



Conference of the States Parties to the United Nations Convention against Corruption

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Executive summary

Note by the Secretariat

Addendum

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II. Executive summary

Chile

General comments

Both the governmental authorities of Chile and the representatives of civil society that have been consulted have highlighted the low levels of corruption in that country. Corruption-related offences account for 0.1 per cent of investigations.¹ In the area of criminal prosecution, that figure is reflected in the number of officials of the Public Prosecution Service assigned specifically to corruption cases: in total, 9 officials are assigned at the central level, forming part of a specialized anti-corruption unit of the Public Prosecution Service, and 76 specialized prosecutors are assigned in the various regions of Chile; in addition, all (non-specialized) deputy prosecutors have the power to bring corruption-related cases before the criminal courts.

However, the importance of keeping the phenomenon of corruption under control has been recognized. According to the Public Prosecution Service, the offences most commonly committed are embezzlement, bribery and tax evasion. Cases of grand corruption have included that of the Employment Creation Programme, a Government plan in connection with which three members of Parliament were charged with the diversion of funds intended to finance electoral campaigns.

Moreover, the Office of the Comptroller-General has a unit responsible for special audits that investigates matters that affect the general public or are of special relevance to the State Administration. The unit comprises eight officials at the central level who coordinate with the Office's various divisions.

In order to respond to current challenges, in recent years Chile has adopted important changes to its legal system with the aim of complying more precisely with the provisions of the United Nations Convention against Corruption and other international instruments relating to corruption. Those changes have been made as part of the extensive reform of criminal procedure, whereby an accusatorial system has gradually been established since the year 2000. They include the introduction of a regime governing the criminal liability of legal persons; the introduction of heavier penalties for bribery and tax evasion, a change driven, inter alia, by the need to facilitate the extradition of perpetrators of those offences; and measures to protect officials who report irregularities and non-compliance with the principle of probity.

One of the current initiatives worthy of note is the plan to strengthen the Public Prosecution Service through the establishment of a "super-regional" prosecution office responsible for prosecuting highly complex cases. In addition, a draft law aimed at extending the scope of application of current legislation on

¹ The web page of the Public Prosecution Service (www.fiscaliadechile.cl) provides access to various statistical tables covering the years 2004-2010. The data are organized as follows: cases and offences by region and according to whether the identity of the suspect is known or unknown; offences registered according to category of offence and whether the identity of the suspect is known or unknown; cases closed, by category of offence and according to whether the identity of the suspect is known or unknown; etc.

money-laundering and at facilitating access by the Public Prosecution Service to banking data is being considered by the National Congress of Chile.

Criminalization and law enforcement

Criminalization

While some corruption-related offences are established in other laws, such as Law No. 19.913 (on money-laundering) and Law No. 20.393 (on criminal liability of legal persons), most are regulated by the Criminal Code. Chapter V, in particular, deals with offences committed by public officials in the exercise of their official duties and includes acts of bribery, embezzlement of public funds, fraud and extortion. Chile has opted not to establish passive bribery by foreign officials as an offence since it considers that the country of the official concerned would be in a position to prosecute such officials under the offence of active bribery of national officials.

It should be noted that while the various forms of participation in the commission of offences covered by the United Nations Convention against Corruption are not separately defined in the legislation that constitutes the special part of criminal law in Chile, the particularly broad scope of regulation of the general part of criminal law as regards the various forms of participation in an offence — as perpetrator, accomplice or a person who conceals or helps to conceal the offence (chapter II, “Persons liable for offences”) — encompasses the various situations provided for in the United Nations Convention against Corruption. Thus, for example, it is possible to punish the offence of bribery committed through an intermediary and some offences relating to trading in influence that do not fall within the scope of article 240 bis (since that article applies only to public officials, not to private persons).

Some acts are not defined in the same systematic way as in the United Nations Convention against Corruption but may be considered to be covered by general legislative provisions; for example, the offences of embezzlement or misappropriation of property in the private sector may be prosecuted under article 470, paragraph 1, of the Criminal Code, while most offences committed with a view to obstructing justice officials are prosecutable under chapter VI (“Crimes and ordinary offences against public order and public security committed by private persons”).

The offence of bribery in the private sector appears to be covered only partially by provisions relating to the offences of fraud and other forms of deception (chapter IX, “Crimes and ordinary offences against property”). Chile has expressed its interest in learning of examples of relevant legislation of other States with a view to the possible introduction in its legislation of provisions covering that offence.

Money-laundering is established as an offence in Law No. 19.913, which was drawn up on the basis of the principles set out in both the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (concluded at Vienna in 1988) and the United Nations Convention against Transnational Organized Crime (concluded at Palermo in 2000).

The Law restricts neither the type nor the value of property that may be the subject of laundering, establishing that such property is derived directly or indirectly

through the commission of the predicate offence. Moreover, in order to prove that property constitutes the proceeds of an offence, the person prosecuted for the offence of laundering those proceeds is not required to have been convicted of the predicate offence (article 27, paragraph 5, of Law No. 19.913), as is reflected in the relevant decisions of the Chilean courts.

With regard to the subjective element of the offence of money-laundering, the Law establishes that that offence is punishable both when committed with criminal intent (two forms of commission of the offence are described in paragraph (a) and a third in paragraph (b) of article 27) and when committed through negligence (gross negligence, provided for in paragraph 4 of the same article). It is also important to highlight that Law No. 20.393 and the Criminal Code itself establish as criminally punishable the act of forming or organizing a group with the aim of carrying out any of the acts punishable as money-laundering.

The National Congress is currently considering a draft law that will expand the range of predicate offences and bring the penalty applicable to money-laundering into line with the penalty applicable to the predicate offence.

Chile has made an important change to its legal system through the adoption of Law No. 20.393, which establishes for the first time the criminal liability of legal persons for the offences of money-laundering, financing of terrorism and bribery of national and foreign public officials. The Law is an exception to the principle of *societas delinquere non potest*, which is set out in the Code of Criminal Procedure. The attribution of such liability requires the offence to have been committed in the interest of and for the benefit of the legal person concerned by a natural person with managerial, administrative or supervisory powers or by a person under the direct supervision or management of one of the above-mentioned persons; failure on the part of the legal person to comply with managerial or supervisory duties must also be proven. The Law defines such non-compliance on the part of the legal person concerned as the failure to implement organizational, administrative and supervisory mechanisms to prevent the commission of an offence. One of the objectives of the Law is to encourage legal persons to adopt the crime prevention mechanisms for which it provides. As regards punitive scope, the Law has not yet been applied in criminal proceedings; consequently, there is uncertainty as to the way in which the courts will assess some of its aspects, such as the specific consequences that formal recognition of a crime prevention mechanism would have in relation to evidence.

Chile complies almost fully with the provisions of the United Nations Convention against Corruption relating to criminalization. However, a number of areas in which additional measures would be advisable have been identified, in particular:

- If practicable, to expand the scope of article 250 of the Criminal Code, replacing the term “financial benefit” with the term “undue advantage” in order to include both pecuniary and other benefits, taking into account the fact that the interpretation currently supported in Chile already encompasses benefits that can be assigned a monetary value and thus applies in the majority of cases and not only with respect to pecuniary benefits;
- To ensure that cases of “promise” are covered under the concept of “offer”. Should the judiciary not interpret the law accordingly in future cases, legislative clarification may be considered;

- To consider the adoption of a provision that establishes and defines more accurately the criminal offences provided for in article 19 (abuse of functions) and article 22 (embezzlement of property in the private sector) of the United Nations Convention against Corruption, although the optional nature of both of those provisions is recognized;
- To consider the possibility of extending the range of predicate offences for money-laundering with a view to including all of the acts provided for in the Convention (and established as offences in Chile), particularly those relating to bribery, embezzlement or misappropriation of property in the private sector, while recognizing the optional nature of those provisions;
- To consider the adoption of a legislative measure relating to the continued retention of the proceeds of an offence that does not necessarily presuppose the use or concealment of such proceeds, in full implementation of article 24 (concealment) of the Convention;
- To ensure, in relation to the obstruction of justice (article 25 (a) of the Convention), that cases of inducement to give false testimony are provided for in Chilean legislation. Should the judiciary not interpret the law accordingly in future cases, legislative clarification may be considered.

Law enforcement

In Chilean legislation, the investigation and prosecution of offences in general are regulated by the Code of Criminal Procedure and are based on the principle of mandatory prosecution, although the principle of prosecutorial discretion is applied in various ways. In the case of an offence committed by a public official in the discharge of his or her functions, under article 170 of the Code of Criminal Procedure, prosecution is mandatory. Furthermore, the National Prosecutor has issued a general instruction to the effect that that principle should also be applied with respect to public officials who have committed offences but not in the discharge of their functions.

The criminal prosecution of officials of the executive, the legislature or the special courts requires a pretrial proceeding whereby the official in question is stripped of his or her privileges and immunities (or, in the case of a member of the judiciary or an official of the Public Prosecution Service, a preliminary proceeding to ascertain whether or not that person has committed an offence in the discharge of his or her duties). Since the entry into force of the new system of criminal procedure in Chile, four such proceedings have been requested in respect of members of Parliament, as a result of which the initiation of investigations in each case has been made possible.

In Chile, there are two key institutions responsible for combating corruption through law enforcement: the Office of the Comptroller-General and the Public Prosecution Service. Both have constitutional autonomy and are independent from the other powers of the State. The Office of the Comptroller-General, in particular, implements a policy of safeguarding administrative probity through, inter alia, preventive control of the legality of the actions of the Administration. The Public Prosecution Service, for its part, investigates corruption cases through specialized prosecutors in all of the country's regions who may seek the assistance and advice of the Specialized Anti-Corruption Unit. The Unit not only provides legal support

during investigations but also employs financial and accounting analysts who analyse the information gathered in cases relating to economic crime.

The right of victims and witnesses to receive adequate protection during the course of criminal proceedings, one of the most important innovations of the new criminal procedure, is recognized at the constitutional level and is regulated by various legislative instruments, chiefly the Code of Criminal Procedure and the Constitutional Act relating to the Organization of the Public Prosecution Service. The latter entrusts the National Prosecutor with the issuing of the instructions necessary to ensure that victims and witnesses are adequately protected and establishes specialized units within the Public Prosecution Service and each regional prosecution office. The Chilean authorities have indicated that, to date, they have applied legislation on witness protection only in exceptional cases.

Procedures for the freezing, seizure and confiscation of property are regulated both by the Code of Criminal Procedure and the Law on Drug Trafficking (Law No. 20.000) and are fully applicable to money-laundering offences. The regulations governing the seizure, freezing and confiscation of property, as set out in the Code of Criminal Procedure and the Criminal Code, are of a general nature and should be applied in the investigation of most of the crimes and ordinary offences provided for in Chilean legislation; they also serve also as alternative regulations where there is no law providing specifically for the case concerned. In addition, Law No. 20.000 on drug trafficking contains special provisions relating to the seizure, freezing and confiscation of property. Those special provisions are applicable only to investigations relating to the crimes or ordinary offences established in that Law and to the investigation and prosecution of money-laundering, as indicated in the explicit references contained in Law No. 20.000 to Law No. 19.913 on money-laundering with respect to these and other matters. In addition, article 32 of Law No. 19.913 expressly and specifically regulates, in money-laundering cases, such precautionary measures relating to property — freezing measures — as the Public Prosecution Service may request. As indicated previously, any matters not explicitly regulated by special legislation on drugs and money-laundering are covered by the general provisions of the Criminal Code and the Code of Criminal Procedure. Consequently, those general provisions are applicable also to corruption-related offences. The regulation of freezing and seizure falls within the scope of civil procedure legislation only with regard to the freezing measures or precautionary measures relating to property that may be requested and applicable procedures.

Chilean legislation does not provide for the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime. However, current legislation relating to money-laundering is undergoing revision, on the basis of which a new draft law is being prepared that will permit, *inter alia*, the seizure, freezing and confiscation of property of equivalent value.

Of note with regard to bank secrecy are the regulations applicable to the investigation of offences committed by public officials in the exercise of their functions, which give the Public Prosecution Service the power to order the disclosure of all transactions relating to current accounts and respective balances and not only records of specific transactions that are of direct relevance to the proceedings.

Chile complies almost fully with the provisions of the United Nations Convention against Corruption relating to law enforcement. However, it is considered that the following measures would help to strengthen the current legal regime:

- Consideration of the advisability of regulating the freezing of assets in a uniform manner, without the application of civil procedure measures, in order to avoid different treatment of a given case under different bodies of law and thus to limit possible doubts concerning interpretation;
- Consideration of the possibility of adoption of a legislative measure that establishes greater balance between immunity and investigation or trial, ensuring, in particular, that a decision to reject a request for proceedings for the deprivation of privileges and immunities does not prevent subsequent investigation once the official concerned has ceased to exercise his or her official functions, provided that the standard required by the courts in order to accede to such requests is raised;
- Taking into account that Chile already has a criminal prosecution system that complies with the requirement established in the United Nations Convention against Corruption that each State Party should have an independent body or bodies specialized in combating corruption, support for the plan to strengthen the Public Prosecution Service through the establishment of a super-regional prosecution office responsible for prosecuting highly complex cases;
- Consideration of the measures necessary to encourage persons other than public officials — for example, employees of private companies — to report acts established as offences under the United Nations Convention against Corruption, particularly since Chile is planning to introduce in its criminal law provisions relating to acts of corruption in the private sector;
- Study of the possibility of introducing a provision similar to that contained in article 21 of Law No. 20.000 in order to determine whether persons convicted of corruption-related offences reoffend.

International cooperation

General comments

International cooperation in criminal matters is afforded by Chile on the basis of international treaties and the principle of reciprocity, in conformity with the principles of international law. The provisions of the United Nations Convention against Corruption relating to international cooperation can be applied directly in Chile. With regard to domestic legislation, cooperation is afforded in accordance with the regulations set out in the Code of Criminal Procedure and the Courts Organization Code. Chile has signed a number of bilateral and multilateral treaties on extradition, the transfer of sentenced persons, mutual legal assistance and law enforcement cooperation.

Extradition

Chilean legislation permits extradition on the basis of either a treaty or the principle of reciprocity. In the absence of an extradition treaty, the relevant general requirements of international law are applied, those requirements being cited in previous decisions of the Chilean courts as being set out in two multilateral treaties

signed by Chile, namely the Inter-American Convention on Extradition of 1933 and the Convention on Private International Law of 1928 (the Havana Convention, which contains the “Bustamante Code” or Code of Private International Law). Those requirements are as follows: the extradition request must be formulated and submitted through diplomatic channels; certain essential documents (including information indicating the relationship between the alleged facts and the order for the arrest of the person sought) must be submitted; the penalty applicable to the offence must be of minimal severity (on the understanding that the minimum applicable penalty should be one year’s deprivation of liberty); extradition shall not be carried out if the person sought faces the death penalty or if the offence is of a political or military nature; dual criminality; the possibility of extraditing nationals (unless otherwise provided for in the relevant treaties); the alleged offence is required to have been committed abroad and criminal proceedings must not be barred by statute of limitations; reciprocity must apply in the absence of a treaty; and the evidence must be of a standard equivalent to the common-law concept of “probable cause”.² Although a treaty is not required, Chile may apply the United Nations Convention against Corruption as the legal basis for extradition.

Under Chilean legislation, any offence that carries a main penalty greater than one year’s deprivation of liberty is extraditable, with the exception of political and military offences. Accordingly, Chilean legislation does not establish a list of extraditable offences. There have been cases in which the court has ruled that the concept of “more than one year” should be interpreted in such a way that it suffices that more than one year of deprivation of liberty falls within the range of penalties applicable to the offence, or that deprivation of liberty for more than one year is a penalty that can be applied to the offence in question. If, in addition to the main penalty of deprivation of liberty for more than one year, the law provides for accessory penalties that restrict the rights of the offender or are of a pecuniary nature, the offence remains extraditable. However, if the offence is punishable by penalties alternative to deprivation of liberty, such as deprivation or suspension of rights or a fine, it is not an extraditable offence. Accordingly, most but not all of the offences established under the Convention are extraditable under Chilean legislation.

None of the offences established in the Convention are regarded as political offences in Chile.

Extradition proceedings are regulated by the Code of Criminal Procedure. The parties to such proceedings (the prosecutor, the requesting State and the person sought) have the right to due process and the guarantees arising therefrom. Fair treatment is guaranteed by the Constitution. Passive extradition is granted if the court considers that the identity of the person sought has been proven; if the offence is extraditable under existing treaties or in accordance with the principles of international law; and if the evidence gathered during the extradition proceedings would be sufficient for the person sought to be indicted in a Chilean court. This standard of proof requires the investigation carried out to have made it possible to establish reliable evidence of the commission of the offence and of the participation in that offence of the person sought and is equivalent to probable cause. The court proceedings do not constitute a trial whereby the guilt and criminal liability of the

² An expression that can be translated as “reasonable grounds to prosecute”.

person concerned are established, but rather a preliminary hearing or pretrial that enables the Chilean court to establish whether there are sufficient and reliable grounds for prosecution.

Chilean legislation also provides for a simplified extradition procedure for cases in which the person sought agrees to his or her extradition.

The passive extradition system in Chile permits the provisional detention of the person sought, including prior to receipt of the formal extradition request, subject to certain minimum conditions. Once the extradition request has been formalized, the detention period can be extended in accordance with the terms established in the relevant treaties or, in the absence of a treaty, for up to two months.

Chile applies no constitutional or legal limitations to the extradition of its nationals. However, some of the international treaties ratified by Chile establish the possibility of rejecting the extradition of a person on the grounds of nationality, in which case it is required that the accused person should be prosecuted in the requested State. However, since the reform of criminal procedure in 2005, no extradition request has been rejected on the grounds that the person sought was a Chilean national.

While Chile is recognized as complying closely with article 44 of the Convention, the following recommendation has been made:

- While it is recognized that article 44 (8) of the Convention makes extradition conditional upon the minimum penalty requirements established in the domestic legislation of the requested State, it is recommended that Chile review its legislation, taking into account the provisions of article 44 (4) and (7) in order to ensure that all of the offences established in the Convention are considered extraditable under the its domestic legislation and the treaties to which it is party.

Mutual legal assistance

Chile affords legal assistance on the basis of treaties or the principle of reciprocity. The relevant provisions of the Convention may be applied directly, with the exception of measures that entail restriction or deprivation of the rights guaranteed by the Constitution, such measures requiring the prior authorization of a Chilean court. Provision for such assistance in national legislation is limited to two articles of the Code of Criminal Procedure providing for regulation of the general procedure for affording assistance. Assistance may be granted at any stage of proceedings, from the preliminary stage of the investigation to adjudication.

The affording of assistance does not depend on the dual criminality requirement. The main requirement for the execution of requests is that the requested action should be in accordance with Chilean legislation.

Spontaneous exchange of information is a common practice in Chile. Bank secrecy does not constitute a ground for the rejection of a request, since such secrecy may be lifted at the request of the prosecutor.

The central authority of Chile responsible for mutual legal assistance is the Ministry of Foreign Affairs and Spanish is the language of requests that is acceptable to Chile. Requests should normally be submitted through diplomatic channels via the relevant embassy. However, the request may be sent directly to the central authority

and subsequently formalized through the relevant embassy if such a procedure is provided for in a treaty, such as the United Nations Convention against Corruption. The central authority transmits the request to the institution responsible under Chilean law for processing such requests — usually to the Public Prosecution Service — for execution.

While Chile has very limited legislation relating to mutual legal assistance, it complies in practice with the requirements of article 46 of the Convention and the other relevant provisions of the Convention are applied directly.

However, the following is recommended:

- Since Chilean legislation sets out only limited regulations governing mutual legal assistance in criminal matters, the question of whether the elaboration of more specific legislation might improve the transparency and predictability of procedures for the benefit of the requesting State should be considered.

Law enforcement cooperation

Direct cooperation in the area of law enforcement in Chile is the responsibility of the Financial Analysis Unit, the banking supervision agencies, Customs and the police. Chile has established a number of channels for the direct exchange of information, through a wide range of international agreements and through its participation in international networks and organizations. To date, there are no examples of joint investigations in corruption cases, although such practices are likely to be possible if carried out on a case-by-case basis and if specific instruments are concluded for those purposes.

As yet, there is no legal or treaty-based framework for the use of special investigative techniques in corruption cases.

While Chile has applied some of the provisions of chapter IV relating to law enforcement cooperation, it is recommended:

- To study the experience of other countries in coordination between competent authorities and agencies with a view to determining the optimal way in which coordination should be carried out and, in particular, to assess the possibility of designating liaison offices;
- To develop specific legislation on the use of special investigative techniques in corruption cases;
- To conclude appropriate agreements or arrangements for using special investigative techniques in the context of international cooperation;
- To create a framework for the use of special investigative techniques, in the absence of an international agreement or arrangement, or on a case-by-case basis, including such methods as interception and controlled delivery of goods or funds.

Technical assistance

Note has been taken of the technical assistance needs indicated by Chile with regard to asset recovery, which often requires complex investigations at the transnational level.