



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

CHILE: PHASE 1bis

**REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997
RECOMMENDATION**

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CHILE - REVIEW OF IMPLEMENTATION OF THE CONVENTION PHASE 1BIS

1. Chile signed the Convention on 17 December 1997 and deposited its instrument of ratification with the OECD Secretary-General on 18 April 2001. The implementing legislation, Law No. 19,829, entered into force on 8 October 2002.

The OECD Working Group on Bribery monitoring process

2. The Phase 1 review of Chile took place in 2004 and the Phase 2 review took place in 2007.¹ In 2007, the Working Group was seriously concerned that Chile had not taken any steps to address the Working Group's Phase 1 recommendations with regard to the liability of legal persons, sanctions, jurisdiction, bank secrecy or the foreign bribery offence. It recommended that Chile take prompt action in order to achieve full compliance with Articles 1, 2, 3, 4 and 9 of the Convention. It also made specific recommendations.

3. Considering the seriousness of the situation, the Working Group decided to engage in an exceptional additional review of Chile's legislation (Phase 1bis), originally planned to take place in October 2008. The present review has been discussed by the Working Group in October 2009, after relevant laws have entered into force. The present review also addresses a few amendments that had not been requested in Phase 1 or Phase 2. However, since the Bill on liability of legal persons has not entered into force as the time of the Working Group meeting, it is not discussed in this report. A further report will be discussed in December 2009.²

The Chilean legislation

4. In 2002, Law No. 19,829 amended the Chilean Penal Code. Title V of the Penal Code is entitled Crimes and Misdemeanours Committed by Public Officials in the Exercise of their Functions (articles 216-260).³ Part 9 of Title V is entitled Bribery (articles 248-251). Articles 248, 248bis and 249 apply to passive domestic bribery and articles 250 and 250bis apply to domestic active bribery. Article 250bis A established the foreign bribery offence and article 250bis B defined a foreign public official. In 2003, Law 19,913 established the Chilean financial intelligence unit (UAF) and added active bribery of a Chilean or foreign official to the list of predicate offences of the money laundering offence.

¹ Phase 1 evaluates the implementation of the Convention into Chile's legislation. Phase 2 evaluates Chile's enforcement of its legislation implementing the OECD Convention, assesses its application in the field and monitors Chile's compliance with the 1997 Revised Recommendation.

² The Bill on Liability of Legal Persons for the Crimes of Money Laundering, Financing of Terrorism and Offences of Bribery, was submitted to the Congress on 31 March 2009 (Bulletin 6423-07). It was approved in the Chamber of Deputies in July 2009 and by the relevant senatorial commission in October 2009. The Bill is expected to be approved in the Senate and to enter into force by the end of October 2009.

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

5. Law No. 20,341 of 22 April 2009 amends the offence of foreign bribery and related sanctions (Bulletin 5725-07, also called GNECC Bill, see Annex 1).

6. Law 20,371 of 25 August 2009 amends the Organic Court Code to introduce nationality jurisdiction for foreign bribery, and updates the law on money laundering (Bulletin 6476-07, see Annex 2).

1. ARTICLE 1: THE OFFENCE OF BRIBERY OF A FOREIGN PUBLIC OFFICIAL

7. Law No. 20,341 has created a Chapter 9bis in the Penal Code, has repealed articles 250bisA and 250bisB and has replaced them with new articles 251bis and 251ter in Chapter 9bis dedicated to foreign bribery.⁴

8. The table below compares the offences of bribery of foreign public officials before and after the 2009 amendments. Since the translations diverge, the differences in substance are highlighted in bold:

Article 250bis A, as in force at the time of Phase 2	New article 251bis in force since 22 April 2009
<p>A person who offers to give an economic advantage to a foreign public official, to his benefit or that of a third person, for performing an act or refraining from acting in order to obtain or retain, for himself or a third party, any business or advantage in the field of international business transactions shall be punished with imprisonment, fine and disqualification, as referred to in article 248bis, first paragraph. The same punishment shall be imposed on a person who offers the said advantage to a foreign public official for his having acted or refrained from acting.</p> <p>A person who, under the circumstances described in the foregoing paragraph, consents to afford said economic advantage shall be punished with short-term imprisonment, minimum degree, as well as the fine and disqualification referred to above.</p>	<p>He who offers, promises or gives a foreign public official an economic or other nature benefit, for that official or a third person, to act or refrain from acting in order to obtain or retain – for him or a third party – any improper business or advantage in the field of any international transactions shall be punished with short-term confinement, medium to maximum degree, and with the fine and disqualification referred to in article 248bis, indent one. Should the benefit have a non-economic nature, the fine will range from one hundred to one thousand monthly tax units. The same penalties shall be imposed on he who offers, promises or gives the said benefit to a foreign public official for his/her having acted or refrained from acting.</p> <p>He who, in the same situations described in the above indent, consents to give the said benefit, shall be sanctioned with short term confinement, from minimum to medium degree, besides the same penalties of fine and disqualification.</p>

1.1. To offer, promise or give

9. Article 250bis A, paragraph 1 referred to a person who “offers to give” a bribe. Paragraph 2 covered “he who... consents to afford said economic advantage”. Similarly, article 250 on active domestic bribery referred to “he who offers or consents to afford” an economic advantage. Although Chile

⁴ Bribery of Chilean officials and bribery of foreign public officials are now in two separate chapters because the former aims to protect public administration and the latter aims to protect international transactions.

considered that the offence would cover the act of “giving” a bribe, no supporting case law was provided. The Working Group therefore recommended in its Phase 2 Report that Chile “take all necessary measures to ensure that the foreign bribery offence can apply to the giving of a bribe”.⁵

10. New article 251bis now sanctions “he who offers, promises or gives” a bribe. This clears all doubts about the coverage of the Chilean law and its adequacy with the Convention on this point. The corresponding domestic offence has not been amended and awareness of the scope of the foreign bribery offence should be adequate.

11. According to the Chilean authorities, the offence is completed even where the offer does not come to the attention of the foreign public official.

1.2. Any undue pecuniary or other advantage

a) Pecuniary vs. non-pecuniary advantages

12. Article 250bis A referred to “an economic advantage”. The Chilean authorities had stated that non-pecuniary advantages bear no relation to the construction of the offence of bribery under Chilean laws. According to the Chilean authorities, any advantages whether or not pecuniary can be economically valued and therefore would be covered. This did not conform to the Convention which proscribes all types of advantages, including non-pecuniary ones. The Working Group therefore recommended in its Phase 2 Report that Chile “amend the law to ensure that the foreign bribery offence can apply to bribes composed of non-pecuniary benefits”.⁶

13. New article 251bis covers “economic or other nature benefit”. The Chilean authorities explain that the offence now applies to bribes in the form of an honorary distinction, a political endorsement or a university admission that cannot be quantified, for instance. This clears all doubts about the coverage of the Chilean law and its adequacy with the Convention on this point. The corresponding domestic active and passive bribery offences have not been amended and awareness of the scope of the foreign bribery offence should be adequate.

b) “Undue” advantages

14. Under the Convention, bribery requires that the briber give or offer an “undue” payment to the public official. Article 250bis A did not expressly require that the economic advantage be “undue”. In addition, it did not specify that the advantage expected by the briber would be “improper”. The text of the law could thus in theory have applied to entirely legitimate payments seeking proper official action. The Working Group therefore recommended in its Phase 2 Report that Chile “amend the law to ensure that vagueness with regard to the requirement that the advantage supplied by the briber be “undue” is eliminated”.

15. The wording of new article 251bis is identical to the wording of the previous offence on this point. On the other hand, the expected advantages are now qualified as “improper” (see below point 1.3). In the opinion of the Public Prosecutor’s office and academics, there is no need to qualify the payment to the public official as “undue” since no one would be prosecuted for having made a legitimate payment to a public official (be it Chilean or foreign). The “undue” nature of the payment is implicit. Payments or

⁵ In its Phase 1 report, the Working Group already recommended that the Chilean authorities take remedial actions in this respect.

⁶ In its Phase 1 report, the Working Group already “strongly encouraged Chile to make the necessary legislative changes”.

advantages given to obtain an undue benefit can only be undue. Besides, the inclusion of an element setting forth that the benefit is “undue” may also lead to confusion in its interpretation. On the other hand, the advantages expected by the briber are now qualified as “improper”.

16. Chile states that a payment or advantage which is permitted or required by the written law or regulations or case law of the foreign public official’s country would not be an offence under Chilean law (see Commentary 8 to the Convention). Notwithstanding, in a case in which the payment or advantage, while not expressly permitted or required by the local law of the foreign public official’s country, were also not prohibited thereby, the Chilean authorities state that a Chilean court would rule that the advantage is undue and deemed an offence under Chilean laws.

1.3 In order to obtain or retain business or other improper advantage

17. The Convention applies to bribes given “in order to obtain or retain business or other improper advantage”. Article 250bis A applied to bribes given “in order to obtain or retain... any business or advantage”. The absence of mention of the improper nature of the advantage obtained as a result of bribery, added to the absence of mention of the “undue” nature of the advantage given (as a bribe), raised questions in Phase 1 and Phase 2. Notably, as noted above, the text of the law could thus in theory have applied to entirely legitimate payments seeking proper official actions.

18. New article 251bis applies to bribes given “in order to obtain or retain... any improper business or advantage”. The Chilean authorities explain that this amendment seeks to clarify the illegality of any asset or business obtained as a result of bribery of a foreign public official.

19. The Chilean authorities indicate that the example proposed at Commentary 4 on the Convention⁷ could be framed within the offence, considering that notwithstanding the possibility of the existence of an area of discretionary activity of the public official for choosing among all the persons, if his decision was taken because someone offered him an undue economic benefit, that action transforms the business or advantage in an undue activity, due to the consent of the public official was vitiated. The Chilean authorities indicate that new article 251bis is also in conformity with Commentary 5 on the Convention.⁸

1.4 To a foreign public official

20. The Phase 2 Report highlighted that the Chilean definition of a foreign public official differed from the Convention in that it did not cover all “public enterprises” but only “public service enterprises” which are limited to public utilities (*empresa de servicio público*).⁹ In addition, “public service enterprises” may be only those that are both created by statute and that carry out a public function. Many state-owned or state-controlled enterprises carrying out public functions may be created other than by statute. The Working Group recommended therefore that Chile “take all necessary measures to ensure that the concept of ‘public service enterprise’ in the definition of “foreign public official” is consistent with the Convention definition of ‘public enterprise’”.

⁷ Commentary 4: “It is an offence within the meaning of [Article 1] paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.”

⁸ “‘Other improper advantage’ refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements”.

⁹ However, the Chilean authorities stated that a Chilean court would refer to the definition of public official under article 260(13) of the Penal Code which expands the ambit of public function to public enterprises.

21. Law No 20,341 replaced the words “public service enterprise” with the words “public company” (*empresa pública*). The Chilean authorities explain that the term “public enterprise” includes both “public enterprises established by law” and “State private enterprises”. This concept is included in several legal texts and has been confirmed in rulings from the Comptroller General’s Office and court case law.¹⁰ The definition of foreign public official seems to be now in line with the Convention.

22. Commentary 14 to the Convention defines a “public enterprise” as “any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence”. Chile state that the Commentaries on the Convention are understood as a guide to be used for interpretation purposes. Consequently, the “public enterprise” concept described in Commentary 14 shall be used as guidelines by the authorities responsible for its interpretation. The interpretation of the offence should be monitored by the Working Group as case law develops.

1.5 *In the conduct of international business*

23. Article 250bis A applied to bribes “in the field of international business”. Article 251bis now covers bribes “in the field of any international transactions”.

24. The amendment results from the discussion between Chile and the lead examiners at the preliminary meetings for Phase 1 on the scope of the word “business”: the question was to know whether the word “business” would be as broad as the word “transaction”.¹¹ After a thorough discussion on the matter, Chile decided to amend the offence in order to include all kinds of international transactions (*i.e.* not only those of a commercial nature).

2. ARTICLE 3: SANCTIONS

25. In its Phase 2 Report, the Working Group adopted six recommendations concerning sanctions at §230, which include the recommendations already made in Phase 1. Confinement and financial sanctions have been increased. The possible sanction of disqualification from holding public office is unchanged.

2.1 *Confinement penalties against natural persons*

26. The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. In its Phase 2 Report, the Working Group recommended that Chile “a) substantially increase the criminal sanctions applicable to foreign bribery in order (i) to provide for effective, proportional and dissuasive sanctions, including in cases where the bribe is solicited by the foreign public official” and “b) eliminate mandatory reductions of sanctions for foreign bribery... (ii) in cases of solicitation of the bribe by the foreign public official”.

¹⁰ Chilean “Public enterprises established by law”, which have a commercial or industrial activity, include Codelco, Bancoestado, “Empresa Nacional de Minería (Enami)”, “Empresa Nacional del Petróleo (ENAP)”, “Empresa de Ferrocarriles del Estado (EFE), among the most important State companies. Chilean “State private companies” are private companies in which the State or its agencies have a major or equitable interest, conditions, representation or share, as indicated in Law No. 10336, article 16 (The Comptroller General’s Office Organic Law). “State private companies” do not form part of the State Administration.

¹¹ Chile had explained that said criterion had been adopted in the light of the Title and Preamble of the Convention itself, which refer to international business transactions. The French version of the Convention also refers to international business rather than international transactions (*commerce international*).

27. Law 20,341 modified the level of sanctions for both the domestic and foreign bribery offences. Sanctions for foreign bribery are now globally higher in terms of confinement than the corresponding sanctions for active bribery of Chilean officials. See a comparative table of the applicable sanctions for natural persons in Annex 3.

28. Chile kept the discrepancy of confinement sanctions against natural persons, depending on whether the briber (i) offers or gives a bribe to a public official or (ii) consents to solicitation. They consider that it has a didactic purpose and reflect the lesser seriousness attached to a favourable response to solicitation. However, the sanctions available in both situations have been increased. Notably, the maximum confinement rose from 3 to 5 years in case of offer, and from 540 days to 3 years in cases of answering a solicitation. The minimum sanction was also raised from 61 days to 541 days in case of offers, but not in cases of solicitation.

29. As noted in the Phase 2 Report, given Chilean law, it can be expected that alleged bribers of foreign public officials will frequently, if not invariably, claim that they were solicited to benefit milder sanctions. Disproving this claim may be difficult for prosecutors because – unlike the case in domestic bribery cases – the foreign official will often be unavailable. The Chilean authorities acknowledge this difficulty of confronting the testimonies of the alleged briber and of the foreign public official. They nonetheless consider that the Chilean criminal procedure allows for alternatives. First, the system of free evaluation of evidence allows prosecutors to establish the proof by any available means, for example a testimony by videoconference, an email, a financial accounting report, etc. Chilean prosecutors can carry informal investigations with foreign counterparts to corroborate or refute the declarations of the briber, without prejudice of the results of the mutual legal assistance actions carried out by formal channels. Chilean prosecutors have also travelled abroad to obtain evidence there.

2.2. *Mandatory reductions of penalties and statute of limitations*

30. The Phase 1 and Phase 2 Reports noted that there are a number of provisions that automatically reduce sanctions still further. In particular, sanctions become almost *de minimis* if the "*media prescripción*" of article 103 PC applies. This provision significantly lowers the applicable sanctions if the briber gives him/herself up to the authorities or is detained more than two and a half years after the offence was committed (*i.e.* after half of the limitations period has run). In such cases, the maximum prison sentence was only 60 days. Therefore, the Working Group recommended in its Phase 2 Report that Chile "eliminate mandatory reductions of sanctions for foreign bribery ... (ii) in cases where the case begins more than half way through the limitation period".

31. The Chilean authorities have not eliminated the mandatory reduction of penalties in case half of the limitations period has elapsed, because this rule applies to all offences in Chile, and the Chilean authorities do not wish to make an exception for the bribery offence. However, the raising of the maximum sanction for foreign bribery entails a partial raise of the maximum penalty applicable where half of the limitations period has elapsed: the maximum sanction remains 60 days when the briber has been solicited, but has raised to 540 days when he/she is the initiator of the bribery transaction.¹² In addition, the Chilean authorities highlight that case law extended the effect of suspension of the statute of limitations to this provision. The running of the statute of limitations is suspended by the formalisation of the investigation, the submission of a complaint and the request of a prosecutor to conduct a formalisation hearing. If the suspension occurs before half of the limitations period elapsed, article 103 would not apply. Finally, a 2009

¹² The same rules on statute of limitations apply to all offences, except for particularly special situations such as crimes against humanity and genocide.

instruction of the prosecutor general¹³ highlights the fact that offences of bribery are usually detect late and consequently asks prosecutors to pay attention to the statute of limitation and to the rule of "*media prescripción*", and to take appropriate action to suspend their running.

2.3 *Penalties and Mutual Legal Assistance and Extradition*

32. The Convention mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. In its Phase 2 Report, the Working Group recommended that Chile “a) substantially increase the criminal sanctions applicable to foreign bribery in order... (ii) to ensure that effective mutual legal assistance and extradition are not excluded by the level of applicable sanctions in any foreign bribery case”.

33. Mutual legal assistance (“MLA”) is not contingent upon the seriousness of the penalty attached to a crime in Chile or in the requesting state for which MLA is sought, but rather on the existence of bilateral and multilateral treaties. Treaty-based MLA, including the use of coercive measures such as search and seizure, is also not conditional on the length of imprisonment set forth in the criminal law of Chile or the requesting state.

34. Extradition procedure is ruled by the Criminal Procedure Code in addition to bilateral or multilateral treaties. A country can request the extradition of a person from Chile when the individual is accused of an offence which is assigned a sanction of more than one year imprisonment in that country (article 440). Article 449 also requires that the offence be one for which extradition is authorised under applicable treaties or principles of international law¹⁴ (passive extradition). With Law 20,341, all maximum sanctions for active bribery of a Chilean or foreign public official are now above one year.

35. Vice versa, Chile can request another Party for the extradition of an individual suspected of having committed an offence whose minimum length of imprisonment exceeds one year in Chile (active extradition, article 431(1)). In 2007, the minimum sanction for bribery of foreign public officials was 61 days (*i.e.* below the one year threshold) and requesting active extradition was therefore not possible.

36. Law 20,341 raised the minimum sanction from 61 days to 540 days when the briber offers or gives a bribe to a Chilean or foreign public official, *i.e.* above the one year threshold. However, the minimum sanction in case the briber consents to a solicitation from an official is still 61 days, *i.e.* below the one year threshold. So, it would seem that extradition can be requested only in cases where the briber initiated the offence, something that the prosecutor would have to prove. However, the Chilean authorities indicate that recent case law could solve this problem. The Supreme Court, in a case of passive extradition, considered that because the offence at stake is punished by maximum penalties between 61 days and 5 years, depending on the circumstances, the threshold of one year, which is comprised between 61 days and 5 years, is met.¹⁵ The Chilean authorities are confident that a similar interpretation would apply in cases of active extradition linked to the foreign bribery offence. The sanctions would therefore be sufficient to enable extradition.

¹³ Oficio FN n°059/2009 of 30 January 2009 repeals the previous instructions dedicated to corruption offences.

¹⁴ Chile indicated in Phase 1 that the Convention would provide the legal basis for extradition in the absence of an extradition treaty.

¹⁵ Penal Chamber of Supreme Court, Cause Number 2194 -2008, Sentence of 28 October 2008, Passive extradition for illicit association and repeated frauds.

2.4 *Financial penalties against natural persons*

37. In its Phase 2 Report, the Working Group recommended that Chile, “in conjunction with the recommended amendment of the law to ensure its application to bribes composed of non-pecuniary benefits, appropriately modify the method of fixing pecuniary sanctions for foreign bribery”.

38. Fines were up to twice the amount of the bribe. They are now from once to twice the amount of the bribe, or from EUR 4 643 to 46 430 when the bribe has no economical value.¹⁶ The amendment solves the difficulty identified in Phases 1 and 2 of calculation of fines related to offences involving non-pecuniary bribes.

39. In cases where the bribe is composed of both pecuniary and non-pecuniary elements, the Chilean authorities consider that the court will opt between two possibilities, depending of the circumstances of the case. First, the court could consider that only one offence is committed and the harsher of the two sanctions will be imposed. Second, the court could consider that two or more offences have been committed and the pecuniary sanctions could be cumulated.¹⁷

2.5 *Seizure*

40. Article 3.3 of the Convention requires each Party to take necessary measures to provide that “the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure...”

41. For seizure to apply, in the form of precautionary measures, Chilean case law required that a formal investigation be launched. Hence the prosecutor had to first ask for the formalisation of the investigation and subsequently ask for seizure. This means that the suspect was informed about the investigation before any measure can be taken. The Chilean authorities had indicated in Phase 2 that this had caused difficulties in some cases of financial offences and that a more effective procedure would allow precautionary measures to be requested without the suspect’s knowledge and before he/she has the chance to dispose of his/her assets. In its Phase 2 Report, the Working Group recommended that Chile “take all necessary measures to ensure that seizure can be initially obtained in appropriate cases without the prior knowledge of the suspect”.

42. The Chilean authorities indicate that recent case law and the Criminal Procedure Code answer this recommendation on provisional seizure. First, the Chilean authorities indicate that recent case law no longer require that the investigation is formalised to perform seizure based on article 157 of the Code of Criminal Procedure. Indeed, article 157 only indicates “during the phase of investigation” and does not limit the scope of the real precautionary measures to the period after the formalisation of the investigation.¹⁸

43. Second, article 236 provides for a possibility to apply precautionary measures without the defendant’s knowledge, with the consent of the judge, even before the formalisation of the investigation, if the facts are of certain seriousness and the secrecy of the measures is the condition for its success. The

¹⁶ 100 to 1000 UTM. The UTM value changes every month. It is of CLP 36 645 in September 2009.

¹⁷ Pursuant to article 70 of the Penal Code on the determination of the sanction, “when imposing a fine, the court may determine the amount thereof on the basis not only of mitigating and aggravating circumstances, but mainly of the financial standing or powers of the accused”.

¹⁸ See case law: *ICA San Miguel, Rol Corte 652-2006 de 14 de julio de 2006*; *ICA Santiago, Rol Corte 937-2007, de 7 de mayo de 2007*; *ICA La Serena, Rol Corte 104-2004, de 24 de junio de 2004*; *ICA La Serena, Rol Corte 161-2007, de 18 de julio de 2007*.

Chilean authorities indicate that the use of article 236 remains exceptional. Requests based on article 236 and the law on drugs are made (and usually granted) in investigations of money laundering. It would be interesting to see whether prosecutors and judges use this possibility in bribery investigations in future.

2.6 *Additional Civil and Administrative Sanctions*

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

45. The offence of foreign bribery is punishable by confinement, a fine and the disqualification for public office or functions from three to ten years. The disqualification prevents the person convicted to this sanction to enter public administration for a given time.¹⁹ In its Phase 2 Report, the Working Group recommended that Chile “consider the imposition of additional administrative sanctions upon natural and legal persons subject to criminal sanctions for the bribery of a foreign public official”.

46. During Phase 2, various Chilean authorities indicated their intention to introduce administrative sanctions or precautionary measures vis-à-vis persons convicted or suspected of bribery. First, PROCHILE has indicated that although it does not have the power to apply administrative sanctions, it will exclude from its export promotion programs Chilean companies or persons convicted of foreign bribery in future. Since January 2008, an Anti-Corruption Clause is included in the contracts of the Fund for Agricultural and Livestock Exports Promotion, which allows PROCHILE to terminate a contract if bribery is proved.²⁰ PROCHILE is also considering the possibility to introduce a similar clause in its other contracts.

47. Second, in Phase 2 CORFO stated that it would be willing to apply sanctions for foreign bribery provided an official system of communication of foreign bribery convictions between states is created, so that CORFO would know about such convictions. CORFO maintains its position in 2009. Although the examining team recognised that such an international system would be helpful, it encouraged CORFO to begin by taking into consideration convictions in Chile and other convictions about which they are aware. In addition, the lead examiners indicated that measures such as requiring applicants to disclose convictions could assist in providing CORFO with the necessary information. As of September 2009, CORFO does not request applicants to disclose possible convictions. In the framework of the accession of Chile to the OECD, Chile accepted the Recommendation on Bribery and Officially Supported Export Credits.²¹ Since

¹⁹ In addition, offenders who were already public officials will be dismissed from public service (article 119 of the Administrative Statute). However, this sanction will rarely be applied since it is not applicable against managers of state-owned companies having bribed a foreign public official, since labour law, rather than administrative law, applies to them.

²⁰ “Tenth: PROCHILE may conclude in advance this Agreement if: ... d) Any kind of corruption acts are proved in the execution of this contract. For the purposes of this provision, the term "corruption" is understood as the offer, to give or the act of giving to a public official, domestic or foreign, an economic benefit, gift, gratuity or commission, as a reward or inducement, to act or refrain from taking actions which in the exercise of his/her function are related to the implementation of activities contained in the present agreement.”

²¹ Chile also expressed the following position: “Drawing of funds is to be suspended if formalities in the application of the OECD Convention terms are not fulfilled; however, repeat violations would result in the termination of the credit line. However, in the case of severe violations of the OECD Convention terms, sanctions mandate the acceleration of the granted credits and retain CORFO’s right to require its repayment.”

November 2008, all contracts opening lines of credit to support exports include an anti-corruption clause with a sanction associated to its breach.²² CORFO also indicates that it assesses the integrity of the project before approving the draft.

48. Third, the Directorate for Public Procurement (*Chilecompra*)²³ indicated that it expects to send to the Ministry of Finance proposed revisions to a bill before Congress that would prohibit legal or natural persons convicted of foreign bribery from participating in public procurement contracts.

49. Article 17 of Law 19,886 on Public Procurement and Contracting stipulates that regulations will establish the ineligibility, incompatibility, suspension and removal from the State Registry of Suppliers for breach of obligations or other reasons. Executive Decree No. 1,763 of 26 December 2008 (published in the official gazette on 6 October 2009), amends the Regulations of the Law on Public Procurement and Contracting. Article 1(31) of the Executive Decree disables the enrolment in the State Registry of Suppliers of companies convicted of bribery of domestic or foreign public officials, for the period mentioned in the judgement. The debarment of the company extends to its directors and, in the case of limited liability companies (such as individual companies, collective and “*en comandita*” companies), it extends to its managers.

50. In addition, the Chilean authorities have indicated that the Directorate for Public Procurement has elaborated a draft that seeks to improve Law 19,886 on Public Procurement and Contracting. The Bill, scheduled to be presented to the next government in 2010,²⁴ would introduce the prohibition for persons convicted of bribery of domestic or foreign public officials to act as suppliers of the State.²⁵ The Bill would also introduce the possibility for the prosecutor of asking the guarantee judge to suspend persons (individuals and companies) suspected of bribery in criminal proceedings from the State Registry of Suppliers, as a precautionary measure.

51. Finally, foreign bribery might also have civil consequences, as indicated in the Phase 1 report. A “victim” may file a civil action for restitution or damages during a criminal proceeding or alternatively, may file a civil action before a civil court. However, it is doubtful whether the requisite elements of “victim” and “damages” are present in the case of foreign bribery.²⁶ The State is so far the only recognised victim. However, the Chilean authorities consider that a competitor might try to obtain the status of “victim” and that damages might be assessed, for example, as an “opportunity cost” (*i.e.*, the value of a potential contract), but there is no confirming case law so far.

²² “The person who gets the credit will prevent that those involved in the implementation of this credit line do not offer, promise or give illegal payments or other advantages in relation to the operations of this instrument. In case of contravention, CORFO reserves the right to accelerate the compliance of the credit line, suspend or cancel money orders under the respective credit lines.”

²³ Chilecompra is a decentralised public service subordinated to the Ministry of Finance, which manages governmental purchases.

²⁴ As of June 2009, this initiative is at the analysis and discussion stage, especially in the budgetary instances of the Ministry of Finance, because of the financial commitment involved.

²⁵ Although there is no blacklist of debarred companies, the Directorate for Public Procurement maintains a formal list of suppliers, but bribery was not a cause for exclusion from the list at the time of Phase 2.

²⁶ This doubt is due to the difficulty in qualifying and/or identifying, say, a competitor as a “victim” and in characterising the proceeds of a bribe (*i.e.*, what the briber obtains in return for the commission of the offence) as “damages”.

3. ARTICLE 4: JURISDICTION

3.1 Territorial jurisdiction

52. Article 4.1 of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory”. Commentary 25 clarifies that “an extensive physical connection to the bribery act is not required”.

53. The Penal Code and the Organic Court Code set forth the principle of territoriality for all offences, including the foreign bribery offence. For offences that need not produce actual harm to constitute a crime, such as domestic or foreign bribery (crimes of “endangerment”), territorial jurisdiction is established where the action “began”. If the bribe began with an offer made outside Chile, Chile could not establish territorial jurisdiction even though the bribe was actually given in Chile. The law therefore appears to be inconsistent with the Convention.

54. During the Phase 2 on-site visit, prosecutors stated that they would consider that territorial jurisdiction would exist if part of the offence took place in Chile, regardless of whether the offence began in Chile. However, there is no case law in respect of any criminal offences in which this position was applied.

55. The Working Group recommended that Chile review this deficiency in both Phase 1 and Phase 2. Chile has not modified applicable law in this area. In its Phase 2 Report, the Working Group recommended that Chile: “promptly take all necessary action to ensure that territorial jurisdiction extends over all foreign bribery offences committed in whole or in part in Chilean territory.”

56. Because the offence has been amended so that not only the offer of a bribe is sanctioned, but also the giving or promising of a bribe, the loophole is now reduced. Indeed, the Chilean authorities confirmed that now, if a bribe is offered abroad by a foreigner but given in Chile, the offence is considered as reiterated and Chilean courts can exercise their jurisdiction.

57. The Chilean authorities also confirmed that Chilean courts will have jurisdiction over Chilean accomplices of a main perpetrator who escapes Chilean jurisdiction because for instance he/she is a foreigner having committed an offence abroad, if the perpetration of the offence is certain. This would be the situation, for instance, of a person acting as an intermediary in Chile of an offence of bribery committed abroad by a foreigner.

58. Nonetheless, the government tried twice to introduce legislative amendments to expressly establish jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory. The discussion of these amendments was intense and was sometimes confusing.²⁷

²⁷

Bill 5725-07 which became Law 20,341 and Bill 6476-07 which introduces nationality-based jurisdiction. First, the government proposed to amend article 6(2) of the Organic Court Code (OCC). With this amendment, Chilean courts would have been competent to adjudicate in respect of acts of bribery committed abroad by Chilean nationals or when part of the execution of the offence would have taken place in the territory of Chile. The Senate considered that because article 6 is dedicated to acts committed abroad, it would be illogical to introduce elements of territoriality in it. In addition, the Senate considered that articles 5 and 157 OCC sufficiently cover situations where part of the offence takes place in Chile. The government later proposed to amend article 157 of the OCC. After the sentence indicating that the competent court is the one where the offence started, it proposed to add a sentence specifying that Chilean courts would be competent even concerning offences only partially committed in Chile. The Supreme Court, in a negative opinion dated 20 May 2009 (*Oficio n° 111*), considered that this would not make sense since the same Bill introduces nationality jurisdiction. Therefore, acts that would not be covered by the

Nonetheless, the conclusion of the debates was that the amendments were not necessary because the Chilean law does establish the jurisdiction of Chilean courts over offences of bribery committed partly in Chile and partly abroad: if part of the execution of the offence took place in Chile, the offence is considered committed in Chile. It remains to be seen how courts will apply the principle of territorial jurisdiction in practice.

3.2 Nationality jurisdiction and Extraterritorial jurisdiction

59. Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”.

60. Article 6 of the Penal Code excludes nationality jurisdiction except where it is specifically provided for by law. These exceptions are set in article 6 of the Organic Court Code. Nationality jurisdiction applies to a limited list of offences. The list includes thus far bribery “committed by Chilean public officials or by foreigners working for Chile”. In its Phase 2 Report, the Working Group recommended that Chile: “... adopt nationality jurisdiction in foreign bribery cases in order to strengthen enforcement of the offence.”

61. Law 20,371 introduced jurisdiction over active bribery of foreign public officials committed abroad by Chilean nationals, or foreigners who habitually reside in Chile.²⁸ The concept of habitual resident is not defined in Chilean law. However, the Chilean authorities consider that nationality jurisdiction could apply to the three categories of residents covered in the Law on Foreigners: permanent residents having obtained a permanent visa; temporary residents having obtained a visa (such as student residents and residents subject to an employment); and refugees.

62. Prosecutors must investigate any offence (committed abroad by Chileans) they become aware of. No conditions apply, such as dual criminality, the denunciation by another State or the presence of the suspect (but his/her absence would prevent prosecution). In this latter case, Chile would request the active extradition of the person investigated. The same rule applies when the offence is committed in Chile.

63. The court competent to hear about offences committed abroad is the Criminal court of Santiago, pursuant to article 167 of the Organic Court Code.

64. In addition, article 6(8) of the Organic Court Code subjects to Chilean universal jurisdiction offences committed outside Chilean territory and “included in treaties” “celebrated” with other countries. It is unclear whether a court would establish nationality jurisdiction in respect to the foreign bribery offence pursuant to this provision. Prosecutors and legal specialists at the Phase 2 on-site visit offered different interpretations of this provision, some arguing that it would apply only to offences created in the treaty itself and others arguing that it could extend to treaties, like the Convention, which mandate the creation of an offence in national law. This provision has so far never been applied by the courts.

territorial jurisdiction would fall under the new extraterritorial jurisdiction (see below). The Chamber of Deputies kept the provision, but the Senate repealed it.

²⁸ Article 6(2) also includes offences related to legally protected Chilean public interests, such as crimes or misdemeanours against sovereignty or state security, falsification of State seals or national currency, embezzlement of public monies, and breach of trust in the custody of documents.

4. ARTICLE 6: STATUTE OF LIMITATIONS

65. Article 6 of the Convention requires that any statute of limitations with respect to foreign bribery provide for “an adequate period of time for the investigation and prosecution” of this offence.

66. The modification of confinement sanctions has not altered the statute of limitations. Because foreign bribery remains a “misdemeanour”, the statute of limitations is still five years for initiating a criminal action and for sentencing purposes (whether the bribe is offered or given as a result of solicitation).²⁹

5. ARTICLE 7: MONEY LAUNDERING

67. Law 19,913 on money laundering listed offences in Chapter 9 of the Penal Code as predicate offences for the application of the offence of money laundering. Since Law 20,341 created a new Chapter 9bis dedicated to foreign bribery, foreign bribery was no longer a predicate offence for the purpose of the application of the money laundering offence, and Chile no longer complied with Article 7 of the Convention. Law 20,371 amended Law 19,913 to remedy this situation: offences of Chapter 9bis of the Penal Code are added to the list of predicate offences. With Bill 6423-07, liability of legal persons would apply to the offence of money laundering.

6. ARTICLE 9: MUTUAL LEGAL ASSISTANCE

6.1 *MLA and legal persons*

68. Article 9.1 of the Convention requires that each Party cooperate with the others to the fullest extent possible in providing “prompt and effective legal assistance” with respect to criminal investigations and proceedings and non-criminal proceedings against a legal person that are within the scope of the Convention. The Phase 2 Report noted that the situation of MLA proceedings involving legal persons remained unsettled, until their liability is established. The Working Group recommended Chile to “take all necessary measures to ensure that MLA can be provided in criminal and non-criminal case of foreign bribery involving legal persons”.

69. Chile has had experience in providing information on legal persons at the request of another State in which a criminal investigation had been opened. Once the Bill on Liability of Legal Entities will enter into force, MLA for criminal and non-criminal proceedings against legal persons should be facilitated. In particular, dual criminality would no longer be an obstacle. Chile is a party to a number of bilateral and multilateral Conventions on mutual legal assistance in criminal matters and is considering becoming party to other Conventions.³⁰

6.2 *Bank secrecy*

70. Article 9.3 of the Convention states that “a Party shall not decline to provide mutual legal assistance on the grounds of bank secrecy”. In its Phase 1 report, the Working Group had noticed that constitutional provisions prohibited access to confidential bank information in reply to an MLA request,

²⁹ The statute of limitations is governed by the general rules of the Penal Code (articles 93-105).

³⁰ Chile is taking the necessary steps to submit the European Convention on Mutual Assistance in Criminal Matters and its Protocols to congressional approval.

unless provided for in bilateral treaties. The Working Group had therefore concluded that Chile failed to comply with Article 9.3 of the Convention.³¹

71. In Phase 2, the Working Group noted that there had been significant improvements in MLA in Chile since Phase 1, thanks to the entry into force of the new Criminal Procedure Code. Article 20bis of the new CPC provides that foreign requests for MLA shall be handled by the Public Prosecutor's Office, which shall seek the intervention of a guarantee judge as necessary in the same manner as in domestic investigations. The new role for prosecutors appeared also to have lessened the importance of treaty-based MLA (and its attendant limitations given Chile's treaties).

72. The Phase 2 report nevertheless notes that because bank secrecy is a major barrier to effective investigation of economic crime in Chile,³² it is also a serious problem for MLA. As explained in the Phase 2 Report, (i) restrictions apply to the power of a guarantee judge to lift bank secrecy³³ (compared with procedures for domestic bribery and money laundering);³⁴ and (ii) prosecutors face significant practical hurdles relating to obtaining bank information (in terms of burden of proof, delays, misbalanced interpretation of bank secrecy and bank confidentiality).

73. The Working Group therefore recommended Chile to "align the rules for lifting bank secrecy in foreign bribery cases with the rules applicable in domestic bribery cases and in money laundering investigations by the Financial Intelligence Unit (UAF)..." The Working Group also recommended Chile to "take all necessary measures to ensure that Chile will not decline to render mutual legal assistance in foreign bribery cases on grounds of bank secrecy". In November 2008, the Prosecutor General highlighted, during a conference, the same difficulties as mentioned in March 2007 and asked for a new legal framework adapted to the characteristics of modern economic criminality and international standards.

74. Since Phase 2, the Prosecutor general of Chile has issued an instruction to all Chilean prosecutors dedicated to offences of corruption, including bribery of foreign public officials (Oficio 59/2009 above mentioned). A chapter of this instruction is dedicated to bank secrecy. It reiterates that bank secrecy can be fully lifted by the guarantee judge in cases involving investigations against public officials for offences committed in the discharge of their duties; there is no requirement that the requests relate to specific operations. The Chilean authorities confirmed that because foreign bribery is listed as an offence to which the instruction applies, this exception to the rules on lifting bank secrecy will be applied in cases of foreign bribery, even though the investigation is not directly against the foreign public official.

³¹ The Working Group also required Chile to report within 1 year on its action with regard to removing its bank secrecy impediment to MLA. In 2004, Chile reported that it would create a working group in order to develop a law governing MLA. However, this commitment has not been followed by any action changing the rules on bank secrecy.

³² During Phase 2, prosecutors and police authorities declared that bank secrecy is one of the main problems encountered in Chile when investigating alleged acts of bribery and economic crime. They anticipated similar problems in future investigations for foreign bribery.

³³ The General Banking Law authorises the prosecutor, with the approval of the guarantee judge, to examine or request the background related to "specific" operations that have been performed by a person formally accused and that have a "direct relationship" with the investigation. The Bank Current Accounts and Checks Law, also authorises only the disclosure of "determined financial items" of a current account, at the request of a prosecutor and with approval of the guarantee judge.

³⁴ For instance, article 1(4) of the Bank Current Accounts and Checks Law provides that for investigations against public officials for offences committed in the discharge of their duties (e.g. bribery), there is no requirement that the requests for lifting bank secrecy relate to specific operations or have a direct relationship with the investigation.

75. in addition, the Chilean authorities indicate that in most cases the judge authorises the lifting of bank secrecy at the request of the prosecutor. They also indicate that Chilean prosecutors have been able to communicate banking information to foreign prosecutors in one procedure not related to money laundering (in a fraud case), on the basis of article 20bis of the CPC. Another procedure is in progress for lifting bank secrecy at the request of a foreign judicial authority (as of June 2009). The Chilean authorities therefore decided for the time being not to introduce a Bill to the Congress about that subject.³⁵ They however indicate that the Public Ministry (prosecutors' office) permanently monitors the functioning of laws, including on mutual legal assistance.

76. Although the new instruction to prosecutors seems to align the rules for lifting bank secrecy in foreign bribery cases with the rules applicable in domestic bribery cases, and Chile does not appear to have declined to render mutual legal assistance on the grounds of bank secrecy since Phase 2, practical difficulties might remain and the issue should be followed up once case law develops.

7. ARTICLE 11: RESPONSIBLE AUTHORITIES

77. Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

78. Chile notified the Secretary-General of the responsible authorities in August 2009. The central authority to contact with requests of mutual legal assistance (Article 9) and extradition (Article 10) is the Directorate for legal affairs of the Ministry for Foreign Affairs (*Dirección Asuntos Jurídicos Ministerio relaciones Exteriores*). The central authority to contact in relation with consultations related to jurisdiction (Article 4) is the Unit of international relations and cooperation of the Ministry of Justice (*Unidad Relaciones Internacionales y Cooperación, Ministerio de Justicia*).

³⁵

On the contrary, the lifting of bank secrecy in money laundering investigations should be further facilitated with the adoption of a Revised Bill on the Authorisation of the Lifting of Bank Secrecy in Money Laundering Investigations, Bulletin No. 4426-07.

EVALUATION

General Comments

79. The Working Group on Bribery commends Chilean authorities for the high level of co-operation and openness during the examination process.

80. Several legislative developments have occurred in Chile since the Phase 2 evaluation of Chile's legislative and practical implementation of the Convention in October 2007. With Law No. 20,341: (i) the foreign bribery offence can apply to bribes composed of non-pecuniary benefits; (ii) the foreign bribery offence can apply to the giving of a bribe; and (iii) the concept of "public service enterprise" in the definition of "foreign public official" is consistent with the Convention definition of a "public enterprise". Law 20,341 also increased the criminal sanctions available to foreign bribery. Furthermore, under Law No. 20,371, Chile has also introduced jurisdiction over active bribery of foreign public officials committed abroad by Chilean nationals, or foreigners who habitually reside in Chile.

81. The Working Group notes that the Bill on the liability of legal persons, Bill 6423-07, has not entered into force as of 8 October 2009. A further report to consider this legislation, Phase 1ter, will be discussed by the Working Group in December 2009.

82. The Working Group considers that, overall, Chile's legislation conforms to the standards of the Convention, except Article 2 for the reason mentioned in the foregoing paragraph. Irrespective of any further matters raised by the Working Group in December 2009, the following aspects of Chile's legislation should be followed up in Phase 3.

Specific issues

1. The offence of bribery of a foreign public official: "undue" pecuniary or other advantages

83. The Convention requires the criminalisation of the offer, promise, or giving of any "undue" advantage to a foreign public official. New article 251bis of the Penal Code is identical to its predecessor on this point, although the advantages expected by the briber are now qualified as "improper". In the opinion of the Public Prosecutor's office and academics in Chile, there is no need to qualify the payment to the public official as "undue" since no one would be prosecuted for having made a legitimate payment to a domestic or foreign public official. Authorities explain that the "undue" nature of a payment is implicit and that the absence of an express reference to an "undue" advantage will pose no practical obstacle to prosecution. In the absence of supporting case law, the Working Group will revisit the issue during the Phase 3 evaluation process.

2. Sanctions and active extradition

84. Chile can request the extradition of an individual suspected of having committed an offence where the minimum length of imprisonment for that offence exceeds one year in Chile. Law 20,341 raised the minimum sanction for foreign bribery above the one year threshold when the briber offers or gives a bribe. However, the minimum sanction where the briber consents to a solicitation from an official is still less than one year, and it would therefore appear that extradition can only be requested in cases where the

briber initiated the offence. Chilean authorities indicate that recent case law concerning passive extradition could solve this problem, *i.e.* a case which took into account the highest sanction available for an offence which is structured similarly to the foreign bribery offence. Practice on this point, and case law in active extradition matters, should be followed up in Phase 3.

3. Territorial jurisdiction

85. Under the Penal Code and the Organic Court Code, territorial jurisdiction is established in Chile based on where the conduct “began”. During parliamentary debates, it was clarified that if any part of the offence is committed in Chile, jurisdiction over the offence can be exercised. In addition, Chilean authorities explain that because the foreign bribery offence now covers the offer of a bribe, as well as the giving or promising of a bribe, any of these acts can be treated as separate offences and trigger territorial jurisdiction. Phase 3 should consider how the courts in Chile will apply the principle of territorial jurisdiction in practice.

4. Mutual legal assistance

MLA and legal persons

86. In Phase 2, the Working group noted that MLA proceedings involving legal persons remained unsettled, until their liability is established. Once the Bill on the liability of legal persons enters into force, MLA for criminal and non-criminal proceedings against legal persons should be facilitated. In particular, dual criminality would no longer be an obstacle.

MLA and bank secrecy

87. The Working Group concluded in Phase 2 that because bank secrecy is a major barrier to effective investigation of economic crimes within Chile, it was also a serious problem for MLA. Since Phase 2, the Prosecutor General of Chile issued an instruction concerning offences of corruption, including bribery of foreign public officials, which seems to align the rules for lifting bank secrecy in foreign bribery cases with the rules applicable in domestic bribery cases. In addition, Chile does not appear to have declined to render mutual legal assistance on the grounds of bank secrecy since Phase 2. However, practical difficulties might remain and the issue should be followed up in Phase 3 once case law develops.

ANNEX 1 – LAW NO. 20,341 OF 22 APRIL 2009

(1) Article 239 is replaced with:

“Article 239.- A public official who, in the performance of transactions proper to his office, defrauds or consents to defrauding the State, municipalities or public educational or charitable agencies, either by causing them a loss or depriving them of lawful profits, shall be punished with short term imprisonment, medium to maximum degree.

Should the fraud exceed forty monthly tax units, the judge can increase in one degree the penalty above mentioned.

Should the fraud exceed four hundred monthly tax units, the penalty of long-term imprisonment, minimum degree, shall be applied.

Anyhow, the penalties of fine of ten to fifty per cent of the damages caused and a provisional absolute disqualification from holding public positions or functions, medium to maximum degree, shall be applied.”

(2) Article 240, indent one, is replaced with:

“Article 240.- A public official who, directly or indirectly becomes interested in any kind of contract or transaction in which he must intervene in the performance of transactions proper to his office, shall be punished with penalties of short term confinement in its medium degree, provisional absolute disqualification from holding public positions or functions in its medium to maximum degree and a fine of ten to fifty per cent of the value of the interest taken in the business.”

(3) In Section 248, the expression “suspension in any of its degrees and a fine ranging from half the fees or benefit solicited or accepted to the total amount thereof” is replaced with “short-term confinement, minimum degree, suspension in any of its degrees and a fine ranging from half the fees or benefit solicited or accepted to the total amount thereof.”

(4) In section 248bis, indent 1, “short-term confinement, minimum to medium degree” is replaced with “short-term confinement, medium degree”.

(5) In Section 250, the following amendments are made:

(a) The following new indent 2 is inserted: “As to the benefit offered in relation with the acts or omissions of Article 248, the briber shall be punished, in addition, with the penalty of short term confinement in its minimum degree.

(b) In indent 2, renumbered 3, the expression “in its minimum to medium degrees” is replaced with “in its medium degree.”

(c) Indent 3, renumbered 4, is replaced with the following:

“As to the benefit consented or offered in relation with crimes or misdemeanours listed in Article 249, the briber shall be punished, in addition, with the penalty of short term confinement in its medium degree, in the case of the benefit offered, or of short term confinement in its minimum to medium degrees, in the case

of the benefit consented. In these cases, if a higher penalty corresponds to the briber for the crime or misdemeanour, the latter shall be applied.”

(6) Sections 250bis A and 250bis B are derogated.

(7) The following new heading is inserted after section 251: “§ 9bis. Bribery to Foreign Public Officials”

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

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

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

ANNEX 2 – LAW 20,371 OF 25 AUGUST 2009

Section 1.- In section 6, No. 2, of the Organic Court Code, the following paragraph is inserted before the semicolon (;): “and bribery of foreign public officials, where committed by a Chilean or a person having habitual residence in Chile.”

Section 2.- Section 27, letter (a), of Law No. 19,913 is amended as follows:

After No. “6”, the conjunction “and” is replaced with a comma (,).

Between No. “9” and the phrase “of the Title”, the phrase “and 9 bis” is inserted.

Article 6 of the Organic Court Code now reads:

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

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

ANNEX 3 – SANCTIONS APPLICABLE TO THE OFFENCES OF ACTIVE BRIBERY OF CHILEAN AND FOREIGN PUBLIC OFFICIALS

Modifications introduced in 2009 by Law 20,341 are highlighted in bold.

Act/omission of public official	Fine	Confinement³⁶	Accessory Sanctions: Disqualification from holding public office
article 251bis: active bribery of a foreign public official			
act or omission	From once to twice the advantage, or from 100 to 1000 UTM when the advantage is of a non-economic nature	offer: 541 days -5 years (previously 61 days – 3 years)	provisional partial or absolute disqualification
		consent to afford: 61 days – 3 years (previously 61 days-540 days)	
article 250: active bribery of a Chilean public official			
commission of proper act for which no fees are set (indent 2)	From half the fees or advantage to their value	61 days-540 days (added)	suspension of public function (61 days-3 years)
omission of proper act or commission of improper act (indent 3)	twice the advantage	offer: 541 days-3 years (minimum previously of 61 days)	provisional partial or absolute disqualification
		consent to afford: 61 days-540 days	
commission of improper act of trading in influence (indent 3)	twice the advantage	offer: 541 days-3 years (minimum previously of 61 days)	perpetual partial or absolute disqualification
		consent to afford: 61 days-540 days	
certain listed criminal offences or misdemeanours committed by the official (indent 4)	three times the advantage	offer: 541 days-3 years (unless higher sanctions apply to the expected offences, in which case the latter will apply - added)	offer: perpetual partial or absolute disqualification or provisional absolute disqualification
		consent to afford: 61 days-3 years (unless higher sanctions apply to the expected offences, in which case the latter will apply - added)	consent to afford: perpetual partial or absolute disqualification or provisional absolute disqualification

³⁶

In Chile, deprivation of liberty includes imprisonment (*presidio*), confinement (*reclusion*) and prison (*prision*). Prison, confinement and temporary imprisonment are either long-term or short-term and consist of minimum, medium or maximum degrees. Bribery is always sanctioned by short-term confinement, the degree for which depends on the type of bribery.