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Working Group on Bribery in International Business Transactions

ASSESSMENT REPORT ON PERU'S REQUEST TO ACCEDE TO THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

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This document is for discussion under Agenda Item 7(d).

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**REQUEST BY PERU TO ACCEDE TO THE CONVENTION ON COMBATING BRIBERY
OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS**

ASSESSMENT REPORT BY THE SECRETARIAT

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A. INTRODUCTION

1. Application to Accede to the Anti-Bribery Convention

1. On 16 March 2009, the government of Peru formally applied to the OECD Secretary-General to become a full participant in the OECD Working Group on Bribery in International Business Transactions (WGB) and to accede to the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (Anti-Bribery Convention).¹ Since then, Peru has consistently inquired with the Secretariat as to the progress of the WGB's consideration of its request, demonstrating a sustained interest in joining the WGB and acceding to the Anti-Bribery Convention.

2. WGB procedure for accession to the Convention

2. At its December 2003 meeting, the Working Group endorsed a proposed solution to a series of issues including a revised set of criteria ('Revised Criteria') to be applied in assessing applications for participation in the Working Group and accession to the Convention. At its meeting on 3 February 2004, the Council welcomed the proposed general solution endorsed by the Working Group, including the revised criteria for enlargement, as amended by the Executive Committee [C(2004)1, C(2004)1/CORR1, C/M(2004)2/PROV],² which require the WGB to evaluate whether:

- a) Peru is 'willing and able' to meet the obligations contained in the Anti-Bribery Convention and the recommendations set out in the 1997 Revised Recommendation,³ and
- b) Peru's accession would be to the 'mutual benefit' of other Parties.

3. The Secretariat has prepared this assessment report to assist the Working Group to develop a technical opinion on Peru's eligibility to join the WGB and accede to the Anti-Bribery Convention. It has been prepared on the basis of Peru's replies to the Questionnaire to Countries Seeking Participation in the Working Group and Accession to the Convention (Questionnaire) [DAFFE/IME/BR/WD(2004)9] and a review of relevant legislation, as well as research by the Secretariat.

4. The analysis of some issues in this report could benefit from additional and more current information. Some of Peru's responses to the questionnaire were incomplete. Unfortunately, the Secretariat did not have sufficient time to seek clarification from Peru, largely because Peru provided the responses in English only on 10 May 2011 instead of by the 28 March 2011 deadline. This assessment report also relies heavily on secondary sources such as evaluation reports from other international bodies. However, these reports date from 2007 to 2009 and hence may contain outdated information. Much of the assessment in

¹ See letter from Mr. Yehude Simon Munaro, Prime Minister of Peru and President of the Council of Ministers, Annex 1.

² See Revised Criteria, Annex 2.

³ The 1997 Recommendation has been superseded by the 2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions [C(2009)159], although aspects of the 1997 Recommendation pertaining to the Revised Criteria remain largely the same.

this report was also based on the Secretariat's reading of various statutory provisions in Spanish that were not officially provided by Peru. For these reasons, this assessment report identifies a number of matters for further analysis in any future work of the WGB.

5. Based on the WGB's assessment of Peru's suitability as a candidate to become a full participant in the WGB and accede to the Anti-Bribery Convention, the WGB will decide how to respond to Peru's request and will forward its technical opinion to the Council via the Investment Committee, in accordance with the terms of Council resolution C(2004)132/FINAL.

3. Background Information

a) Geopolitical factors

6. The Republic of Peru (estimated population 29.2 million) occupies an area of 1.28 million square kilometres in Western South America. It borders the South Pacific Ocean in the west, Ecuador and Colombia in the north, Brazil and Bolivia in the east and Chile in the south.⁴ Peru is divided into 25 regions and departments established under the 2005 Organic Law of Regional Governments, and there is a local level of government comprising provinces, districts and villages. Peru is undergoing a transfer of functions from the central governments to the regions, as part of a constitutional process of decentralisation.⁵ Peru is a constitutional republic, consisting of executive, judicial and legislative branches.

7. Peru was the seat of the Inca Empire until its conquest by Spain from 1531-1533. On 28 July, 1821, Peru declared its independence; however remaining Spanish forces were not defeated until 1824 at the Battle of Ayacucho. Peru was under military rule between 1968 and 1979, when a new constitution was drafted, along with the creation of a Constitutional Assembly, paving the way for a return to democratic leadership in 1980. The Presidency of Alberto Fujimori from 1990 to 2000 saw radical legal and economic reforms, including the drafting of a new Constitution. Peru also underwent significant reform after the resignation of President Fujimori in 2000, and with the emergence of a number of high-profile corruption and asset recovery cases. In 2009 the Supreme Court of Justice of Peru convicted former President Fujimori of various corruption offences, including embezzlement and bribery of Peruvian public officials.

8. The 1993 Constitution of the Republic of Peru provides for a unicameral parliamentary system, with a Congress consisting of 120 members, elected for a five-year term (Article 90). In addition to passing laws, Congress ratifies treaties, authorises government loans, and approves the government budget. The President is the head of State and is elected by popular vote for a period of five years; there is no immediate re-election (Chapter IV).

9. Peru's legal system is based on the civil law model and the independence of the judiciary is guaranteed in the Constitution (Article 139). The highest judicial body is the Supreme Court of Justice (*Corte Suprema*), with a President and 16 Supreme Court judges, which has national jurisdiction. Judgments of the Supreme Court are not published.⁶ There is also a Constitutional Court with jurisdiction over cases involving individual constitutional rights. Superior courts, with separate jurisdiction over each of the 25 regions, hear appeals from the provincial courts of first instance, which are divided into civil, criminal and special chambers.

⁴ CIA World Factbook: www.cia.gov/library/publications/the-world-factbook/geos/pe.html.

⁵ Political Constitution of Peru, Chapter XIV: Decentralisation.

⁶ Peru, MESICIC Second Round Evaluation, p.19.

b) General situation regarding corruption in Peru

10. Peru is a party to UN Convention against Corruption (UNCAC) (signed 10 December 2003, ratified 16 November 2004) and in March 2007 was the first country to be reviewed, by Argentina and Norway, under the Pilot Review Programme, which evaluated the implementation of selected articles of the UNCAC, including Article 16 (Bribery of foreign public officials and officials of public organisations).⁷ In addition, Peru is currently preparing for its review under the Mechanism for the Review of Implementation of the UNCAC. Peru is also a party to the UN Convention against Transnational Organised Crime (UNTOC) (signed 14 December 2000, ratified 23 January 2002), which includes various relevant obligations such as the criminalisation of corruption, measures against corruption, and the liability of legal persons.

11. Peru is a party to the InterAmerican Convention against Corruption (IACAC) (signed 29 March 1996, ratified 4 April 1997) and the Mechanism for Follow-Up on the Implementation of the IACAC (MESICIC). Peru has undergone mutual evaluations under the first, second and third rounds of monitoring and these reports were adopted by the MESICIC member countries on 29 July 2004, 28 June 2007 and 18 September 2009, respectively.⁸

12. Peru also adheres to the Andean Plan against Corruption, Decision 668 of the Andean Community, and is a member of the Asia-Pacific Economic Cooperation (APEC) forum, where it is a participant in the Anti-Corruption and Transparency Task Force (ACT). Peru signed the Agreement for the Establishment of the International Anti-Corruption Academy as an International Organisation on 2 September 2010, on the occasion of its inauguration.

13. Peru is a member of the Financial Action Task Force of South America against Money Laundering (GAFISUD). Peru's Financial Intelligence Unit (FIU-Peru) was created by Law 27693, of April 2002 and was incorporated into the Superintendence of Banking and Insurance Companies.⁹ On 21 July 2005, GAFISUD adopted a Mutual Evaluation Report (MER) assessing Peru's measures to combat money laundering and terrorism financing under the second round of evaluation.¹⁰ GAFISUD adopted the MER for the third round of evaluation of Peru on 31 July 2008,¹¹ and Peru presented a follow-up report in December 2009.

14. Ranked 78th out of 178 countries on Transparency International's 2010 *Corruption Perceptions Index*, Peru has a score of 3.5 out of 10.0, where a score of 0 indicates a perception of the country being highly corrupt and 10, a perception of being very clean.¹² The World Bank ranked Peru's control of corruption at 45.2% in 2009, compared to a regional average of 43.5%, whereas its regulatory quality (perceptions of the ability of the government to formulate and implement sound policies and regulations that permit and promote private sector development) was ranked 63.8% compared to a regional average of

⁷ Responses, p.10. Peru has made the Pilot Review Report publicly available : www.pcm.gob.pe/Prensa/ActividadesPCM/2009/Febrero/Informe_Per%FA_Programa_Piloto.pdf.

⁸ Available online at: www.oas.org/juridico/english/per.htm.

⁹ Responses, p.35-36.

¹⁰ See: www.gafisud.info/pdf/InformePer_1.pdf.

¹¹ See: www.gafisud.info/pdf/InformeEvaluacinMutuadelPer_1_1.pdf.

¹² Transparency International, *Corruption Perceptions Index 2010*, available online at URL: (www.transparency.org/policy_research/surveys_indices/cpi/2010/results).

47.6%.¹³ In Transparency International's *Global Corruption Barometer* for 2010, business and the private sector in Peru received a rating of 2.9 out of 5, where 1 is perceived to be not at all corrupt and 5 is perceived to be extremely corrupt.¹⁴

15. Article 4 of Peru's Constitution guarantees the freedom of the press, including the right to distribute information, opinions, and expressions without any previous authorisation, censorship or any impediment. According to an annual survey of press freedom by Freedom House, Peru is equal 92nd, with Panama, in a total of 196 rankings, and is considered 'partly free.'¹⁵ However, according to the UNCAC Pilot Review Programme report, Peru has a strong history of press freedom with an active and independent press, galvanised by the events of the 1990s. The Peruvian media actively covers matters involving alleged corruption by Peruvian government officials and companies.¹⁶

B. WHETHER PERU IS 'WILLING AND ABLE' TO MEET THE RESPONSIBILITIES IMPOSED BY THE CONVENTION AND RECOMMENDATION

1. Government Policy Framework and Strategy

16. Under the mandate of the *State Policies of the National Accord*, which was executed on 5 March 2002 and sets out 31 State Policies, the Government of Peru created, in 2008, a *National Plan against Corruption* (NPAC). The NPAC deals with the 26th State Policy, relating to 'Promotion of ethics and transparency and eradication of corruption, money laundering, tax evasion and trafficking of any and all kinds.' The NPAC sets out seven objectives, each with a set of strategies aimed at achieving these objectives. While the main focus is on a multifaceted approach to combating domestic bribery, strategy 3.4 aims to establish an effective legal framework for combating corruption. Under this specific strategy, on 14 January 2009 the Criminal Code was amended to incorporate the offence of transnational bribery, and the Whistleblower Protection Law (No. 29542) was enacted on 22 June 2010. The NPAC also aims to promote a culture of ethics and reporting in the business sector (Objective 4) and to apply international anti-corruption instruments in national anti-corruption legislation (Strategy 7.1).¹⁷

17. On 29 January 2009 a 'Special Standing Multi-party Commission in Charge of the Control, Follow up and Evaluation of the Plan against Corruption' (Special Commission) was established by Ministerial Resolution (No. 044-2009-PCM), to control, follow up and evaluate the NPAC. The Special Commission has a website with reports from the monthly Commission meetings, a form for reporting

¹³ World Bank Institute, Worldwide Governance Indicators, available online at URL: www.info.worldbank.org/governance/wgi/sc_chart.asp.

¹⁴ Transparency International, *global Corruption Barometer 2010*, available online at URL: www.transparency.org/policy_research/surveys_indices/gcb/2010/results.

¹⁵ Freedom House (URL: www.freedomhouse.org), Freedom of the Press, 2010 edition.

¹⁶ Peru, Pilot Review of selected UNCAC Articles, p.12.

¹⁷ Responses, pp.3-8; Plan Nacional de Lucha contra la Corrupción, Presidencia del Consejo de Ministros, Perú (www.pcm.gob.pe/popup_PCM/plan_anticorrupcion.pdf).

suspected corruption offences online and a list of legislative proposals relating to the fight against corruption.¹⁸

18. In addition, the Peruvian *High Level Commission against Corruption* (CANA) was created by Executive Order on 28 January 2010,¹⁹ and is responsible for ‘supervision and enforcement’ of the NPAC. CANA meets, on average, every two months and is made up of the President of the judiciary, President of the Constitutional Panel, President of the National judge selection and evaluation council, Attorney-General, Ombudsman, Mayor of the Metropolitan Municipality of Lima, Prime Minister, Minister of Justice, Coordinator of the National Assembly of Regional Governments, President of the national confederation of private business associations (CONFIEP), Executive Director of the National Council for Public Ethics (PROÉTICA), Technical Secretary of the National Accord Forum. CANA’s objectives are, *inter alia*, to propose medium and long-term policies to prevent and combat corruption; update the NPAC and ensure its implementation; and to submit legislative proposals to Congress, the Executive Branch and Constitutionally Autonomous Institutions, aimed at preventing and fighting corruption in Peru. However, agreements adopted by the Commission do not have a binding nature in order to ensure the autonomy of the participating institutions.²⁰ The relationship between CANA and the Special Commission is unclear, and their functions appear to overlap. The separate roles and responsibilities of these two commissions could be clarified in any future work.

2. Criminal Legislative Framework

19. Peru is a civil law country. The Constitution prevails over any other legal rule and treaties must be approved by Congress before their ratification by the President.²¹

20. Criminal law offences are found mainly in the Peruvian Criminal Code. The current Criminal Code was enacted in 1991 by legislative decree (No. 635). Article 11 of the Criminal Code provides that both intentional and negligent conduct is criminalised, and Article 12 clarifies that all crimes are intentional, unless a crime expressly provides for negligent liability. Article 13 sets out the offence of failing to prevent a crime if there is a moral or legal duty to prevent it or if it creates an imminent danger; or if the failure to prevent leads to the commission of the crime. This is of interest in the potential application of the foreign bribery offence and could be a matter for further consideration in any future work.

21. Applicable procedural rules are contained in the new Criminal Procedural Code (*Código Procesal Penal*, CPC), enacted on 4 July 2004. The CPC sets out the process for investigation and prosecution of offences in Peru and represents a shift towards a criminal justice system based on oral hearings to be attended by the parties to the proceeding, the community in general, and the press.²² The new Code is being applied gradually in the various regions of Peru and its application should culminate in Lima at the end of 2011, on the basis of a formal calendar (adopted by Supreme Decree No. 013-2005-JUS).²³ Despite the significant changes contained in the new CPC, it is unclear why it has taken Peru seven years to implement them, and how this has affected investigations and prosecutions during this period.

¹⁸ See Special Commission website: www.congreso.gob.pe/comisiones/2009/anticorrupcion/presentacion.htm.

¹⁹ Executive Order 016-2010-PCM, see website: www.can.pcm.gob.pe.

²⁰ Responses, p.5-6.

²¹ Political Constitution of Peru, Articles 51 and 55, respectively.

²² Responses, p.17-18.

²³ Responses, p.10.

a) Domestic bribery and corruption offences

22. The Criminal Code contains a number of provisions criminalising the following forms of passive and active domestic bribery: acceptance or solicitation of bribes for violation of official duty (Article 393) or for performance of official duty (Articles 394 and 394a); passive and active bribery of Judges, State Attorneys, Experts, Arbitrators or Members of the Administrative Court (Articles 395 and 398); passive bribery of court officers (Article 396); active bribery (Article 397); and trafficking in influence (Article 400). In the context of Peru's report under the UNCAC Pilot Review Programme, it was recommended that Peru 'eliminate the delineations between bribery with and without connection to the violation of the public official's duties, as this might serve to enhance the public perception that some forms of bribery are more acceptable than others.'²⁴ In addition, both the MESICIC and UNCAC Pilot Review reports noted that the provisions in Articles 393-396 do not expressly criminalise the offer, gift or promise of advantages or benefits to third party beneficiaries, such as the relatives of a public official, or his/her political party, although accessorial liability could potentially be invoked using Articles 24 and 25 of the Criminal Code.²⁵ Private sector bribery is not specifically addressed within the Criminal Code.²⁶

23. Article 425 of the Code defines 'public official':

Article 425: Public official or civil servant

The term public official or civil servant applies to:

1. Anyone in the civil service career.
2. Anyone in policymaking positions or positions of trust, even if those positions are elected by popular vote.
3. Any person who, regardless of the labor regime under which they work, have employment or contractual ties of any kind with State entities or agencies by virtue of which they perform functions in said entities or agencies.
4. Receivers and depositaries of assets attached or deposited by competent authorities, even though they might belong to private individuals.
5. Members of the Armed Forces and the National Police.
6. Any other persons mentioned in the Constitutions and the law."

24. The MESICIC recommended that Peru expand the Article 425 definition of public officials to include 'those who have been selected, appointed or elected to perform activities or functions in the name of the State or in the service of the State, even if they have not taken up the position or office.'²⁷ However, Peru's report under the UNCAC Pilot Review Programme notes that Peruvian courts have interpreted Article 425 broadly to cover even 'de facto' government officials, as was the case in the prosecution of Vladimiro Montesinos, who was presidential advisor and de facto head of Peru's intelligence service, for corruption-related offences.²⁸

25. Sanctions for passive bribery offences differ depending on the category of offence, including acceptance or solicitation of the bribe and violation or performance of the official duty. Penalties therefore range from between four to ten years' imprisonment and disqualification from holding public office.

²⁴ Peru, Pilot Review of selected UNCAC articles, p. 31.

²⁵ Peru, MESICIC Second Round Report, p. 18; Peru, Pilot Review of selected UNCAC articles, p. 15.

²⁶ Responses, pp.7, 13-14.

²⁷ Peru, MESICIC Second Round Report, pp. 18, 24.

²⁸ Peru, Pilot Review of selected UNCAC articles, p. 15.

Penalties for passive bribery of the judiciary range from six to fifteen years' imprisonment and disqualification from holding public office.

26. Sanctions for active bribery offences are comparatively less than those relating to passive bribery: four to six years' imprisonment for bribing an official to violate his/her official duties, and three to five years for bribing an official to perform them. Penalties for bribing a member of the judiciary range from four to eight years' imprisonment and disqualification from holding public office. There are no pecuniary penalties for active or passive bribery of domestic public officials.

27. Peru provided data to the MESICIC relating to the enforcement of domestic bribery offences in the Fujimori-Montesinos cases, as annexes to the questionnaire for the second round evaluation. While the Committee recognised that the data demonstrated that Peru was enforcing the domestic bribery offences, it noted that an obstacle to measuring progress in implementation was the fact that the Supreme Court did not regularly publish the contents of its judgments. The MESICIC therefore recommended that Peru consider 'publication, on the website of the Supreme Court of Justice, of the contents of the judgments it issues as the court of last resort for criminal matters.'²⁹

b) Foreign bribery offence

28. Article 397-A of the Criminal Code contains the offence of 'Active Transnational Bribery'. This article was incorporated in the Code on 14 January 2009 with the passage of the '*Act that amends, incorporates and regulates various provisions in order to implement the Trade Promotion Agreement entered into by and between Peru and the United States of America*' (Act 29316):

Article 397-A: Active Transnational Bribery

Whoever in any way offers, grants or promises directly or indirectly to public officials or civil servants of another country or officials of an international public agency an undue donation, promise, advantage or benefit to his/her own benefit or that of another person, so that said public officials or civil servants carry out or omit acts of their office or position violating their obligations or still complying with their obligations to obtain or retain a business or any other undue advantage in the performance of international economic or commercial activities will be punished with no less than five (5) years and no more than eight (8) years imprisonment.

29. To offer, promise or give: The wording 'offers, grants or promises' (*ofrezca, otorgue o prometa*), while not verbatim, is consistent with Article 1(1) of the Convention, which requires *each* of the alternatives of offering, promising or giving a bribe to be criminalised. It also reflects the wording included in the foreign bribery offences in the Criminal Codes of in other Spanish-speaking members of the WGB.³⁰

30. Any undue pecuniary or other advantage: It appears, *prima facie*, that the definition of a bribe as 'an undue donation, promise, advantage or benefit' meets the standards of Article 1 of the Convention, subject to clarification that these terms cover all advantages, pecuniary and non-pecuniary, tangible and intangible.

31. Intermediaries: Article 397-A reflects the requirement in Article 1(1) of the Convention, that the advantage be offered 'directly or through intermediaries', by using the terms 'directly or indirectly'.

²⁹ Peru, MESICIC Second Round Report, pp.19-20, 24.

³⁰ For example: Argentina: *ofreciere u otorgare* (Art. 258bis); Chile: *ofreciere, prometiére o diere* (Art. 251bis); Mexico: *ofrezca, prometa o dé* (Art. 222bis); Spain: *el ofrecimiento, promesa o concesión* (Art. 445).

32. Third party beneficiaries: By incorporating the terms ‘to his/her own benefit or that of another person’ (*que redunde en su propio provecho o en el de otra persona*), the wording Article 397-A differs from the domestic active bribery offence (Article 397) and avoids the issues identified in the MESICIC evaluations (see description above). Article 397-A therefore appears consistent with the requirement, in Article 1(1) of the Convention, that bribes ‘for that official *or for a third party*’ are criminalised.

33. Foreign country: ‘Another country’ is not defined in Article 397-A, and ‘country’ is not defined elsewhere in the Criminal Code. This may therefore require clarification to ensure consistency with the definition of ‘foreign country’ in Article 1(4)(b) of the Convention (to include all levels and subdivisions of government, from national to local), and in Commentary 18 (to include any organised foreign area or entity).

34. Foreign public official: Article 397-A does not define foreign public officials. The definition of public official or civil servant in Criminal Code Article 425 that applies to domestic bribery would presumably apply also to foreign bribery (see above), though this has not been confirmed by Peru. On its face, Article 425 does not cover the categories set out in Convention Article 1(4)(a) (legislative, administrative or judicial office, whether appointed or elected). Article 425 covers persons with a ‘civil service career’ but it is unclear what this means. Article 425 also does not cover Commentary 16, which notes that public authority may be held by persons not formally designated as such, but through their *de facto* performance of public function may be considered to be foreign public officials. Article 425 does define as a public official a person who ‘maintains employment or a contractual relationship of any nature with State entities or agencies, and that as a result of this, exercises functions in such entities or agencies.’³¹ But this would not cover those who might perform a public function through unpaid, volunteer work. It also may not cover someone who performs public functions but is not employed directly by the state, *e.g.* an employee of a private company hired by the government to manage public procurement. ‘State entities or agencies’ are not further defined, and may require clarification that they are consistent with the definitions set out in Commentaries 13 (‘public agency’) and 14 (‘public enterprise’). The coverage of foreign officials who perform a legislative function is questionable. It is also debatable whether the provision would cover foreign police officers, since Article 425 expressly includes the Peruvian National Police, which arguably suggests that the other provisions in the Article do not cover police officers. Officials of public international organisations are covered in Article 397-A itself, through reference to ‘officials of an international public agency’.

35. Act or refrain from acting: The provision in Article 397-A: ‘so that said public officials or civil servants carry out or omit acts of their office or position violating their obligations or still complying with their obligations’, differs somewhat from Article 1(1) of the Convention which requires that the official act or ‘refrain from acting in relation to the *performance* of official duties.’ As the offence is tied to the officials ‘obligations’, it may not cover the use of an official’s position for acts that are beyond his/her obligations or competencies (Convention Article 1(4)(c) and Commentary 19).

36. To obtain or retain business or other improper advantage in the conduct of international business: The wording of Article 397-A mirrors that of the Convention: ‘to obtain or retain a business or any other undue advantage in the performance of international economic or commercial activities,’ and therefore appears consistent with the Article 1(1) requirements.

³¹ Unofficial translation.

37. Complicity: The Peruvian Criminal Code provides for accessorial liability, in the form of abetting (Article 23),³² instigation (Article 24)³³ and primary and secondary complicity (Article 25).³⁴ The applicable penalty to each of these forms of accessorial liability is that of the original offence; five to eight years' imprisonment in the case of the Article 397-A foreign bribery offence, except in relation to 'fraudulent assistance' which was not integral to the commission of the crime, which carries a discretionary sanction ('prudently reduced sentence'). Article 23 could also cover cases where intermediaries are used in foreign bribery transactions, as it applies liability to 'anyone who commits the punishable act themselves or through a third party, or who commits it in conjunction with another.' Articles 404 and 405 contain the offences of concealment. These provisions appear *prima facie* consistent with the Convention requirement of accessorial liability for the foreign bribery offence, and cover all of the categories set out in Article 1(2) except authorisation, namely incitement (instigation, Article 24), aiding (primary and secondary complicity, Article 25), abetting (Article 23). Any future work could follow up on application of the accessorial liability provisions in practice, to ensure that authorisation is covered, and to clarify the meaning of 'fraudulent assistance' in Article 25, as opposed to accessorial liability for 'aiding' in the commission of a crime.

38. Attempt and conspiracy: Article 1(2) of the Convention requires that Parties criminalise attempt and conspiracy in relation to foreign bribery to the same extent as attempt and conspiracy are criminalised in relation to domestic bribery. Article 16 (Attempted Commission) of the Criminal Code sets out the framework for criminalising attempt to commit Criminal Code offences, which 'occurs when a person begins to carry out a crime that they decided to commit but does not consummate it'. The sanctions for attempt are at the discretion of the judge, who 'shall punish attempted commission with a prudently reduced sentence'. Peru states that conspiracy is criminalised in Article 317 of the Criminal Code, which provides that any person who forms 'part of an *organisation* of two or more persons *to commit crimes* will be punished for the mere fact of being a member of the same.' The applicable sanctions are three to six years' imprisonment. It is not clear what is necessary to prove that two or more persons constituted an 'organisation,' and whether the collective intent must be to commit crimes, or merely the crime in question (i.e. foreign bribery). However, it appears that this provision falls short of conspiracy being contingent upon membership of a 'criminal organisation,' as organised crime offences are provided for elsewhere in the Code, and refer specifically to 'criminal organisations'. Any future work could follow up on application of the attempt and conspiracy provisions in practice; however these appear *prima facie* consistent with the Convention requirements of uniform application of attempt and conspiracy offences to foreign and domestic bribery provisions.

39. Defences: Article 15 provides an exemption from liability (or reduced penalties) for those whom, for reason of their culture or custom, commit an offence without being able to understand the criminal nature of his/her act. This provision provides a potentially significant exception to the foreign bribery offence, in the context of an offence that is committed abroad, and often considered by business people and the general public as part of the business culture, or custom. The provision may thus be inconsistent with Commentary 7 of the Convention. This could be an issue for further consideration in any future work. In addition, Article 20 sets out a range of 'exemptions' from liability, including 'mental disorder'; minors;

³² Article 23. Participation as principal, abettor and co-principal. Anyone who commits the punishable act themselves or through a third, or who commits it in conjunction with another shall be punished with the penalty provided for this violation.

³³ Article 24. Instigation. Anyone who fraudulently causes another person to commit the punishable act shall be punished with the penalty applicable to the principal.

³⁴ Article 25. Primary and secondary complicity. Anyone who fraudulently provides assistance in the commission of the crime, without which it could not have been committed, shall be punished with the penalty provided for the principal. Those who otherwise fraudulently provide assistance shall be punished with a prudently reduced sentence.

rational defence of property from unlawful aggression; danger to life, personal safety, or individual rights; duress; fulfilment of an obligation or legitimate exercise of a law, office or position; or by order of a competent authority in exercise of its functions. The final exemption could arguably be a potential issue for employees of State-owned or State-controlled enterprises who are ordered by senior executives or higher-level officers to pay bribes in the course of international business. This could be another potential issue for further consideration.

c) *Liability of legal persons*

40. Peru provided very limited information on the liability of legal persons for foreign bribery. Its responses state that its criminal justice system is based on the principle of '*societas delinquere non potest*' (companies cannot break the law).³⁵ Peru also refers to Article 27 of the Criminal Code, which provides for individual liability in the case of offences committed on behalf of corporate entities, to ensure that individual employees are not able to escape liability on the basis of the lack of liability for legal persons.³⁶

41. Peru's responses did not refer to Article 105 of the Criminal Code. Peru's MESICIC Third Round Report cites this provision as the basis for corporate liability without evaluating the provision or recommending improvements.³⁷ The provision appears to apply to foreign bribery cases, and allows for the closure or suspension of the company when an individual commits a crime while performing the activities of a legal person:

Article 105: Measures applicable to legal persons

Should the punishable act be committed in the performance of the activities of any legal person, or using their organisation to facilitate or conceal its commission, the judge shall apply any or all of the following measures:

1. Temporary or permanent closure of its premises or facilities. A temporary closure shall not exceed five years.
2. Dissolution or liquidation of the company, association, foundation, cooperative or committee.
3. Suspension of the activities of the company, association, foundation, cooperative, or committee for a period of not more than two years.
4. A ban on the company, foundation, association, cooperative, or committee from engaging in the future in activities of the kind in which the offence was committed, aided, or abetted.

The ban may be temporary or permanent. A temporary ban shall not exceed five years.

When any of these measures is applied, the judge shall order the appropriate authority to arrange the intervention of the legal person in order to safeguard the rights of the legal person's employees and creditors for up to two years.

A change of trade name, legal status, or corporate reorganisation shall not be an impediment to the application of these measures.

³⁵ Responses to question 9.

³⁶ Article 27: whoever acts an authorized body to represent a legal entity and perpetrates a crime identified or characterised in the Criminal Code is liable as the author, even if the special elements substantiating the penalty of this crime do not agree therewith, but they do agree in the case of the principal.

³⁷ Peru, MESICIC Second Round Report, p. 13.

42. For present purposes, Article 105 raises several unanswered questions and may not meet the requirements of the Convention. ‘Legal person’ is not defined; entities such as foreign subsidiaries and State-owned or State-controlled enterprises therefore may not be covered. There is no information on whether corporate liability depends on the prosecution and/or conviction of a natural person.

d) Statute of limitations

43. Article 80 of the Criminal Code provides for a limitation period equal to the maximum penalty for the relevant crime, which would be eight years in the case of the Article 397-A foreign bribery offence. Article 81 provides for limitation periods to be halved when the defendant is under 21 or over 65 years old, which would be four years in foreign bribery cases.

The date of the offence

44. Based on a reading of a version of the Criminal Code that was not provided by the Peruvian authorities, Article 82 sets out the date of commencement of the offence, for the purposes of determining the limitation period. The commencement is determined on the basis of the category of offence as instantaneous (when the crime is perpetrated), continuing (when the criminal activity ceases) and permanent (when the crime is completed). The limitation period for attempt offences commences on the day when the defendant ceased the criminal activity. Article 9, however, determines the time of commission of a Criminal Code offence, which occurs when the perpetrator acts or fails to act, regardless of when the results occur. In the absence of examples in the form of case law, it is difficult to determine how these provisions interact, given that the crime of bribery often involves both the offer and the transfer of the bribe, and bribes paid in instalments. In any case, the conceptualisation of the nature of the offence (as instantaneous or continuous) and hence the determination of the date on which it is committed, is an issue in other members of the Working Group and could merit consideration in any future work.

Suspension and interruption of the limitation period

45. Article 83 provides for interruption of the limitation period by acts of the Public Prosecutor or the judicial authorities. There is no information on whether a request for mutual legal assistance would interrupt the limitation period. The period starts anew after the interruption. The limitation period will expire, however, when the time after interruption exceeds one half of the applicable limitation period, that is, four years in the case of foreign bribery. Therefore the total limitation period for foreign bribery cases, excluding the period of interruption, is twelve years (if the defendant is between the age of 21 and 65). Article 84 provides for the suspension of the limitation period if the commencement or continuation of criminal proceedings depends upon an issue to be resolved in another proceeding. It is unclear whether this provision also relates to foreign proceedings, which could be at issue in foreign bribery cases and could merit further consideration in any future work. The double jeopardy provision is contained in Article 90, and is potentially relevant to multijurisdictional enforcement of the foreign bribery offence. Article 91 provides the accused with the right to waive the limitation period for criminal offences.

46. Given the Working Group’s identification of the statute of limitations as a horizontal issue in the implementation of the Convention, it is likely that length of the basic limitation period in Peru coupled with provisions to suspend and interrupt it, would satisfy the Convention requirement, in Article 6, that the limitation period allow ‘an adequate period of time’ for foreign bribery investigations and prosecutions.

e) Sanctions

47. Article 3(1) of the Convention requires that the bribery of a foreign public official be punishable by effective, proportionate and dissuasive sanctions, comparable to sanctions applicable to the domestic bribery offence.

Sanctions applicable to natural persons

48. Sanctions applicable to the Article 397-A foreign bribery offence (5-8 years' imprisonment) are greater than those applicable to the Article 397 generic active domestic bribery offences (4-6 years' imprisonment for bribes to act in violation of official duties; 3-5 years' imprisonment for bribes to act/omit to act in compliance with official duties), and equivalent to the Article 398 specific active domestic bribery offences (see above). Pecuniary sanctions for natural persons are available for some criminal offences but not for domestic and foreign bribery.

49. The sanctions regime for the liability of intermediaries and accessories is uniform for all Criminal Code offences. The sanctions for attempt are at the discretion of the judge, who 'shall punish attempted commission with a prudently reduced sentence', whereas conspiracy carries three to six years' imprisonment and accessory liability carries the same penalty as that of the original offence (see above, paras. 33 and 34). The Article 13 offence of failure to prevent an offence does not have a specific sanction but provides that the sanction can be reduced.

50. Article 46 sets out the factors that the judge must take into account when determining the sentence, including the nature and means of the offence, the damage caused, the motive, and any reparations or confessions made after the offence. Article 52 provides a discretion for judges to convert a prison sentence of less than two years into a fine, where one day's imprisonment would be the equivalent of one day-fine (set out in Article 41 as equal to the average daily income of the defendant, including assets, income, remuneration, expense levels and other signs of wealth). Whether such a converted sentence would satisfy the requirements of effective, proportionate and dissuasive sanctions would depend heavily on the facts of each case, including the amount of the bribe and the calculation of the daily income of the individual.

51. While this sanctioning regime appears consistent with the requirements of Article 3(1) of the Convention to the extent that penalties for the foreign bribery offence are equal to, and potentially greater than, those applicable to domestic bribery offences, any further work should consider whether the maximum penalties and lack of pecuniary sanctions, other than the discretion to convert prison sentences of less than two years to day-fines, amount to 'effective, proportionate and dissuasive criminal penalties'.

Sanctions applicable to legal persons

Article 3(2) of the Convention requires that, in the event that criminal responsibility does not apply to legal persons, States Parties ensure that legal persons are subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions. In Peru, as is the case for natural persons, there are no provisions for pecuniary sanctions for legal persons. Though not referred to in Peru's responses, the range of available sanctions is contained in Article 105 (see above), and 'the judge shall apply any or all' of: temporary or permanent closure of premises; dissolution or liquidation; suspension of activities for a period of not more than two years; and a ban on engaging in activities of the kind in which the offence was committed, aided, or abetted. Despite the lack of available monetary sanctions, the penalties contained in Article 105 are potentially quite severe. However, it is not possible to assess whether on their own they are sufficiently effective, proportionate and dissuasive, without examples of how they have been applied in practice.

Confiscation

52. Article 3(3) of the Convention requires that Parties provide that the bribe and the proceeds of the bribery of a foreign public official, or their equivalent value, are subject to seizure and confiscation. Article 102 of the Criminal Code provides that the court shall order forfeiture or loss of the instrument or proceeds

of the crime, including assets, money, profit or any product derived from the offence, unless there is a separate procedure underway to confiscate or recover these assets. The judge may also order seizure of the goods as a preliminary measure, although this is discretionary. It is unclear whether, in the event that the instrument or proceeds cannot be located, it is possible to confiscate their equivalent. However, the issue of confiscation of the equivalent of the instrument of the bribe or its proceeds has proved a challenge in the implementation of Article 3(3) in a number of Parties to the Convention.

53. In relation to legal persons, there does not appear to be any provisions on confiscation. The issue of confiscation in relation to both natural and legal persons could be further considered in any future work.

Additional civil or administrative sanctions

54. Article 3(4) of the Convention requires Parties to consider the imposition of additional civil or administrative sanctions. Peru did not provide information on administrative sanctions that may be imposed against natural or legal persons for foreign bribery. In its responses, Peru only referred to the administrative sanctions against Peruvian public officials. The Ethics Code for the Public Service Act (Law 27815) and related regulations (Executive Order 033-2005-PCM) contain administrative sanctions for Peruvian public officials who violate their official duties, ranging from a warning, to temporary suspension up to one year, and termination. Law 29622 and its regulations (Supreme Executive Order 023-2011-PCM) expand the mandate of the Peruvian Office of the Controller General (*Contraloría*) as the sanctioning authority, and the General Administrative Procedures Act (Law 27444) sets out the administrative law principles to be applied in any actions against public officials.³⁸ The Office of the Controller General also works directly with the police to prevent, investigate and sanction in cases of corruption involving the 4,200 government entities over which it has oversight control, including in relation to public contracting and procurement activities.³⁹ Relevant provisions are contained in the Government Procurement Law.

f) Jurisdiction

Territorial jurisdiction

55. In its responses, Peru refers to the principle of territoriality contained in Article 1 of the Criminal Code, which applies the Criminal Code to anyone (a Peruvian or foreign person) who commits an act within the territory of Peru, including on Peruvian ships or aircraft, or private ships or aircraft in international waters or airspace, 'except for the exceptions contained in international law.'⁴⁰ Article 5 provides that the place of commission of the offence is that in which the criminal act or omission takes place, or where the effects of the crime are produced. Therefore, the framework for territoriality jurisdiction in Peru appears consistent with the requirements of Article 4(1) of the Convention, that each Party to take necessary measures to establish jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

Nationality jurisdiction

56. Article 4(2) of the Convention requires Parties that have jurisdiction to prosecute their nationals for offences committed abroad, to establish such jurisdiction with respect to the foreign bribery offence. Peru did not provide any information as to how extraterritoriality jurisdiction has been applied in practice;

³⁸ Responses, p.15.

³⁹ Peru, Pilot Review of Selected UNCAC Articles, p.9.

⁴⁰ Responses, p.16.

however Article 2 of the Criminal Code sets out the principle of extraterritoriality, which applies the Criminal Code to every crime committed abroad under the conditions set out in Articles 2(1) to (5).

57. Peru's responses did not deal with the issue of nationality jurisdiction. Based on a reading of an unofficial version of the Criminal Code, Article 2(3) extends jurisdiction to extraditable offences committed by or against a Peruvian citizen, when they are also criminalised in the country where the crime took place. According to Peru, foreign bribery is an extraditable offence.⁴¹ However, the provision is operable only if the perpetrator enters Peru. The requirement that the conduct be criminalised in the country where the crime took place incorporates an element of double criminality, the operation of which would need to be followed up in any future work. There is no information on whether nationality jurisdiction applies to legal persons.

58. It is important to note that Article 4 contains a set of exceptions to the Article 2 extraterritoriality principle, in particular in relation to political offences and connected acts (Article 4(2)). Article 5 of the Convention stipulates that investigation and prosecution of the foreign bribery offence shall not be influenced by considerations of the potential effect upon relations with another State or the identity of the natural or legal persons involved. In light of this provision, and given the highly political nature of both the domestic and foreign bribery offences, this is a concerning exception and should be considered in any future work.

g) Enforcement – investigation and prosecution

59. As outlined above, the CPC sets out the process for investigation and prosecution of offences and is being applied gradually in the various regions of Peru and its application should culminate in Lima at the end of 2011. It is unclear on the basis of Peru's responses whether the new Code will apply to criminal matters that occur on or after its date of enactment, or dating from its application in the region where the offence took place. This would be a matter for follow-up in any future work.

Detection and investigation

60. Peru's responses to the questionnaire do not refer to the duty to report foreign bribery. Based on a reading of the CPC, individuals are obliged to report offences to the authorities (Article 326(2)(a)). A similar obligation applies to public officials who become aware of the commission of an offence in the exercise of their duties or by reason of their position (Article 326(2)(b)). Article 327 provides an exception to the reporting obligation for those who are subject to professional secrecy obligations, and for those who are related to the perpetrator by established degrees of consanguinity (*consanguinidad*) or affinity (*afinidad*). This is a matter which would require further analysis in any future work.

61. The Attorney General's Office (*Ministerio Público*) is the responsible authority for the investigation and prosecution of Criminal Code offences. According to Peru's responses to the questionnaire, Article 159 of the Constitution mandates the Office of the Attorney-General to carry out the investigation of a crime from the outset, and the National Police (*Policía Nacional*) conducts the investigation at the direction of the Attorney-General. The Office of the Attorney-General therefore conducts preliminary investigations, through the National Police, before filing charges before a judge of the Criminal Court, to open a judicial investigation. The bylaws of the Office of the Attorney-General and the judiciary, along with the CPC, set out the process for criminal investigations and prosecutions.⁴²

⁴¹ Response to Question 15.

⁴² Responses to question 10.

62. While Peru did not provide details of the process for investigating and prosecuting crimes under the new CPC, the UNCAC Pilot Review Programme report provides the following outline:

‘The main focus of the reform is to carry out the shift towards a fully accusatorial system, with the main principles of the separation of investigation and judgment, the concentration of responsibility for prosecution in the hands of the prosecutor, the responsibility of the prosecutor to initiate the process by accusation, the restriction of the judge to the content of the accusation, the principles of contradiction, equality and oral negotiation.’⁴³

Prosecution

63. The 2007 UNCAC Pilot Review Programme report notes that Peru has created decentralised anti-corruption Prosecutors’ Offices (*Procuradurías Públicas Anticorrupción descentralizadas*) for cases conducted at a regional level, as well as specialised Prosecutors’ Offices for corruption of public officials (*Fiscalías Especializadas en delitos de corrupción de funcionarios*) and a special Office of the Ad Hoc Prosecutor for the Fujimori/Montesinos case. Peru also operates special Anti-Corruption Courts within the judiciary and the National Police have a special Anti-Corruption Division. It is unclear whether any of these specialised anti-corruption units are responsible for investigating foreign bribery, and if any specific training on the Article 397-A offence is provided to police, prosecutors or judges.

64. Other than a reference to the bylaws of the Office of the Attorney-General, Peru did not provide any information concerning principles of prosecution that would be applicable to the Article 397-A foreign bribery offence. This is a matter which could require further analysis in any future work.

65. In relation to actual cases, in its responses to the third round MESICIC questionnaire, Peru stated that in 2008, the decentralised anti-corruption Prosecutors’ Offices had initiated 1 079 cases of corruption of Peruvian public officials.⁴⁴ Peru also provided a list of 179 charges arising from the Fujimori/Montesinos case that have been concluded or are underway in the Ad Hoc Prosecutor’s Office. Most of these charges are for corruption-related offences. The difficulty in quantifying the number of concluded cases is perhaps partly due to the fact that the Supreme Court does not regularly publish the contents of its judgments has been noted above. Peru has not provided any information in the context of the Questionnaire, or its MESICIC or GAFISUD evaluations, in relation to sanctions against legal persons under Articles 104 and 105 of the Criminal Code. To date, Peru has not prosecuted a case of bribery of foreign public officials.

66. The reviewers for the UNCAC Pilot Review Programme (Argentina and Norway) noted Peru’s success in securing and repatriating assets in the Fujimori/Montesinos cases and that when properly supported, the capabilities of law enforcement and the prosecution were excellent. The report emphasizes, however, that due to a lack of training, support and resources, prosecutors rarely seek confiscation of criminal instruments or proceeds in complex crime prosecutions, even when available. The report also noted that only 17% of registered cases in the regions were prosecuted, and only about one-third of these resulted in convictions.⁴⁵

⁴³ Peru, Pilot Review of selected UNCAC articles, p.7.

⁴⁴ Cuestionario en relación con las disposiciones de la Convención InterAmericana contra la Corrupción seleccionadas en la Tercera Ronda y para el seguimiento de las recomendaciones formuladas en las rondas anteriores, pp. 11-12.

⁴⁵ Peru, Pilot Review of selected UNCAC articles, p.10.

h) Mutual legal assistance

67. Peru may request and provide MLA in foreign bribery cases. Mutual legal assistance (MLA) in criminal matters is governed by the CPC. Article 508 provides:

Article 508: Applicable rules

1. Relations of the Peruvian authorities with foreign authorities and with the International Criminal Court in the area of international judicial cooperation are governed by international treaties concluded by Peru and, in the absence thereof, by the principle of reciprocity within a framework of observance of human rights.

2. Should a treaty exist, its provisions shall govern the international judicial cooperation procedure. The foregoing notwithstanding, the provisions under domestic law, and this Code in particular, shall serve to interpret said provisions and shall apply wherever not specifically provided otherwise by the Treaty.

68. Peru, as a party to the UNCAC and IACAC, therefore applies the international co-operation provisions in these treaties in relation to requesting and providing MLA in cases of domestic and foreign bribery. Peru did not provide information in relation to other bilateral or multilateral agreements in relation to MLA, other than a bilateral MLA treaty with Brazil.⁴⁶

69. There is no specific form set out for requesting MLA from Peru. However, Article 509 requires that requests be translated into Spanish and provides that the request does not need authentication if it is provided via the central authority or the diplomatic channel. The truthfulness and validity of the MLA request will be presumed, if it is presented in the form of ‘documents’ (*documentos*). Legal assistance may be provided in the forms set out in Article 511, including: extradition; notice of resolutions and court rulings; depositions and statements; judicial documents; documents and reports; investigations or inspections; examination of objects and places; account blocking, foreclosures, seizures or attachments of criminal property, freezing of assets, domicile searches, searches in general, communications control, identification or location of the instrument or proceeds of the crime; facilitating information and evidence; temporary transfer of persons to provide testimony; transfer of prisoners and controlled deliveries. Article 512 establishes the Office of the Attorney-General as the Central Authority for MLA, but provides that the Ministry of External Relations shall assist with the receipt and transmission of MLA requests, along with concluding agreements with foreign central authorities on the exchange of technology, information, experience, coordination of international legal cooperation, and training.

70. Peru did not provide statistical information on MLA requests but some information is available from other sources. At the time of its first round evaluation of implementation of the 2004 IACAC, Peru had issued 125 MLA requests in the context of the Convention, and of these ‘40% of the letters rogatory have been declared not viable, 30% have been declared viable, and 30% are in process.’⁴⁷ No information was provided on Peru’s responses to MLA requests received from other IACAC Parties. Peru’s 2008 GAFISUD MER contains data on MLA requests made between 2005 and 2008: in 2006 and 2007, 2 requests for MLA in relation to bribery of public officials were made in 2006 and 2007 (a total of 4); and in 2007, 1 request for MLA was made in relation to active bribery.⁴⁸

⁴⁶ Responses to question 15.

⁴⁷ Peru, MESICIC First Round Report, p.42.

⁴⁸ Peru, 2008 GAFISUD MER, p.105-106.

71. In relation to bank secrecy, Article 2.5 of the Constitution provides that bank secrecy can only be lifted at the request of a judge, prosecutor or Congressional Investigative Commission according to law, and only in relation to the case being investigated. Article 9(3) of the Convention prohibits Parties from declining to render MLA for criminal matters within the scope of the Convention on the ground of bank secrecy. It is unclear whether the Constitutional basis for lifting bank secrecy in Peru would also apply to requests made by *foreign* judges or prosecutors for information held by Peruvian banks, and therefore whether MLA could be declined on the ground of bank secrecy. GAFISUD noted that Peru's Financial Intelligence Unit was unable to access information protected by bank secrecy. Peru's latest follow-up report (2009), outlined a bill that had been proposed to rectify this situation and noted that according to advice from a criminal law academic, this would not require amendment of Article 2.5 of the Constitution.⁴⁹ The issue of bank secrecy and MLA requests could be further considered in any future work.

i) Extradition

72. Extradition in Peru is granted by the Executive Branch of government, with the prior approval of the Supreme Court, in compliance with Peruvian law and international treaties and based on the principle of reciprocity, as set out in Article 37 of the Constitution.⁵⁰ In its responses to the Questionnaire, Peru provided a list of bilateral extradition treaties currently in force and noted that most treaties operate under the minimum penalty system. Only in the cases of Belgium, France and the UK, is extradition based on a list of extraditable offences.⁵¹ Peru is also a party to a number of multilateral Conventions containing provisions on extradition, including IACAC, UNCAC and UNTOC.

73. As with MLA, extradition is governed by Article 508 of the CPC (see above). In February 2006, the International Judicial Cooperation and Extraditions Unit (UCJIE) was created within the Office of the Attorney-General, and is the central authority for extradition requests. Article 518 establishes the requirements for extradition requests and Article 523 describes the procedure connected with provisional or pre-extradition detention.

74. Article 517 of the CPC sets out a number of mandatory bases upon which an extradition request will be refused. It provides that an extradition will not proceed if the conduct does not constitute an offence in the requesting State and in Peru (dual criminality), and does not have a maximum sentence equal to or greater than one year's imprisonment. In the case of extradition requests with respect to multiple offences, at least one of the offences must satisfy these requirements for the extradition to proceed. Article 517 does not include a prohibition against the extradition of Peruvian nationals but it does prohibit extradition when special reasons of national sovereignty, security or public order or other essential interests for Peru exist (Article 517(3)(b)). While Article 10 of the Convention provides that extradition for foreign bribery is to be subject to the conditions set out in the domestic law and applicable treaties of each Party, further analysis would be required in any future work to determine whether the scope of Article 517(3)(b) of the CPC is consistent with the object and purpose of the Convention and with the requirement in 1997 Revised Recommendation VII(iii) of an 'adequate basis' for co-operation.

75. Peru did not provide any information on actual extradition requests made or received in its responses to the questionnaire. Peru provided the following data to the MESICIC in the context of its third round evaluation for implementation of the IACAC:

⁴⁹ Peru, Follow-Up report to GAFISUD, 2009, p.11.

⁵⁰ Responses to question 15.

⁵¹ Bahamas, Belgium, Bolivia, Brazil, Chile, China, Colombia, Costa Rica, Ecuador, Fiji, France, Italy, Kenya, Malawi, Mexico, Panama, Paraguay, Spain, United Kingdom, United States of America.

‘According to information supplied by the Ministry of Justice of Peru, from 2004 to 2008 there have been 102 extradition requests for corruption-related offenses under bilateral treaties, as well as under international instruments that facilitate judicial assistance and cooperation, such as the InterAmerican Convention against Corruption and the InterAmerican Convention on Mutual Assistance in Criminal Matters, among others.’⁵²

76. Peru reported receiving no extradition requests for corruption cases since the creation of the UCJIE in 2006.

77. In the MESICIC’s 2009 evaluation of Peru’s extradition framework, it found that Peru actively sought international cooperation to secure the return to Peru of persons accused of acts of corruption outside its territory, but that the information provided was not sufficiently detailed to determine in which cases Peru relied on the IACAC as a basis for extradition. The MESICIC also recommended that Peru consider the implementation of training programs on the application of the IACAC in extradition requests, specifically designed for judicial and administrative authorities with jurisdiction over such matters.⁵³

3. Tax treatment of bribe payments

78. Peru’s Tax Code does not expressly deny the deduction of bribe payments. Peru, in its responses to the questionnaire, explains that despite the lack of non-deductibility of bribe payments, tax statements disclosing acts of corruption would amount to confessions of offences under the Criminal Code, and therefore would be sanctioned under the criminal justice system.⁵⁴

79. Peru’s MESICIC Third Round Report cites the Amended Consolidated Text of the Income Tax Law (Executive Decree 179-04-EF of 2004), which sets out (in Article 37) a range of deductible expenses, including organisation expenses, initial pre-operating expenses, and ‘*entertainment expenses normal for the line of business, in a portion which, overall, does not exceed half a percent (0.5%) of the gross income, up to a maximum of 40 tax units*’ (Article 37(q)). The Regulations on the Income Tax Law (Executive Decree 122-94-EF of 1994) elaborate on Article 37, such that acceptable expenses include those incurred for the purpose of outside representation, or designed to present an image that enables a company to maintain or improve its market position, including gifts and hospitality for clients. Entertainment expenses do not, however, include travel expenses or advertising costs. The Regulations also stipulate that expenses may only be deducted if they are ‘credibly attested by means of payment vouchers that may legally be used to substantiate costs or expenses and provided that a relationship of causality between them and the taxed income can be demonstrated.’

80. Article 44 lists the range of prohibited deductions, including ‘expenses whose supporting documentation does not meet the basic requirements set forth in the *Regulations on Payment Vouchers*’ (Article 44(j)).⁵⁵ It appears that neither the list of deductible expenses in Article 37, nor the lists of non-deductible expenses in Article 44, refers to payments that may constitute an offence under Peruvian law, nor payments made in connection with bribery or corruption. The MESICIC recommended that Peru strengthen standards on denial or prevention of favourable tax treatment for expenditures made in violation

⁵² Peru, MESICIC Third Round Report, pp.18-19.

⁵³ Peru, MESICIC Third Round Report, pp.19-20.

⁵⁴ Responses to question 11.

⁵⁵ Peru, MESICIC Third Round Report, p.3.

of the anticorruption laws, and provided a list of measures to comply with this recommendation.⁵⁶ Any further work in the WGB should also follow up on this matter.

81. In its responses to the Questionnaire, Peru refers to the investigation and auditing powers of the National Superintendence of Tax Administration (SUNAT), set out in Article 62 of the Consolidated Text of the Tax Code, as a basis for ensuring the detection and investigation of bribes in tax reporting procedures.⁵⁷ There is no reference; however, to any obligations of SUNAT officials to report suspected bribery detected in the course of tax audits, to Peruvian law enforcement authorities.

4. Accounting and auditing

a) Accounting requirements

82. According to Peru's responses, the Commercial Code of 1902 applies to all publicly-held companies and requires companies to keep accounting records of their operations (Article 33), with the involvement of certified public accountants or business accountants (Article 35). The records must include all operations relative to the disposal and acquisition of assets, as well as an exact list of all outstanding debts and obligations (Articles 37 and 38), and must be kept for at least five years after the winding up of all business activities (Article 49). Article 45 prohibits ex officio inspections by a judge, court or any authority to determine whether accounting records are maintained in accordance with the Commercial Code (Article 45), except in the case of liquidation, universal succession or bankruptcy (Article 46).⁵⁸

83. Any future work should analyse the precise content and requirement of these regulations, which was not possible in the time allocated for the assessment report, to determine whether these amount to a requirement that companies maintain 'adequate records' within the meaning of Revised Recommendation V(A)(i).

84. Additional information on Peru's accounting standards are described in Peru's 2009 MESICIC Third Round Report (pp. 6-12). Article 87(7) of the Amended Consolidated Text of the Tax Code (Executive Decree 135-99-EF of 1999) requires that taxpayers keep up-to-date books and records, and record any taxation-related activities or operations in accordance with the relevant standards. Article 62 further provides that SUNAT may inspect taxpayers' books and records, which shall be kept in accordance with the relevant standards. The Superintendence Resolution (234-2006/SUNAT) stipulates the documents to form part of a full accounting system (Article 12), including the minimum information to be recorded in each such document (Article 13). The suppression, destruction or concealment of documents is proscribed in Article 430.

85. The MESICIC report also refers to the General Law on the National Accounting System (Law 28708 of 2006) which provides that the objectives of the National Accounting System (SNC) are to harmonise and standardise accounting in the public and private sectors through the approval of accounting standards (Article 4). The SNC is made up, *inter alia*, of the National Public Accounts Office (DNCP), the system's governing organ, and the Accounting Standards Board (CNC) (Article 5). The DNCP and the CNC, within their jurisdictions, issue and adopt accounting standards and procedures applicable to the public and private sectors, respectively. Article 15 of the Law grants the DNCP authority to adopt the necessary measures for the dissemination of, training in, and permanent updating of the accounting standards and procedures in force. Article 16(3) requires private sector entities to keep an accounting

⁵⁶ Peru, MESICIC Third Round Report, p.5.

⁵⁷ Responses to question 11.

⁵⁸ Responses to question 12.

record of their operations in accordance with the standards and procedures issued and approved by the CNC.

86. In addition, the Companies and Securities Commission's (CONASEV) Regulations governing Financial Information and Handbook for the Preparation of Financial Information (CONASEV Resolution 103-199 – EF/94.10) set out the requirements for the preparation and presentation of financial information in order to meet the minimum requirements in accordance with the Generally Accepted Accounting Principles (GAAP). Article 223 of the Corporations Law requires that financial statements be presented in accordance with 'generally accepted accounting principles'. These are defined, under Article 1 of Accounting Standards Board resolution 013-98-EF/93.01 (published on July 23, 1998), to comprise the International Accounting Standards (IAS), as officially recognized by resolutions of the Accounting Standards Board, and the standards introduced by oversight and control agencies for the entities in their area, provided that they are compatible with the theoretical framework on which the International Accounting Standards are based.

87. In relation to publicly-held corporations, the Consolidated Text of the Organic Law of the CONASEV (Law 26126 of 1992), provides CONASEV with the mandate to, *inter alia*, supervise compliance with the Corporations Law and issue standards on the preparation and presentation of individual and consolidated financial statements to ensure that they reasonably reflect the financial position, results of operations, and cash flows of the companies and entities under its supervision, and monitor the activities of firms of auditors appointed by natural and legal persons under their supervision, impart to them rules on the contents of their reports, and order them to furnish any information or background data on the performance of their functions. Article 253 provides that CONASEV is charged with supervision and control of publicly held companies and has the authority to require open stock corporations to present financial information and adopt decisions on breaches of the *Corporations Law* and of rules issued by CONASEV, and to impose the respective penalties. CONASEV resolution 055-2001-EF/94.10 of 2001, states at Article 8 that the CONASEV Administrative Tribunal can impose penalties and order corrective measures. CONASEV resolution 103-1999-EF/94.10 of 1999¹² (*Financial Reporting Regulations and Financial Report Preparation Handbook*), applicable to open stock corporations, contains the standards to be observed by companies in the preparation and presentation of financial information, in order to ensure that said information meets certain basic conditions in accordance with generally accepted accounting principles.

88. With respect to Peruvian authorities responsible for preventing or investigating noncompliance with measures for safeguarding the accuracy of accounting records, the MESICIC recommended that Peru provide training and guidance to help them detect possible acts of corruption that are concealed in those records.⁵⁹

89. Peru's responses provided some information on the available sanctions for books and records violations. Criminal sanctions for failure to comply with accounting requirements include: a maximum of one year imprisonment and a day-fine of between 60 and 90 days for fraudulent accounting in order to obtain an undue advantage (Article 199, Criminal Code); and between two and five years' imprisonment and 180 to 365 day-fines for failing to keep books and records, false accounting, destruction or concealment of books, records or documents related to taxes (Article 5, Criminal Tax Code). Peru notes that there are administrative sanctions for non-compliance with accounting requirements, but does not go into detail.⁶⁰ Further consideration will be necessary to determine whether existing criminal and

⁵⁹ Peru, MESICIC Third Round report, p.12.

⁶⁰ Responses to question 12.

administrative sanctions for accounting and auditing offences in Peru are ‘effective, proportionate and dissuasive’ as required by Article 8(2) of the Convention.

90. Peru’s most recent MESICIC report also refers to Articles 19-22 of the Organic Law of the CONASEV. The provisions set out the penalties for infringements considered minor, serious and very serious.

b) Auditing and internal company controls

91. Due to the very limited information provided by Peru on auditing and internal company controls, this section is almost entirely taken from Peru’s 2009 MESICIC Third Round Report, pp. 6-12.

Requirements to submit to external audit

92. The Corporations Law (Law 26887 of 1997) applies to all types of business and associations and requires, in Article 223, that the financial statements of joint stock corporations be prepared and presented in accordance with the applicable legal provisions and generally accepted accounting principles. Article 226 provides that the incorporation papers, bylaws, or a decision of the general meeting adopted by 10% of the subscribed voting stock, may order the corporation to undergo an annual external audit, where the auditors are appointed annually and submit their report accompanying the financial statements to the general meeting. Article 227 provides that in the case of corporations that do not undergo permanent external audits, the financial statements are reviewed by external auditors on behalf of the corporation at the request of shareholders who represent at least 10% of the total subscribed voting shares or the holders of non-voting shares, by means of a written communication to the corporation. As noted above, CONASEV has a mandate to monitor the activities of firms of auditors appointed by natural and legal persons under their supervision, impart to them rules on the contents of their reports, and order them to furnish any information or background data on the performance of their functions.

93. Other than Articles 226 and 227, which do not constitute mandatory external audit provisions, there is no obligation for publicly held companies or associations of whatever type to have internal accounting controls. The MESICIC noted this deficiency and recommended that Peru adopt appropriate measures to make this an obligation.⁶¹ This could be an issue for follow up in any future work.

94.

Reporting or disclosure obligations

95. External auditors do not appear to be obliged to report suspected bribery to management, corporate monitoring bodies or law enforcement authorities. Peru has not provided any information on this subject, but on the basis of reports to other evaluation bodies, it appears that such a reporting obligation does not exist. As outlined above, Article 327 of the CPC provides an exception to the reporting obligation for those who are subject to professional secrecy obligations, which includes accountants and auditors. However, Article 12 of the Code of Professional Ethics provides that accountants and auditors are subject to professional secrecy obligations except in relation to information requested by competent legal authorities in accordance with the law. In its Third Round evaluation of Peru, the MESICIC recommended that Peru ‘consider using guidelines or manuals on the conduct of internal audits designed to detect anomalies or corrupt acts and to make it a duty for individuals and accountants responsible for the entry of accounting records and for internal auditors when they detect anomalies to bring them to the attention of the legal representative and the partners (in the case of companies) or members (in the case of

⁶¹ Peru, MESICIC Third Round Report, p.11.

associations), and to report them to the appropriate authorities in the event that they could constitute an offense.⁶²

Internal company controls

96. Peru did not provide any information concerning further internal controls but instead referred to an agreement adopted in 2009 by the Board of Directors of the National Confederation of Private Business Associations (CONFIEP), whereby each affiliated association should have in place a Code of Conduct to be followed by its associates. CONFIEP also approved a model Code of Conduct to guide its member associations. In November 2010, a compilation of the 'Codes of Conduct of the Associations affiliated to CONFIEP' was submitted to the CANA (see above). While the covering agreement between CONFIEP and its associations clearly states the commitment to reject all acts of corruption, only five out of the twenty codes of conduct of the various associations included in the compilation mention renouncing or combating corruption.⁶³ This is a matter that could be further considered in future work.

5. Money Laundering

97. Peru is not a member of the Financial Action Task Force (FATF), but is a member of the Financial Action Task Force of South America against Money Laundering (GAFISUD). On 21 July 2005, GAFISUD adopted a Mutual Evaluation Report (MER) assessing Peru's measures to combat money laundering and terrorism financing under the second round of evaluation.⁶⁴ GAFISUD adopted the MER for the third round of evaluation of Peru on 31 July 2008,⁶⁵ and Peru presented a follow-up report in December 2009.

a) Offence of money laundering

98. It is unclear whether domestic and foreign bribery are predicate offences for money laundering. The Criminal Act against Money Laundering (Law 27765) was enacted on 26 June 2002 and criminalises money laundering in Articles 1 (Acts of conversion and transfer) and 2 (Acts of concealment and possession). Article 6 characterises predicate offences as 'conduct punishable under criminal law' then sets out an inclusive list of selected offences such as drug trafficking, terrorism and customs offences. This list does not refer to domestic or foreign bribery. Peru's questionnaire responses suggest that only drug trafficking and "narcoterrorism" are predicate offences to money laundering. These provisions appear *prima facie* consistent with the requirement in Article 7 of the Convention, that each Party which has made bribery of its own public official a predicate offence, do so on the same terms for the bribery of foreign public official.

99. In Peru's 2005 and 2008 MERs, GAFISUD noted that although the wording in Article 6 intended to cover all predicate offences required by FATF Recommendation 1, the inclusive list of selected offences could lead to errors in interpretation. In the 2008 MER, GAFISUD suggested that an alteration be made to avoid an interpretation that the money laundering offence relates only to the predicate offences expressly listed in Article 6, and that Peru clarify that for the purposes of the money laundering offence, the proceeds of an offence include those that flow directly and indirectly from it.⁶⁶

⁶² Peru, MESICIC Third Round report, p.11.

⁶³ Códigos de Conducta de los gremios asociados a CONFIEP.

⁶⁴ See: www.gafisud.info/pdf/InformePer_1.pdf.

⁶⁵ See: www.gafisud.info/pdf/InformeEvaluacinMutuadelPer_1_1.pdf.

⁶⁶ GAFISUD 2008 MER, pp.13-15.

100. Money laundering by natural persons is punishable by 8 to 15 years' imprisonment and 120 to 350 day-fines. Article 3 contains aggravating factors, namely the identity of the perpetrator, and Article 4 contains the offence of failure to report suspicious transactions. As with the foreign bribery offence, legal persons can be sanctioned in relation to the money laundering offence under Articles 104 and 105 of the Criminal Code (see above). The Superintendence of Banking and Insurance Companies (SBS) can also impose administrative liability on legal persons for failing to implement anti-money laundering systems (Law 27602) and violating reporting obligations (Resolution SBS No. 1725-2003).⁶⁷ Peru did not provide to GAFISUD statistics on concluded cases of money laundering.⁶⁸

b) Money laundering reporting

101. Peru's Financial Intelligence Unit (UIF-PERU) was created by Law 27693, of April 2002 and was incorporated into the SBS in 2007.⁶⁹ The UIF-PERU is the central authority for combating money laundering and terrorist financing and is authorized to receive, analyse, handle, evaluate and transmit information for the detection of money laundering and terrorism financing. It receives suspicious transaction reports and is responsible for communicating suspected offences to the Office of the Attorney-General. UIF-PERU's membership of the Egmont Group was confirmed in March 2008.⁷⁰

102. Entities required to report suspicious transactions to UIF-PERU include financial institutions, private pension funds, casinos, real estate agents, dealers in precious metals and stones, lawyers, stock brokers, individuals and companies importing or selling arms, laboratories and companies producing and selling chemicals, and courier and mail services.⁷¹ Depending on the type of reporting entity, supervision is undertaken by CONASEV, SBS and UIF-PERU and reporting obligations are contained in respective resolutions applying to each of these government authorities. As mentioned above, one shortcoming is the inability of UIF-PERU to access information protected by bank secrecy.

103. Up to December 2007, UIF-PERU had made 27 financial intelligence reports to the Office of the Attorney-General relating to bribery of public officials. In 2008, it made 25.⁷² In terms of information sharing, UIF-PERU reported that as of 31 March 2008, it had exchanged information with 68 countries, and had issued 281 information requests to foreign FIUs (of which 30 were still awaiting a response) and had received 113 information requests (of which 2 still required a response).⁷³

⁶⁷ GAFISUD 2005 MER, p.30.

⁶⁸ GAFISUD, 2008 MER, p.13.

⁶⁹ Responses to question 16.

⁷⁰ GAFISUD, 2008 MER, p.28.

⁷¹ Resolutions SBS No. 838-2008; 486-2008; CONASEV No. 087-2006-EF794.10, GAFISUD 2008 MER, p.23.

⁷² GAFISUD 2008 MER, p.100.

⁷³ Peru, GAFISUD 2008 MER, p.101.

C. WHETHER PERU'S ACCESSION TO THE CONVENTION WOULD BE TO THE MUTUAL BENEFIT OF OTHER PARTIES⁷⁴

1. Regional and worldwide economic actor

104. Peru has a mid-sized economy. In terms of GDP, it would rank 24 out of 39 if it were a member of the Working Group, just behind Greece and Switzerland. Among Working Group members in Latin America, the size of Peru's economy would rank behind those of Brazil, Mexico and Argentina but just ahead of Chile's.⁷⁵

105. Peru's economy has expanded rapidly in recent years, however. Economic progress in Peru in the last decade stands out among economic rankings in Latin America.⁷⁶ In its questionnaire responses, Peru reported that it averaged a strong annual growth rate of 7.2% in 2006-2010, one of the highest in the region. Despite a sharp decline in GDP growth to 0.9% in 2009, Peru's economy rebounded to record 8.8% growth in 2010, the 11th highest globally.⁷⁷ The Peruvian economy seems to have reached a trend of sustained growth. According to Peru, strong performance is the result of 'responsible management of monetary and fiscal policies which has made it possible to strengthen the Peruvian economy and make Peru an attractive country for investment'.⁷⁸ Macroeconomic stability and trade openness have also contributed to this achievement.⁷⁹ The decentralisation process (see above) is focused on bringing more small businesses into the formal economy.

106. However, in comparison, the average living standard is low. In 2010, GDP per capita in purchasing power parity was USD 9 200, and ranked 115th in the world. A major challenge is for growth to translate to development, with 34.9% of the population still below the poverty line.⁸⁰ This being said, Peru experienced the largest change in percentage points of poverty reduction (around 14%) in Latin America between 2005 and 2009.⁸¹

2. Foreign trade and investment relations⁸²

107. Peru's trade policy has contributed to the country's growth and development. In this context, Peru has increased its involvement in international trade in recent years, through a policy of liberalising trade, particularly by negotiating free-trade agreements with Canada, Chile, European Free Trade

⁷⁴ Please see Peru's Responses for tables of statistics and trade data referred to in this section of the Report.

⁷⁵ 2010 data based on purchasing power parity. Source: International Monetary Fund, World Economic Outlook Database, 2010.

⁷⁶ Peru, GAFISUD 2008 MER, p.3.

⁷⁷ Figures taken from the International Monetary Fund's World Economic Outlook, April 2011.

⁷⁸ Responses to question 17.

⁷⁹ Peru's Economy: Prospects and Challenges, Julio Velarde, Governor, Central Bank of Peru, March 2011.

⁸⁰ Central Intelligence Agency, *The World Factbook 2010*, Peru (URL: www.cia.gov/library/publications/the-world-factbook).

⁸¹ Peru's Economy: Prospects and Challenges, presentation by Julio Velarde, Governor, Central Bank of Peru, March 2011 (copy available from the Secretariat).

⁸² This part of the report reflects information provided by the Peruvian authorities, at the Responses to question 17.

Association (EFTA – Iceland, Liechtenstein, Norway, and Switzerland), Korea, MERCOSUR (Mercado Común del Sur – Argentina, Brazil, Paraguay and Uruguay), Mexico, Singapore, China and the US, negotiations are underway with the EU, Japan and Thailand. With the aim of deepening economic integration with its neighbours, Peru has advanced the initiative of the Alliance of the Pacific, agreed recently with Chile, Colombia and Mexico. Peru acceded to the World Trade Organisation (WTO) on 1 January, 1995 and is an active participant in the Andean Community (CAN) regional integration process, and a member of APEC.

a) Trade relations

Exports and imports

108. In 2009, Peru ranked 59th and 65th in world merchandise exports and imports, respectively and registered USD 398 million in outward flows of foreign direct investment.⁸³ If Peru were a Working Group member, it would rank 33 and 38 (out of 39) in exports in merchandise and services respectively in 2008.⁸⁴ In 2010, the share of export of goods in GDP was 23.1%; and the share of export of services was 2.6%. The share of import of goods in GDP was 18.7%; and the share of import of services in GDP was 3.9%.⁸⁵ According to SUNAT, mining and petroleum had the main share in the commodity pattern of Peruvian exports in 2010 (USD 24 566.8 million), followed by agriculture (USD 3 164.6 million) and fisheries (USD 2 532.6 million).⁸⁶

Trade partners

109. Geographically, Peru's major economic partners are in North America, with NAFTA partners accounting for 26.6% of Peru's exports in 2010, of these 17.2% were to the United States. Peru also has strong trade ties with China (accounting for 15.3% of exports and 14.9% imports in 2010) and other countries in Latin America, with the Andean Community and MERCOSUR countries accounting for 10.3% of Peru's exports in 2010.⁸⁷

b) Foreign Direct Investment (FDI)

110. Between 2006 and 2010, FDI *inflows* to Peru more than doubled from USD 3 467 million in 2006 to USD 7 328 million in 2010. In 2010, FDI inflows represented around 4.8% of GDP (USD 153 919 million). Peru has attracted a growing amount of FDI, with the greatest percentage of FDI inflows going to mining (23.32%), communications (18.23%), finance (14.88%) and industry (14.73%).⁸⁸

111. Peru's *outward* FDI and portfolio investment have recorded significant growth, going from zero outflows in 2006, to USD 215 million in 2010. FDI outflows peaked in 2008, at USD 736 million. The FDI outflows remain much lower than the corresponding inflows, meaning that Peru has remained a net importer. However, steadily growing FDI outflows are a sign of the strengthening financial position of Peruvian companies and increasing participation in the international market.

⁸³ According to information registered by Peru's Central Reserve Bank (*Banco Central de Reserva del Perú*), p.44.

⁸⁴ Source: World Trade Organisation.

⁸⁵ Banco Central de Reserva del Perú (BCRP) 2010. Responses to question 17.

⁸⁶ Responses to question 17.

⁸⁷ Please refer to the trade and investment tables in Peru's Responses, from page 44 to 47.

⁸⁸ Responses to question 17.

ANNEX 1: PERU'S FORMAL REQUEST TO BECOME A WORKING GROUP MEMBER



Decenio de las personas con discapacidad en el Perú

"Año de la Unión Nacional frente a la Crisis Externa"

Lima, Perú: 16 MAR 2009

Oficio N° 572-2009-PCM/DM

Mr.
ANGEL GURRIA
Secretary General
OECD

Dear Mr. Secretary General:

I would like to express Peru's intention to become a participant in the Working Group on Bribery in International Business Transaction and reiterate the firm intention of the Government of Peru to accede to the "OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions".

Towards that end, we are willing and prepared to fulfill the necessary requirements and procedures. OECD acceptance to our request would be very much appreciated and welcomed by the Peruvian Government as it will come at a very appropriate time when Peru has put the fight against corruption Plan at the highest level in its good governance agenda.

As you are aware, in spite of the difficult times that the international economy is facing, Peru has consolidated as South America's fastest-emerging developing economy. Peruvian growth is built on solid foundations. Peru's real GDP growth in 2007 was the largest in Latin America and in 2008 will likely be the highest in the region, expected to be over 9%. Exports are growing at a pace of 25% and have reached US\$ 28 billion in 2007 and will probably rise up to US\$ 31 billion in 2008 with a trade surplus of around US\$ 3 billion. Free-trade agreement with the United States, Canada, China, the European Free Trade Area (Switzerland, Norway, Liechtenstein and Iceland), Singapore, Chile and Thailand have already been concluded and similar negotiations with the European Union, Korea and Mexico will be finished during 2009. The Foreign Investment flow to Peru reached US\$ 16 billion during the first semester of 2008.

Since last July, Peru is a Party to the OECD Declaration on International Investment and Multinational Enterprises and Related Acts and has become a participant in related work of the OECD Investment Committee. Peru is also an active participant in the APEC's Anti-Corruption and Transparency Expert Task Force established in 2005.

/...



2.

Peruvian Anticorruption Legislation and Policy include seven strategic targets: i) promotion and creation of an anticorruption system articulated and strengthened; ii) institutionalization within the public administration of the primacy of ethics, transparency and fight against the corruption; iii) development of a modern and effective prosecutor system against the corruption; iv) promotion of good anticorruption practices among the enterprise sector; v) fostering of good anticorruption practices in the mass media; vi) firm commitment and active participation at all levels of the Peruvian society in the national strategy to fight against corruption; and vii) development of coordinated efforts at the international level in the fight against national corruption. All these measures include concrete actions, resources, performance measures, specific goals and responsible authorities in charge of implementing them.

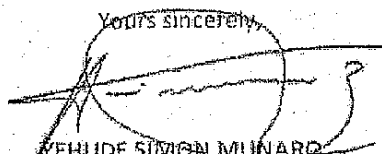
In recent years, attention has been given to the adaptation of the Peruvian legislation to different international instruments where Peru is a Party, such as the Inter American Convention against Corruption of the Organization of American States (OAS) and the United Nations Convention against Corruption; as well as consistency with other international referents like the OECD Anti Bribery Convention and the UN Convention against the Transnational Organized Crime. In this regard, Peru firmly believes that it can substantively contribute to the OECD work regarding anticorruption.

We have been following very closely the comprehensive review of OECD anti-bribery instruments and we are very much interested in taking advantage of the very useful initiatives of the Working Group.

The challenges of today's global environment require that countries remain vigilant in continuing their individual and co-operative efforts to encourage a business environment that does not tolerate unfair, unethical and unlawful behavior. For our country joining the Convention will have a clear impact in creating a fair business climate, fostering economic growth, and encouraging our democratic development. Peru can contribute to keep up vital monitoring activities, and work together across borders to enforce anti-bribery laws and enhance international cooperation.

It is our sincere hope to receive your positive response to our request. I would like to express, Mr. Secretary General, the assurances of my highest consideration.

Yours sincerely,



YEHUDA SIMON MUNARO
President of the Council of
Ministers of Peru

ANNEX 2: REVISED CRITERIA FOR ACCESSION TO THE OECD ANTI-BRIBERY CONVENTION

[Extract from c(2004)1, as amended and approved by Council and the Executive Committee in C(2004)1/CORR1, and C/M(2004)2/PROV]

In order to reinforce the principle of openness in line with Article 13 of the Convention, the Group favourably explored the approach whereby new requests for accession would be measured and thoroughly examined against two criteria: “willing and able,” and “mutual benefit.” Under this approach the “major player” criterion would not be retained as an independent measure but the Group would incorporate under “mutual benefit” certain elements considered to be relevant as new candidates are evaluated.

As a prerequisite to the new approach, the Group undertook to reach a more accurate common definition of the “willing and able” and “mutual benefit” criteria in order to ensure that the principle of openness would be consistent with the effectiveness of the Convention and the retention of its current standards. This means that a country applying for participation in the Working Group must show:

- that its existing legal framework for combating bribery on a domestic level, including legislation relating to the criminalisation of passive bribery, is satisfactory;
- that it can meet the standards laid down in the Revised 1997 Recommendation, including criminalisation of bribery of foreign public officials (Article III); that it already disallows the tax deductibility of bribes (Article IV), that it has accounting requirements, external audit and internal company controls compatible with the Recommendation (Article V); and that it is able to cooperate with other Parties to the Convention as concerns MLA (Article VII);
- its enforcement capacity, particularly for investigation and prosecution of bribery cases;
- that it is ready and able to submit to the same rigorous monitoring mechanism as the other Parties in the Convention and that it is prepared and able to participate as a lead examiner in peer reviews of other Parties to the Convention;
- whether its companies engaged in international business are involved in transactions where solicitation of bribes by/for foreign public officials could occur;
- that it is a significant economic actor in its geographic region or sub region, or in particularly important or sensitive economic sectors;
- the extent of its GDP derived from international trade and investment activities.