 Art. 4, and articulates measures concerning the prevention officer, the offence prevention

system, and training. But the two documents leave out many elements that are important for preventing foreign bribery, such as policies on gifts; hospitality and entertainment; third party agents and intermediaries; political contributions, *etc.* Like Art. 4, the UNAC Guide does not describe the features of an effective reporting mechanism.

163. The guidance has also had little or no impact in promoting corporate compliance in the private sector. The UNAC Guide is intended for prosecutors. Much of the document is dedicated to topics like investigative techniques, and only a limited part concerns OPMs. It is therefore not very accessible to companies and compliance professionals. Technical Document 78 is aimed at SOEs. Because of the narrow target audience, the private sector companies and compliance industry professionals at the on-site visit were largely unaware of the two documents. As in Phase 3, they draw guidance instead from foreign sources such as the [Resource Guide to the U.S. Foreign Corrupt Practices Act](#) and the [UK Bribery Act Guidance](#). One company explained that it sought certification of its OPM in part because of the lack of clear Chilean standards.

164. Despite these shortcomings, Chile does not intend to issue further guidance on OPMs. It believes that jurisprudence will clarify matters, but this is unlikely since a large proportion of corruption cases are resolved without trial (see p. 125). Chile also argues that guidance would result in rigid, “one-size fits all” OPMs. That Chilean companies continue to rely heavily on guidance from other jurisdictions shows that there is ample room for Chile to issue further guidance without being unduly rigid or prescriptive.

Commentary

The lead examiners are extremely concerned that Chile has not issued clear and unified guidance on OPMs for preventing foreign bribery. The 2014 UNAC Guide and CAIGG Technical Document 78 are intended for prosecutors and SOEs. They have not had any impact on the private sector, and in any event contain significant shortcomings. More companies have adopted OPMs since Phase 3, which is a positive development. However, these OPMs are likely of uneven quality given the continuing lack of guidance. Prosecutors and investigators also need training on corporate investigations and OPMs (see p. 26). They, too, would therefore benefit from additional guidance.

The lead examiners therefore reiterate Phase 3 Recommendation 1(a)(ii) and recommend that Chile (a) develop guidance on the elements of an effective OPM for preventing foreign bribery, including by referring to Annex II of the 2009 Anti-Bribery Recommendation, (b) disseminate the guidance to the private sector (especially SMEs), investigators, prosecutors, and the judiciary, (c) encourage Chilean companies, especially SMEs, to adopt models that conform to the guidance. The lead examiners also reiterate Phase 3 Follow-up Issue 13(b)(ii) and recommend that the Working Group follow up the application of the offence prevention model defence by Chilean courts, including the burden of proof.

c. Independence of the Prevention Officer

165. Law 20 393 takes a rigid approach to the independence of a company’s compliance officer. The prevention officer who oversees the OPM must be autonomous from the company’s administration, shareholders, partners and controllers. However, the company’s owner, partner or controlling shareholder may serve as the prevention officer if the company’s annual income does not exceed UF 100 000 (CLP 2.7 billion or USD 4.1 million). This threshold is the Chilean statutory definition of SMEs (Law 20 416 Art. 2). Some 98.7% of Chilean companies fall below this threshold (up from 96.5% in Phase 3).

166. This strict rule is contrary to best practices in corporate compliance. Like other elements of a corporate compliance programme, the level of the prevention officer's autonomy should be risk-based. As the UNAC 2014 Guide (p. 30) notes, the autonomy of the prevention officer is "an obvious requirement, essential for the officer's faithful discharge of his/her duties". It therefore should not be dispensed with lightly. Phase 3 Recommendation 1(b) accordingly asked Chile to ensure that the requisite independence of prevention officers is determined based on all relevant factors, and not solely on the size of the company's revenues.

167. Chile has not heeded this Working Group recommendation. It reiterates that the independence requirement is too onerous because SMEs have limited resources. But the rule in Law 20 393 considers only revenues, which is not a complete measure of a company's resources. Chile also states that the law does not prevent SMEs from having an independent prevention officer, but requiring them to do so would hinder their development. But by the same token, the current rule could also unduly hinder a company's development by requiring an independent prevention officer even if the company's risk profile does not justify such a measure. Chile's questionnaire responses also argue at length that "the entity's size or organisational complexity [...] are factors to be taken into account." But this is precisely the problem with Law 20 393, which takes into account only the company's revenues and not its additional features or other measures of its size. With around 24 000 exporters, the SME sector is also sufficiently large that justifies stronger anti-corruption measures.

Commentary

The lead examiners reiterate Phase 3 Recommendation 1(b) and recommend that Chile amend Law 20 393 to ensure that the requisite independence of prevention officers is determined based on all relevant factors, and not only the size of the company's revenues.

d. Certification of Offence Prevention Models and the Regulation of Certifiers

168. Under Law 20 393 Art. 4(4), a legal person may obtain a certification of the adoption and implementation of its OPM. A certificate attests that the OPM meets the minimum requirements in Arts. 4(1)-(3) and is valid for up to two years. The number of companies with certified OPMs has more than doubled from 236 in Phase 3 in 2014 to 498 in 2017. Certification is performed by external auditing companies, risk-rating agencies or other entities registered with the *Comisión para el Mercado Financiero* (CMF) (previously the Securities and Insurance Superintendence, SVS). There are 24 registered certifiers, up from 19 in Phase 3.

169. It is questionable whether certifiers have sufficient expertise in anti-corruption compliance. As in Phase 3, the requirements on the qualification of certifiers are minimal. Individuals involved in the certification process need only have a degree that provide him/her with "knowledge related to process assessments and the controls associated thereto, sufficient to adequately exercise the individual's work" (CMF Instruction 302/2011). Expertise in anti-corruption corporate compliance is not a prerequisite. Just one of the six certifiers at the on-site visit had worked previously in anti-corruption and anti-money laundering. The remaining stated that they had general experience in compliance without specifying in what area. Almost all of the certifiers had been accountants, auditors and/or business school graduates. None stated that he/she had received formal anti-corruption training.

170. The standards and methodology for certification vary widely. As explained at p. 51, Law 20 393 stipulates only the minimum elements for an effective OPM. The CMF has not issued further guidance on additional OPM elements for preventing bribery. Like Chilean companies, certifiers must rely on material from foreign jurisdictions. There is also no guidance on the methodology for determining whether an OPM meets the requisite standards. CMF Instruction 302/2011 requires certifiers to develop a methodology but does not specify its contents. In practice, very different methodologies are used. Some but not all certifiers at the on-site visit use detailed questionnaires. Some focus on gap identification; others on risk analysis. One certifier used a methodology with 12 components, while another had 35. Only one certifier described testing a company's prevention and detection measures. Most certifiers take on average 3 months to issue a certificate, but one said 12 months.

171. These lax rules are exacerbated by an almost complete lack of oversight by Chilean authorities. When asked about the regulation of certifiers, the Ministries of Justice and Finance stated that the CMF is responsible for this matter. However, the CMF does not verify whether certifiers meet the qualification requirements, who are merely required to provide sworn statements to that effect. A "field supervision" conducted in 2018 covered only 4 out of 24 certifiers, though Chile contends that these 4 certifiers accounted for 87% of the certificates that were issued. The CMF also did not examine the methodology and standard applied by a certifier, but only whether a certifier generated documents required by Instruction 302. An earlier "supervision plan" meant to identify instances of conflict of interest was based on reports provided by certifiers. Verification conducted by the CMF was limited to using open sources to confirm whether a certifier has a financial interest in a company they certify. The CMF said it had no choice but to "trust the certifiers".

172. This lack of regulation inevitably leads to certifications of uneven quality which undermines Law 20 393's goal of promoting effective corporate compliance. Companies at the on-site visit observed that certifiers "work very differently" which they take into account when choosing a certifier. "Certifier shopping" would seem likely. Even the certifiers at the on-site visit would like to see greater regulation, at least in the area of certification methodology.

Commentary

The lead examiners regret that since Phase 3 Chile has not improved the rules on certifier qualifications, and on the standard and methodology of certification. The current rules are not sufficient to ensure quality. The CMF exercises only the superficial oversight of certifiers that they are mandated to do by law. As a result, there is no assurance that certified OPMs are effective in preventing foreign bribery.

For these reasons, the lead examiners reiterate Phase 3 Recommendation 2(b) and recommend that Chile (a) stipulate qualification requirements that ensure certifiers have sufficient expertise in anti-corruption corporate compliance, (b) provide guidance to certifiers on the elements of an effective OPM for preventing foreign bribery (see p. 52), (c) stipulate the methodology, procedure and criteria for the certification of OPMs, and (d) ensure that the CMF enforces the rules concerning certifier qualifications, methodology and standards.

e. Legal Effect of a Certified Offence Prevention Model

173. Although Law 20 393 allows OPMs to be certified, it does not provide that certification would necessarily allow a company to escape liability for bribery. In Phase 3,

prosecutors, lawyers, companies and certifiers had widely divergent views on the legal consequences of certification. Phase 3 Recommendation 2(a) thus asked Chile to clarify this issue.

174. Opinion on the legal effect of certification has since consolidated into two camps. At one end, companies and certifying entities generally agree that the certification does not automatically exempt a legal person from liability. As one company stated at the on-site visit, a certificate is “just a piece of paper” that gives a third-party opinion on an OPM. A certificate may have “some evidentiary value”, but the test of liability remains whether an adequate OPM had been effectively implemented at the time of the offence.

175. At the other end, the Public Prosecutors’ Office (PPO) believes that certification raises a rebuttable presumption that the OPM defence will succeed and shield the company from liability. The 2014 [UNAC Practical Guide](#) states that certification “involve[s] a greater challenge for the investigation, since it must be effective enough to *disprove compliance* evidenced by the certification granted” (emphasis added). Chile’s questionnaire responses similarly state that certification elevates the evidentiary standard for the prosecutor and raises a “presumption of compliance of management and supervision duties”. The earlier Prosecutor Instruction 440/2010 also states that establishing corporate liability is more complex if a company’s OPM has been certified.

176. The PPO’s position is not consistent with Chilean law or sound policy. Law 20 393 does not state that certification raises a presumption of compliance. As the private sector rightly noted, the test of liability in the Law is whether a properly designed OPM was effectively implemented at the time of the offence. This is an issue for the judge and prosecutor, not the certifier of the OPM. Chile’s questionnaire responses go so far as to suggest that the prosecutor may be reduced to examining the certification process. This is hardly the original role of the prosecutor contemplated under Law 20 393.

177. Towards the end of this evaluation, the PPO attempted to soften its position by stating that certification creates “evidentiary difficulties”. Nevertheless, a clear statement of official policy will be necessary to ensure uniform application of the law in the PPO, given the earlier repeated statements that certification raises a rebuttable presumption of compliance, as well as the language in the 2014 UNAC Practical Guide and Prosecutorial Instruction 440/2010 to similar effect.

Commentary

The lead examiners are highly concerned with the weight that Chilean authorities accord to the certification of an OPM. Under both Law 20 393 and Annex I of the 2009 Anti-Bribery Recommendation, a legal person should be liable for foreign bribery committed by a lower level employee that results from a failure of supervision or of implementation of internal controls and compliance measures. Whether the company’s compliance programme has been certified is not the question. If certification raises a presumption of compliance, as the PPO contends, then the responsibility of determining guilt or innocence would essentially be delegated at least in part from the judge and prosecutor to the certifier. This would not be sound public policy. Nor would it be consistent with Law 20 393 or the Anti-Bribery Recommendation. Concerns about excessive weight given to certification are aggravated by the poor regulation of certifiers and the lack of standards for certification (see previous section) as well as the large number of certificates that have been issued.

For these reasons, the lead examiners recommend that Chile ensure prosecutors do not consider that certification creates a presumption that the legal person has successfully

discharged its direction and supervisory functions, and that the court and the prosecutor have the sole responsibility of determining this issue when considering liability under Law 20 393. In particular, Prosecutor Instruction 440/2010 and the 2014 UNAC Practical Guide should be amended to reflect this position.

Just before the adoption of this report, the PPO stated that certification does not raise a presumption of compliance. The lead examiners welcome this statement and urge Chile to amend its existing policy documents described above in a manner consistent with this statement.

C.3. Jurisdiction to Prosecute Legal Persons

178. Chile has not implemented Phase 3 Recommendation 5 to amend its legislation to clearly provide territorial and nationality jurisdiction to prosecute legal persons for the foreign bribery offence. At various times since Phase 3, Chile has provided four different theories on its jurisdiction to prosecute legal persons. Initially, it stated that it could prosecute a legal person for foreign bribery only when it also had jurisdiction to prosecute the natural person who committed the crime. This meant Chile cannot prosecute a Chilean company for extraterritorial foreign bribery committed by a non-Chilean employee or resident. Chile then argued that the Organic Court Code Art. 6(2) provided nationality jurisdiction over not only natural but also legal persons. It reiterates this argument in Phase 4. But the provision refers to jurisdiction to prosecute “a Chilean or a person who has habitual residence in Chile” and hence appears to only apply to natural persons, although there is no case law on these matters. The Working Group has rejected two further arguments based on the first and second paragraphs in Law 20 393 Art 5.⁴⁵

Commentary

The lead examiners reiterate Phase 3 Recommendation 5 and recommend that Chile amend its legislation to clearly provide territorial and nationality jurisdiction to prosecute legal persons for foreign bribery.

C.4. Sanctions and Confiscation against Legal Persons

a. Sanctions and Confiscation Available

179. In Phase 3, Law 20 393 Arts. 9-16 provided for the following sanctions against legal persons for foreign bribery: (i) a fine of UTM 200-10 000 (CLP 9.5-475 million or USD 14 000-718 000), with the maximum doubling to CLP 950 million (USD 1.4 million) if there is a conviction for the same offence in the previous five years; (ii) dissolution of the legal person or cancellation of its status (not applicable to public entities or public service providers); (iii) permanent or temporary debarment from acts and contracts with the State; and (iv) partial or total loss of fiscal benefits (e.g. tax breaks), or an absolute prohibition from receiving such benefits for a specified period. Publication of the judgment was mandatory upon conviction. Confiscation of the proceeds and instruments of an offence was, in theory, also mandatory. Value confiscation was not available, as with natural persons (see p. 38).

180. Since 2009, the Working Group has said that the maximum fine of USD 718 000 for a first offender, even if doubled for a repeat offender, was wholly insufficient. The value

⁴⁵ Phase 3 Report para. 108; Phase 3 Written Follow-Up Report, para. 7 and pp. 28-29.

of contracts and profits that companies obtain through foreign bribery is frequently higher by several orders of magnitude. Prosecutors have implicitly acknowledged the inadequacy of fines by extracting heavier penalties from companies through conditional suspensions (see next section).

181. Law 21 121 rectified these concerns. Foreign bribery was reclassified as a felony and hence the applicable fines were increased to UTM 40 000-300 000 (CLP 1.9-14.3 billion or USD 2.9-21.5 million). Dissolution and confiscation, including value confiscation, are also available. These developments implement Phase 3 Recommendations 3(d) and are welcomed.

b. Sanctions Imposed in Practice

182. Chile has prosecuted and sanctioned only one legal person for foreign bribery. In the absence of foreign bribery cases, this report examines sanctions imposed against legal persons in several domestic corruption cases. According to Chile, 14 legal persons have been prosecuted for domestic corruption under Law 20 393.

183. The sole corporate prosecution for foreign bribery was in the *Asfaltos Chilenos* case. Two agents of a Chilean company allegedly offered to increase the commission under a cement contract from USD 15 to USD 25 per tonne. The extra commission would be split among the two agents and a Bolivian official. The company resolved charges of foreign bribery under Law 20 393 through a conditional suspension (SCP), agreeing to donate CLP 10 million (USD 15 000) in computer equipment to an educational centre and to implement an offence prevention model (OPM). As mentioned at para. 129, it is not clear how the amount of the donation was arrived at.

184. Three domestic corruption cases have resulted in corporate convictions, all through abbreviated procedures. In the *Salmones Colbún* case which was discussed in the Phase 3 Report, bribes totalling CLP 1 to 3.8 million (USD 1 500-5 700) were paid to obtain gains of CLP 5 million (USD 7 500). Two companies were each fined UTM 500 (CLP 23.8 million or USD 36 000), loss fiscal benefits and a water permit, and debarment. In the *University of Del Mar (No. 2)* case,⁴⁶ a university paid bribes of CLP 45 million (USD 68 000) and was fined UTM 2 000 (CLP 95 million or USD 144 000). In the *Pehuente* case,⁴⁷ bribes of CLP 1.5 million (USD 2 300) were paid to avoid CLP 188 million (USD 284 000) in fines. The company was fined UTM 680 (CLP 32 million or USD 48 000) and debarred from public procurement for four years. Confiscation was not sought or imposed in these cases.

185. Additional legal persons have been sanctioned for domestic corruption through conditional suspensions (SCPs). In the *Ceresita* case discussed in the Phase 3 Report, the company bribed Chilean officials to avoid land zoning restrictions. The suspension comprised ten conditions, including a donation of land to the government, construction of a recreational park and implementation of an OPM. The economic value of the conditions was USD 2.5 million. In the *SQM* case, the company allegedly made illicit payments to politicians. It agreed to pay USD 4.2 million and agreed to improve its OPM. Like the *University del Mar (No. 2)* case, the *SEK University* case involved bribery to obtain accreditation. The university agreed to pay CLP 25 million (USD 38 000) to the Treasury,

⁴⁶ 8th Guarantee Court, Santiago (2 June 2016), RUC 1200084351-0.

⁴⁷ 7th Guarantee Court, Santiago (19 August 2015), RUC 1400129785-7.

create a CLP 500 million (USD 760 000) scholarship programme, and continue operating an OPM.

186. These four cases resolved through SCPs are notable in two respects. First, the legal persons agreed to financial penalties well in excess of the maximum fines available under Law 20 393. This is a clear indication that the maximum fines upon conviction are too low. Second, the facts underlying the resolution are not published (see para. 128). It is therefore not possible to assess whether the sanctions were effective, proportionate and dissuasive.

Commentary

The lead examiners note that the recent Law 21 121 amended the foreign bribery offence to provide for confiscation in foreign bribery cases. However, the provision only requires confiscation against a bribed official. A similar provision requiring confiscation against the briber existed before the amendment but did not result in the use of confiscation against legal persons. They therefore recommend that Chile (a) take further steps to ensure that confiscation is routinely sought and imposed against legal persons in corruption cases where appropriate. As mentioned at p 43, Chile should also improve the framework for resolutions of foreign bribery cases through SCPs and ABPs.

C.5. Engagement with the Private Sector

187. Phase 3 Recommendation 11(a) asked Chile to “continue to raise awareness in a more co-ordinated manner, involving all relevant government bodies that interact with Chilean companies that are active in foreign markets, and make greater efforts to raise awareness among enterprises, particularly small- and medium-sized enterprises (SMEs)”. Recommendation 6(iii) also asked Chile to maintain statistics on the format, regularity, audience and impact of its awareness-raising seminars and events. Chile has since made some limited efforts to engage the private sector. However, the impact of these efforts has been muted, especially among SMEs. Co-ordination continues to be problematic, with important government bodies remaining uninvolved.

188. The Ministry of Foreign Affairs (MOFA) has done most of the awareness-raising. A booklet explaining the Convention referred to in the Phase 3 Report remains available on MOFA’s [webpage](#). A second [webpage](#) from the General Directorate of International Economic Relations (DIRECON) also explains the Convention. In 2014, the MOFA issued a [brochure](#) on preventing foreign bribery that was sent to some 7 000 companies in the database of ProChile (two-thirds of which were SMEs). The brochure was updated in 2018. MOFA’s Directorate of International and Human Security (DISIN) has asked Chilean overseas mission to raise awareness, though these efforts pertain more generally to anti-corruption and not necessarily foreign bribery.

189. Other government bodies have engaged in awareness-raising to a lesser degree. As mentioned at para. 161, the CAIGG and UNAC have issued guidance on corporate offence prevention models (OPMs). Two SME agencies in the Ministry of Economy (MOE)⁴⁸ state that they have provided training to SMEs with a foreign bribery component. The National Group of Experts against Corruption (GNECC) that was formed in 2003 also stated that it has raised awareness. No details were provided of these efforts, however. UAF’s efforts are described at p. 17.

⁴⁸ The *División de Empresas de Menor Tamaño*) and the *Consejo Nacional Consultivo de la Empresa de Menor Tamaño*.

190. These efforts have had an uneven impact. None of the companies at the on-site visit could recall government awareness-raising efforts or were aware of the guidance from CAIGG and UNCC (see para. 163). A few business organisations stated vaguely that the government made some efforts but could not provide any details. That said, large companies generally appeared to be aware of the risk of foreign bribery. A few mentioned high-risk jurisdictions where they do business. Another explained that their extensive reliance on intermediaries was their main source of risk. SMEs, however, likely continue to have little awareness of foreign bribery. As mentioned at para. 153, OPMs remain uncommon among SMEs. Some on-site visit participants said that SMEs do not need compliance systems, and that anti-bribery measures are “never a priority” for SMEs.

191. Results likely would have been better had some government bodies been more active. The CMF has direct contact with listed companies but has not raised awareness of foreign bribery. It has also been inactive in promoting and setting guidance on OPMs (see para. 170). ProChile (MOFA’s trade promotion agency) also has direct contact with Chilean companies, but it too has not raised awareness. The MOE’s two SME agencies stated that CORFO is better positioned to raise awareness, but CORFO itself has done little in this respect (see para. 215). An Anti-Corruption Alliance consisting of the public and private sectors, academics, and civil society was formed in 2012. It has not specifically addressed foreign bribery, however, and focuses only on the implementation of the UN Convention against Corruption.

192. After the on-site visit, Chile updated and sent the MOFA brochure on preventing foreign bribery to all 785 public officials of DIRECON. MOFA’s DISIN raised awareness among Chilean overseas missions through capacity-building activities and a follow-up questionnaire that specifically referred to foreign bribery. ProChile, PPO and UAF organised workshops on the prevention of foreign bribery for SMEs.

Commentary

The lead examiners recommend that Chile continue to raise awareness in a more co-ordinated manner by involving all relevant government bodies that interact with Chilean companies that are active in foreign markets. Efforts should especially continue to focus on SMEs. They also reiterate their recommendation at p. 52 that Chile develop guidance on OPMs and disseminate them to the private sector.

D. OTHER ISSUES

D.1. Tax Measures for Combating Bribery

a. Non-Tax Deductibility of Bribes and Financial Sanctions

193. Chilean law prohibits the tax deduction of bribes and of financial sanctions for bribery. Chile’s Internal Revenue Service (*Servicio de Impuestos Internos*, SII) adopted [Circular 56](#) in 2007 to make explicit that bribes are not tax-deductible. [Circular 38/2018](#), which was issued immediately after the Phase 4 on-site visit and replaced Circular 56/2007, also expressly prohibits the tax deduction of bribes. The Circulars are legally binding and available on SII’s website. Chile states that fines and confiscation imposed upon a criminal conviction are not tax deductible, since Art. 31 of the [Income Tax Law](#) only allows the deduction of expenses that are necessary to produce income.

194. The prohibition against the deduction of financial sanctions could be circumvented, however. As described at para. 137, companies and individuals are often required to make a charitable donation as part of a resolution of corruption charges through a conditional suspension of proceedings. These payments may not be tax deductible as a business expense under Art. 31. However, SII states that if certain requirements are met, then some payments may be deductible as a charitable donation under Art. 31(7), *e.g.* the recipient is a non-profit institution whose exclusive or principal purpose is to provide a benefit to the public;⁴⁹ the payments support training programmes; and payments do not exceed a certain percentage of the company's taxable liquid income or capital.

195. Phase 3 Recommendation 9(b) asked Chile to strengthen the enforcement of non-tax deductibility of bribes. The Working Group suggested that SII be routinely informed of foreign bribery convictions. SII could then audit the taxpayer who has been convicted to see whether the bribe had been deducted from income tax as a legitimate expense. SII would not need to prove that the payment was a bribe, as this would already have been proven as part of the criminal conviction. Under Chilean law, SII may re-examine a tax return within six years of the date of filing.

196. Chile has only partially implemented this Phase 3 recommendation. The Public Prosecutor's Office (PPO) informs SII about a bribery case only if the case also involves a tax crime that is punishable by the deprivation of liberty.⁵⁰ This rule would require the PPO to report some but not all foreign bribery cases, since claiming a tax deduction of a bribe as a business expense is not necessarily a tax crime that could result in incarceration. Moreover, the PPO informs SII of *allegations*, which in and of itself is not necessarily a problem. But the Phase 3 recommendation concerns the referral of *convictions*.

Commentary

The lead examiners reiterate Phase 3 Recommendation 9(b) and recommend that Chile ensure that SII is routinely informed of foreign bribery convictions and systematically re-examines the relevant tax returns of convicted taxpayers to determine whether bribes have been deducted.

b. Detection of Bribes

197. SII has yet to detect a foreign bribery case. SII is one of the government bodies that are required to file Suspicious Transactions Reports (STRs) to the Financial Analysis Unit (see p. 13). Since 2015, 13 STRs have been generated but these cases involved money laundering generally and not corruption, according to SII. SII states that it also monitors taxpayers who are politically exposed persons (PEPs). However, these individuals are likely Chilean officials, and hence the monitoring would help detect domestic – not foreign - bribery.

198. Chile has not implemented a Phase 3 recommendation to strengthen SII's ability to detect bribe payments. The Standard Plan is SII's reference manual for tax examinations. The Working Group recommended that the Standard Plan incorporate the essential elements of the 2013 OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors. This would ensure that tax examiners systematically include bribery in their risk assessments and audits. Chile has not done so, however. Instead, it has

⁴⁹ SII (13 July 2015), [Oficio N° 1809](#).

⁵⁰ Tax Code (Decree Law 830) Article 162(6).

translated the Handbook and circulated it to tax examiners as a separate document. Excerpts of the Handbook were also attached to SII Circular 12/2016. There is also no suggestion that SII has trained tax examiners on how to detect bribery.

199. Chile has also not implemented the Working Group’s recommendation to examine why SII had failed to detect proven cases of bribery. The Phase 3 Report noted that bribes deducted from taxes in the *Serlog* case were detected only after the taxpayer had been convicted. Chile agreed that it would analyse why SII failed to detect the bribes in the case when the tax return was first filed. It would also conduct a system-wide review of the detection framework. These tasks have not been performed.

Commentary

The lead examiners reiterate Phase 3 Recommendation 9(c) and recommend that Chile (a) incorporate the essential elements of the 2013 OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors into the SII’s Standard Plan for Tax Audits, (b) train tax examiners on how to detect bribery during tax examinations, and (c) examine why SII has failed to detect proven cases of bribery.

c. Reporting of Foreign Bribery and Information Sharing

200. Like several other government bodies, SII is subject to multiple obligations to report crime. As public officials, SII officials must report offences (including foreign bribery) to law enforcement authorities pursuant to CPC Arts. 175-177 (see p. 13). SII officials must also file suspicious money laundering transactions reports (STRs) to the Financial Analysis Unit (UAF) (Law 19 913 and SII Circulars 12/2016 and 17/2016). At the on-site visit, SII mentioned two other reporting obligations: [Circular 8/2010](#), which covers the reporting of tax crimes, and reporting misconduct by SII officials (Law 18 834 (Administrative Statute) Art. 61(k) and Circular 29/2017). SII also has a whistleblowing channel on its Intranet where “any official can report all types of fraud, irregularities or breaches of probity”. A channel on the Internet targets reporting of tax evasion, not foreign bribery *per se*.

201. As with the other government bodies, the multiple reporting obligations may raise challenges. SII confirms that an unwritten procedure requires reports under the CPC to go first to the head of the reporting official’s unit (Phase 3 Report para. 157). Reports of tax crimes may pass through an evaluation committee (Circular 8/2010). STRs involving foreign bribery are sent to a regional SII legal department or the central “Department of Criminal Judicial Defence” (Circular 12/2016 Section 4). Reports from all three channels then ultimately find their way to SII’s central legal directorate. But STRs involving other offences must be reported to the official’s superior and then an evaluation committee that decides whether to report the matter to the UAF (Circular 17/2016). Reporting of misconduct by SII officials follow another different channel, to the Deputy Director of Internal Controller (Circular 29/2017). An SII official must file an STR within 48 hours of becoming aware of the suspicious transaction. But reports under the CPC or Circular 8 are not subject to a strict deadline and must be made only within a reasonable time, according to SII.

202. SII may also share information with law enforcement upon request. On a domestic level, the SII must provide information to Chilean courts and prosecutors upon demand unless the information sought is subject to legislative provisions on secrecy. If a prosecutor challenges a claim of secrecy, the matter will be decided by the courts (Arts. 19 and 180 CPC). The PPO also has direct access to information held by SII on a secure website,

including tax returns.⁵¹ On an international level, Chile ratified in 2016 the Convention on Mutual Administrative Assistance in Tax Matters. Art. 22.4 of the Convention allows Chile to share information received for tax purposes with law enforcement authorities to combat corruption and other financial crimes under certain conditions. Phase 3 Recommendation 9(d) is thus implemented. Chile states that its recent bilateral tax treaties contain similar language for information-sharing taken from Art. 26 of the OECD Model Tax Convention.

Commentary

Like their counterparts in other government bodies, SII officials are subject to multiple provisions that could require them to report allegations of foreign bribery. Reports under the different provisions ultimately arrive in SII's central legal department before they are forwarded to the PPO or UAF. This lessens concerns about co-ordination. To make the reporting framework more effective and easier to apply, the lead examiners recommend that Chile make the existing reporting obligations more consistent.

D.2. Public Advantages

203. This section considers the denial of public advantages, including public procurement contracts, as administrative sanctions for foreign bribery. It also addresses the prevention, detection and reporting of foreign bribery by agencies involved in officially supported export credits and guarantees as well as official development assistance (ODA). The latter was the subject of Phase 3 Follow-up Issue 13(f).

a. Public Procurement

204. As in Phase 3, Chile has two parallel provisions to provide debarment from public procurement as a sanction for certain crimes, including foreign bribery. Under Art. 10 of Law 20 393 (corporate liability), a company may be debarred permanently or for two to five years. Under Art. 92 of Ministry of Finance Decree 250/2004, persons convicted of bribery (including foreign bribery) are excluded from *ChileProveedores*, the government's registry of suppliers, for three to five years. Unlike Law 20 393, exclusion from *ChileProveedores* is mandatory upon conviction and applies to both natural and legal persons.

205. The Phase 3 Report expressed concerns about ineffective enforcement of this debarment regime. *ChileCompra*, within the Ministry of Finance, oversaw Chile's public procurement system. It maintained a [register](#) of debarred companies based on information provided by the Public Prosecutor's Office monthly. There was no indication, however, that procuring agencies were informed of the register or were required to check it before awarding a contract.

206. Chile has taken steps to address these concerns since Phase 3. *ChileCompra* launched a new electronic procurement project in 2016 that required procuring entities to use an on-line form when buying from suppliers. A clause in the form requires the procuring entity to check the debarment register and acknowledge that the supplier has not been debarred under Law 20 393. This system currently covers approximately 70% of procurement but is expected to increase to 100% by 2019. In addition, the 2017 Code of

⁵¹ OECD (2017), [Effective Inter-Agency Co-Operation in Fighting Tax Crimes and Other Financial Crimes](#), (3rd. ed.), p. 225.

Ethics on Integrity in Public Purchases (Section 3.2.2(b)) states that procuring entities must check the debarment register. Procurement officials must also pass a test on technical competency, knowledge of regulations, and ethics. Despite these measures, however, Chile's official development agency does not appear to follow the prescribed procedure (see next section).

207. More could be done, however, to assess the anti-corruption measures of suppliers. According to *ChileCompra*, Chilean procuring entities do not routinely check the debarment lists of multilateral financial institutions. This is because a company's presence on such a list is not a ground for denying procurement contracts under Chilean law. However, this overlooks the fact that debarment by a multilateral financial institution could indicate a supplier's lack of fitness. Procuring entities also do not examine a supplier's anti-corruption compliance programme or offence prevention model, since procurement contracts do not require such a programme or model.

Commentary

The lead examiners reiterate Phase 3 Recommendation 12(a) and recommend that Chile encourage public contracting authorities to (a) routinely check the debarment lists of multilateral financial institutions in relation to public procurement contracting, and (b) consider, as appropriate, the internal controls, ethics and compliance programmes of companies seeking procurement contracts.

b. Official Development Assistance

208. Chile's ODA programme is modest compared to other OECD countries. The programme is managed by the Chilean International Co-operation and Development Agency (*Agencia Chilena de Cooperación Internacional para el Desarrollo*, AGCID). In 2017, Chile provided under USD 7.2 million in bilateral assistance to 46 countries in South America (26%), Central America (20%), Mexico (20%), Africa (17.1%) and the Caribbean (16.7%). Additional "triangular" assistance was provided in partnership with other donors. Chile is not a member of the OECD Development Assistance Committee (DAC). For the sake of comparison, the smallest ODA programme in 2016 among the then 29 DAC members was USD 25.7 million, approximately 3.5 times bigger than Chile's.⁵²

209. Chile's ODA projects are generally not at risk of involving foreign bribery. AGCID has not used private sector companies or individuals to implement its projects, and has used NGOs in only two projects to date. Two-thirds of the ODA is spent on the training of human capital, mostly by providing scholarships. The remaining assistance consists of knowledge transfer through internships, as well as seminars and expert missions by mostly Chilean public officials.⁵³ These types of assistance are unlikely to involve bribery in international business as defined in the Convention. Nevertheless, AGCID's anti-corruption efforts are relevant to Chile's implementation of the 2016 OECD Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption.

210. AGCID's standard ODA contract contains measures to prevent and detect corruption. Clause 14 stipulates that, if the officials or employees of the party implementing

⁵² OECD, [International Development Statistics](#); AGCID (25 April 2018), "[Cuenta Pública AGCID 2017: Chile coopera para la inclusión social y el medio ambiente en la Región](#)".

⁵³ AGCID (25 April 2018), "[Cuenta Pública AGCID 2017: Chile coopera para la inclusión social y el medio ambiente en la Región](#)".

the project engage in corruption, including foreign bribery, then the agreement shall be terminated without compensation. Future contracts between AGCID and the implementing party are prohibited. The clause refers to the 1996 predecessor of the 2016 OECD Recommendation, however. Clause 7 allows AGCID to evaluate, supervise and monitor the project. Clause 11 obliges the contractual parties to co-operate with audits conducted by the Office of the Comptroller General.

211. AGCID officials are subject to at least four reporting obligations. They must report criminal offences to law enforcement under the Criminal Procedure Code (CPC); suspected money laundering under Law 19 913; as well as criminal offences and breaches of the principle of administrative probity under the Administrative Statute (see p. 13). Furthermore, violations of the [AGCID Code of Ethics](#) must be reported to the head of unit, or to the AGCID officer responsible for the Code if greater confidentiality is needed. The matter can be further reported to the Comptroller General after all internal reporting channels have been exhausted.

212. Communication of these reporting obligations could be improved, however. The Code of Ethics refers to the two reporting obligations under the Code and the Administrative Statute but not the others. Some AGCID officials attended training organised by UAF on reporting under Law 19 913. AGCID has a compliance officer responsible for STRs; whether other officials are informed or trained is unclear. There is no indication that AGCID officials have been reminded of the reporting obligations or reporting channels under the CPC. There is no information on whether and how confidential reports can be made. There are no provisions to protect whistleblowers other than those that apply generally to public officials (see p. 15). Information about the available protection has also not been communicated.

213. AGCID debars individuals and companies that have been convicted of foreign bribery from ODA contracts. Its standard ODA contract contains a provision to this effect (see above). At the on-site visit, AGCID added that the award of ODA contracts is subject to Chilean law on public procurement. However, AGCID's process for vetting applicants differs substantially from the one prescribed by the procurement authorities (see para. 206). For example, AGCID states that Art. 92 of the Ministry of Finance Decree 250/2004 governs debarment, and does not refer to debarment under Law 20 393 (on corporate liability). During the application process, AGCID does not check the debarment lists maintained by *ChileCompra* or multilateral financial institutions (e.g. the World Bank). Nor does AGCID consider the applicant's corruption risk management system. It also does not analyse or consider the risk of corruption in the ODA recipient country before awarding contracts.

Commentary

The lead examiners commend AGCID for adopting anti-corruption measures despite a relatively limited ODA programme. They recommend that AGCID strengthen these measures by further implementing key aspects of the 2016 OECD Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption. In particular, AGCID should (a) analyse and consider the risk of corruption in an ODA recipient country before awarding ODA contracts; (b) evaluate the anti-corruption risk management systems of ODA contract applicants; (c) verify whether applicants have been convicted of corruption or foreign bribery under the Penal Code or Law 20 393 (on corporate liability), or are on the debarment lists of ChileCompra or multilateral financial institutions; (d) make more consistent the reporting channels for the different reporting obligations; (e) remind AGCID officials and relevant stakeholders of their

obligations (especially under the CPC and Law 19 913) to report corruption in ODA projects, and communicate to them the channels for reporting; and (f) ensure that its standard ODA contract refers to the 2016 ODA Recommendation.

c. Officially Supported Export Credits and Guarantees

214. Chile still has not adhered to the [2006 Recommendation of the Council on Bribery and Officially Supported Export Credits \(2006 Recommendation\)](#). During its accession to the OECD and its Phase 2 evaluation, Chile undertook to adhere to the 2006 Recommendation and to implement anti-foreign bribery measures.⁵⁴ In Phase 3, Chile stated that it had not adhered to the Recommendation because it was not providing export credits or guarantees. The Chilean Economic Development Agency (*Corporación de Fomento de la Producción*, CORFO) has the Foreign Trade Credit Guarantees Programme (COBEX) which provides coverage to financial intermediaries that extend credit to companies involved in foreign trade. Coverage is triggered in case of non-payment, without extinguishing the debt of the company. Such export guarantees have an average duration of six months. Nevertheless, Chile continues to decline adhering to the Recommendation because CORFO provides such guarantees through financial intermediaries and not directly to companies. It does not consider CORFO to be an export credit agency.

215. CORFO is nevertheless planning to introduce two anti-corruption measures. First, participants in the COBEX programme would be required to declare that they are aware of Chile's corporate liability and foreign bribery laws. Exporters must further declare that their resources are of lawful origin and would be used for legal purposes. Financial intermediaries must also declare that funds provided to the company are administered in accordance with relevant laws, COBEX regulations, and best practices on transparency. Second, financial intermediaries must verify whether a multilateral financial institution (e.g. the World Bank) has debarred an exporter. These are commendable initiatives but the 2006 Recommendation suggests many more measures to prevent, detect, report and sanction foreign bribery.

216. Officials in CORFO, like in other public bodies, are subject to multiple obligations to report crime. CORFO's Code of Ethics require officials who witness or become aware of a crime during the performance of their duties to file a complaint with the Public Prosecutor's Office (or the Police if there is no prosecutor's office). This obligation derives essentially from CPC Arts. 175-177 and the Administrative Statute Art. 61(k). In addition, Law 19 913 requires CORFO officials to report suspected money laundering transactions to the Short-Term Compliance Officer or through the intranet.

Commentary

The lead examiners reiterate Phase 3 Recommendation 12(b) and recommend that Chile adhere to the 2006 Recommendation on Bribery and Officially Supported Export Credits (or its successor instrument). In addition, they recommend that Chile adopt and implement anti-corruption measures planned by CORFO in the context of the COBEX programme.

⁵⁴ See Phase 3 Report para. 195; Phase 2 Report para. 42; Phase 2 Written Follow-Up Report Written Follow-Up Report para. 5 and pp. 15-16; CORFO Official Letter 688/2007; CORFO letter to ECG Chair dated 1 July 2009.

CONCLUSIONS: POSITIVE ACHIEVEMENTS, RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

217. The Working Group commends Chile for its enforcement efforts since Phase 3. Chile obtained its first foreign bribery conviction against a natural person in November 2016. Another foreign bribery case was successfully resolved without trial in October 2015, resulting in sanctions against a company and one of its managers. Chile has also enacted Law 20 121 which clarified some aspects of its foreign bribery offence, and increased the sanctions and statute of limitations for foreign bribery.

218. Yet, the Working Group is of the view that Chile could do more to increase enforcement and compliance with the OECD Convention. In particular, Chile should improve its framework for the resolution of corruption cases through SCPs and ABPs. It must address longstanding concerns about the scope of and guidance on the offence prevention model (OPM) defence, the legal effect of certification of OPMs, and the regulation of certifiers. Furthermore, despite the enactment of Law 20 121, 24 of 34 Phase 3 recommendations remain outstanding, including 8 which require legislative action. Of note, effective whistleblower protection is urgently needed in both the public and private sectors. Longstanding recommendations on confiscation, bank secrecy, and certifiers of offence prevention models remain outstanding.

219. Of the Phase 3 recommendations that were outstanding after the 2016 Written Follow-Up Report, Chile has implemented Recommendations 3(a)-(b) and (d) (sanctions), 4(a) (investigations and prosecutions) and 9(d) (tax-related measures). It has partially implemented Recommendations 1(a) (liability of legal persons); 2(a)-(b) (OPM certification); 3(c) (sanctions); 4(h) (investigations and prosecutions); 6 (statistics); 7(a) (money laundering); 8(b) (accounting and auditing); 9(b)-(c) (tax); 11(a)-(b) (awareness-raising) and 12(b) (public advantages). Chile has not implemented Recommendations 1(b) (independence of prevention officers); 3(e) (sanctions); 4(f)-(g) (investigations and prosecutions); 5 (jurisdiction); 7(b) (money laundering); 8(a) (accounting and auditing); 10(a)-(b) (international co-operation); 11(c) (whistleblower protection); and 12(a) (public advantages).

220. In conclusion, based on the findings in this report, the Working Group acknowledges the good practices and positive achievements set out in Part 1 below and makes the recommendations set out in Part 2. The Working Group will also follow up the issues identified in Part 3. The Working Group invites Chile to submit a written report on the implementation of these recommendations, the follow-up issues, and all foreign bribery enforcement actions in two years (*i.e.* by December 2020).

1. Good Practices and Positive Achievements

221. This report has identified several good practices and positive achievements in Chile for combating foreign bribery. Chile is commended for its first two successful foreign bribery enforcement actions, one of which was re-opened after Working Group criticism in Phase 3. A second re-opened case was also extensively investigated. Institutional arrangements further bolster enforcement. Foreign bribery investigations benefit from the expertise of a PPO anti-corruption unit (UNAC) that provides valuable assistance to prosecutors. This is mirrored by the creation of new police units that specialise in economic crime cases. Regional Prosecutors who are considered more experienced than local

prosecutors are assigned to foreign bribery cases. In several foreign bribery investigations, the PPO has widely used mutual legal assistance to seek evidence from abroad.

222. Further good practices are found in the prevention and detection of foreign bribery. The suspicious money laundering transaction reporting system has been expanded to create better conditions for the detection of corruption. Despite a limited official development assistance programme, Chile has adopted relatively comprehensive measures to prevent and detect corruption when delivering assistance abroad. By ratifying the Convention on Mutual Administrative Assistance in Tax Matters, Chile has enhanced the sharing of tax information with law enforcement authorities to combat corruption and other financial crimes.

2. Recommendations of the Working Group

Recommendations Regarding the Detection of Foreign Bribery

1. With regards to the **detection of foreign bribery**, the Working Group recommends that Chile:
 - (a) Adopt as a matter of priority an appropriate regulatory framework to protect private sector employees who report suspicions of foreign bribery from discriminatory or disciplinary action [2009 Recommendation IX.iii and Phase 3 Recommendation 11(c)];
 - (b) Provide comprehensive and adequate protection to whistleblowers in the public sector [2009 Recommendation IX.iii and Phase 3 Recommendation 11(c)];
 - (c) Enhance the Public Prosecutors' Office's capacity to detect foreign bribery cases [2009 Recommendation IX.ii];
 - (d) Monitor not only the Chilean but also the international media for foreign bribery allegations involving Chilean companies or individuals [2009 Recommendation IX.ii];
 - (e) Make efforts to increase its public officials' reporting of foreign bribery by (i) making the reporting obligations under the CPC, AS and Law 19 913 more consistent; (ii) training its officials on and raising their awareness of the mechanisms for reporting foreign bribery, such as by providing guidelines; and (iii) enforcing the obligation of public officials to report suspicions of crimes and imposing sanctions on those who breach this obligation [2009 Recommendation III.i, III.iv and IX.ii];
 - (f) (i) Analyse why Chilean overseas missions have failed to report specific foreign bribery allegations and take appropriate remedial action that address these failures; and (ii) take steps to ensure that the instructions in the new circular are properly implemented by its overseas missions and; (iii) ensure that its overseas missions actively monitor the local media for allegations of foreign bribery involving Chilean individuals and companies [2009 Recommendation IX.ii and Phase 3 Recommendation 11(b)(i)];

- (g) (i) Develop typologies of money laundering that specifically address foreign bribery, drawing on successfully concluded enforcement actions in Chile and material from foreign sources; and (ii) further train UAF staff and reporting entities specifically on detecting foreign bribery [2009 Recommendation III.i and Phase 3 Recommendation 7(b)];
- (h) (i) Encourage external auditors to take greater account of the risks of foreign bribery in the companies that they audit; (ii) align the reporting obligations that apply to the external audit profession by requiring external audit firms to report crimes to competent authorities; (iii) ensure that auditors who report suspected wrongdoing reasonably and in good faith to competent authorities are protected from legal action; and (iv) improve audit quality standards, including with regard to certification and independence [2009 Recommendation X.B.i, ii and iv, and Phase 3 Recommendation 8(b)]; and
- (i) Establish a policy for companies to self-report foreign bribery, including by considering whether to offer conditional suspensions and abbreviated procedures as an incentive for self-reporting [2009 Recommendation III.i].

Recommendations Regarding the Enforcement of the Foreign Bribery Offence

2. With regards to **investigations and prosecutions**, the Working Group recommends that Chile:
 - (a) Take steps to ensure that prosecutors and judges apply the autonomous definition of a foreign public official under Chilean law [Convention Art. 1 and Commentary 3];
 - (b) Take steps to ensure that expertise in forensic accounting and information technology is available in foreign bribery investigations [Convention Arts. 2 and 5, 2009 Recommendation III.ii and Annex I.B, and Phase 3 Recommendations 1(a) and 4(h)];
 - (c) Further train prosecutors on foreign bribery investigations and prosecutions, including corporate investigations and corporate offence prevention models [Convention Arts. 2 and 5, 2009 Recommendation III.ii and Annex I.B, and Phase 3 Recommendations 1(a) and 4(h)];
 - (d) (i) Ensure that it assesses credible allegations of foreign bribery when they surface, and seriously investigate this offence in Chile and abroad; and (ii) use proactive steps to gather information from diverse sources to increase sources of allegations and enhance investigations [Convention Art. 5, 2009 Recommendation V and Annex I.D];
 - (e) Align the investigative tools available in investigations of foreign bribery and money laundering, so that basic, special and covert investigative techniques are available and used in foreign bribery investigations [Convention Art. 5, Commentary 27 and Phase 3 Recommendation 4(g)]; and
 - (f) (i) Align the rules for lifting bank secrecy in foreign bribery cases with the rules applicable in domestic bribery cases, tax offences and money laundering;

- (ii) ensure that the information subject to banking restraints are readily available to prosecutors and not subject to bank secrecy rules; and (iii) take measures to reduce delay and improve the co-operation of financial institutions when providing the required financial information [Convention Arts. 5 and 9(3), and Phase 3 Recommendation 4(f)].
3. With regards to **conditional suspension of proceedings (SCPs) and abbreviated procedures (ABPs)**, the Working Group recommends that Chile, as a matter of priority:
- (a) Ensure that SCPs and ABPs remain available for natural persons in all foreign bribery cases [Convention Arts. 3 and 5, 2009 Recommendation Annex I.D];
 - (b) Improve transparency and accountability by (i) establishing more detailed criteria that prosecutors must consider when deciding whether to use an SCP/ABP; (ii) making public, as necessary and in compliance with the relevant rules, the essential elements of resolutions, in particular the reasons for using an SCP/ABP, the main facts of the case, the party(s) to the agreement, and the sanctions; and (iii) increasing judicial oversight of SCPs/ABPs, including the decision to use these measures and the terms of a resolution [Convention Arts. 3 and 5, 2009 Recommendation III.i and Annex I.D];
 - (c) Amend its legislation to ensure that all appropriate measures (especially the requirement that a legal person implement an OPM) and confiscation are equally available under an SCP and a conviction [Convention Arts. 3 and 5, 2009 Recommendation Annex I.D];
 - (d) Provide guidance on the choice of terms for an SCP, including on the use of charitable donations [Convention Arts. 3 and 5, 2009 Recommendation Annex I.D];
 - (e) Take greater steps to verify that OPMs implemented by companies pursuant to an SCP are adequate [Convention Arts. 3 and 5, 2009 Recommendation Annex I.D]; and
 - (f) Where conditions for foreign bribery under an SCP include donations, (i) ensure that such conditions are effective, proportionate and dissuasive, (ii) include as a term of the SCP that the offender shall not seek a tax deduction with the donation, and (iii) verify in all cases the appropriateness of charities that receive donations [Convention Art. 3].
4. With regards to **sanctions and confiscation**, the Working Group recommends that Chile:
- (a) Take steps to ensure that sanctions against natural persons are effective, proportionate and dissuasive in all foreign bribery cases in practice [Convention Art. 3(1) and Phase 3 Recommendations 3(c) and 6(i)];
 - (b) Maintain detailed statistics on sanctions imposed in domestic and foreign bribery cases [Convention Art. 3(1) and Phase 3 Recommendations 3(c) and 6(i)];

- (c) For natural persons, amend its legislation to provide for the confiscation of property, the value of which corresponds to that of the proceeds of a foreign bribery offence, or provide for monetary sanctions of comparable effect, in cases where the bribe and the proceeds of foreign bribery cannot be confiscated in [Convention Art. 3(3) and Phase 3 Recommendation 3(e)]; and
 - (d) Take further steps to ensure that confiscation is routinely sought and imposed in corruption cases against natural and legal persons, where appropriate [Convention Art. 3(3)].
5. With regards to **international co-operation**, the Working Group recommends that Chile:
- (a) Continue to be proactive when following up outstanding MLA requests, including by routinely contacting foreign authorities through informal channels and the Working Group [Convention Art. 9(3)];
 - (b) Provide training to prosecutors on seeking MLA in foreign bribery cases [Convention Art. 9(3)];
 - (c) Take all necessary measures to ensure that it will not deny MLA in foreign bribery cases on grounds of bank secrecy [Convention Art. 9(3) and Phase 3 Recommendation 10(a)];
 - (d) Ensure that it can provide MLA for confiscation of property the value of which corresponds to the bribe and the proceeds of foreign bribery [Convention Arts. 3(3) and 9, and Phase 3 Recommendation 10(b)]; and
 - (e) Take steps to reduce the time that the PPO takes to execute incoming MLA requests, especially when financial information is sought [Convention Art. 9].

Recommendations Regarding the Liability of, and Engagement with, Legal Persons

6. With regards to the **liability of legal persons**, the Working Group recommends that Chile:
- (a) Bring Law 20 393 in line with Annex I of the 2009 Anti-Bribery Recommendation by eliminating the OPM defence where bribery is committed by an individual with the highest-level managerial authority in a legal person [Convention Art. 2, 2009 Recommendation Annex I.B];
 - (b) (i) Develop guidance on the elements of an effective OPM for preventing foreign bribery, including by referring to Annex II of the 2009 Anti-Bribery Recommendation; (ii) disseminate the guidance to the private sector (especially SMEs), investigators, prosecutors, and the judiciary; (iii) encourage Chilean companies, especially SMEs, to adopt models that conform to the guidance [Convention Art. 2, 2009 Recommendation Annexes I.B and II, and Phase 3 Recommendation 1(a)(ii)];
 - (c) Amend Law 20 393 to ensure that the requisite independence of prevention officers is determined based on all relevant factors, and not only the size of the company's

revenues [Convention Art. 2, 2009 Recommendation Annexes I.B and II, and Phase 3 Recommendation 1(b)];

- (d) (i) stipulate qualification requirements that ensure certifiers have sufficient expertise in anti-corruption corporate compliance; (ii) provide guidance to certifiers on the elements of an effective OPM for preventing foreign bribery; (iii) stipulate the methodology, procedure and criteria for the certification of OPMs; and (iv) ensure that the CMF enforces the rules concerning certifier qualifications, methodology and standards [Convention Art. 2, 2009 Recommendation Annexes I.B and II, and Phase 3 Recommendation 2(b)];
 - (e) Ensure that prosecutors do not consider that certification creates a presumption that the legal person has successfully discharged its direction and supervisory functions, and that the court and the prosecutor have the sole responsibility of determining this issue when considering liability under Law 20 393, including through the amendment of Prosecutor Instruction 440/2010 and the 2014 UNAC Practical Guide [Convention Art. 2, 2009 Recommendation Annexes I.B and II]; and
 - (f) Amend its legislation to clearly provide territorial and nationality jurisdiction to prosecute legal persons for foreign bribery [Convention Art. 4 and Phase 3 Recommendation 5].
7. With regards to **engagement with the private sector**, the Working Group recommends that Chile continue to raise awareness in a more co-ordinated manner by involving all relevant government bodies that interact with Chilean companies that are active in foreign markets, including SMEs [2009 Recommendation III.i and Phase 3 Recommendation 11(a)].

Recommendations Regarding Other Measures Affecting Implementation of the Convention

8. With regards to **anti-money laundering measures**, the Working Group recommends that Chile:
- (a) Urgently require appropriate non-financial entities including lawyers, accountants and auditors to report suspected money laundering transactions related to foreign bribery [Convention Art. 7, 2009 Recommendation III.i, and Phase 3 Recommendation 7(b)]; and
 - (b) Take measures to enforce the money laundering offence more effectively in connection with foreign bribery cases, and ensure that in practice an individual is simultaneously convicted of money laundering and foreign bribery, where appropriate [Convention Art. 7 and Phase 3 Recommendation 7(a)].
9. With regards to **false accounting**, the Working Group recommends that Chile:
- (a) Amend its legislation to prohibit both natural and legal persons from engaging in the full range of conduct described in Art. 8(1) of the Convention, and subject such conduct to effective, proportionate and dissuasive sanctions [Convention Art. 8, 2009 Recommendation X.A.i, and Phase 3 Recommendation 8(a)];

- (b) Vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate [Convention Art. 8, 2009 Recommendation X.A.i, and Phase 3 Recommendation 8(a)]; and
- (c) Maintain enforcement statistics [Convention Art. 8, 2009 Recommendation X.A.i, and Phase 3 Recommendation 6(ii)].

10. With regards to **tax-related matters**, the Working Group recommends that Chile:

- (a) Ensure that SII is routinely informed of foreign bribery convictions and systematically re-examines the relevant tax returns of convicted taxpayers to determine whether bribes have been deducted [2009 Recommendation III.iii and VIII.i, Tax Recommendation II, and Phase 3 Recommendation 9(b)]; and
- (b) (i) Incorporate the essential elements of the 2013 OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors into the SII's Standard Plan for Tax Audits; (ii) train tax examiners on how to detect bribery during tax examinations; and (iii) examine why SII has failed to detect proven cases of bribery [2009 Recommendation III.i, III.iii and VIII.i, Tax Recommendation II, and Phase 3 Recommendation 9(c)]; and
- (c) Make the multiple obligations on SII officials to report foreign bribery more consistent [2009 Recommendation III.i, III.iv and IX.ii].

11. With regards to **public advantages**, the Working Group recommends that Chile:

- (a) Encourage public contracting authorities to (i) routinely check the debarment lists of multilateral financial institutions in relation to public procurement contracting, and (ii) consider, as appropriate, the internal controls, ethics and compliance programmes of companies seeking procurement contracts [Convention Art. 3(4), 2009 Recommendation IX.i and Phase 3 Recommendation 12(a)];
- (b) Further implement key aspects of the 2016 OECD Recommendation of the Council for Development Co-operation Actors on Managing the Risk of Corruption. In particular, AGCID should (i) analyse and consider the risk of corruption in an ODA recipient country before awarding ODA contracts; (ii) evaluate the anti-corruption risk management systems of ODA contract applicants; (iii) verify whether applicants have been convicted of corruption or foreign bribery under the Penal Code or Law 20 393 (on corporate liability), or are on the debarment lists of ChileCompra or multilateral financial institutions; (iv) make more consistent the reporting channels for the different reporting obligations; (v) remind AGCID officials and relevant stakeholders of their obligations (especially under the CPC and Law 19 913) to report corruption in ODA projects, and communicate to them the channels for reporting; and (vii) ensure that its standard ODA contract refers to the 2016 ODA Recommendation [2016 Recommendation for Development Co-operation Actors on Managing the Risk of Corruption 6.i, iii, iv, 7.i-ii, 10.ii)]; and
- (c) Regarding export credits, adhere to the 2006 Recommendation on Bribery and Officially Supported Export Credits (or its successor instrument), and adopt and implement anti-corruption measures planned by CORFO in the context of the

COBEX programme [2009 Recommendation III.i, IX.i and XII, 2006 Export Credit Recommendation, and Phase 3 Recommendation 12(b)].

3. Follow-Up by the Working Group

12. The Working Group will follow up the issues below as case law and practice develop:

- (a) Law 20 393, particularly (i) the interpretation of the term “directly and immediately” in the interest or for the benefit of the legal person and (ii) the application of the offence prevention model defence by Chilean courts, including the burden of proof [Convention Art. 2, 2009 Recommendation Annexes I.B-C and II, and Phase 3 Follow-up Issues 13(b) and 13(b)(ii)];
- (b) Whether the limitation period for formalised investigations is sufficient for proper investigation and prosecution [Convention Arts. 5 and 6, and Phase 3 Recommendation 4(a)];
- (c) Whether sanctions imposed against natural persons are effective, proportionate and dissuasive in all foreign bribery cases [Convention Art. 3]; and
- (d) The Convention as a treaty basis to provide confiscation as MLA in foreign bribery cases [Convention Arts. 3(3) and 9, and Phase 3 Follow-up Issue 13(e)].

ANNEX 1: PHASE 3 RECOMMENDATIONS AS OF 2016 WRITTEN FOLLOW-UP

<i>Phase 3 Recommendation</i>	<i>Status at Written Follow-up</i>
Recommendations Concerning Investigation, Prosecution and Sanctioning of Foreign Bribery	
1. With regards to the liability of legal persons and offence prevention model defence, the Working Group recommends that Chile:	
(a) Provide guidance on the elements of an effective model for preventing foreign bribery as required by Law 20 393 and (i) train judges, prosecutors on police on this guidance; and (ii) encourage Chilean companies, especially SMEs, to adopt models that conform to the guidance; and	Partially Implemented
(b) Ensure that under Art. 3 of Law 20 393 the requisite independence of prevention officers is determined based on all relevant factors, and not solely the size of the company's revenues (Convention, Art. 2; 2009 Recommendation Annex I.B and Annex II).	Not Implemented
2. With regards to the liability of legal persons and certification of offence prevention models, the Working Group recommends that Chile take immediate steps to:	
(a) Clarify the legal effect of certification of an offence prevention model under Law 20 393; and	Partially Implemented
(b) Strengthen and enforce rules and standards that apply to certifying entities, including those regarding qualifications, certification requirements (Convention, Art. 2; 2009 Recommendation Annex I.B and Annex II).	Partially Implemented
3. With regards to sanctions and confiscation , the Working Group recommends that Chile:	
(a) Eliminate mandatory reductions of sanctions for foreign bribery (i) where a foreign public official solicits the bribe; and (ii) where the case begins more than half way through the limitation period (Convention, Art. 3(1));	Not Implemented
(b) Amend the Penal Code to ensure equivalence between the fines applied to domestic and foreign bribery cases (Convention, Art. 3(1));	Not Implemented
(c) Take steps to ensure that sanctions against natural persons are effective, proportionate and dissuasive in all foreign bribery cases in practice (Convention, Art. 3(1));	Partially Implemented
(d) Increase the maximum fine available against legal persons for foreign bribery to a level that is effective, proportionate and dissuasive (Convention, Art. 3); and	Not Implemented
(e) Amend its legislation without delay to provide for confiscation of property, the value of which corresponds to that of the proceeds of a foreign bribery offence, where the bribe and the proceeds of foreign bribery cannot be confiscated, or monetary sanctions of comparable effect (Convention, Art. 3(3)).	Not Implemented
4. Regarding investigations and prosecutions , the Working Group recommends that Chile:	
(a) Take steps to ensure that the overall limitation period for the foreign bribery offence, including the two-year period for formalised investigations, is sufficient for proper investigation and prosecution (Convention, Arts. 5 and 6);	Not Implemented
(b) Periodically review its laws implementing the Convention and its approach to enforcement in order to effectively combat international bribery of foreign public officials (Convention, Art. 5 and 2009 Recommendation V);	Fully Implemented

<i>Phase 3 Recommendation</i>	<i>Status at Written Follow-up</i>
(c) (i) Take steps to ensure that foreign bribery allegations are thoroughly investigated and not prematurely filed, and that corporate liability is fully explored; (ii) use proactive steps to gather information from diverse sources to increase sources of allegations and enhance investigations; (iii) seek co-operation and MLA from foreign countries whenever appropriate, including through the Working Group's Informal Meetings of Law Enforcement Officials, and solicit the assistance of Chilean embassies and other international fora to facilitate MLA; (iv) take steps to ensure that Chilean authorities thoroughly explore territorial links with Chile in foreign bribery cases, including by issuing guidance to law enforcement authorities on the jurisdiction to prosecute foreign bribery; and (v) take appropriate steps to further investigate the foreign bribery cases that have been provisionally filed or where a decision had been taken to not open an investigation (Convention, Arts. 2, 4(1), 5, Commentary 27; 2009 Recommendation XIII, Annex I.D);	Fully Implemented
(d) Improve its internal co-ordination and intelligence gathering in foreign bribery cases by (i) ensuring that prosecutors and law enforcement authorities systematically inform the UNAC of any foreign bribery allegation which comes to their knowledge, including via incoming MLA requests; and (ii) consider establishing a national database of all foreign bribery cases (Convention, Art. 5; 2009 Recommendation V);	Fully Implemented
(e) Raise awareness of Art. 5 of the Convention among Chilean judges, prosecutors, investigators and relevant government officials, including by adding references to factors enumerated in Art. 5 to the relevant prosecutor instructions (Convention Art. 5, Commentary 27; 2009 Recommendation III.i);	Fully Implemented
(f) Align the rules for lifting bank secrecy in foreign bribery cases with the rules applicable in domestic bribery cases, tax offences and money laundering; and take measures to ensure that financial institutions provide the required financial information promptly in appropriate cases (Convention, Arts. 5 and 9(3));	Not Implemented
(g) Align the investigative tools available in investigations of foreign bribery and money laundering, so that special and covert investigative techniques are available in foreign bribery investigations (Convention, Art. 5, Commentary 27); and	Not Implemented
(h) Take urgent steps to ensure that expertise in corporate investigations, evaluation of offence prevention models, forensic accounting and information technology is available in foreign bribery investigations (Convention, Arts. 2, 5; 2009 Recommendation III.ii).	Partially Implemented
5. Regarding jurisdiction over foreign bribery cases, the Working Group recommends that Chile amend its legislation to clearly provide territorial and nationality jurisdiction to prosecute legal persons for the foreign bribery offence (Convention, Art. 4(4)).	Not Implemented
6. With regards to statistics , the Working Group recommends that Chile maintain detailed statistics on (i) sanctions imposed against natural and legal persons in domestic and foreign bribery cases; (ii) enforcement of false accounting offences; (iii) format, regularity, audience and impact of its awareness-raising seminars and events (Convention Arts. 3(3), 8; 2009 Recommendation II).	Partially Implemented
Recommendations Concerning Prevention, Detection, and Reporting of Foreign Bribery	
7. With regards to money laundering , the Working Group recommends that Chile:	
(a) Take appropriate measures to enforce the money laundering offence more effectively in connection with foreign bribery cases, and ensure that its law provides that an individual is simultaneously convicted of money laundering and foreign bribery where appropriate; and	Partially Implemented

<i>Phase 3 Recommendation</i>	<i>Status at Written Follow-up</i>
(b) Require appropriate non-financial entities including lawyers, accountants and auditors to report suspected money laundering transactions, develop typologies on money laundering related to foreign bribery, and further encourage reporting entities to make STRs (Convention Art. 7; 2009 Recommendation III.i).	Not Implemented
8. With regards to accounting and auditing, corporate compliance, internal control and ethics , the Working Group recommends that Chile:	
(a) Regarding the false accounting offence, (i) amend its legislation to prohibit both natural and legal persons from engaging in the full range of conduct described in Art. 8(1) of the Convention, and subject such conduct to effective, proportionate and dissuasive sanctions; and (ii) vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate (Convention, Arts. 3, 5, 8(1); 2009 Recommendation X.A.i); and	Not Implemented
(b) Regarding external auditors, (i) consider requiring “external audit firms” to report crimes to competent authorities; (ii) ensure that auditors who report suspected wrongdoing reasonably and in good faith to competent authorities are protected from legal action; (iii) take steps to encourage external auditors to take greater account of the risks of foreign bribery in the companies that they audit; and (iv) improve audit quality standards, including with regard to certification and independence (2009 Recommendation X.B.i, ii, v).	Partially Implemented
9. With regards to tax-related measures , the Working Group recommends that Chile:	
(a) Update Circular 56/2007 to refer to PC Art. 251bis and Law 20 393 (2009 Recommendation VIII.i; 2009 Tax Recommendation I.i);	Fully Implemented
(b) Ensure that SII is routinely informed of foreign bribery convictions and systematically re-examines the relevant tax returns of convicted taxpayers to determine whether bribes have been deducted (2009 Recommendation III.iii, VIII.i; 2009 Tax Recommendation II);	Partially Implemented
(c) Incorporate the essential elements of the 2013 OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors into the SII’s Standard Plan for Tax Audits, and examine why SII has failed to detect proven cases of bribery (2009 Recommendation III.i, III.iii, VIII.i; 2009 Tax Recommendation II);	Partially Implemented
(d) Promptly ratify the Convention on Mutual Administrative Assistance in Tax Matters, and consider systematically including the language of Art. 26 of the OECD Model Tax Convention in all future bilateral tax treaties with countries that are not parties to the multilateral Convention (2009 Recommendation VIII.i; 2009 Tax Recommendation I.iii).	Partially Implemented
10. With regards to international co-operation , the Working Group recommends that Chile:	
(a) Take all necessary measures to ensure that it will not deny MLA in foreign bribery cases on grounds of bank secrecy (Convention, Art. 9(3));	Not Implemented
(b) Ensure that it can provide MLA for confiscation of property the value of which corresponds to the bribe and the proceeds of foreign bribery (Convention, Arts. 3(3) and 9).	Not Implemented
11. With regards to awareness-raising and reporting , the Working Group recommends that Chile:	
(a) Continue to raise awareness in a more co-ordinated manner, involving all relevant government bodies that interact with Chilean companies which are active in foreign markets, and make greater efforts to raise awareness among enterprises, particularly SMEs (2009 Recommendation III.i);	Partially Implemented

<i>Phase 3 Recommendation</i>	<i>Status at Written Follow-up</i>
(b) Regarding reporting, (i) analyse why Chilean overseas missions failed to report foreign bribery allegations and take appropriate remedial action; and (ii) enforce the obligation on public officials to report suspicions of crimes (2009 Recommendation IX.ii); and	Partially Implemented
(c) Enhance and promote the protection from discriminatory or disciplinary action of public and private sector employees who report in good faith and on reasonable grounds to competent authorities suspected acts of foreign bribery (2009 Recommendation IX.iii).	Not Implemented
12. With regards to public advantages , the Working Group recommends that Chile:	
(a) Ensure that all government procuring agencies verify whether an individual or company has been convicted of foreign bribery before granting a procurement contract, and consider routinely checking debarment lists of multilateral development banks in relation to public procurement contracting (Convention Art. 3(4); 2009 Recommendation XI.i); and	Not Implemented
(b) Adhere to the 2006 Recommendation on Bribery and Officially Supported Export Credits if and when it provides officially supported export credits (2009 Recommendation III.i, IX.i, XII; 2006 Export Credit Recommendation).	Partially Implemented
<i>Phase 3 Follow-up by Working Group</i>	<i>Status at Written Follow-up</i>
13. The Working Group will follow up the issues below as case law and practice develop:	
(a) The foreign bribery offence, particularly (i) coverage of bribes to induce an official to perform his/her duty; (ii) coverage of bribery by a company that was the best qualified bidder or otherwise could properly have been awarded the business; (iii) whether the definition of a foreign public official is interpreted as autonomous; and (iv) whether the prevalence of bribery in a foreign jurisdiction can constitute a defence or mitigating factor (Convention, Art. 1, Commentaries 3, 4 and 7; 2009 Recommendation III.ii);	Continue to follow up
(b) Law 20 393, particularly (i) the interpretation of the term “directly and immediately” in the interest or for the benefit of the legal person and (ii) the application of the offence prevention model defence by Chilean courts, including the burden of proof (Convention, Art. 2; 2009 Recommendation Annex I.B and I.C, and Annex II);	Continue to follow up
(c) Sanctions against natural and legal persons (Convention, Art. 3(1));	Continue to follow up
(d) Application of conditional suspensions and expedited procedures (Convention, Art. 5; 2009 Recommendation V);	Continue to follow up
(e) The Convention as a basis for MLA for confiscation (Convention, Arts. 3(3) and 9);	Continue to follow up
(f) AGCI engagement with the private sector in future development projects, and its measures relating to prevention, detection, reporting and debarment (2009 Recommendation XI.ii).	Continue to follow up

ANNEX 2: PARTICIPANTS AT THE ON-SITE VISIT

Public Sector

- Ministry of Foreign Affairs
- Ministry of Justice
- Public Prosecutors' Office, including Specialised Anti-Corruption Unit (UNAC), International Cooperation and Extraditions Unit (UCIEX), Specialising Unit on Money Laundering, Economic Offences and Organised Crime (ULDDECO)
- *Policía de Investigaciones de Chile* (PDI): BRIDEF and BRIDEC
- *Carabineros de Chile*, OS7 and OS9
- Financial Market Commission (CMF)
- Financial Analysis Unit (UAF)
- *Contraloría General de La República*
- *Consejo de Auditoría Interna General de Gobierno* (CAIGG)
- Ministry of Economy, Development and Tourism, including Secretariat of the *Consejo Nacional Consultivo de la Empresa de Menor Tamaño*
- Ministry of Finance, including *ChileCompra* / Directorate for Public Procurement, Ministry of Finance (*Dirección de Compras y Contratación Pública*)
- Internal Taxation Service (SII)
- Superintendent of Banks and Financial Institutions (SBIF)
- *Agencia Chilena de Cooperación Internacional para el Desarrollo* (AGCID)
- *Corporación de Fomento de la Producción de Chile* (CORFO)

Judiciary

- Third Criminal Oral Trial Court of Santiago (Court of Appeal in the *Serlog* case)

Congress

- Members of Joint Commission on Bill 10 739
- *Comité de auditoría Parlamentaria*
- *Comisión para asignaciones parlamentarias*

Private Sector

Private Enterprises

- Agricom (fruit)
- Aguas Andinas (utilities)
- Anglo American (mining)
- Banco BBVA (bank)
- Banco de Chile (bank)
- Banco de Crédito e Inversiones (Bci) (bank)
- Banco del Estado de Chile (bank)
- Blumar (fishing)
- Camanchaca (fishing)
- Codelco (mining)
- *Compañía Minera Dona Ines de Collahuasi S.C.M.* (mining)
- *Compañía Minera Teck Carmen de Andacollo* (mining)
- Corpesca (fishing)
- Copefrut (Cooperativa Agrícola y Frutícola de Curico) (fruit)
- Dole (fruit)
- Falabella (retail)
- *Industria Azucarera Nacional* (IANSa) (fruit)
- *Inversiones La Construcción* (retail)
- NS Agro (fruit)
- Transelec (electricity)
- Walgreen Boots Alliance/FASA (retail)
- Walmart (retail)

Business Associations

- *Asociación de Bancos e Instituciones Financieras (Abif)*
- *Asociación de Exportadores de Fruta de Chile*
- *Asociación Gremial de los Industriales del Pan de Santiago*
- *Asociación de Industrias Metalúrgicas y Metalmeccánicas de Chile (Asimet)*
- *Cámara Chilena de la Construcción*
- *Cámara Chileno Alemana (CAMCHAL)*
- *Camara Nacional de Comercio, Servicios y Turismo de Chile (CNC)*
- *Generadoras de Chile*
- *Sociedad Nacional de Minería*

Registered Certifiers of Offence Prevention Models

- BH Compliance Ltda
- Efectus
- Feller Rate
- International Credit Rating (ICR)
- MC Compliance
- Prelafit Compliance

*Individual Lawyers and Legal Academics**Accounting and Auditing Profession*

- *Association of External Auditor Firms (AG de Empresas de Auditoría Externa)*
- *Chilean College of Accountants (Colegio de Contadores de Chile)*
- *Instituto de Auditores Internos de Chile A.G.*
- Deloitte
- Ernst & Young
- KPMG

Civil Society

- *Canal 13*
- *Chile Transparente (Transparency International)*
- *El Centro de Investigación Periodística (CIPER)*
- *Espacio Público*
- *Fundación Ciudadano Inteligente*
- *Fundación Generación Empresarial*
- *Sindicato del Banco Santander*

ANNEX 3: CHILE'S FOREIGN BRIBERY ENFORCEMENT ACTIONS

This section describes the allegations of Chilean nationals or companies bribing foreign public officials. Ten allegations have emerged since Chile enacted a foreign bribery offence in 2001. One has resulted in a conviction and another was resolved through a conditional suspension of proceedings. A third case was closed without charges after an investigation. Six allegations have been provisionally filed. The tenth allegation was not investigated and occurred before the Convention entered into force in Chile. The names of on-going cases have been anonymised.

1. Ongoing Investigations or Prosecutions into Potential Foreign Bribery [1]

*Oil Company Case*⁵⁵

M, a Chilean-Peruvian businessman, is the founder and a director of Oil Company, an international trader of fuel and petroleum products. The company is headquartered in the British Virgin Islands (BVI) and has offices in several jurisdictions, including in Chile and Guatemala. According to media articles, in 2011 Oil Company allegedly financed the election campaigns of the Patriotic Party in Guatemala in the amount of GTQ 887 000 (USD 115 000). Shell companies controlled by the Patriotic Party issued fake invoices to Oil Company for the payments. In 2012, the Patriotic Party won the elections, and Otto Pérez Molina and Roxana Baldetti Elía became President and Vice-President. Amidst a corruption scandal in 2015, Pérez and Baldetti resigned and have since been in custody. In June 2016, the Guatemalan authorities arrested an individual L, who in 2011-2013 was an Oil Company employee and later manager in Guatemala.

This allegation came to the attention of the Chilean PPO after it was added to the Working Group Matrix of Foreign Bribery Allegations in October 2017.

Chile has made limited inquiries in the case. The PPO in Guatemala started an investigation in 2015. On two occasions, Chile's PPO informally contacted its counterpart in Guatemala which stated that they were not investigating M, the Chilean-Peruvian businessman. In Chile, the PPO searched open sources and government databases to collect personal and financial information and connections of certain individuals with Chile. UNAC then discontinued the case because of a lack of connection with Chile. The PPO stated that it is monitoring the press and has asked its Guatemalan counterpart to provide any information that might surface regarding Chilean entities. Just before the adoption of this report, Chile stated that it opened an investigation into this case on 16 November 2018 and has sent MLA requests to Peru and Guatemala.

⁵⁵ [República \(4 June 2016\)](#); [Centro de Medios Independientes \(5 June 2016\)](#); [Soy502 \(6 June 2016\)](#); [Nomada \(16 June 2016\)](#); [Bloomberg](#).

2. Completed Case Resulting in Conviction [1]

*Serlog Case*⁵⁶ (*Fragata Case and Case #6 – Military Equipment (Korea) Case in the Phase 3 Report, Para. 24-25*)

Pak Lee was an advisor of the Attaché of the Ministry of Defence of the Embassy of Korea in Chile. One of his roles was to promote Korean companies operating in Chile. A retired military General Victor Lizárraga and arms dealer Guillermo Ibieta controlled the company Servicios Logísticos Limitada (Serlog). In 2006-2007, Lizárraga and Ibieta bribed Pak Lee with nine payments of CLP 600 000 (USD 900) each, totalling CLP 5.4 million (USD 8 200). The cheque for a tenth payment in the same amount was not cashed. The payments were channelled through Serlog to Pak Lee's spouse. In return, Pak Lee introduced Lizárraga and Ibieta to Korean companies that were seeking contracts from the Chilean military. Lizárraga and Ibieta then sought to represent the Korean companies as agents in the contract negotiations. Pak Lee also assisted in these negotiations.

The Chilean authorities discovered the case while wiretapping Ibieta in a separate investigation, which in turn originated from a Chilean UAF report. The case was under investigation at the time of Phase 3. Chile sent an MLA request to Korea in 2011 and a supplemental request in 2012 to obtain documents to prove that Pak Lee was a Korean public official. Korea provided the information on 16 January 2014.

In November 2016, the Third Criminal Court of Santiago convicted Lizárraga of five counts of foreign bribery. Lizárraga was sentenced to 205 days of imprisonment, a fine of CLP 3 million (USD 4 500) and disqualification from temporary positions and public offices for 7 years plus one day. At the time of the foreign bribery conviction, Lizárraga was serving a sentence for an unrelated homicide offence.⁵⁷ Confiscation was not imposed since there was no evidence that Lizárraga benefited financially from the offence. The Constitutional Court rejected an appeal of the conviction on 25 September 2018. A further appeal to the Supreme Court is pending. Ibieta died before the investigation was concluded. The company Serlog was not prosecuted because the crime took place before Chile enacted Law 20 393 to create corporate liability.

3. Completed Case Resulting in “Conditional Suspension of Proceedings” [1]

*Asfaltos Chilenos Case*⁵⁸ (*Case #5 – Cement (Bolivia) Case in the Phase 3 Report, Para. 20-23*)

Two Bolivian nationals, Berna Milan and Naftalí Murillo Chávez, represented a Chilean cement company (Asfaltos Chilenos S.A.). Milan was a labour union leader in Bolivia, while Murillo worked for Asfaltos Chilenos. Both have Bolivian nationality. On 10 September 2010, Milan contacted Murillo about selling cement to the Bolivian Highway Administration (ABC). While in Chile on 11 September 2010, Murillo called Luis Sanchez, the President of Anti-Bribery Convention, to propose the sale. She also proposed a meeting in Bolivia to further discuss the deal. On 14 September 2010, Murillo and Milan met Sanchez in Bolivia and proposed increasing the commission from USD 15 to USD 25

⁵⁶ *Víctor Federico Lizárraga Arias*, Third Criminal Oral Trial Court of Santiago, RIT No. 60-2016, Judgement (18 November 2016). Court decisions and case status are available [online](#).

⁵⁷ [Emol](#) (23 November 2012).

⁵⁸ [La Tercera \(21 December 2015\)](#) and Chile's Phase 4 questionnaire responses.

per tonne. The extra commission would be split among the three individuals. The two Bolivians reportedly had documentary proof that they acted on behalf of the Chilean cement company. They presented to Sanchez two letters on the cement company's letterhead that were signed by the company's commercial manager, Sergio Moroso. During a press conference on 17 September 2010, the Bolivian authorities stated that Milan and Murillo had been arrested.

The Chilean authorities investigated the case only after criticism from the Phase 3 lead examiners. They initially filed the case provisionally for lack of evidence and Bolivia's failure to respond to a November 2010 MLA request. They re-opened the investigation in November 2013 after the Phase 3 on-site visit. A new MLA request pursuant to the UN Convention against Corruption (UNCAC) was sent to Bolivia in March 2014, resubmitted in August 2014, and executed in March 2015. The Chilean authorities also interviewed two managers of the cement company who stated that the company had not authorised the alleged bribe payments. The managers, however, confirmed the authenticity of the letters presented to Sanchez which authorised one of the Bolivians to market the company's products in Bolivia and to sell cement at specified terms.

In October 2015, the Chilean authorities agreed to conditionally suspend proceedings against the company (Asfaltos Chilenos S.A.) and its commercial manager (Sergio Moroso). Moroso was required to pay CLP 1 million (approx. USD 1 500) to a charitable institution as well as to maintain a fixed address and report any changes to the Public Prosecutor's Office (PPO). Asfaltos Chilenos was required to donate CLP 10 million (approximately USD 15 000) in computer equipment to an educational centre, and to implement an offence prevention model. The term of the agreement was one year, and the time for meeting the conditions was ten months.

4. Closed Case without Charges after Investigation [1]

*LAN Airlines Case*⁵⁹ (Case #4 – Airlines (Argentina) Case in the Phase 3 Report, para. 16-19)

LAN Airlines is Chile's flag carrier. It is owned by a parent company LATAM, a holding company incorporated and headquartered in Chile. It owns 49% of LAN Argentina which operates domestic and international flights in Argentina. Another subsidiary, LAN Cargo, was incorporated in Chile and headquartered in Miami, US. At the relevant time, Ignacio Cueto Plaza was LAN Airlines' CEO. Ricardo Jaime was the Secretary of Transport in Argentina. Jaime appointed Manuel Vasquez as a Cabinet Advisor in early 2005.

LAN received the Argentine government's approval and began operating flights in that country in June 2005. Immediately, LAN faced labour disputes and several regulatory issues. In early 2006, Vasquez contacted a senior LAN Cargo executive and offered to assist LAN's activities in Argentina. Eventually, Vasquez offered to negotiate directly with the unions on LAN's behalf, on the understanding that he would be compensated for these efforts, and that third parties who had influence over the unions would also be paid. Cueto agreed to the proposition.

⁵⁹ *US v. Latam Airlines Group S.A.*, Dist. Ct. (S. Florida) 16-60195-CR-Hurley, [Deferred Prosecution Agreement](#) (25 July 2016); *In the Matter of LAN Airlines S.A.*, Securities and Exchange Commission, Administrative Proceeding 3-17357, [Cease-And-Desist Order](#) (25 July 2016); *In the Matter of Ignacio Cueto Plaza*, Securities and Exchange Commission, Administrative Proceeding 3-17100, [Cease-and-Desist Order](#) (4 February 2016).

LAN ultimately paid Vazquez as agreed through a sham agreement. In October 2006, Vasquez provided LAN with a USD 1.15 million consulting contract which purported to help LAN to optimise its air routes in Argentina. The contract was never signed and Vasquez never performed the work. Nevertheless, LAN paid the amount in the contract in three instalments from October 2006 to January 2007 to a brokerage account in the US owned by Vasquez and his wife. Cueto knew that some of the money might be passed to union officials in Argentina to resolve the labour dispute. Several months later in November 2007, Vasquez invoiced LAN for an additional USD 58 000. The invoice again stated that the payment was for studying air routes, which Cueto knew was false. Nevertheless, LAN paid the amount in the invoice to an account in Spain that was in the name of a second company owned by Vazquez's son and wife.

In 2016, LAN and Cueto entered into agreements with the US Securities and Exchange Commission and the Department of Justice to resolve proceedings based on violations of the provisions on internal controls, and books and records in the US Foreign Corrupt Practices Act.

The Chilean authorities investigated the case only after Working Group criticism. They opened an investigation in January 2011 after receiving a complaint on 2 December 2010 from a Chilean parliamentarian who had learned of the allegations through the Argentine press. A first MLA request was sent to Argentina in 2011. The case was then provisionally filed on the basis that Chile did not have jurisdiction to prosecute. In Phase 3, the Working Group considered that the Chilean authorities did not make sufficient efforts to obtain evidence or to explore the case's connections with Chile. As a consequence, the Chilean authorities re-opened the case in March 2014.

In the re-opened investigation, Chile sent a second MLA request to Argentina and another to the US, both in 2014. The prosecutor who led the investigation stated at the Phase 4 on-site visit that he travelled to Argentina to obtain the testimony of Jaime and Vasquez. He also took the testimony of several of LAN's senior managers and directors. All of the directors denied authorising or knowing of the payments to Vasquez.

The re-opened investigation ended for reasons that are not entirely clear. Three different reasons were provided. First, Chile's Phase 4 questionnaire responses stated that the evidence gathered indicated that LAN had paid union officials, who were not foreign *public* officials. This explanation was repeated during the first day of the on-site visit by a prosecutor who assisted in the case and additional prosecutors from UNAC, the PPO's anti-corruption unit. These Chilean representatives emphasised in particular that there was insufficient evidence that LAN's payments went to Jaime, Argentina's Minister of Transport. This led the evaluation team to inquire whether the Chilean authorities considered the possibility that Vasquez, Jaime's advisor, retained part of the payments for his own benefit.

The prosecutor present at the first day of the on-site visit provided a second reason why the case ended. She stated that Vazquez was not a public official under Argentine law. The media stated that he was an advisor of Jaime but he in fact never held any position in government.

The Chilean authorities then provided a third explanation that contradicted the first two. On the last day of the on-site visit, the former lead prosecutor in the case met the evaluation team. He stated that Vazquez claimed that he was not a public official because he did not have Argentine nationality. He rejected this claim and concluded that Vazquez was a public official given of his actual role. There were therefore strong arguments that foreign bribery

had been committed. Nevertheless, the case had to be terminated because it was time-barred. The lead prosecutor stated that the explanation in the questionnaire responses of why the case was terminated was incorrect. He had recently left the PPO and hence prosecutors who were not familiar with the case drafted the responses.

The Chilean authorities also explained why the company LAN was not charged. The alleged bribery took place before Chile enacted Law 20 393 to create corporate liability. LAN was also not charged for submitting false information to the financial markets because the payments to Vasquez would not have materially altered the company's financial statements.

5. “Provisionally Filed” or Discontinued Cases Where Allegation Emerged after Phase 3 [2]

*Tethyan Copper Case*⁶⁰

The Reko Diq copper and gold mines are in the province of Balochistan in Pakistan. In 1993, the government of Balochistan and BHP, a company incorporated in the US, entered into the Chagai Hills Joint Venture Agreement (CHEJVA) to explore deposits in Reko Diq. In 2000, CHEJVA was amended to assign BHP's exploration rights to Mincor, another Australian company. Mincor created the Tethyan Copper Company Pty Limited (TCC) to conduct explorations in Reko Diq. TCC in turn incorporated a subsidiary in Pakistan, Tethyan Copper Company Pakistan (Private) Limited (TCCP). In 2006, Antofagasta PLC and Barrick Gold Corporation each acquired 50% of TCC, including TCCP and its rights in Reko Diq. Antofagasta is incorporated in the UK but headquartered in Chile. Barrick is a Canadian company.

In February 2011, TCCP applied for a mining lease in Reko Diq, believing that it was legally entitled to the lease subject only to “routine” government requirements. But in November 2011, the authorities in Balochistan rejected the application.

The case generated three separate litigations. In January 2013, the Pakistani Supreme Court held that CHEJVA was void and hence TCC did not have any rights in Reko Diq. The Court's decision was based principally on a finding that CHEJVA breached several statutory requirements when it was enacted in 1993. The Court also found that the government failed to dispose of the Reko Diq mineral rights in a transparent manner to obtain the best price. Briefly in passing, the Court stated that the government's signatory to CHEJVA had a conflict of interest and had been convicted earlier of “living beyond his means”. However, there was no suggestion in the Court's judgement that TCC, BHP or Mincor bribed this official or otherwise engaged in corruption.

Separately, TCC launched two simultaneous arbitration proceedings over the denial of the mining lease. In one of those proceedings, the International Centre for Settlement of Investment Disputes (ICSID) in March 2017 rejected Pakistan's claim that TCC engaged

⁶⁰ *Maulana Abdul Haque Baloch and others v. Government of Balochistan*, Supreme Court of Pakistan, civil petition 796/2007 and others, [Judgment](#) (7 January 2013); *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID No. ARB/12/1, [Decision on Claimant's Request for Provisional Measures](#) (13 December 2012) and [Claimant's Press Release on Decision on Liability](#) (20 March 2017); [Asia-Pacific Forum for International Arbitration](#) (22 August 2017); [Thetyan.com](#), “[The Reko Diq Mining Project](#)”; [Express Tribune](#) (12 July 2017); [The Nation](#) (14 July 2017); [Express Tribune](#) (5 September 2017); [Express Tribune](#) (19 January 2018).

in corrupt practices for illegal and undue gains. The reasons for the ruling are not publicly available. Pakistan may face an award of USD 11.5 billion. In September 2017, Canada's federal government proposed a settlement which the Balochistan government was reportedly willing to consider.

The Chilean' authorities became aware of the case when it was inserted into the Working Group Matrix in December 2017. In April 2018, the Chilean Embassy in Saudi Arabia forwarded additional press information to the PPO via the Ministry of Foreign Affairs.

The PPO has not opened an investigation and has only relied on information from the press and open sources on the internet. UNAC stated that the facts linked to corruption took place in 1993 while Antofagasta became involved in the Reko Diq project only in 2006. No other connection between the case and Chile has been found.

*University del Mar (No. 1) Case*⁶¹

According to media articles, the former rector of the University del Mar, Héctor Zúñiga, allegedly bribed Panama's consul general in Chile, Ángela Collado Báez. Collado signed a contract with the University on 4 May 2009, before she left her position as consul in July 2009. Under the contract, Collado would be paid USD 4 000 monthly to promote the activities of the University in Panama and Central America, including the exchange of Panamanian students. Zúñiga also reportedly opened two bank accounts in Panama that were in his name but were managed by Collado. Almost USD 100 000 were transferred into the accounts to pay for Panamanian students and their courses, according to Zúñiga.

Chile initially considered this as a potential foreign bribery matter but has since provisionally filed the case. The authorities became aware of these allegations while investigating a separate domestic corruption case that originated from a suspicious transaction report provided by the UAF to the PPO. The PPO opened a preliminary investigation and an MLA request was sent to Panama in January 2016 which was executed on 28 September 2017. The evidence gathered showed that Collado held the position of consul from October 2004 to July 2009. She signed the contract with the University in May 2009, but the work under the contract began only in September 2009. Bank statements obtained in the investigation did not reveal any payments to Collado while she was consul. Collado's testimony was not available. Apart from taking Zúñiga's testimony, there is no information on whether other investigative steps were taken in Chile. The case was then provisionally filed on 7 November 2017.

6. "Provisionally Filed" Cases Where Allegation Emerged before Phase 3 [3]

*Uniq IDC Case*⁶² (Case #7 – Airport (Venezuela) Case in the Phase 3 Report, para. 26-27)

According to media articles, Holding IDC S.A (Chile) was the majority shareholder in a joint venture Uniq IDC. Flughafen Zürich AG (Suisse) was the other joint venture partner. In 2004, Uniq obtained a 20-year concession to improve and operate two airports in Venezuela (Marine Santiago and Teniente Coronel Andres Salazar). The contract was awarded without tender and was allegedly obtained by bribing Alexis Navarro, a former governor of the Venezuelan state of Nueva Esparta. The Venezuelan authorities ultimately

⁶¹ [El Mercurio \(30 May 2014\)](#); [The Clinit \(30 May 2014\)](#); [El Mostrador \(30 May 2014\)](#).

⁶² [Terra \(3 August 2009\)](#).

revoked the contract. In 2009, the Venezuelan authorities began to prosecute Venezuelan officials for alleged corruption in the award of the concession.

The case was added to the Matrix in March 2014. The Chilean authorities initially stated that there not sufficient basis to exercise territorial jurisdiction over the case. The alleged crime also occurred before Chile had nationality jurisdiction to prosecute foreign bribery. However, the Chilean authorities changed their position and opened an investigation just before the Phase 3 Report was adopted in March 2014. The case was then provisionally filed in October 2014. There is no information on the investigative measures taken by the authorities in Chile and abroad (possibly in Venezuela).

Marambio Case⁶³ (Case #2 – Travel Company (Cuba) Case in Phase 3 Report, para. 12-14)

According to media articles, Chilean nationals Max and Marcel Marambio had business interests in Cuba and Chile. The Cuban authorities began investigating them in 2010 for various offences including bribery of Cuban public officials. The brothers were convicted and sentenced *in absentia* to prison terms of 20 and 15 years in 2011. Numerous Cuban government officials were also convicted.

The Chilean authorities did not open an investigation when the allegations initially surfaced. They received an MLA request containing the allegations in 2010 but did not open a domestic investigation. After the brothers' conviction in Cuba and after the Chilean FIU received a suspicious transaction report, the Chilean authorities finally opened an investigation in 2011. After reviewing the materials received from Cuba pursuant to an MLA request, the Chilean authorities opened an investigation for money laundering and false accounting before filing the case again for lack of evidence. There have not been developments since Phase 3.

Gildemeister Case⁶⁴ (Case #1 – Government Vehicles (Peru) Case in Phase 3 report, para. 8-11).

Automotores Gildemeister S.A. is a Chilean company which incorporated a Peruvian subsidiary Gildemeister Perú SA to handle the distribution of vehicles in that country. According to media articles, in 2007 the Peruvian government cancelled contracts with Gildemeister Perú SA for the purchase of police vehicles and ambulances. A report by the Peruvian authorities had found that these purchases were overpriced. Gildemeister Perú SA agreed to return moneys received under the contracts to the Peruvian authorities. An anti-corruption judge in Peru opened proceedings for corruption against several Peruvian officials and two officials of Gildemeister Perú SA.

The Chilean authorities learned of the case through media reports. They then contacted their Peruvian counterparts who stated that the bribery had been committed by the Peruvian manager of Gildemeister Perú SA. At the time of the alleged bribery, legal persons could not be held liable in Chile for foreign bribery or money laundering. Chile also did not have jurisdiction to prosecute nationals for extraterritorial foreign bribery. Chile provisionally filed the case without taking any further steps. There have not been developments since Phase 3.

⁶³ [La Habana \(21 July 2010\)](#); [La Tercera \(7 October 2010\)](#); [Cristóbal Peña \(3 November 2010\)](#); [El Mercurio \(27 March 2011\)](#); [BBC \(5 May 2011\)](#); [Emol \(6 June 2011\)](#); [AFP \(9 June 2011\)](#); [CubaDebate \(9 June 2011\)](#).

⁶⁴ [La República \(15 August 2007\)](#); [Todos Los Peruanos Corruptos \(7 March 2009\)](#).

Lucchetti Case⁶⁵ (Case #3 – Pasta Company (Peru) Case in Phase 3 Report, para 15)

According to media articles, in 2000 Lucchetti's major shareholder Alejandro Luksic and directors Gonzalo Menendez and Fernando Pacheco allegedly paid bribes to Vladimiro Montesinos, the former head of Peru's secret service and a close aide to Peruvian President Alberto Fujimori. Luksic allegedly would contribute USD 2 million to the President's re-election campaign. In return, Montesinos would influence a court decision to allow the company to build a pasta factory in a protected nature reserve in Lima. Luksic and the two executives were charged in Peru in 2001. In 2006, the Peruvian Supreme Court ruled that the charges were barred by the statute of limitations. Montesinos was convicted and sentenced to four years in prison in 2005.

Chile did not open an investigation into this case. It stated that that foreign bribery was not an offence or a predicate offence for money laundering in Chile at time of the offence.

⁶⁵ [UPI \(2 October 2001\)](#); [EFE \(26 October 2005\)](#); [Clarín \(26 October 2005\)](#); [EFE \(27 October 2005\)](#); [Cooperativa \(1 December 2005\)](#); [EFE \(6 February 2006\)](#); [La Segunda \(7 February 2006\)](#).

ANNEX 4: LIST OF ABBREVIATIONS AND ACRONYMS

ABP	abbreviated procedure (<i>procedimiento abreviado</i>)	PC	Penal Code
AGCID	<i>Agencia Chilena de Cooperación Internacional para el Desarrollo</i> (official development assistance)	PDI	<i>Policía de Investigaciones de Chile</i> (investigative police)
AML	anti-money laundering	PEP	politically exposed person
AS	Administrative Statute Law (18 834)	PPO	Public Prosecutor's Office (<i>Ministerio Público</i>)
BRICRIM	<i>Brigada de Investigación Criminal</i> (Criminal Investigation Brigade, PDI)	SBIF	<i>Superintendencia de Bancos e Instituciones Financieras Chile</i> (Superintendent of Banks and Financial Institutions)
BRIDEF	<i>Brigada Investigadora de Delitos Funcionarios</i> (Metropolitan Civil Offenses Investigative Brigade, PDI)	SCP	conditional suspension of proceedings (<i>suspensión condicional del procedimiento</i>)
BRILAC	<i>Brigada Investigadora de Lavado de Activos</i> (Money Laundering Investigation Brigade, PDI)	SII	<i>Servicio de Impuestos Internos</i> (Internal Taxation Service)
CAIGG	<i>Consejo de Auditoría Interna General de Gobierno</i>	SME	small- and medium-sized enterprise
CLP	Chilean pesos	SOE	state-owned or state-controlled enterprise
CMF	<i>Comisión para el Mercado Financiero</i>	STR	suspicious transaction report
CORFO	<i>Corporación de Fomento de la Producción de Chile</i> (export credits)	UAF	<i>Unidad de Análisis Financiero</i> (Financial Analysis Unit)
CPC	Criminal Procedure Code	UF	<i>unidades de fomento</i> (unit of account)
FCPA	U.S. Foreign Corrupt Practices Act 1977	ULDDECO	<i>Unidad Especializada en Lavado de Dinero, Delitos Económicos y Crimen Organizado</i> (Specialised Unit in Money Laundering, Economic Offences and Organised Crime, PPO)
GNECC	<i>Grupo Nacional de Expertos contra la Corrupción</i> (National Group of Experts against Corruption)	UN	United Nations
MOFA	Ministry of Foreign Affairs	UNAC	<i>Unidad Especializada Anticorrupción</i> (Specialised Anti-Corruption Unit, PPO)
MLA	mutual legal assistance	USD	United States dollar
MOJ	Ministry of Justice	UTM	<i>unidades tributarias mensuales</i> (monthly tax units)
NGO	non-governmental organisation		
ODA	official development assistance		
OPM	offence prevention model (<i>i.e.</i> compliance programme)		

ANNEX 5: EXCERPTS OF RELEVANT LEGISLATION

NOTE: The excerpts do not reflect amendments by Law 21 121.

Foreign Bribery Offence (Penal Code Article 251bis and 251ter)

Book Two Crimes and Offenses and Penalties Simple

Title V Of Crimes And Crimes Committed By Simple Employees In The Performance Of Its Charges

§ 9a. Bribery of Foreign Public Officials

Section 251bis. He who offers, promises or gives a foreign public official a benefit of an economic or other nature, for that official or a third person, to act or refrain from acting in order to obtain or retain – for him or a third party – any improper business or advantage in the field of any international transactions shall be punished with short-term confinement, medium to maximum degree, and with the fine and disqualification referred to in article 248bis, indent one. Should the benefit have a non-economic nature, the fine will range from one hundred to one thousand monthly tax units. The same penalties shall be imposed on he who offers, promises or gives the said benefit to a foreign public official for his/her having acted or refrained from acting.

He who, in the same situations described in the above indent, consents to give the said benefit, shall be sanctioned with short term confinement, from minimum to medium degree, besides the same penalties of fine and disqualification.

Section 251ter. For the purposes of the provisions of the preceding article, it is considered a foreign public official any person holding a legislative, administrative or judicial office in a foreign country, whether appointed or elected, and any person exercising a public function for a foreign country, whether within a public body or a public company. It shall also mean any official or agent of a public international organisation.

Liability of Legal Persons (Law 20 393)

First Article. The following Act on criminal responsibility of legal persons is hereby approved:

Article 1. Contents of the Act. This Act regulates the criminal responsibility of legal persons in respect of offenses mentioned in Article 27 of Act No. 19 913, Article 8 of Act No. 18,314 and Articles 250 and 251 bis of the Criminal Code, the procedure for the investigation and establishing of such criminal responsibility, the determination of applicable penalties and the enforcement thereof.

As to those matters not covered by this Act the provisions contained in Book I of the Criminal Code and in the Criminal Procedure Code, and in the special laws set forth in the preceding indent, where appropriate, shall apply.

For the purpose of this Act, Article 58, indent 2, of Criminal Procedure Code shall not apply.

Article 2. Scope. The provisions of this Act shall apply to private legal persons and to State companies.

Chapter I. Criminal Responsibility of Legal Persons.

1. Attachment of criminal responsibility to legal persons.

Article 3. Attachment of criminal responsibility. Legal persons shall be responsible for the offenses listed in Article 1, when directly and immediately committed in their own interest or for their own benefit by their owners, controllers, responsible officers, principal executives officers, representatives or those conducting activities of administration and supervision, provided that the commission of the offense results from the breach of the legal person's direction and supervisory functions.

Under the same assumptions of the preceding indent, legal persons shall also be responsible for the offenses committed by individuals who are under the direction or supervision of any of the subjects mentioned in the preceding indent.

It shall be considered that the functions of direction and supervision have been met if, before the commission of the offense, the legal person had adopted and implemented organization, administration and supervision models, pursuant to the following article, to prevent such offenses as the one committed.

Legal persons shall not be responsible in the event that the individuals mentioned in the preceding indents have committed the offense exclusively in their own advantage or in favour of a third party.

Article 4. Offenses prevention model. For the purpose of the third indent of the preceding article, legal persons may adopt the prevention model referred to therein, which shall contain at least the following elements:

(1) Appointment of a prevention officer.

- (a) The maximum administrative authority of the legal person, whether its board of directors, an administrating partner, manager, a principal executive officer, an administrator, a liquidator, its representatives, owners or partners, as appropriate to the form of administration of the legal person, hereinafter “the Administration of the Legal Person”, shall appoint a prevention officer, who shall remain in office for up to three years, renewable for equal periods.
- (b) The prevention officer shall be autonomous from the Administration of the Legal Person and from its owners, partners, shareholders or controllers. Notwithstanding, he may perform control or internal audit functions.

In the case of legal persons whose annual income does not exceed one hundred thousand “*unidades de fomento*”, the owner, partner or controlling shareholder may personally undertake the functions of the prevention officer.

(2) Definition of means and faculties of the prevention officer.

The Administration of the Legal Person shall provide the prevention officer with sufficient means and faculties for the performing of his functions, including at least the following:

- (a) The material means and resources necessary to conduct his functions properly, taking into consideration the size and economic capacity of the legal person;
- (b) Direct access to the Administration of the Legal Person to promptly inform it, through appropriate channels, on the implemented measures and plans in the accomplishment of his mission, and to render account of his management at least half-yearly.

(3) Establishment of an offenses prevention system.

The prevention officer shall, in conjunction with the Administration of the Legal Person, establish an offenses prevention system for the legal person, which shall at least contemplate the following:

- (a) Identification of the activities or processes of the entity, whether habitual or sporadic, in the context of which the risk of committing offenses listed in article 1 emerges or increases.
- (b) Establishment of specific protocols, rules and procedures that permit to persons involved in the activities or processes indicated in the foregoing letter “(a)”, to program and implement their tasks or functions in a manner that prevents the commission of the said offenses;
- (c) Identification of the procedures for administrating and auditing the financial resources that permit the legal person to prevent their use in the commission of the aforementioned offenses;
- (d) The existence of internal administrative sanctions, as well as the procedures for reporting or pursuing pecuniary responsibility against the persons who fail to comply the offenses prevention system.

These internal obligations, prohibitions and sanctions shall be stated in the regulations to be adopted by the legal person to that effect, and shall be communicated to all workers. This internal regulation shall be expressly incorporated in the respective employment contracts and agreements on rendering services of all workers, employees and suppliers of services of the legal person, including its maximum executive officers.

- (4) Supervision and certification of the offenses prevention system.
 - (a) The prevention officer shall, in conjunction with the Administration of the Legal Person, establish methods for the effective application of the offenses prevention model and its supervision, so as to detect and correct its failures and to update it according to the change of circumstances of the respective legal person.
 - (b) Legal persons may obtain certification of the adoption and implementation of its offenses prevention model. Such certificate shall attest that the model meets all the requirements set forth under numbers (1), (2) and (3) above, in connection with the situation, size, scope of business, level of income and complexity of the legal person.
 Certificates may be issued by external auditing companies, risk rating societies or other entities registered with the Securities and Insurance Superintendence, which are able to perform this function in accordance with the regulations established by the aforementioned Comptroller Organ, for this purpose.
 - (c) It shall be understood that individuals participating in certification activities conducted by the entities mentioned in the preceding letter “(b)” perform a “public function” in terms of article 260 of the Criminal Code.

Article 5. Autonomous Criminal Responsibility of the Legal Person. The Responsibility of the legal person shall be autonomous from the criminal responsibility of individuals, and shall subsist where the requirements prescribed by article 3 are present and, in addition, one of the following situations takes place:

- (1) Individual criminal responsibility shall have extinguished in accordance with numbers 1 and 6 of Article 93 of the Criminal Code.
- (2) In the criminal proceeding instituted against individuals set forth in the first and second indent of article 3, temporary dismissal of the alleged offender or alleged offenders is decreed according to the grounds set forth in letters “(b)” and “(c)” of article 252 of the Criminal Procedure Code.

Such responsibility may also be prosecuted when, having proved the existence of any of the offenses of article 1, and the other requirements prescribed by article 3 have met, it has not been possible to establish the participation of the responsible individual or individuals, provided that it is irrefutably proved in the respective proceeding that the offense must have been necessarily committed in the scope of the functions or faculties proper to the persons mentioned in the first indent of the said article 3.

2. Circumstances mitigating criminal responsibility of a legal person.

Article 6. Mitigating circumstances. The following circumstances shall be regarded as mitigating the criminal responsibility of legal persons:

- (1) The one prescribed by number 7, article 11 of the Criminal Code;
- (2) The one prescribed by number 9, article 11 of the Criminal Code. It shall be especially understood that the legal person substantially collaborates when at any stage of the investigation or judicial proceeding, its legal representatives, before taking notice that a judicial proceeding has been brought against the legal person, have reported the criminal offense to the authorities or supplied information to ascertain the facts under investigation.
- (3) Adoption by the legal person, before the initiation of the legal proceeding, of effective measures to prevent the repetition of the same kind of offenses under investigation.

3. Circumstances aggravating criminal responsibility.

Article 7. Aggravating circumstance. A circumstance is considered to aggravate criminal responsibility of a legal person if it has been convicted for the same offense in the past five years.

Chapter II Consequences Of The Declaration Of Criminal Responsibility Of The Legal Person

1. Penalties in general.

Article 8. Penalties. Legal persons shall be subject to one or more of the following penalties:

- (1) Dissolution of the legal person or cancellation of its legal status;
This penalty shall not apply to State companies or to private legal persons that provide a public utility service the interruption of which might cause grave social and economic consequences or serious damage to the community as a result of the application of such penalty.
- (2) Permanent or temporary prohibition from entering into acts and contracts with State organs;
- (3) Permanent or temporary loss of fiscal benefits, or absolute prohibition from receiving the same for a specified period of time;
- (4) Fine for fiscal benefit;
- (5) The ancillary penalties prescribed by article 13.

Article 9. Dissolution of the legal person or cancellation of its legal status. Dissolution or cancellation will result in permanent loss of status of a legal person.

The judgment decreeing dissolution or cancellation of a legal person shall, according to its type or legal nature and in the absence of an express legal provision to govern it, designate the liquidators in charge of liquidating it. Likewise, and in equal conditions, it shall entrust them with the execution of acts or contracts necessary to:

- (1) Conclude every activity of the legal person, except for those being required for the success of liquidation;
- (2) Pay the liabilities of the legal person, including those deriving from the commission of the offense. The terms of these debts shall be understood to have expired by operation of law, thus becoming immediately payable and its payment shall be made in full respect of the preferences and credit precedence established by Chapter XLI, Book IV of the Civil Code, particularly the rights of workers of the legal person, and
- (3) Distribute the remaining property among the shareholders, members, owners or proprietors pro rata their respective interest. The foregoing shall be understood without prejudice to the right of the affected persons to proceed against the offenders for obtaining any reparation for damages. In case of stock corporations, the provisions of article 133 bis of Act No. 18,046 shall apply.

However, where the social interest so warrants, the judge may, by a grounded resolution, order the disposal of all or part of the assets of the dissolved legal person, as a set or economic unit at a public auction and to the best bidder. This shall take place before the judge himself.

This penalty may be imposed only in cases of crimes where the aggravating circumstance established in article 7 is present. Likewise, it may be applied when convicting for crimes committed repeatedly according to the provisions of article 351 of the Criminal Procedure Code.

Article 10. Prohibition to engage in acts and contracts with State organs. This prohibition consists in the loss of the right to participate as supplier of goods and services to State organs.

To determine this penalty, the Court shall abide by the following scale:

- (1) Permanent prohibition to enter into acts and contracts with State organs.
- (2) Temporary prohibition to enter into acts and contracts with State organs. Its duration shall be rated as follows:
 - (a) Lowest degree: two to three years;
 - (b) Medium degree: three years and one day to four years;
 - (c) Highest degree: four years and one day to five years.

Such prohibition shall apply from the date on which the judgment becomes enforceable. The Court shall give notice of this circumstance to the Directorate for Public Procurement. Such Directorate shall keep an updated register of legal persons to which it has been imposed this penalty.

Article 11. Partial or total loss of fiscal benefits or absolute prohibition from receiving the same for a specified period. For the purpose of this Act, fiscal benefits shall be those benefits granted by the State or its organs by way of subventions without reciprocal supply of goods or services and, in particular, subsidies for financing specified activities or special programs and expenses inherent in or associated to their implementation, whether such resources be allocated through Contestable Funds or under permanent laws or subsidies, subventions in special areas or benefits established by special statutes and other similar ones.

This penalty shall be graded as follows:

- (1) Lowest degree: loss of twenty to forty percent of the fiscal benefit.
- (2) Medium Degree: loss of forty-one to seventy percent of the fiscal benefit;
- (3) Highest Degree: loss of seventy-one to one hundred percent of the fiscal benefit.

If the legal person is not entitled to such fiscal benefits, the sanction applicable may be the absolute prohibition to obtain them for a period of two to five years from the date on which the judgment declaring its responsibility becomes enforceable. The Court shall give notice of the imposition of this sanction to the General Administration Secretariat of the Ministry of Finance and to the Regional and Administrative Development Under-Secretariat of the Ministry of the Interior, so that it is entered in the main records of collaborators of the State and Municipalities, which are respectively bound to keep under Act 19,862.

Article 12. Fine for Fiscal benefit: This penalty shall be rated as follows:

- (1) Lowest Degree: from two hundred to two thousand monthly tax units (*unidades tributarias mensuales*).
- (2) Medium Degree: from two thousand and one to ten thousand monthly tax units.
- (3) Highest Degree: from ten thousand and one to twenty thousand monthly tax units.

The Court may authorize that the payment of a fine be made in instalments within a time limit not exceeding twenty-four months, when the quantum thereof is liable to endanger the continuity in its habitual business of the sanctioned legal person or when the social interest so warrants.

The competent Court shall, once conviction becomes enforceable, communicate the application of the fine to the Treasury General of the Republic, which shall enforce its collection and payment.

Article 13. Ancillary Penalties. The following ancillary penalties shall be applied in addition to those mentioned in the preceding articles:

- (1) Publication of an abstract of the judgment. The Court shall order the publication of an abstract of the decisiveness part of the judgment which imposes the penalties, in the Official Gazette or in another nationwide circulating newspaper.
The sanctioned legal person shall bear the costs of that publication.
- (2) Confiscation. The proceeds from the offense and other property, effects, objects, documents and instruments thereof shall be confiscated.
- (3) In those cases where the committed offense requires the investment of resources of the legal person in excess of its income, the payment into the Treasury of an amount equivalent to the investment made shall be imposed as an ancillary penalty.

2. Determination of penalties.

Article 14. General scale. The penalty imposed on the legal person shall be determined in relation to the one applicable to the corresponding offense as set forth in article 1, according to the following scale:

GENERAL SCALE ON PENALTIES APPLICABLE TO LEGAL PERSONS.

1. Penalties for crimes.

- (a) Dissolution of the legal person or cancellation of its legal status;
- (b) Prohibition to enter into acts and contracts with State organs in its highest to permanent degree.
- (c) Loss of fiscal benefits in its highest degree or absolute prohibition to receive them from three years and one day to five years.

- (d) Fine for Fiscal benefit in its highest degree.

In these cases, the penalties set forth in article 13 will always be applied as ancillary penalties.

2. Penalties for misdemeanours.

- (a) Temporary prohibition to enter into acts and contracts with State organs in its lowest to medium degree;
- (b) Loss of fiscal benefits in its lowest to medium degree or absolute prohibition to receive them from two to three years;
- (c) Fine in its lowest to medium degree.

In these cases, the penalties set forth in article 13 will always be applied as ancillary penalties.

Article 15. Legal determination of the penalty applicable to the offense. To the offenses sanctioned under articles 250 and 251bis of the Criminal Code and under article 8 of Act 18,314, it shall be applied the penalties provided in this Act for misdemeanours according to the preceding article.

To the offense under article 27 of Act 19 913 it shall be applied the penalties for crimes according to the preceding article.

Article 16. Circumstances amendatory of responsibility. If a mitigating circumstance and no aggravating circumstance occur, in cases of misdemeanours, only two of the penalties contemplated under article 14 shall be applied, one of them being applied in its lowest degree. In case of crimes, the Court shall apply only two of the penalties contemplated under such article in their *minimum*, where appropriate.

If the aggravating circumstance contemplated in this Act occurs and there is no mitigating circumstance, in cases of misdemeanours the Court shall apply all the penalties in its highest degree. In case of crimes, it shall apply the penalties in their *maximum*, where appropriate, or dissolution or cancellation.

If two or more mitigating circumstances occur and no aggravating circumstance, in cases of misdemeanours, the Court shall apply only one penalty, ranging from lowest to highest. In case of crimes, the Court shall apply two penalties of those contemplated for misdemeanour.

If several mitigating circumstances and the aggravating one prescribed by this Act occur, the aggravating circumstance shall be rationally compensated with any of the mitigating circumstances, the penalties being adjusted to the foregoing indents.

Article 17. Rules of judicial determination of the penalty. To regulate the quantum and nature of the penalties to be imposed, the Court must, keeping a detailed record of its reasons in its ruling, consider the following criteria:

- (1) The amounts of money involved in the commission of the offense.
- (2) The size and nature of the legal person.
- (3) The financial capacity of the legal person.
- (4) The degree of observance of and compliance with laws and regulations and mandatory technical rules in the exercise of its habitual business or activity.
- (5) The extent of the damage caused by the offense.
- (6) The seriousness of the social and economic consequences or, as the case may be, the serious damages that imposing a penalty might cause to the community where a State company or a public utility company is involved.

Article 18. Transference of criminal responsibility of the legal person. In case of voluntary or mutually agreed transformation, merger, absorption, division or dissolution of the legal person responsible for one or more crimes referred to in article 1, its responsibility for the offenses committed prior to the occurrence of any of such acts shall be transferred to the legal persons resulting thereof, if any, according to the following rules, all that without prejudice to the rights of others acting in good faith.

- (1) If the penalty of fine is imposed, on cases of transformation, merger or absorption of a legal person, the resulting legal person shall be responsible for the total quantum. In the event of division, the resulting legal persons shall be equally or jointly responsible for payment thereof.
- (2) In cases of dissolution by mutual agreement of a for-profit legal person, the penalty shall be transferred to the members and participants in the capital thereof, who shall be responsible up to the limit of the value of the liquidation share assigned to them.
- (3) If any other penalty is concerned, the judge shall assess its convenience, depending on the pursued purposes in each case.

In order to adopt this decision, the judge shall, above all, bear in mind the substantial continuity of the material and human means and the activity being carried out.

- (4) From the request for hearing of the formalization against a non profit legal entity and until the acquittal or conviction and pending enforcement thereof, the authorization provided for in indent one, article 559 of the Civil Code shall not be granted.

3. Extinguishment of the criminal responsibility of a legal person.

Article 19. Extinguishment of criminal responsibility. Criminal responsibility of a legal person is extinguished on the same grounds as set forth under article 93 of the Criminal Code, except the reason contemplated under number 1 thereof.

Chapter III Procedure

1. Beginning of the investigation on criminal responsibility of a legal person.

Article 20. Investigation of criminal responsibility of legal persons. If during the investigation of any of the offenses prescribed by article 1, the Public Prosecutors' Office takes notice of the possible participation of any of the persons referred to in Article 3, it shall extend such investigation in order to determine the criminal responsibility of the corresponding legal person.

Article 21. Application of the rules relating to the alleged offender. As to what is not governed by this Act, the legal provisions relating to the alleged offender, the accused person, and the convicted person, set forth in the Criminal Procedure Code and in the respective special laws, shall be applicable to legal persons, provided they are compatible with the particular nature of the legal persons.

In particular, the provisions of articles 4, 7, 8, 10, 93, 98, 102, 183, 184, 186, 193, 194 and 257 of the Criminal Procedure Code shall apply to them, rights and guarantees that may be exercised by any representative of the legal person.

Article 22. Formalizing the investigation. When the prosecutor deems it appropriate to formalize the proceeding against the legal person, he shall request the guarantee judge to summons its legal representative, in accordance with article 230 et seq of the Criminal Procedure Code. It shall be a previous requirement to proceed in this manner, at least that a hearing of formalization of the investigation has been requested or filed a requirement according to the rules of the simplified proceeding, in respect of the individual, that might involve the responsibility of the legal person as provided by indents one and two of article 3, except for those cases set forth in article 5.

Such request shall also contain the identification of the legal representative of the legal person.

Article 23. Representation of the legal entity. If the legal representative of the alleged offender legal person is summoned to appear in a hearing before the Court and he fails to appear without reason, the Court may order his arrest until the hearing, which shall take place within a deadline of twenty-four hours from his deprivation of liberty.

If the legal representative is not found, the prosecutor shall request the Court to appoint a criminal public defender, who shall act as *curator ad litem* on behalf of the legal person.

Anyhow, the legal person may at any time appoint a defender of its trust.

Where according to the criminal procedural legislation the presence of the alleged offender is required as a condition or requirement for a hearing, it shall be understood that such requirement has been met with the presence of the *curator ad litem* or the defender of trust, as the case may be. For

that purpose, the warnings contemplated under indent one shall apply to *curator ad litem* and to the defender of trust.

Article 24. Inapplicability of the principle of opportunity. The provisions of Article 170 of the Criminal Procedure Code shall not apply in respect of the criminal responsibility of legal persons.

Article 25. Conditional suspension of proceedings. Conditional suspension of proceedings may be decreed if no sentence or other conditional suspension of the on-going proceeding exist, against the alleged offender legal person for any of the offenses prescribed by this Act.

The guarantee judge shall, where appropriate, order that during the suspension period, which may not be less than six months nor more than three years, the legal person be subject to one or more of the following conditions:

- (1) To pay a certain amount for fiscal benefit;
- (2) To render a particular service in favour of the community;
- (3) To report, on a regular basis, on its financial statement to the institution to be determined.
- (4) To implement a program for giving effect to the organization, administration and supervisory model referred to in article 4.
- (5) Any other condition that is considered appropriate in view of the circumstances of the particular case and proposed on reasoned grounds by the Public Prosecutors' Office.

In cases where the Judge imposes the measure outlined in number (1), he shall notify the Treasury General of the Republic.

Article 26. Determination of the procedure applicable to the criminal responsibility of the legal person. If the prosecutor, when requiring or accusing, according to the rules of the simplified procedure, requests the application of any of the penalties prescribed for misdemeanours in the lowest degree, the knowledge and judgment thereof shall be in accordance with the simplified rules of procedure.

If the prosecutor, when indicting, requests only a penalty of crime or misdemeanour in its medium degree, the knowledge and judgment thereof shall be made in accordance with the rules of oral trial in Chapter III of Book II of the Criminal Procedure Code.

If the prosecutor requires or accuses the individual and legal person at the same moment, the procedure applicable to individuals shall continue. The previous, shall not apply in case of penalties of crimes.

Regarding the criminal responsibility of the legal persons, monitory proceeding shall not apply.

Article 27. Abridged Proceeding. The proceeding established in articles 406 et seq of the Criminal Procedure Code shall be applied to determine the responsibility and to impose the sanctions established by this Act.

This procedure shall be used to knowledge and adjudicated the facts in respect of which the prosecutor requests the imposition of one or more penalties of misdemeanour.

The Court may not impose a higher or less favourable penalty than the one required by the prosecutor.

Article 28. Defence of legal persons. Any legal person being unable to get its own defence is entitled to ask the Judge to appoint a public criminal defender.

Article 29. Suspension of Conviction. If in the condemned sentence the Court imposes a penalty of misdemeanour in its lowest degree, it may, through grounded resolution and on an exceptional basis, especially considering the number of workers or the net annual sales or the export amounts of the company, decree suspension of the sentence and its effects for a period of no less than six months nor more than two years. In this case, the Court may exempt the ancillary penalty of confiscation.

In case of State companies or companies that provide a necessary public utility service the interruption of which might cause grave social and economic consequences or serious damage to the community, the Judge may decree the suspension of the penalty regardless of the imposed sentence.

If after the lapse of the period provided for in the first indent, the legal person has not been subject of a new requirement or a new formalization of the investigation, the court shall order not giving effect to the judgment and, instead, decree the final dismissal of the case.

This suspension shall not affect the civil liability resulting from the offense.

Article Second. The following indent two is hereby added to article 294 bis of the Criminal Code:

“When the association has been formed through a legal person, shall be imposed dissolution or cancellation of juridical status in addition, as an ancillary consequence of the penalty imposed to the responsible individuals”

Article Third. The following indent two is introduced to Article 28 of act No. 19 913 which creates the Financial Analysis Unit and amends several provisions on money laundering:

“When the association has been formed through a legal person, shall be imposed dissolution or cancellation of juridical status in addition, as an ancillary consequence of the penalty imposed to the responsible individuals”

Resolution of Criminal Proceedings

Conditional Suspension of Proceedings

Criminal Procedure Code

Article 237. Conditional suspension of the process. The prosecutor, with the agreement of the accused, may request the judge of guarantee the conditional suspension of the proceedings.

The judge may request from the public prosecutor the information he deems necessary to resolve.

The conditional suspension of the proceedings may be decreed:

- a) If the penalty that may be imposed on the accused, in the event of conviction, does not exceed three years of deprivation of liberty;
- b) If the accused has not previously been convicted of a crime or simple crime, and
- c) If the defendant does not have a conditional suspension of the proceedings in force, at the moment of verifying the facts of the new process.

The presence of the defender of the accused in the hearing in which the request for the conditional suspension of the proceedings is filed will constitute a validity requirement for the same.

If the complainant or the victim attends the hearing in which the application for the conditional suspension of the proceedings is granted, it must be heard by the court.

In the case of accused persons for crimes of homicide, kidnapping, robbery with violence or intimidation in people or force in things, child abduction, abortion; for those contemplated in articles 361 to 366 bis and 367 of the Penal Code; for the crimes indicated in articles 8, 9, 10, 13, 14 and 14 D of law No. 17,798; for crimes or quasi-delict contemplated in other legal bodies that are committed using any of the weapons or elements mentioned in letters a), b), c), d) and e) of article 2 and article 3 of the aforementioned law No. 17,798, and driving while intoxicated causing death or serious or very serious injuries, the prosecutor must submit his decision to request the conditional suspension of the proceedings to Regional Attorney.

When decreeing the conditional suspension of the proceedings, the judge of guarantee will establish the conditions to which the accused must submit, for the period that it determines, which cannot be less than one year or more than three. During this period, the course of the prescription of the criminal action will not be resumed. Likewise, during the term for which the conditional suspension of the proceedings is prolonged, the term provided in article 247 shall be suspended.

The resolution that is pronounced about the conditional suspension of the proceedings will be appealable by the accused, by the victim, by the public prosecutor and by the complainant.

The conditional suspension of the proceedings will not in any way impede the right to pursue through civil means the pecuniary liabilities derived from the same act.

Article 238. Conditions to comply decreed the conditional suspension of the proceedings. The judge of guarantee will arrange, as it corresponds, that during the period of suspension, the imputed one is subject to the fulfilment of one or more of the following conditions:

- a) Reside or not reside in a specific place;
- b) Abstain from frequenting certain places or people;
- c) Undergo medical, psychological or other treatment;
- d) To have or exercise a job, trade, profession or employment, or attend an educational or training program;
- e) To pay a certain amount, as compensation for damages, in favour of the victim or to guarantee its payment. Payment may be authorized in instalments or within a certain period, which in no case may exceed the period of suspension of the procedure;
- f) To attend periodically before the public prosecutor and, in its case, to prove the fulfilment of the other imposed conditions;
- g) Establish an address and inform the public prosecutor of any change in the same, and
- h) Another condition that is appropriate in consideration of the circumstances of the specific case that is being dealt with and was proposed, in a reasonable manner, by the Public Prosecutor's Office.

During the period of suspension and hearing in a hearing all the interveners who attend it, the judge may modify one or more of the imposed conditions.

Article 239. Revocation of the conditional suspension. When the accused fails, without justification, seriously or repeatedly the imposed conditions, or is the object of a new formalization of the investigation by different facts, the judge, at the request of the prosecutor or the victim, will revoke the conditional suspension of the proceedings, and this will continue according to the general rules.

The resolution that is dictated pursuant to the preceding paragraph shall be appealable.

Article 240. Effects of the conditional suspension of the proceedings. The conditional suspension of the proceedings does not extinguish the civil actions of the victim or of third parties. However, if the victim receives payments under the provisions of article 238, letter e), they will be imputed to the compensation of damages that may correspond.

After the period that the court has set pursuant to Article 237, fifth paragraph, without the suspension was revoked, the criminal action shall be terminated, the court must dictate on its own initiative or at the request of the party the dismissal.

Prosecutor Instruction 699/2014

7.5 Conditional Staying of Proceedings. This alternative is applicable to specialty offenses, provided the legal requirements are complied with, even if the State Defence Council has not consented thereto in its capacity as plaintiff, and notwithstanding the right of said agency to be heard, particularly to set the most appropriate conditions for the Treasury.

However, in view of the delicate legally protected interest involved in these offenses and the impact this kind of decision may have on the penalty's preventive purposes, prosecutors are instructed to make an exceptional, restricted and prudent use of this power, particularly bearing in mind the difficulty in seeing to satisfaction of the conditions set to stay a case and the image projected to citizens should such an alternative be implemented in corruption cases.

Accordingly, prosecutors must weigh, on a case by case basis, the circumstances surrounding the commission of the offense, the nature, means and motive thereof, and proceed with its criminal prosecution where necessary due to its seriousness and the significance of the events in a specific case.

It must be recalled that in some instances a conditional stay of proceedings turns out to be a ground for vacation of office, as in the case of justices and prosecutors, according to section 332 in relation to section 256, both of the Court Organization Code, and section 65 in relation to section 60 of Act No. 19,640 on the Public Prosecutor's Office Organization Act.

In any case, should the decision entail a request for a special hearing to propose a conditional stay of proceedings, said hearing request must be filed in writing and bear the signature of the Regional Prosecutor, although the deputy prosecutor attends the same.

In the event the alternative is proposed at any other hearing, the relevant Regional Prosecutor must authorize the same, and signify his consent in writing. Regardless of the hearing it is dealt with, a favourable technical report prepared by the Anti-corruption Specialized Unit shall be a condition precedent to the adoption of this alternative. The above provisions are exclusive of investigations for low-complexity flagrant bribery.

Abbreviated Procedure

Article 406. Budgets of the abbreviated procedure. The abbreviated procedure for knowing and ruling shall apply, the facts in respect of which the prosecutor requires the imposition of a penalty of deprivation of liberty not exceeding five years of imprisonment or confinement in its maximum degree; not exceed ten years of imprisonment or imprisonment greater than the minimum degree, in the case of the offenses included in paragraphs 1 to 4 bis of Title IX of Book Two of the Criminal Code and in Article 456 bis A of the same Code, with the exception of the figures sanctioned in articles 448, first paragraph, and 448 quinquies of that legal body, or any other penalties of different nature, whatever their entity or amount, whether they are unique, joint or alternative.

For this, it will be necessary that the accused, in knowledge of the facts of the accusation and the background of the investigation that founded it, expressly accept them and express their agreement with the application of this procedure.

The existence of several defendants or the attribution of several crimes to the same defendant will not prevent the application of the rules of the abbreviated procedure to those accused or offenses in respect of which the budgets indicated in this article concur.

Article 407. Opportunity to request the abbreviated procedure. Once the investigation is formalised, the processing of the case according to the rules of the abbreviated procedure may be agreed at any stage of the procedure, until the oral preparation hearing.

If an accusation has not yet been deduced, the prosecutor and the complainant, as the case may be, will make them orally at the hearing that the court will call to resolve the request for an abbreviated procedure, to which all the interveners must be summoned. If the accusations are deduced verbally, the rest will be carried out in accordance with the rules of this Title.

If an accusation has been filed, the prosecutor and the private accuser may modify it according to the general rules, as well as the penalty required, in order to allow the processing of the case in accordance with the rules of this Title. For these purposes, the acceptance of the facts referred to in the second paragraph of article 406 may be considered by the prosecutor as sufficient to estimate that the attenuating circumstance of article 11, No. 9 of the Penal Code, without prejudice to the rest rules that are applicable for the determination of the penalty.

Without prejudice to the provisions of the preceding paragraphs, regarding the offenses indicated in Article 449 of the Penal Code, if the accused expressly accepts the facts and background of the investigation on which an abbreviated procedure is based, the prosecutor or the complainant, as the case may be, it may request a penalty that is lower than the minimum prescribed by law, and must previously consider the provisions of rules 1a or 2a of that article.

If the abbreviated procedure is not admitted by the guarantee judge, the verbal accusations made by the prosecutor and the complainant will be considered as not made, as well as the modifications that, if any, they have made to their respective libelos, and will continue according to the provisions of Book Two of this Code.

Article 408. Complainant's opposition to the abbreviated procedure. The complainant can only oppose the abbreviated procedure when in his private accusation he has made a legal qualification of the facts, attributed a form of participation or indicated circumstances that modify the criminal liability different from those consigned by the prosecutor in his accusation and, as a consequence of this, the penalty requested exceeds the limit indicated in article 406.

Article 409. Prior intervention of the guarantee judge. Before resolving the request of the public prosecutor, the guarantee judge will consult the defendant in order to ensure that the accused has agreed to the abbreviated procedure freely and voluntarily, that he knows his right to demand an oral trial, that he understands the terms of the agreement and the consequences that this may mean and, especially, that has not been subject to coercion or undue pressure by the prosecutor or third parties.

Article 410. Resolution on the application for abbreviated procedure. The judge will accept the request of the prosecutor and the accused when the background of the investigation were sufficient to proceed in accordance with the rules of this Title, the penalty requested by the prosecutor will comply with the provisions of the first paragraph of Article 406 and verify that the agreement has been provided by the accused with knowledge of their rights, freely and voluntarily.

When he does not deem it so, or when he considers the opposition of the complainant to be well founded, he will reject the request for an abbreviated procedure and dictate the order to open the oral trial. In this case, the acceptance of the facts by the accused and the acceptance of the background referred to in the second subparagraph of article 406, as well as the modifications of the accusation or of the particular accusation made to enable the abbreviated procedure. Likewise, the judge will arrange that all the antecedents related to the approach, discussion and resolution of the request to proceed according to the abbreviated procedure be eliminated from the registry.

Article 411. Procedure in the abbreviated procedure. Once the abbreviated procedure has been agreed upon, the judge will open the debate, grant the floor to the prosecutor, who will make a summary statement of the accusation and of the actions and proceedings of the investigation that will be the basis for it. Next, the other participants will be given the floor. In any case, the final exposition will always correspond to the accused.

Article 411bis. Sanctions to the prosecutor who does not attend or leave the hearing unjustifiably. To the absence or unjustified abandonment of the prosecutor to the hearing of the abbreviated procedure or to any of its sessions, if it takes place in several, the provisions of the second paragraph of article 269 shall apply.

Article 412. Failure in the abbreviated procedure. After the debate, the judge will issue a sentence. In case of conviction, may not impose a higher penalty or more unfavourable to that required by the prosecutor or the complainant, as appropriate.

The conviction cannot be issued exclusively on the basis of the acceptance of the facts by the accused.

In no case shall the abbreviated procedure prevent the granting of any of the alternative penalties considered in the law, when applicable.

The judgment will not rule on the civil suit that has been filed.

Article 413. Content of the sentence in the abbreviated procedure. The sentence issued in the abbreviated procedure will contain:

- a) The mention of the court, the date of its issuance and the identification of the participants;
- b) The brief statement of the facts and circumstances that would have been object of the accusation and of the acceptance by the defendant, as well as of the defendant's defence;
- c) The clear, logical and complete exposition of each one of the facts that are given as proven on the basis of the acceptance that the accused had expressed regarding the background of the investigation, as well as the merit of these, valued in the way provided for in article 297;
- d) The legal or doctrinal reasons that serve to legally qualify each of the facts and their circumstances and to base its decision;
- e) The resolution that will condemn or absolve the accused. The conviction will set the penalties and decide on the application of any of the alternatives to the deprivation or restriction of freedom provided by law;
- f) The ruling on the costs, and
- g) The signature of the judge who issued it.

The sentence that condemns a temporary penalty must express with precision the day from which it will start to count and will set the time of detention or preventive detention that must serve as payment for compliance.

The conviction will also provide for the seizure of the instruments or effects of the crime or its restitution, when appropriate.

Article 414. Appeals against the sentence handed down in the abbreviated procedure. The final judgment issued by the guarantee judge in the abbreviated procedure can only be challenged on appeal, which must be granted in both cases.

In the knowledge of the appeal, the Court may rule on the concurrence of the cases of the abbreviated procedure provided for in article 406.

Article 415. Rules applicable in the abbreviated procedure. The provisions set forth in this Title shall apply to the abbreviated procedure, and in matters not provided for in it, the common standards set forth in this Code and the provisions of the ordinary procedure.

Obligation to Report Crimes

Criminal Procedure Code

Article 175. Mandatory reporting. They will be required to report:

- a) The members of Carabineros de Chile, of the Investigative Police of Chile and of the Gendarmerie, all the crimes that witness or arrive at their news. The members of the Armed Forces will also be obliged to denounce all the crimes of which they become aware in the exercise of their functions;
- b) Prosecutors and other public employees, the offenses of which they become aware in the exercise of their functions and, especially, where appropriate, those that they notice in the ministerial conduct of their subordinates;
- c) Heads of ports, airports, train or bus stations or other means of locomotion or cargo, captains of ships or commercial aircraft navigating in the territorial sea or territorial space, respectively, and drivers of trains, buses or other means of transport or cargo, crimes committed during the trip, in the precincts of a station, port or airport or on board the ship or aircraft;
- d) Heads of hospital establishments or private clinics and, in general, professionals in medicine, dentistry, chemistry, pharmacy and other branches related to the conservation or restoration of health, and those who exercise auxiliary services, that they notice signs of poisoning or other crime in a person or in a corpse, and
- e) The directors, inspectors and teachers of educational establishments of all levels, the crimes that affect the students or that have taken place in the establishment.

The complaint made by any of the parties in this article will exempt the rest.

Article 176. Deadline to make the complaint. The persons indicated in the previous article must make the denunciation within the twenty-four hours following the moment in which they become aware of the criminal act. Regarding the captains of ships or aircraft, this period will be counted from arrival at any port or airport of the Republic.

Article 177. Failure to comply with the obligation to report. The persons indicated in article 175 who omit to make the denunciation that is prescribed in it will incur the penalty provided in article 494 of the Penal Code, or in the one indicated in special provisions, in what corresponds.

The penalty for the crime in question will not be applicable when it appears that the person who omitted to make the complaint risked the criminal prosecution of himself, his spouse, his partner or ascendants, descendants or siblings.

Article 178. Responsibility and rights of the complainant. The complainant shall not incur any liability other than that corresponding to the offenses committed by him or her on the occasion of the complaint. Nor will it acquire the right to intervene later in the proceeding, without prejudice to the powers that may correspond to it in the case of being a victim of the crime.

Ley 18834 (Decree Law 29) (Administrative Statute)

Article 61. The duties of each officer:

[...]

- k) Report to the Attorney General or the police if there is no prosecution in the place in which the official serves, with due expedition, crimes or misdemeanours and the competent authority of irregular events, especially those that contravene the principle of administrative probity regulated by law No. 18,575.

Article 90A. The officials who exercise the actions referred to in letter k) of article 61 shall have the following rights:

- a) They cannot be subject to the disciplinary measures of suspension of employment or dismissal, from the date on which the authority receives the complaint and until the date on which it is definitively resolved not to have it as presented or, where appropriate, up to ninety days after completing the summary investigation or summary, initiated from the aforementioned complaint.
- b) Not to be transferred from the locality or from the function they perform, without their written authorization, during the period referred to in the preceding letter.
- c) Not be subject to annual prequalification, if the defendant was your superior, during the same period referred to in the previous letters, unless expressly requested by the complainant. If you do not, your last qualification will apply for all legal purposes.

Accepted the complaint by a competent authority, the formulation of it before other authorities will not give rise to the protection that establish this article.

Article 90B. The complaint referred to in the preceding article must be founded and meet the following requirements:

- a) Identification and domicile of the complainant.
- b) The detailed narration of the facts.
- c) The individualization of those who have committed them and of the persons who have witnessed them or who have news of them, as soon as the complainant is recorded.
- d) Accompany the background and documents that serve as a basis, when possible.

The complaint must be formulated in writing and signed by the complainant. If he cannot sign, a third party will do so at his request.

It may be requested that they are secret, regarding third parties, the identity of the complainant or the data that allow to determine it, as well as the information, background and documents that are given or indicated on the occasion of the complaint.

If the complainant makes the request of the preceding paragraph, the disclosure, in any form, of this information will be prohibited. The violation of this obligation will give rise to the corresponding administrative responsibilities.

Complaints that do not comply with the provisions of the first and second preceding paragraphs will be considered as not presented.

The authority that receives the complaint will have a period of three working days from that date to resolve if it will be presented. In case the person receiving the complaint lacks the competence to decide on said origin, it will have a term of 24 hours to send it to the authority it considers competent.

If after the term established in the previous paragraph has elapsed, the authority has not ruled on the origin of the complaint, then it will be considered as submitted.

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