



# Anti-Corruption Regulation

in 54 jurisdictions worldwide

Contributing editor: Homer E Moyer Jr

# 2012



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# Chile

## Marcos Ríos and Solange González

Carey y Cía Ltda

### 1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Chile is a signatory to and has ratified the Inter-American Convention against Corruption, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and the United Nations Convention against Corruption.

### 2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Domestic and foreign anti-bribery laws are essentially embodied in articles 248 to 251-ter of the Criminal Code. These articles contain the statutory offences and their applicable penalties, including disgorgement. Additional administrative penalties for domestic public officials are provided in the Public Officials Statute. The Legal Entities Criminal Liability Law also provides penalties for entities involved in bribery of domestic and foreign public officials.

### Foreign bribery

#### 3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Pursuant to the Chilean Criminal Code, it is a criminal offence to:

- offer, promise or give an economic or other benefit to a foreign public official, for such public official or a third party's benefit, in order for the foreign public official to act or refrain from acting, for the purpose of obtaining or retaining for him or herself or for another party any business or unfair advantage in the course of international business transactions;
- offer, promise or give such a benefit to a foreign public official as consideration for past performance of such an action or omission; and
- consenting or agreeing to give or provide such a benefit.

#### 4 Definition of a foreign public official

How does your law define a foreign public official?

As provided in the Criminal Code, a foreign public official is a person who:

- holds a parliamentary, administrative or judicial position in a foreign state, whether appointed or elected;
- performs public duties or functions for a foreign state, whether in a public entity or a state-owned company; or
- is an official or agent of a public international organisation.

### 5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

Chilean law does not expressly address gifts, travel expenses, meals or entertainment provided to foreign public officials. However, the giving of any of such benefits may be considered an offence to the extent that it is an economic benefit that is granted in order for the foreign public official to act or refrain from acting, for the purpose of obtaining or retaining any business or unfair advantage in the course of international business transactions, or as post-facto consideration for having performed one of the referred acts or omissions.

### 6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Facilitating payments are prohibited under the Criminal Code. A person who offers or agrees to offer an economic benefit to a public official who requests or accepts greater fees than those applicable in connection with an action that is customary for his or her position or that does not require the payment of any fees, may be subject to imprisonment, fines and impediments to hold public office positions.

### 7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

While there is no special regulation or prohibition for payments through intermediaries or third parties, corrupt payments made through intermediaries or third parties should be deemed prohibited under general criminal law rules, provided the elements of the crime described in section 3 above are present. Criminal law penalises not only the direct author or perpetrator of a crime (ie, a party actually making a corrupt payment), but also the mastermind or inducer of such corrupt payment. Hence, if a party has used an intermediary to offer, promise or give an economic benefit to a foreign public official for the purpose of obtaining or retaining any business or unfair advantage for him or herself, etc, such party may be held criminally liable for such corrupt payments.

### 8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

As a general rule, only individuals who participate in the commission of any kind of crime (including bribery) are subject to criminal liability. Exceptionally, the Legal Entities Criminal Liability Law imposes criminal liability on legal entities for conduct where the relevant behaviour:

- is a crime of, inter alia, bribery of local or foreign public officials;

- is perpetrated in the legal entity's own interest, directly or indirectly by its owners, representatives, main executives, or other individuals in charge of carrying out the relevant entity's business; and
- results from the entity's non-compliance with certain specific supervision and control obligations provided in such law. These obligations are deemed fulfilled if the company has effectively implemented internal controls or regulations to prevent the relevant crimes.

This corporate criminal liability may be passed along from one legal entity to another (eg, if a legal entity merges with one which committed the relevant offence), and is independent from the individual's liability (ie, the company's liability will subsist the extinction of the relevant individuals' liability).

## 9 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Bribery of foreign public officials is subject only to criminal governmental enforcement, which is in charge of the Prosecutor's Office (Ministerio Público). A private negligence tort action could be filed against the offender, however, by a party seeking compensation for damages caused by the relevant bribery; but only the person suffering the relevant damages has standing to file such an action.

## 10 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The Prosecutor's Office (Ministerio Público), an independent public agency, is responsible for enforcing all criminal offences, including foreign bribery laws and regulations. Additionally, the State Defence Council (Consejo de Defensa del Estado) can enforce such laws to the extent that the state has an interest therein.

## 11 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

There is no disclosure mechanism applicable specifically for cases of bribery. Pursuant to applicable law, however, companies may request the imposition of lesser penalties based upon the following mitigating circumstances:

- the company's endeavour to repair with extreme care the damage caused, or to prevent further harmful consequences. To apply this mitigation circumstance, the company must have taken all necessary material efforts to effectively repair the damage;
- the company's material collaboration with the criminal investigation. In this case, voluntary disclosure prior to initiation of criminal proceedings serves as strong grounds to mitigate applicable penalties; and
- the company's adoption of effective measures to prevent and discover such crimes, before commencement of the criminal trial.

## 12 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Bribery of foreign public officials (as opposed to crimes against private property) must be subject to a criminal trial and cannot be resolved through settlement. Upon the Prosecutor's Office request, however, the court may decide to try the case through an abbreviated trial, provided that the applicable penalty does not exceed five years of imprisonment, and the defendant accepts the charges and agrees to conduct the proceedings in such manner.

Additionally, if certain requirements are met (eg, the applicable penalty does not exceed three years of imprisonment and the defendant has no previous criminal conviction), the Prosecutor's Office may request the court to conditionally adjourn the proceeding. If accepted by the court, the criminal proceeding will be thus adjourned for a limited term (one to three years), during which the defendant must comply with certain conditions and obligations determined by the court (eg, compensate damages to the relevant victims of the crime, refrain from meeting with certain persons, etc). If the defendant complies with these conditions and obligations, the criminal trial ends and the criminal action is extinguished. If otherwise, the adjournment will be revoked and the trial will continue. Under current criminal enforcement policies, however, it seems unlikely that the Prosecutor's Office would request this adjourned proceeding benefit in a foreign public official bribery case.

## 13 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Foreign bribery laws were only introduced in 2009. As a consequence, no foreign bribery enforcement cases or investigations have yet transpired.

## 14 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

To the extent that the Legal Entities Criminal Liability Law applies (see question 8 above), only companies created in Chile may be prosecuted for foreign bribery. Companies created abroad cannot be subject to prosecution for foreign bribery, notwithstanding the relevant individuals' personal liability.

## 15 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Regarding infringement of foreign bribery laws, the Criminal Code sanctions individuals as follows:

- the person who offers, promises or gives a bribe to a foreign public official may be sanctioned with imprisonment from 18 months to 5 years, with an additional absolute or special impediment to hold public office, and with a fine equal to twice the amount of the bribe. If the benefit obtained through the bribe is not of an economic nature, a fine ranging from 100 to 1,000 'monthly tax units' (*unidades tributarias mensurales*, or UTMs) will apply; and
- the person who consents or agrees to provide the relevant benefit to a foreign public official shall be sanctioned with imprisonment from two months to three years, plus the above-mentioned impediments and fines.

In the case of companies violating the foreign bribery laws, the Legal Entities Criminal Liability Law provides the following sanctions:

- temporary or perpetual prohibition to enter into contracts with governmental entities;
- partial loss of, or absolute prohibition during two to three years, to opt for governmental benefits;
- fines ranging from 200 to 10,000 UTMs;
- disgorgement; and
- other ancillary sanctions, such as publication of an excerpt of the judicial decision.

## 16 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

Foreign bribery laws were introduced only in 2009. As a consequence, no decisions or investigations involving foreign bribery have yet transpired.

## Financial record keeping

### 17 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The Commercial Code requires that all commercial companies keep accurate corporate books and records, including accounting records. The Corporations Law requires external auditing for corporations. Publicly traded corporations and certain special regulated entities (eg, banks, pension funds, health insurance companies) must comply with additional record-keeping, reporting and effective internal control obligations, as provided in the relevant legislation (eg, the Corporations Law, the Securities Market Law, the Banking Law, their respective regulations, etc).

In addition, the Tax Code requires that certain taxpayers carry complete and accurate accounting books and records, and sanctions the falsehood, alterations or misrepresentations contained in taxpayers' books and records. The Criminal Code also penalises the fraudulent falsehood or alteration of documents in general causing damage to third parties.

### 18 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Companies do not have a general statutory obligation to disclose violations of anti-bribery laws or accounting irregularities associated with such offence. However, publicly traded corporations and special regulated companies, such as those mentioned in question 17 above, may be obligated to report such violations to the relevant regulatory authority in certain circumstances. For example, publicly traded corporations must report 'material events' that may reasonably affect their business and securities (eg, a criminal investigation or litigation).

### 19 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Financial record keeping legislation has been used by the Chilean Tax Authority (Servicio de Impuestos Internos), the State Defence Council, the Prosecutor's Office, and the banking, securities and pension funds regulators, to prosecute tax, money laundering and securities offences, as well as other regulatory violations. It has not been used, however, to prosecute foreign or domestic bribery.

### 20 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

While there is no sanction specifically applicable to accounting irregularities associated with the payment of bribes, the Tax Code provides that the following conducts (among other) may be subject to fines that range from 50 to 300 per cent of the amount of avoided taxes, or imprisonment of 541 days to five years, or both:

- misuse of receipts and invoices with the purpose of concealing or altering the actual amount or price of an executed transaction or avoiding an applicable tax;

- breach of the obligation to chronologically register the account information, or lack of legally issued substantiating information.
- fraudulent omissions in the accounting books in connection with goods acquired, transferred or exchanged by the company;
- falsification of information provided in the balance sheets or inventories; and
- any other fraudulent actions aimed at concealing or altering the actual amount or price of an executed transaction or avoiding an applicable tax.

In addition, the Corporations Law provides that experts, accountants and external auditors who, by means of false or fraudulent reports, statements or certificates, misrepresent information to shareholders or third parties doing business with the company in reliance of such false or fraudulent information or statements, may be subject to imprisonment or confinement from 541 days to five years, and to fines of up to 4,000 *unidades de fomento* (UFs – a Chilean indexation unit).

### 21 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Domestic or foreign bribes cannot be deducted for corporate tax purposes and, if deducted, the Tax Authority will reject such deduction. In order to be deductible for tax purposes, costs and expenses must be strictly related with and necessary to generate the relevant corporate income.

## Domestic bribery

### 22 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Pursuant to the General Government Administration Law and the Public Officials Statute, except for official authorised fees and a very limited exception for gifts or gratuities received pursuant to rules of protocol or as an expression of customary courtesy and good manners, public officials cannot charge for discharging their duties, or request or accept any gifts, gratuities, benefits or other privileges.

In addition, the Criminal Code sanctions:

- any public officials who:
  - request or agree to receive greater fees than those applicable to the office they hold, or an economic benefit in their or a third party's benefit, in consideration for performing or having performed an act within the purview of their office;
  - request or accept an economic benefit for their own or a third party's benefit, in consideration for refraining or having refrained from performing an act pertaining to their position, or for the execution of an action in contravention of their statutory duties; or
  - request or accept to receive an economic benefit, for their own or a third party's benefit, in order to incur certain other special public official crimes (eg, embezzlement, crimes against individuals' constitutional rights, etc); and
- any person who offers or agrees to offer an economic benefit to a public official who performs any of the actions mentioned above is also punished under criminal law.

### 23 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

As described in question 22 above, domestic bribery laws sanction the public official who accepts or requests a bribe, as well as the person who offers or agrees to offer the bribe.

**24 Public officials**

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

A domestic public official is any person who holds a ‘public office’ position or discharges a ‘public function,’ whether in the central government administration or in semi-governmental, municipal or autonomous institutions or enterprises, or in state agencies. While the terms ‘public office’ and ‘public function’ have not been clearly defined by criminal law or judicial decisions, the term ‘public official’ is usually deemed to include employees of state-controlled companies. We are not aware, however, of any judicial decisions in this regard.

**25 Public official participation in commercial activities**

Can a public official participate in commercial activities while serving as a public official?

As a general rule, public officials may engage in any professional or commercial activities while holding a public office, provided that such activities are not within the purview of the duties and functions of the relevant office, and that they do not disturb the timely and due performance of their duties. Accordingly, they may only engage in such activities after working hours, they may not use the relevant public office’s personnel, materials or information, and all such activities must be conducted with private means and without use of proprietary information.

The following public officials, however, cannot engage in any professional or commercial activities (with some limited exceptions relating to academic activities, personal investments and the like):

- public officials who hold material or strategic management positions in the relevant public entity or agency; and
- public officials who hold an executive position that is appointed pursuant to the High Public Management System.

In addition, the Government Procurement Law prohibits public officials’ self-dealing in government procurement transactions, such as having a direct or indirect personal interest in the relevant government procurement transaction while performing duties on behalf of the procuring entity.

**26 Travel and entertainment**

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

Chilean criminal law does not provide any specific restrictions regarding gifts or invitations that may be given to, or expenditures incurred to entertain, a Chilean public official. According to the criminal law provisions mentioned above, however, public officials cannot request or accept any benefits for discharging their duties (including any gifts, meals and travel expenses), and persons who provide or agree to provide such benefits are sanctioned as well. The relevant criminal conduct, however, requires not only that a gift or benefit be provided, requested or accepted, but also that it be done with the purpose of assuring or rewarding an action or omission by the relevant public official.

In addition, certain administrative law regulations – which apply only to public officials and not to the person offering or providing the gift or benefit – prohibit public officials’ requests, prompting of a promise, or acceptance of gifts, benefits or privileges of any nature, given by virtue of their position or function. Unlike the aforementioned criminal law provisions, these administrative regulations do not require a connection between the gift or benefit and a purpose of assuring or rewarding an action or omission by the relevant public official.

**27 Gifts and gratuities**

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

While Chilean law does not provide any specific safe harbour as to permissible gifts or gratuities to be given to or received by Chilean public officials, administrative law allows public officials’ receipt of gifts or gratuities pursuant to rules of protocol or as an expression of customary courtesy and good manners.

In addition, although no specific monetary thresholds are provided under applicable law, according to certain internal guidelines contained in the Government’s Transparency and Probity Manual, the magnitude, amount or value of a gift or benefit should not be such as to cast doubt on the relevant official’s impartiality or unbiased criteria. Furthermore, the Government’s General Internal Auditing Committee (Consejo de Auditoría Interna General de Gobierno) has instructed that public entities adopt internal regulations in order to avoid doubts as to undue advantages obtained by public officials, or as to the impartiality of their decisions. A number of public entities have hence adopted such internal regulations.

**28 Private commercial bribery**

Does your country also prohibit private commercial bribery?

While there is no specific Chilean legislation typifying private commercial bribery, certain conduct constituting private commercial bribery (eg, the offering of bribes to a company’s employee in order to obtain business from such company) could be subject to civil damages claims under general tort law. In addition, in some cases (eg, bribing a company’s employee in order to turn customers away from that company) could eventually constitute unfair competition practices that are prohibited under Chilean law and may be sanctioned with fines and civil damages.

**29 Penalties and enforcement**

What are the sanctions for individuals and companies violating the domestic bribery rules?

Criminal sanctions applicable to public officials and private individuals who violate domestic bribery laws are as follows:

- public officials who request or agree to receive greater fees than those applicable to the office they hold, or an economic benefit in their or a third party’s benefit, in consideration for performing or having performed an act within the purview of their office, will be sanctioned with:
  - imprisonment from two to 18 months,
  - suspension from holding public office from two months to three years, and
  - a fine ranging from half to the full amount of the bribe; and
- public officials who request or accept an economic benefit for their own or a third party’s benefit, in consideration for refraining or having refrained from performing an act pertaining to their position or for the execution of an action in contravention of their statutory duties, will be sanctioned with:
  - imprisonment from 18 months to three years;
  - absolute or special temporary impediments to hold public offices for up to five years; and
  - a fine ranging from one to two times the amount of the bribe. If the offence entails influencing another public official for the benefit of a third party, the same sanctions will apply, except that the impediment will be perpetual;
- public officials who request or accept to receive an economic benefit, for their own or a third party’s benefit, in order to incur in certain other special public official crimes (eg, embezzlement, crimes against individuals’ constitutional rights, etc), will be sanctioned with:

### Update and trends

Because of past corruption cases involving certain members of the armed forces, the government is committed to changing an important part of the armed forces' financing and budgetary system, as well as the secrecy applicable to defence contracts financed under that system. Currently, 10 per cent of the profits of Codelco – the world's largest copper producer and Chile's largest state-owned company – are allocated to the armed forces. This constitutes an important part of the overall financing of the armed forces. With congress having little control over the use of such funds, and with the armed forces' procurement contracts financed under this system being subject to strict secrecy, this financial and budgetary mechanism is widely deemed to be a facilitating factor for potential corrupt practices.

In an attempt to do away with this system, on 20 May 2011 the government introduced a bill in congress that distinguishes financing for the armed forces' 'general activities' from financing for 'strategic' activities. If this bill is approved in its current version, financing of general activities will be subject to annual discussion by congress as part of the national budget, while strategic activities will be financed by a four-year budget, also approved by congress. In addition, a new strategic contingency fund, aimed essentially at the purchase of weapons, would be subject to approval by the Ministries of Defence and Finance, and reviewed by the General Comptroller Office (Contraloría General de la República).

- imprisonment for at least three years,
- temporal or perpetual impediment to hold public office, and
- a fine ranging from one to three times the amount of the relevant bribe; and
- any person who offers or agrees to offer an economic benefit to a public official, for the public official's or a third party's benefit, in order for the public official to incur in any of the foregoing crimes, will be sanctioned with the same fines and impediments mentioned above, and with imprisonment ranging from two months to three years.

Additional administrative sanctions applicable to public officials under the Public Officials Statute include the following:

- written reprimand;
- fines ranging from 5 to 20 per cent of the relevant public official's monthly salary;
- temporal suspension from the relevant public office; and
- removal from the relevant public office.

In connection with the potential sanctions applicable to legal entities for violating domestic bribery laws, please see questions 8 and 15 above.

### 30 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Domestic bribery laws have been enforced in multiple cases with respect to facilitating or 'grease' payments. In some cases where the amounts involved have been negligible, however, the relevant Prosecutor's Office has procured a conditional adjournment of the criminal proceedings.

### 31 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

#### Kodama

In the 2011 *Kodama* case, the Prosecutor's Office conducted an investigation concerning certain personnel of the Housing and Urban Development Agency (Serviu). In January 2011, Serviu entered into a settlement agreement with Kodama (a Chilean construction company) whereby Serviu agreed to pay 17 billion pesos to Kodama. This payment was in exchange for settling a court case filed by Kodama for compensation of 41 billion pesos for alleged over-costs in the construction of certain public transport works. The former minister of housing and urban development voided the settlement payment, but the case is still being investigated for possible Treasury fraud, bribery, and eventual criminal liability of both the public officials and the legal entities involved in the settlement. The main grounds for the investigation are that, allegedly, the settlement payment would exceed the damages assessed by experts appointed for the purposes of the investigation, and such excess would have illegally benefited certain Serviu public officials, as well as Kodama. In addition, on 13 May 2011, the General Comptroller Office (Contraloría General de la República) issued an investigation report stating that the settlement agreement between Serviu and Kodama entailed several wrongdoings. The Prosecutor's Office is currently awaiting the conclusions of an independent expert report, which is expected to contribute further details and evidence to enable the Prosecutor's Office to arraign the defendants.

#### Fragatas

In the *Fragatas* case, two former officials of the Chilean Navy and an arms vendor have been charged for the alleged crimes of bribery and money-laundering in the sale of four frigates to the Chilean government

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in 2004. The relevant government contract would have been awarded to the arms vendor as a result of key information provided to him by the former navy officials – while they were employees of a state-owned shipyard – in exchange for improper payments. Both former officials jointly received deposits for a total of approximately US\$400,000 in their bank accounts from a company related to the arms vendor. Their defence argued that such payments were for legal consultancy services rendered to a foreign frigate manufacturer, but recent investigations apparently show that these two defendants would have sold confidential information regarding the navy's tender

processes to the arms vendor, and created legal entities to conceal the vendor's payments. These operations could include other military supplies, in addition to the frigates. The Prosecutor's Office and the State Defence Committee (Consejo de Defensa del Estado) obtained a judicial order freezing the two former officials' bank accounts and all transactions involving their assets. Currently, the two former officials are in custody and the arms vendor is under home arrest, on charges of bribery and money-laundering. Since January 2012 a navy prosecutor has also been investigating potential criminal conduct involving the frigate tender process and the custody of classified information.



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