

## MEXICO

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

#### A. IMPLEMENTATION OF THE CONVENTION

##### Formal Issues

Mexico signed the Convention on December 17, 1997, and deposited the instrument of ratification on May 27, 1999. On May 17, 1999 Mexico enacted an amendment to the *Federal Penal Code* (FCC), which came into force on May 18, 1999, in order to implement the Convention.

##### Convention as a Whole

Mexico amended the FCC by adding article 222 bis, which establishes the offence of bribing a foreign public official. Article 222 bis provides sanctions for natural persons by incorporating the sanctions provided under article 222 for the bribery of a domestic public official. In addition, article 222 bis provides for the application of sanctions to a legal person where a representative of a legal person has been convicted of bribing a foreign public official and the offence was committed on its behalf.

Other existing provisions under the FCC are relevant to other obligations under the Convention, including forfeiture, the statute of limitations and money laundering. Other statutes, including the *Federal Penal Procedure Code*, contain further relevant provisions.

Pursuant to article 133 of the *Political Constitution of the United Mexican States*, all agreements entered into and signed by the President of the Mexican Republic and approved by the Senate shall be deemed the “Supreme Law for all the Union”, and thus the courts shall comply with such agreements notwithstanding conflicting provisions in the “Constitutions or laws of the States”. Mexico states that as the Convention was entered into in accordance with article 133 of the *Constitution*, it is considered as Supreme Law for all of the Union. The Mexican authorities add that, however, due to the non self-executing application of the Convention, it was necessary to “perform various legislative acts for its implementation”. For this reason, article 222 bis of the FCC was enacted.

##### 1.1 The Elements of the Offence

The Mexican authorities translate article 222 bis of the FCC as follows in their reply to the Phase 1 Questionnaire:

*The same penalties provided in the previous article shall be imposed to whom, with the purpose of obtaining or retaining for himself/herself or for another party, undue advantages in the development or conducting of international business transactions, offers, promises or gives, whether by himself/herself or through a third party, money or any other advantage, whether in assets or services:*

*I. To a foreign public official in order that he/she negotiates or refrains from negotiating the carrying out or the resolution of issues related to the functions inherent to his/her job, post or commission;*

*II. To a foreign public official in order to perform the carrying out or the resolution of any issue that is beyond the scope of the inherent functions to his/her job, post or commission, or*

*III. To any person in order for him/her to go before a foreign public official and require or propose him/her to perform the carrying out or the resolution of any issue related to the inherent functions to the job, post or commission of the last.*

*For the purpose of this article, foreign public official is understood as any person displaying or holding a public post considered as such by the applicable law, whether in legislative, executive or judicial branches of a foreign State, including within autonomous, independent or with major state participation agencies or enterprises, in any governmental order or level, as well as in any international public organization or entity.*

*When any of the crimes included in this article is committed under the hypothesis of article 11 of the FCC, the judge shall impose the legal entity up to five hundred days of fine and shall decree its suspension or dissolution, taking into consideration the degree of knowledge of the management bodies regarding the bribery in the international transaction and the damage caused or the benefit obtained by the legal entity.*

Subsection III of article 222 bis concerns the offence of trafficking in influence, which is not covered by the Convention, and, therefore, its application is not analyzed in this review.

## **Defences**

Article 15 of the FCC sets out various “general defences” to offences under the FCC. These include the typical general defences of absence of any element of the crime, mental illness and self-defence. In addition, paragraph VIII of article 15 provides a defence where an offence is committed under an “insurmountable mistake of law”, which, the Mexican authorities explain, could not be applied to the foreign bribery offence. It is meant, for instance, to address the type of injustice that could occur upon applying a law to a particular set of facts that arises in the context of the ancestral customs and practices of an ethnic group.

### **1.1.1 any person**

Article 222 bis applies in respect of “whom” carries out the proscribed behaviour. The Mexican authorities explain that this language denotes that any natural person could be liable for the offence.

### **1.1.2 intentionally**

Article 222 bis requires that money or any other advantage be given, etc. “with the purpose of obtaining or retaining” an undue advantage. Thus, the offence must be committed intentionally. In addition, pursuant to article 9 of the FCC “an individual is criminally responsible whenever, knowing the elements of the crime, or foreseeing the possible results of the crime, he/she desires or accepts the consequences of the conduct described by law”. The Mexican authorities clarify that the requirement of intent does not contemplate negligence.

### **1.1.3 to offer, promise or give**

Pursuant to article 222 bis, an individual who “offers, promises or gives” commits an offence.

#### **1.1.4 any undue pecuniary or other advantage**

Article 222 bis applies to the giving, etc. of “money or any other advantage, whether in assets or services”. The Mexican authorities provide that according to articles 754 and 755 of the *Federal Civil Code*, personal assets are defined as including securities, shares, bonds and any intangible right that can be converted into money or tangible property. The term “services” is intended to be broadly interpreted.

Furthermore, there is no express exception to the offence for “small facilitation payments” and the Mexican authorities confirm that they are not allowed under Mexican law.

#### **1.1.5 whether directly or through intermediaries**

Article 222 bis applies to offers, etc. made directly “or through a third party”, thus, the offence expressly covers the case where an offer, etc. is made through an intermediary.

#### **1.1.6 to a foreign public official**

The second last paragraph of article 222 bis states that a “foreign public official” is understood as any person who holds or appears to hold a public office according to the “applicable law”. Therefore the question of whether a person is considered a “foreign public official” depends upon whether he/she is considered a “foreign public official” under the law of the official’s country. The Mexican Senate required that the offence be constructed this way in order for passage of the implementing legislation, because it did not otherwise regard the offence to be defined with sufficient clarity.

In this respect article 222 bis would not appear to be consistent with the requirement of an autonomous definition in the Convention. The Mexican authorities state, however, that it is possible that the courts would consider the definition of “foreign public official” in the Convention as an interpretative tool in determining whether a particular person is a foreign public official for the purpose of applying article 222 bis, because the Convention is considered supreme law pursuant to the Mexican Constitution. Furthermore, the Mexican authorities are of the view that Mexican courts would not apply an interpretation of the term public official that differs from the one under Mexican law, which they state is consistent with the definition of “foreign public official” under the Convention.

The second last paragraph of article 222 bis continues by clarifying that a person considered as a “foreign public official” pursuant to the law of that official’s country is considered as such for the purpose of the offence whether he/ she is

*...in legislative, executive or judicial branches of a foreign State, including within autonomous, independent or with major state participation agencies or enterprises, in any governmental order or level, as well as in any international public organization or entity.*

The definition does not expressly apply to persons holding a legislative, executive or judicial post “whether appointed or elected”, but, according to the Mexican authorities, since the definition does not distinguish between elected and appointed public officials, it must be interpreted as applying to both categories. The Mexican authorities also explain that the broad category of foreign public officials described in the Convention (i.e. “any person exercising a public function for a foreign country”) is covered by the part of the definition in article 222 bis that refers to a foreign public official serving an “autonomous” agency.

The part of the definition of “foreign public official” that pertains to public enterprises does not specify that either direct or indirect control is sufficient to constitute government control. However, the Mexican authorities confirm that the case is covered where a person exercises a public function for an enterprise that is owned by an intermediary company that is itself controlled by a foreign government.

### **1.1.7 for that official or for a third party**

Article 222 bis does not expressly apply to the case where a benefit is offered, promised or given directly to a third party for the purpose of obtaining or retaining an undue advantage from a foreign public official. On the other hand, the domestic bribery offence under article 222 of the FCC, which covers active as well as passive bribery, does expressly apply to bribes where the benefit is for a third party.

The Mexican authorities explain that it is not necessary to refer expressly to third parties in article 222 bis because an offence is considered to have been committed where an offer is made to a foreign public official, regardless of who receives the benefit. They further explain that a judge would be able to presume that an offer had occurred where a third party had received a benefit, because pursuant to article 286 of the *Criminal Procedure Code* the judge is entitled to make certain presumptions based on physical evidence.

### **1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties**

Article 222 bis applies to the following two bribery situations:

1. Where the foreign public official is bribed “in order that he/she negotiates or refrains from negotiating the carrying out or the resolution of issues related to the functions inherent to his/her job, post or commission” (subsection I).
2. Where the foreign public official is bribed “in order to perform the carrying out or the resolution of any issue that is beyond the scope of the inherent functions to his/her job, post or commission” (subsection II).

This language covers two situations--one where the foreign public official is bribed in relation to the performance or non-performance of an act related to his/her office, and the other where the foreign public official is bribed in relation to the performance of an act outside his/her office.

### **1.1.9 in order to obtain or retain business or other improper advantage**

Article 222 bis requires that the advantage be offered, etc. for the purpose of “obtaining or retaining...undue advantages”.

This language appears quite consistent with the language in the Convention. Both the “obtaining” and “retaining” of undue advantages are covered, and the term “undue advantages” substantially conforms to the term “improper advantage” used in the Convention.

### **1.1.10 in the conduct of international business**

Article 222 bis is aimed at the obtaining or retaining of undue advantages “in the development or conducting of international business transactions”. It is presumed that “development” denotes the initiation or negotiation of international business transactions. Thus, article 222 bis expressly clarifies that not only the conducting of international business is covered, but the establishing of such business is covered as well.

## **1.2 Complicity**

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

The Mexican authorities state that each person listed in article 13 of the FCC as an author or participant shall be prosecuted as a principal in the offence of bribing a foreign public official under article 222 bis. The following individuals are listed under article 13 as authors or participants:

1. Individuals who agree to or prepare the offence;
2. Individuals who carry out the offence;
3. Individuals who carry out an offence in a “jointly manner”;
4. Individuals who carry out the offence through a third party;
5. Individuals who intentionally cause another individual to perpetrate the offence;
6. Individuals who intentionally help or assist another individual to commit the offence;
7. Individuals who following the commission of the offence, assist the offender in the fulfilment of a promise made prior to its commission;
8. Individuals who without prior agreement, participate with others in the commission of the offence, in cases where the results produced by each person cannot be specified.

This would appear to cover all the categories of persons listed in Article 1.2 of the Convention.

### **1.3 Attempt and Conspiracy**

Article 1.2 of the Convention further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

#### **1.3.1 Attempt**

The Mexican authorities translate paragraph 1 of article 12 of the FCC on attempts as follows:

*A punishable criminal attempt is produced when the determination to perpetrate an offence is materialised by partially or totally executing the actions to produce the consequences, or by omitting those actions that would avoid them, whenever the crime is not completed due to causes contrary to the offender’s will.*

The Mexican authorities comment that, in respect of the offence of bribing a domestic public official or a foreign public official, an attempt is committed the moment an individual exteriorises his/her intention to commit the offence by partially or totally performing the requisite elements of the offence (i.e., the giving, offering or promising of the bribe) although the offence is not completed for reasons outside his/her control. The Mexican authorities provide as an example the case where an individual deposits funds in a bank account in order to bribe a foreign public official, instructs a third party to offer the funds to the official, but the third party refuses to carry out the instructions.

Pursuant to article 63 of the FCC, an attempt is punishable by up to two thirds of the penalty that is prescribed for the completed offence.<sup>1</sup> In determining the appropriate penalty, the judge must, pursuant to paragraph 2 of article 12, consider the guidelines set out in article 52 of the FCC, which include factors such as the seriousness of the offence and the degree of culpability of the offender.<sup>2</sup>

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<sup>1</sup> The Mexican authorities add that when the causation of damage is an integral part of a crime, and the damage cannot be adequately ascertained, the attempt shall be punishable by up to one half the penalty for the completed offence.

<sup>2</sup> Article 52 is discussed more fully under 3.1/3.2 “Criminal Penalties for Bribery of a Domestic and Foreign Public Official”.

In addition, paragraph 3 of article 12 states that “no penalty or security measure” shall be applied where “the offender spontaneously desists from executing the crime or prevents its commission”.

### **1.3.2 Conspiracy**

The offence of conspiracy is set out in article 164 of the FCC, which the Mexican authorities provide states as follows:

*To whom is part of a criminal organization or gang of three or more individuals gather together with the purpose of committing a crime, a penalty that goes from one to eight years in prison and a fine from thirty to one hundred days shall be imposed.*

The Mexican authorities explain that if a person is part of a criminal organisation or gang consisting of 3 or more persons assembled with the purpose of committing the offence of bribing a foreign public official, pursuant to article 164, he/she would be liable for the penalty for conspiracy in addition to the penalty stipulated for the offence of bribing a foreign public official. The penalty for conspiracy is between 1 to 8 years imprisonment and a fine from 30 to 100 days.

## **2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS**

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”.

### **2.1 Sanctions under the Criminal Code**

With respect to the liability of legal persons, article 222 bis of the FCC provides as follows:

*When any of the crimes included in this article is committed under the hypothesis of article 11 of the FCC, the judge shall impose the legal entity up to five hundred days of fine and shall decree its suspension or dissolution, taking into consideration the degree of knowledge of the management bodies regarding the bribery in the international transaction and the damage caused or the benefit obtained by the legal entity.*

Article 11 of the FCC has been translated as follows:

*When any member or representative of a legal entity or of an association, corporation or enterprise of any kind, excepting government institutions, commits a crime with means provided by such legal entity, thus resulting in a crime committed in the name or on behalf of his/her principal or in his/her benefit, the judge, in the cases specifically described by law, may decree the suspension of the corporation or its dissolution, if he/she deems it necessary for reasons of public safety.*

There is no corresponding provision for the application of sanctions to legal persons pursuant to article 222 for the bribery of a domestic public official or in relation to any other offence under the FCC.

#### **2.1.1 Legal Entities**

Article 11 of the FCC applies to a “legal entity” or “an association, corporation or enterprise of any kind” except “government institutions”. It therefore appears that any entity with legal personality other than a

government institution is covered by article 222 bis, which incorporates article 11 by reference. Thus, state-owned or state-controlled companies are not subject to sanctions under article 222 bis.

### **2.1.2 Standard of Liability**

Although a legal person cannot commit a criminal offence under Mexican law, pursuant to article 11 of the FCC, a legal person can be subject to sanctions pursuant to article 222 bis where the following requirements are met:

1. A member or representative of the legal entity must have been convicted of the foreign bribery offence. The Mexican authorities confirm that the notion of a member or representative is not limited to high level executives.
2. The member or representative must have committed the bribery offence with means provided by the legal entity, as the offence must have been committed in the name or on behalf of the legal entity.

In determining the level of fine to be imposed pursuant to article 222 bis, the judge must consider the following:

1. The degree of knowledge of the management of the legal entity concerning the bribery transaction.
2. The damage caused by the bribery transaction. The term “damage” in article 222 bis is intended to be interpreted broadly by the judicial authority, and may include the damages caused to a competitor.
3. The benefit obtained by the legal entity.

The Mexican authorities confirm that the law does not contain guidelines for determining when the dissolution or suspension of a legal entity is necessary for the public safety. However, the public safety criterion does not apply in relation to the imposition of a fine.

## **2.2 Civil Liability**

Article 32 of the FCC contains a statement to the effect that associations and corporations are civilly liable for the damages caused to third parties by the crimes committed by their partners, managers and directors, and that the State is similarly liable for the crimes committed by its public officials.<sup>3</sup> Corresponding to this statement is article 1918 of the *Civil Code*, which establishes the civil liability of “legal entities” for the damages caused by their legal representatives acting in the course of their duties, and article 1927, which establishes the joint liability of the State for the damages caused by its public officials. Article 25 of the *Civil Code* defines the term “legal entities”, and the list of entities therein includes “the Nation, the federal States and the Municipalities”, “corporations of a public nature acknowledged by law”, “business and civil associations”, unions, professional associations and “foreign legal entities of a private nature, according to article 2736”.

The standard of civil liability is established under article 1910 of the *Civil Code*, which states that a party that “acting illegally...causes harm to another person, shall be obliged to repair the damage, unless he/she proves that the damage was produced as a consequence of the victim’s guilt or negligence”.

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<sup>3</sup> In the case of the liability of the State for damages caused by its public servants, the State is jointly liable in the case of intentional crimes, and has subsidiary liability in the case of crimes committed with negligence.

### 3. ARTICLE 3. SANCTIONS

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. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are “subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of a “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

#### 3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Public Official

The Mexican authorities provide that in both the cases of natural persons and legal entities, the penalties under article 222 bis of the FCC are intended to be efficient, proportionate and dissuasive in accordance with Article 3 of the Convention. They state that, however, as the offence was recently established, it is not possible at this time to evaluate the results.

##### 3.1.1/3.2.1 Natural Persons

The same penalties are established under the FCC for the offence of bribing a domestic public official (article 222) and the offence of bribing a foreign public official (article 222 bis). These penalties are established under article 222, which is incorporated by reference under article 222 bis. The penalties are set out as follows:

1. Where the value of the advantage or promise does not exceed 500 times the daily minimum wage<sup>4</sup> (\$1,800 U.S.) or it cannot be appraised, the penalty is between 3 months and 2 years of imprisonment, a fine from 30 to 300 times the daily minimum wage (\$108 to \$1082 U.S.), and dismissal and disablement from 3 months to 2 years from holding a public job, post or commission.
2. Where the value of the advantage or promise exceeds 500 times the daily minimum wage (\$1,800 U.S.), the penalty is between 2 years and 14 years of imprisonment, a fine from 300 to 500 times the daily minimum wage (\$1,082 to \$1,800 U.S.), and dismissal and disablement from 2 to **14** years from holding a public job, post or commission.

The Mexican authorities explain that where the exact value of the advantage or promise cannot be ascertained, but it is certain that it was worth more than 500 times the daily minimum wage, the higher penalty would be applied.

These sanctions shall be applied cumulatively, not alternatively.

Article 52 of the FCC contains statutory guidance for the court on the imposition of penalties. It requires that the judge impose penalties that are “just and within the law, based on the seriousness of the crime and the degree of liability of the offender, taking into consideration a list of factors, which includes the following:

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<sup>4</sup> In November 1999, the daily minimum wage in force in the Federal District of Mexico was \$34.45 pesos, approximately \$3.60 U.S. (On 17 November 1999, 1 U.S. dollar was valued at 9.55 Mexican pesos.)

1. The degree of damage caused to a “legally protected interest or the danger to which it was exposed”.
2. The nature of the act or omission and the means used to carry it out.
3. The nature and degree of participation of the offender;
4. The age, education, understanding, traditions, and social and economic conditions of the offender, as well as the motive for transgressing the law. When the offender is part of an indigenous ethnic group, his/her traditions, etc. shall also be taken into account.
5. The behaviour of the offender following the commission of the offence.

The fine penalties for fraud, theft and embezzlement are essentially the same as those for the offence of bribing a foreign public official. Pursuant to article 370 of the FCC, the minimum term of imprisonment for simple theft (as opposed to aggravated theft, which carries increased penalties) is 4 years as opposed to 2 years for the foreign bribery offence, where the value of the stolen assets exceeds 500 hundred times the minimum wage.

### **3.1.2/3.2.2 Legal Persons**

Pursuant to article 222 bis of the FCC, a “legal entity” is liable to “up to 500 days of fine” and the judge may “decree its suspension or dissolution”. The Mexican authorities explain that under article 29 of the FCC, the term “days of fine” is described as the “daily net income of whoever commits the crime”. The Mexican authorities explain that according to this formulation, the fine for a legal person would be based upon the daily net income of that legal person.

Additionally, article 222 bis provides that in determining an appropriate penalty in relation to a legal entity, the judge must consider “the degree of knowledge of the management bodies regarding the bribery in the international transaction and the damage caused or the benefit obtained by the legal entity”.<sup>5</sup>

### **3.3 Penalties and Mutual Legal Assistance**

The Mexican authorities provide that the penalty of deprivation of liberty is not a relevant factor in determining whether to provide mutual legal assistance.<sup>6</sup>

### **3.4 Penalties and Extradition**

Pursuant to Mexico’s extradition agreements, the deprivation of liberty that is required “in general” to be able to provide extradition is a maximum of not less than one year.<sup>7</sup>

Furthermore, where there is no applicable treaty, the *International Extradition Law* is applied. Pursuant to that statute, the deprivation of liberty that is required in order to provide extradition in relation to intentionally committed crimes is 1 year (arithmetic average) under Mexican legislation and that of the requesting State.

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<sup>5</sup> These considerations are discussed under 2.1.2 on “Standard of Liability”.

<sup>6</sup> See Chapter VI of the First Title ( “Criminal Summons and Rogatory Letters”) of the *Federal Proceedings Code*.

<sup>7</sup> The deprivation of liberty required in order to provide extradition is provided as follows under treaties signed by Mexico: U.K.-not less than 1 year; Netherlands-more than 1 year; Belgium-maximum not less than 1 year; Spain-no less than 1 year; U.S.-maximum not less than 1 year; Brazil-1 year or more; Canada-more than 1 year; Australia-at least 1 year; France-maximum not less than 2 years.

The Mexican authorities provide that since pursuant to article 222 bis the maximum term of imprisonment is greater than 1 year (see discussion under 3.1.1/3.2.1 on “Natural Persons”), the penalties of deprivation of liberty are sufficient to enable extradition pursuant to Mexico’s extradition agreements and pursuant to the *International Extradition Law*.

### **3.6 Seizure and Confiscation of the Bribe and its Proceeds**

Pursuant to article 181 of the *Federal Penal Procedure Code*, “instruments, objects or products” of an offence as well as “assets” that may be related to an offence “shall be seized in order to avoid any alteration, destruction or disappearance” and shall be administered in accordance with the law. The Mexican authorities explain that the term “instruments” could be understood as the means used to bribe a foreign public official (i.e. the bribe) and the term “products” could be understood as the proceeds (i.e. the profits or benefits) of the offence of bribing a foreign public official. This provision is available at any stage of the criminal proceedings, including the investigative one.

Pursuant to article 40 of the FCC, the “instruments of crime as well as the things that are the object of or proceeds of it shall be forfeited” if their use is prohibited or when their use is legitimate in the case of an intentional offence. This is not a discretionary measure. Thus, Mexican courts are required to declare forfeited the bribe as well as the proceeds of bribing a foreign public official upon conviction for the foreign bribery offence. The Mexican authorities confirm that the assets generated by a crime may be traced where they have been converted from their original form, but forfeiture is not available where such assets are no longer available.

Additionally, article 40 extends the power of forfeiture to cases where a third party is in possession of the instrument, etc. for the purpose of concealing or attempting to conceal, disguise or attempt to disguise its origin, ownership, destination or location, contrary to article 400 of the FCC. Article 40 of the FCC applies regardless of the “nature of the instruments, objects or products of the offence”.

### **3.8 Additional Civil or Administrative Sanctions**

#### **3.8.1 Natural Persons**

Where the offence of bribing a foreign public official under article 222 bis of the FCC is committed by a domestic public official, the official would be subject to the administrative sanctions provided in article 53 of the *Federal Act of Liability of Public Officials*, pursuant to which the official would be liable to one or more of the following sanctions:

1. A private or public warning and/or admonition.
2. Suspension or dismissal from his/her post.
3. Economic sanction. A fine in the amount of 2 times the profit, harm or detriment caused is prescribed.
4. Temporary disablement to occupy public posts or commissions from 1 to 20 years. The period of disablement shall be from 1 to 10 years if the profit does not exceed 200 times the minimum daily wage and from 10 to 20 years if it exceeds such limit or the conduct leading to disablement is serious.<sup>8</sup>

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<sup>8</sup> In order for a person to occupy a position in the public service after over 10 years of disablement, the head of the agency or institution of which the person wishes to join must notify the Ministry of Comptrollership and Administrative Development.

### **3.8.2 Legal Persons**

In addition to the civil liability that a legal entity has for the damage caused by its legal representatives (see discussion under 2.2 “Non-Criminal Responsibility”), it may be subject to proceedings under the *General Act on Business Associations*. Pursuant to article 3 of that statute, a legal entity that has an illicit purpose or usually performs illicit acts shall, at the request of the Public Prosecutor or others, be declared null and its immediate liquidation shall proceed. Proceedings taken under this provision do not affect whether a legal person is liable to sanctions under the FCC.

## **4. ARTICLE 4. JURISDICTION**

### **4.1 Territorial Jurisdiction**

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 on the Convention clarifies that “an extensive physical connection to the bribery act” is not required.

The Mexican authorities explain that the FCC establishes jurisdiction over an offence that is committed by a natural person in the territory of Mexico regardless of the nationality of the offender, as follows:

1. Pursuant to article 1 of the FCC, the FCC applies to an offence committed in Mexican territory.

The Mexican authorities provide that, pursuant to article 1, Mexico has jurisdiction over the offence of bribing a foreign public official when either the promise, offer or giving of the advantage takes place within Mexican territory regardless of the means used to commit the crime. Thus a telephone call, fax or e-mail emanating from Mexico would be sufficient to establish jurisdiction.

2. Pursuant to paragraph 1 of article 2 of the FCC, Mexico has jurisdiction over an offence that commences, is prepared or committed in a foreign state where the effects are produced or are intended to be produced in Mexican territory. The Mexican authorities indicate that this paragraph would apply where the proceeds of the crime of bribing a foreign public official are introduced into Mexico’s jurisdiction, but that the criteria would have to be reviewed in relation to each concrete case.

Paragraph 2 of article 2 establishes jurisdiction over an offence committed in a Mexican consulate or against Mexican consular personnel where such an offence has not been tried by the court of the country where it was committed.

3. Pursuant to article 3 of the FCC, Mexico has jurisdiction over a continuous crime being committed abroad, that is still being committed in Mexico. The Mexican authorities indicate that the offence of bribing a foreign public official is not a continuous or a continuing crime.

Article 5 of the FCC clarifies that an offence is considered to have been committed in Mexican territory where, for example, it has been committed on the high seas on board a national vessel, on board a national or foreign aircraft in certain cases and in Mexican embassies or legations.

The Mexican authorities confirm that Mexico’s jurisdiction to impose sanctions on a legal person also applies to a non-Mexican legal person where a bribe is given on its behalf inside the territory of Mexico.

## 4.2 Nationality Jurisdiction

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”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirements of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

Pursuant to article 4 of the FCC, Mexico has jurisdiction over offences under the FCC committed abroad, including the offence of bribing a foreign public official. Article 4 has been translated as follows:

*The crimes committed in foreign territory by a Mexican against Mexicans or against foreigners, or by a foreigner against Mexicans, shall be punished in the Republic according to federal laws, if the following conditions are met:*

- 1. The accused is in Mexico;*
- 2. The defendant has not been definitely judged in the country in which the crime was committed; and*
- 3. The offence committed is considered as a crime in both the country where it was committed and Mexico.*

The Mexican authorities clarify that the term “Mexican” does not include non-Mexicans domiciled in Mexico.<sup>9</sup> They further clarify that in the case of the foreign bribery offence, the party “against” whom the offence is committed is the Mexican State or the state for which the foreign public official acts.

The Mexican authorities explain that the requirement of dual criminality would be considered met where the bribery act is an offence in the country where it is committed, regardless if the offence is described in exactly the same terms as under article 222 bis.

Mexico confirms that its jurisdiction to apply sanctions to a legal person also applies to a legal person organised under the laws of Mexico where, pursuant to article 4 of the FCC, it has jurisdiction over a natural person for a crime committed on its behalf outside the territory of Mexico.

## 4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

The Mexican authorities indicate that consultations and eventual transfer of a case to another Party that can establish jurisdiction shall be carried out in accordance with the procedures established in article 4.3 of the Convention. Consultation procedures have not been established in legislation, regulation or pursuant to bilateral or multilateral agreements.

## 4.4 Review of Current Basis for Jurisdiction

Article 4.4 of the Convention requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and if it is not, to take remedial steps.

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<sup>9</sup> Pursuant to article 30 of the Mexican Constitution, Mexican nationality is acquired by birth or naturalization.

The Mexican authorities indicate that the relevant Mexican legislation was thoroughly examined and it was concluded that the existing provisions provide a broad enough basis for jurisdiction to be effective in the fight against foreign bribery and fully respect the sovereignty of other States.

## **5. ARTICLE 5. ENFORCEMENT**

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

### **5.1 Rules and Principles Regarding Investigations and Prosecutions**

Pursuant to article 21 of the *Political Constitution of the United Mexican States*, the investigation and prosecution of offences is the responsibility of the Public Prosecutor, who shall be assisted by a police force under his/her authority and immediate command.

#### ***Investigations***

The Mexican authorities provide that the Public Prosecutor initiates an investigation when there has been an accusation or complaint that indicates the “probable” commission of an offence. Pursuant to article 123 of the *Federal Code of Penal Procedures* (FCPC), immediately upon being aware of the “probable existence of an offence that by rule should be pursued”, the Public Prosecutor or the officers under his/her authority shall take necessary steps to provide safety and assistance to victims, prevent the concealment or destruction of evidence, instruments or objects used to commit the offence, locate witnesses and prevent the further commission of the offence. In order to give effect to these duties, article 181 of the FCPC provides the authority for seizing the instruments, objects and products of offences in order to prevent their alteration, destruction or concealment<sup>10</sup>, and article 193 of the FCPC provides the authority for ordering the arrest of a suspect in certain circumstances.

The investigative phase is completed when the Public Prosecutor determines whether to initiate “criminal action” before a judge. An investigation will only be suspended if there is not enough evidence to proceed with the process. Pursuant to article 137 of the FCPC, the Public Prosecutor may determine to not initiate a criminal action before a judge in any of the following circumstances:

1. The facts do not indicate that an offence has been committed in accordance with the description under the criminal law.
2. It is fully proved that the accused was not involved in the commission of the offence.
3. It would be impossible to prove the commission of the crime due to some insurmountable evidentiary obstacle.
4. Criminal responsibility has been extinguished under the FCC.
5. It is clearly established that the accused acted on grounds for excluding criminal responsibility.

#### ***Prosecutions***

If the Public Prosecutor determines to initiate a criminal action before a judge, the pre-trial instruction commences in which the judge must decide whether there is enough evidence to submit the case to trial or

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<sup>10</sup> Article 181 of the *Federal Penal Procedure Code* is discussed under 3.6 on “Seizure and Confiscation of the Bribe and its Proceeds”.

dismiss the case. During this phase evidence is presented to demonstrate the guilt or innocence of the accused. The instructional phase may be suspended in any of the circumstances listed in article 468 of the FCPC, which includes the case where the accused has evaded justice or has become mentally ill.

The criminal process is completed when the competent jurisdictional organ pronounces a sentence. The sentence may be appealed by the defendant or the Public Prosecutor. The decision of the second instance may be challenged by obtaining a writ of *Amparo*<sup>11</sup> from the Federal Jurisdictional Organ. Once this process is concluded, the sentence is definite and final.

Moreover, an injured party (e.g. a competitor) has the right to challenge the Public Prosecutor's decision to not prosecute an alleged offence in the following two cases:

1. Pursuant to article 133 of the *Federal Criminal Proceedings Code*, he/she can request the Attorney General of the Republic to review the Public Prosecutor's decision in the context of an administrative proceeding;
2. Pursuant to article 21 of the Mexican Constitution, he/she can request a writ of *Amparo* to nullify the Public Prosecutor's decision and order the Public Prosecutor to prosecute the offence or continue the investigation.

## **5.2 Considerations such as the National Economic Interest**

The Mexican authorities state that the factors listed in Article 5 of the Convention shall not influence the investigation and/or processing of the offence of bribing a foreign public official.

## **6. ARTICLE 6. STATUTE OF LIMITATIONS**

Article 6 of the Convention requires that any statute of limitation with respect to the bribery of a foreign public official provide for "an adequate period of time for the investigation and prosecution" of the offence.

Article 105 of the FCC states that the statute of limitation with respect to an offence shall be equal to "half the imprisonment period stated by law for the offence...but in no event shall it be less than 3 years".<sup>12</sup> Thus, in the case of the offence of bribing a foreign public official under article 222 bis of the FCC, there are two statutes of limitations for the two categories of penalties. The Mexican authorities calculate that where the offence is punishable by between 2 months and 2 years of imprisonment, the limitations period is 3 years, and where the offence is punishable by between 2 years and 14 years of imprisonment, the limitations period is 8 years. Pursuant to article 102.1 of the FCC, the limitations period begins to run the moment the crime in question is committed.

Moreover, article 101 of the FCC provides for the doubling of the limitations period where the suspect is abroad and due to his/her absence it is not possible to prepare the pre-trial investigation, conclude a process or execute a sanction. In addition, if an investigation has been suspended due to lack of evidence, the re-opening of the investigation upon obtaining new evidence interrupts the limitations period.

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<sup>11</sup> An *Amparo* trial is a judicial process for the review of the constitutionality of any act of the legislative, executive or judicial authority that violates the constitutional rights of any natural or legal person, regardless of nationality. In order to obtain a writ of *Amparo* it is necessary to prove the violation of any constitutional right of such a person.

<sup>12</sup> The Mexican authorities explain that this period is calculated by taking half of the addition of the longest and shortest terms of imprisonment established in the law for the offence in question.

## 7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

Article 400 bis of the FCC establishes an offence in relation to the making of transactions with “resources, rights or assets” from an illicit origin. The Mexican authorities confirm that this terminology contemplates the bribe and the proceeds of bribery. A penalty of 5 to 15 years of imprisonment and a fine from 1, 000 to 5,000 days of minimum wage<sup>13</sup> shall be imposed on the following persons:

1. Any individual that by himself/herself or through a third party purchases, sells, possesses, warrants, invests, transports or transfers (within Mexico, or from Mexico to outside Mexico, or from outside Mexico into Mexico) resources, rights or assets of any nature that originated from or represent the product of an illicit activity, for the purpose of concealing, disguising or attempting to conceal or disguise the origin, ownership, destination or location of those resources, etc. or promoting any illicit activity. “Resources, rights or assets that originated from or represent the product of an illicit activity” are those that “are assumed to be directly or indirectly obtained from the commission of any offence, or that represent the asset value or any other profit thereof, in the event that its legitimate origin cannot be proven”.
2. The employees and officers of institutions within the financial system that wilfully assist or cooperate with a third party to carry out any of the aforementioned actions. These sanctions are applied without prejudice to the sanctions that apply under the legislation that regulates the financial system.

Where the conduct prohibited by article 400 bis is perpetrated through the use of services rendered by institutions that are part of the “financial system”<sup>14</sup>, a formal accusation must be filed by the Secretariat of Finance and Public Credit in order to be able to commence a criminal action. In the event that the Secretariat of Finance and Public Credit determines that there is sufficient evidence proving the alleged commission of an offence under article 400 bis, it shall file a formal accusation. The Mexican authorities clarify that this requirement applies whenever a financial institution is used for money laundering purposes, regardless if an employee or officer of the institution is the person who is accused of contravening article 400 bis. They state that the rationale for this requirement is that the Secretariat of Finance and Public Credits is responsible for the coordination, assessment and supervision of Mexican financial institutions. Since these institutions have the duty to report to the Secretariat all relevant, suspicious and unusual transactions, the Secretariat has at its disposal the information needed to determine whether a financial institution is being used to launder the product of an illicit activity. The Mexican authorities explain that this requirement does not create a loophole in the case where a financial institution is an accomplice in the money laundering activity and is therefore not likely to report suspicious transactions to the Secretariat because the Secretariat does not just rely on the information provided by the financial institution. The Secretariat also performs an auditing function, and is able to pursue evidence where suspicious transactions are detected.

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<sup>13</sup> See footnote 4 on the calculation of the daily minimum wage.

<sup>14</sup> Financial system” is defined in article 400 bis as an integration of “credit, bonds and insurance institutions, loan and savings corporations, limited liability financial corporations, credit unions, financial brokerage enterprises, , stock exchange brokers, money exchange offices, retirement fund corporations, and any other financial or exchange mediator”.

Moreover, article 400 bis provides that the penalty shall be increased by one half in the event that a government official responsible for the prevention, prosecution or investigation of money laundering offences commits the offence. In such a case, the government official shall not be able to serve or hold a position with any public institution for a period equal to the length of imprisonment imposed.

The Mexican authorities confirm that article 400 bis applies to the offence of bribing a domestic or a foreign public official because the assets would have originated from an illicit activity. A conviction in relation to the predicate offence is not necessary in order to obtain a conviction for the money laundering offence.

They also confirm that article 400 bis applies regardless of where the bribery occurred, as long as the predicate offence constitutes an offence in the region where it was committed.

## **8. ARTICLE 8. ACCOUNTING**

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

### **8.1/8.2 Accounting Requirements/Companies Subject to Requirements**

#### ***All Natural and Legal Persons***

The Mexican authorities state that all the activities prohibited under Article 8 of the Convention are prohibited pursuant to articles 28 and 30 of the *Federal Fiscal Code* (FFC) and articles 26, 29, 30, 32 and 32A of the Regulations thereunder. In addition, pursuant to the *General Accounting Standards*, a company is required to disclose on its financial statement the full range of material contingent liabilities. Mexico states further that “all natural and legal persons that contribute to public expenses in compliance with the applicable fiscal laws” are bound by these rules. The penalties for non-compliance with these rules are prescribed as follows<sup>15</sup>:

1. The failure to keep proper accounts: fine up to 2298.00 Mexican pesos.<sup>16</sup>
2. The failure to keep a book or special record that they are bound to keep by fiscal laws, the failure to comply with the obligations on valuation of inventory or the failure to follow the procedure of control of inventory: fine up to 1149.00 Mexican pesos.
3. The failure to prepare registers corresponding to the operations performed, or the preparation of incomplete or inaccurate registers: fine up to 919.00 Mexican pesos.
4. The issuance of fiscal receipts in which the name, firm name or address does not correspond to that of the person from whom was acquired the goods, temporary use of assets or the use of services: fine up to 36,000.00 Mexican pesos.
5. The registration of accounting, fiscal or social operations in two or more books or in two or more accounting systems with different contents; the partial or total concealment, alteration or destruction of accounting systems or records, or the documents relevant to the records, which, in accordance with the fiscal laws, are required to be kept; or the false declaration of losses: 3 months to 3 years of imprisonment.

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<sup>15</sup> The following penalties are set out in articles 82, 83, 84, 108 and 111 of the *Federal Fiscal Code*.

<sup>16</sup> See footnote 4, which provides the U.S dollar conversion for Mexican pesos.

Pursuant to article 90 of the FFC, third parties are liable to a fine from 10,000.00 to 20,000.00 Mexican pesos for the commission of the following offences under article 89 of the FFC:

1. Advising or counselling a taxpayer to omit the payment of tax, assisting in the altering of accounts or relevant documents, or insertion of false data in accounts or relevant documents.
2. Acting as an accomplice in the commission of an accounting offence in any other way.

Moreover, articles 108 and 109 of the FFC establish the crime of tax evasion, which dictates a higher penalty (i.e. an additional one half of the penalty) where the evasion was realised by the use of false documents, the repeated omission to issue receipts, the recording of false data or the failure to maintain accounting systems and records as required by the fiscal regulations.

Furthermore, several other Mexican laws contain accounting rules in relation to the following specific types of legal persons:

1. Merchants: Pursuant to article 16, paragraph III of the *Code of Commerce*, “all merchants” are required to keep an accounting system. Article 33 of the *Code of Commerce* enlarges upon this requirement, and states that merchants are required to keep and maintain “adequate” accounting systems. This involves the maintenance of an accounting system “through the instruments, resources, registration and processing systems” that best suit the conditions of the business and enable the identification and tracking of each financial transaction. Moreover, article 37 imposes the requirement that all the registers kept by merchants are in Spanish, even if the merchant is a foreigner. The penalty for not complying with article 37 is a fine of under 25,000 Mexican pesos.

2. Credit Institutions: Article 99 of the *Credit Institutions Law* requires that every act or contract that results in a change to the assets or liabilities of a credit institution or implies a direct or contingent obligation shall be recorded in the accounting records the same day on which it occurs. Pursuant to article 109, the penalty for non-compliance with this provision is a fine equivalent to 100 to 50,000 times the minimum daily wage<sup>17</sup>.

3. Auxiliary Credit Organisations: Article 52 of the *General Law of Auxiliary Credit Organizations and Activities* requires that every act or contract that affects the assets or liabilities of an auxiliary credit organisation or that implies an immediate or contingent obligation must be recorded in the accounting records. Pursuant to article 89, the penalty for non-compliance with article 52 is a fine up to 100,000 days of wage or up to 1 per cent of the paid capital or capital reserves of the auxiliary credit organisation.

4. Firms with Listed Shares: Article 26 bis of the *Securities Market Law* states that every act, contract, or operation carried out by the Brokerage House, regardless of its origin, must be recorded in the accounting records. The penalty for non-compliance with this requirement is, pursuant to article 51, paragraph XV, a fine from 200 to 100,000 days of wages.

5. Mutual Insurance Associations and Institutions: Pursuant to article 100 of the *General Law of Mutual Insurance Associations and Institutions*, every act, contract or document that implies an immediate or eventual obligation, or that affects the assets or liabilities of a mutual insurance association or institution, must be recorded in the accounting records. The penalty for non-compliance with this provision is a fine from 300 to 3,000 days of wages.

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<sup>17</sup> See footnote 4 on the calculation of the daily minimum wage.

6. Federal Bond Institutions: Pursuant to article 63 of the *Federal Bond Institutions Law*, all bond institutions are required to record in their accounting records every transaction, regardless of its origin. The penalty for non-compliance with this requirement is a fine from 200 to 52,500 days of wages.

### **8.1.1/8.2.1 Auditing Requirements/Companies Subject to Requirements**

#### ***Natural and Legal Persons Required to be Audited***

The following natural and legal persons engaged in business activity are required to be audited by private accountants:

1. Those with an aggregate income of over \$7,554,000.00 pesos during the taxable year and with assets worth over \$15,107,000.00 pesos according to the *Asset Tax Law*.
2. Those with at least 300 employees who have rendered services in each of the months in the taxable year.
3. Those authorized to receive donations that are deductible pursuant to the *Income Tax Law*.
4. Federal Public Administration Entities, referred to in the *Federal Law for State-Owned Entities*.

#### ***Audit Rules***

The Mexican Institute of Public Accountants issues rules and procedures for audits, which are generally adopted and followed by accountants. The objective of these dictums is to ensure the truthfulness, appropriateness or relevancy and suitability of the information contained in an audit, and provide the procedures for evaluating financial statements.

#### ***Audits by the Government***

Pursuant to the Mexican Constitution and article 42 of the *Federal Fiscal Code*, the “administrative authority” is authorized to enter a domicile to examine books and documents to verify compliance with fiscal provisions<sup>18</sup>. Thus, entry could be obtained for the purpose of determining the contributions or fiscal credits omitted or to verify the commission of fiscal offences and to provide information to other fiscal authorities.

### **8.1.2 Rules Applicable to the Accountancy Profession**

The *Federal Fiscal Code* contains rules with which members of the accounting profession must comply in preparing the records of firms. These include the requirement that a record of a transaction shall be made within 2 months of its occurrence.

The Mexican Institute of Public Accountants issues generally accepted principles of accounting, which ensure minimum standards in the accountancy profession. In addition, every accountant must abide by the *Accounting Professional Ethical Code*, regardless of his/her area of specialisation. These principles apply to accountants in private practice or employed by a public or private institution. The penalties that can be imposed by the affiliated Associations or the Mexican Institute of Public Accountants for non-compliance with the *Code* are, depending on the seriousness of the breach, a private warning, public admonition, temporary suspension, dismissal, or notification of the competent authorities of a violation of the relevant law.

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<sup>18</sup> This measure is subject to the laws and procedures established for searches.

### **8.3 Penalties**

The *Federal Fiscal Code* provides the following penalties in relation to accounting and auditing obligations:

1. Pursuant to article 91-B, an offence is committed where any individual fails to report contributions collected, withheld, transferred or belonging to the tax payer in its fiscal status report for the period covered by the report. When such omissions are linked to non-compliance with audit rules that regulate the professional standards, independence and impartiality of the public accountant, the person responsible for the preparation of the accounts or audit may be fined between 10 and 20 per cent of the contributions omitted, but the fine shall not exceed two times the fees charged for preparing the accounts, etc.
2. Pursuant to article 52, a public accountant who does not comply with the obligation to, for instance, prepare the fiscal dictum in a timely manner or does not apply audit procedures may receive a warning or may be removed from the registry of accountants for up to 2 years. The penalty for recidivism or for committing a fiscal offence is the immediate cancellation of his/her professional registration. Article 57 provides guidelines for determining when a penalty shall be in the form of a warning, suspension or cancellation from the registry.
3. Pursuant to article 96, a public accountant who assists a taxpayer in evading the tax authorities, or conceals, alters or destroys evidence or instruments of any fiscal offence carried out by the taxpayer, or obtains the object or product of the offence for the taxpayer shall be sanctioned with 3 months to 6 years in prison.

## **9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE**

Article 9.1 of the Convention mandates that each Party cooperate with each other to the fullest extent possible in providing “prompt and effective legal assistance” with respect to the criminal investigation and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

### **9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance**

#### **9.1.1 Criminal Matters**

The Mexican authorities state that Mexico can provide mutual legal assistance for the offence of bribing a foreign public official, pursuant to treaties that Mexico has entered into on mutual legal assistance and the exchange of financial information to combat criminal activities.<sup>19</sup> In addition, Mexico can provide mutual legal assistance in respect of the offence of bribing a foreign public official where there is no applicable treaty, based on the reciprocity principle. The requirements that must be met (in addition to dual

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<sup>19</sup> The Parties to the Convention with which Mexico has a treaty on mutual legal assistance are Australia, Canada, France, Germany, Spain, U.K. and U.S.A. In addition, in 1999 Mexico signed MLA agreements with Greece and Portugal. However, these instruments are subject to the approval of the Mexican Senate.

criminality, which is discussed below) in order to provide mutual legal assistance in criminal matters are that the request sets out in sufficient detail information about the assistance sought, including the title of the authority requesting assistance and the description of the crime, etc. In addition, requests for assistance from foreign courts (rogatory letters) shall meet the requirements set out in the relevant legislation of the foreign jurisdiction.

Pursuant to Mexico's treaties and legislation concerning mutual legal assistance, Mexico may provide mutual legal assistance in the form of search and seizure, the questioning of witnesses, the exchange of information, documents and evidence, the service of summons and the location of witnesses, etc.

### **9.1.2 Non-Criminal Matters**

Mexico can provide mutual legal assistance to Parties requesting assistance in relation to non-criminal proceedings against a legal person in accordance with the *Federal Civil Proceedings Code*.

### **9.2 Dual Criminality**

The Mexican authorities provide that pursuant to some of the treaties that Mexico has entered into on mutual legal assistance in criminal matters, dual criminality is required where the assistance requested involves coercive measures. Mexico states that, however, where dual criminality is required, it shall be deemed to exist in accordance with Article 9.2 of the Convention as Mexico has ratified the Convention.

### **9.3 Bank Secrecy**

The Mexican authorities state that since Mexico has ratified the Convention, it is bound by Article 9.3 of the Convention and, therefore, cannot decline to render mutual legal assistance on the ground of bank secrecy. They further indicate that pursuant to paragraph 2 of article 180 of the *Federal Civil Proceedings Code*, any request made to the Attorney General of the Republic, a public official appointed for receiving such requests or the courts for information or documents related to the financial system shall be carried out through the supervising bodies of the Secretariat of Finance. The Mexican authorities explain that there are no requirements that must be met by a foreign country requesting access to banking records with respect to criminal matters.

## **10. ARTICLE 10. EXTRADITION**

### **10.1 Extradition for Bribery of a Foreign Public Official**

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them.

Pursuant to the *International Extradition Law*, a request for extradition shall be governed by the applicable treaty and where there is no applicable treaty extradition may be provided in accordance with that Act.

Where extradition is requested pursuant to the *International Extradition Law*, in addition to dual criminality (discussed below and under 3.4) certain requirements, including the following, must be met:

1. The requesting country shall apply the principle of reciprocity (article 10, paragraph I);
2. The crime must not have been committed under the jurisdiction of the courts of the Republic (article 7, paragraph IV).

## **10.2 Legal Basis for Extradition**

Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

Mexico states that in the absence of an extradition treaty with another Party, the Convention would be considered the legal basis for extradition in respect of the foreign bribery offence, and the process for extradition provided in the *International Extradition Law* would apply.

## **10.3/10.4 Extradition of Nationals**

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

Article 14 of the *International Extradition Law* states that “no Mexican shall be surrendered to a foreign country except in exceptional cases determined by the Executive”. Article 15 states that citizenship shall not provide an obstacle to extradition if it was obtained following the commission of the offence in question. The Mexican authorities confirm that article 14 applies where there is no applicable treaty. They state that there are no guidelines for the application of the Executive’s discretion.

Mexico confirms that where the extradition of a national is denied pursuant to article 14, the case shall be submitted to the competent judicial authorities and jurisdiction shall be established in accordance with article 4 of the FCC.

## **10.5 Dual Criminality**

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

The Mexican authorities explain that the requirement of dual criminality would be considered met where the bribery act is an offence in the country where it is committed, regardless if the offence is described in exactly the same terms under article 222 bis of the FCC.

## **11. ARTICLE 11. RESPONSIBLE AUTHORITIES**

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.

The Ministry of Foreign Affairs and the General Attorney’s Office have been designated as the authorities responsible for the matters listed in Article 11.

## **B. IMPLEMENTATION OF THE REVISED RECOMMENDATION**

### **3. TAX DEDUCTIBILITY**

According to the Mexican authorities, a bribe paid to a foreign public official is not expressly or implicitly deductible. It is not implicitly deductible because it is not an indispensable expense for the purpose of a

business or activity. In addition, Mexico states that pursuant to article 25, section IV and article 137, section IV of the *Income Tax Law*, gifts, presents and other similar expenses are not deductible unless they are directly related to the sale of products or rendering of services as well as business activities carried out by the taxpayer and are generally offered to customers. The Mexican authorities explain that a bribe is not contemplated by the notion of something that is generally offered to customers. The non-deductibility of such expenses applies to legal and natural persons engaged in a business activity.

The Mexican authorities provide that any expense rejected by the tax authority is added to income. In addition, pursuant to the *Federal Fiscal Code*, tax fraud is subject to penalties of up to 9 years of imprisonment and a fine of up to more than \$1,181,206 pesos, depending on the amount of the fraud.

## EVALUATION OF MEXICO

### General Remarks

The Working Group commends the Mexican authorities for their excellent co-operation during all stages of the examination. In particular, the Working Group appreciates the thoroughness of Mexico's responses and timeliness in providing translations of all the relevant legislation.

Mexico implemented the Convention through an amendment to the Federal Penal Code (FCC), which establishes, under article 222 bis, the offence of bribing a foreign public official. Overall, the Working Group is of the opinion that the relevant Mexican laws, including article 222 bis, conform generally to the standards under the Convention. However, certain issues have been identified below for follow-up in Phase 2.

### Specific Issues

#### 1. Autonomous definition of "foreign public official"

Under article 222 bis of the FCC, a "foreign public official" is defined as any person who holds or appears to hold a public office under the law of the official's country. The Mexican Senate required that the offence be constructed in this way in order for passage of the implementing legislation, because it did not otherwise regard the offence to be defined with sufficient clarity.

The Mexican authorities state that it is possible that the courts would consider the definition of "foreign public official" in the Convention as an interpretative tool in determining whether a particular person is a foreign public official for the purpose of applying article 222 bis, because under the Mexican Constitution the Convention is considered as supreme law. In addition, the Mexican authorities are of the view that Mexican courts would not apply an interpretation of the term public official that differs from the one under Mexican law.

The Working Group remains concerned that the method of defining "foreign public official" in article 222 bis could lead to an inconsistent and in some cases inadequate application of the foreign bribery offence. It therefore recommends that this issue be monitored in Phase 2 to determine whether the resulting approach is in conformity with the autonomous definition in the Convention.

#### 2. Third parties

Article 222 bis does not expressly apply to the case where a benefit is offered, promised or given directly for a third party as a beneficiary. On the other hand, the domestic bribery offence under article 222 of the FCC, which covers active as well as passive bribery, does expressly apply to bribes where the benefit is for a third party.

The Mexican authorities explain that it is not necessary to refer expressly to third parties in article 222bis because an offence is considered to have been committed where an offer is made to a foreign public official, regardless of who receives the benefit. They also explain that because article 286 of the Criminal Procedure Code provides judges with the power to make certain presumptions based on physical evidence, a judge would be able to presume that an offer had occurred where a third party had received a benefit.

The Working Group remains uncertain whether the case would be covered where the benefit is given for a third party as a beneficiary, and recommends that this issue be followed-up in Phase 2.

### **3. Level of monetary sanctions**

The fines for natural persons under article 222 bis, which range from \$108 to \$1,800 U.S., are very low relative to those of other Parties. The Mexican authorities point out that the level of fines must be considered in conjunction with the other penalties, which include imprisonment for up to 14 years, since they are applied cumulatively. In addition, the fines are equivalent to those for domestic bribery and comparable to those for theft, fraud and embezzlement. The Mexican authorities indicate that they are open to propose to the legislative power to increase sanctions in this regard.

Pursuant to article 222 bis a legal person is liable to “up to 500 days of fine”. The term “days of fine” refers to the net income of the legal person. The Working Group interprets this to mean that a company would not be liable to a fine if it showed a net loss in its books. The Mexican authorities explain that they have no previous experience with the application of sanctions to legal persons under the FCC.

The Working Group remains concerned that the fine penalties for natural persons may not be adequate and is uncertain about the practical application of the fines for legal persons. This is in part due to the unavailability of forfeiture where the assets generated by the foreign bribery offence are no longer available. The Working Group therefore recommends that Mexico increase the fines for natural persons. It also recommends that the levels of fines ordered in respect of legal persons be monitored during Phase 2.

### **4. Criminal liability of legal persons**

Although pursuant to article 222 bis the court may impose sanctions on legal persons where a member or representative of that legal person has been convicted of the foreign bribery offence, the legal person is not considered to have committed a criminal offence. Thus a legal person cannot be criminally sanctioned where the natural person who committed the bribery offence cannot be convicted. This raises doubts whether the standard of effective, proportionate and dissuasive sanctions has been met. Mexico indicates that it is interested in sharing information with the Working Group on the most effective practices concerning the liability of legal persons for the foreign bribery offence, including civil and administrative measures. Moreover, the Working Group agrees that the non-criminal liability of legal persons is a general issue that should be pursued further with a view to ensuring the effective and consistent application of the Convention.

### **5. Unavailability of sanctions for state-owned and state-controlled companies**

Pursuant to the FCC, state-owned and state-controlled companies are not subject to sanctions. The Mexican authorities indicate that state-owned companies can be subject to civil liability for the crimes committed by their representatives, and their representatives are liable for the bribery offence under article 222 bis.

The Working Group agrees that the liability of state-owned and state-controlled companies for the foreign bribery offence is a horizontal issue that should be followed in Phase 2.