

ARGENTINA

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

Argentina signed the Convention on December 17, 1997, and deposited the instrument of ratification with the OECD Secretary-General on February 8, 2001. On November 1, 1999, it enacted implementing legislation in the form of the *Statute on Ethics in the Exercise of Public Office (Law No. 25.188)*. It entered into force on November 10, 1999.

Convention as a Whole

The *Statute on Ethics in the Exercise of Public Office (Law No. 25.188)* was enacted in order to implement the Inter-American Convention against Corruption (the OAS Convention), to which Argentina is a party. This legislation amended the Argentine Penal Code (APC), adding article 258 bis, which penalises the active bribery of a foreign public official. In addition, the Argentine authorities are currently preparing an amendment to article 258 bis of the APC (the draft bill) in order to meet the standards of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) as well. The draft bill intends to harmonise its terminology with that of Article 1 of the Convention. The Ministry of Justice and Human Rights and the Anticorruption Office will propose this draft bill to the Congress in the forthcoming ordinary sessions.

Argentina considers the current provisions of the APC on complicity, attempt, jurisdiction, seizure and confiscation, and statute of limitations, as well as those of the accounting regulations to be consistent with the requirements of the Convention. The Argentine authorities are of the opinion that the *Statute on Money Laundering (Law No. 25.246)* and the *Statute on Mutual Legal Assistance and Extradition (Law No. 24.767)*, which also amended the APC comply with the requirements of Articles 7, 9 and 10 of the Convention.

Pursuant to article 31 of the Argentine Constitution, “treaties with foreign powers” are part of the supreme legislation of Argentina as well as the Constitution and the national laws, and have precedence over provincial constitutions and laws¹. Pursuant to article 75.22 of the

¹ Article 31 makes an exception for this with respect to “the province of Buenos Aires, treaties ratified after the Pact of November 11, 1859”. However, the Argentine authorities state that this exception has no relevance to the application of the Convention in Argentina. According to them, this exception

Constitution, treaties take precedence over domestic law. Since the Convention is not included in the treaties which have “constitutional hierarchy”, it ranks above national laws and provincial constitutions and laws, but below the Argentine Constitution and treaties having “constitutional hierarchy”². Also, the Supreme Court decision³ states that a ratified treaty is precedent to domestic law. Moreover, it states that where the domestic legislation conflicts or is deficient with respect to a treaty, provisions of the treaty are directly applicable provided that they contain sufficiently specific descriptions enabling immediate application. However, since article 18 of the Argentine Constitution requires enacted statutes in their domestic law for the imposition of penalties, the provisions on constituent elements of the offence (i.e. Article 1) are not directly applicable. The Argentine authorities state that Commentaries play an important role in Argentine courts as authentic interpretative instruments to the Convention⁴.

In Argentina, judicial decisions are not legally binding on other courts in principle⁵. However, according to the Argentine authorities, in practice, the courts treat Supreme Court decisions as binding.

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

General Description of the Offence

Argentina translates article 258 bis of the APC, which was added by the amendment to establish the offence of bribing a foreign public official, as follows:

It shall be punished with 1 to 6 years of imprisonment and perpetual special disqualification to hold a public office, whoever offers or gives to a public official from another State, directly or indirectly, any object of pecuniary value, or other benefits as gifts, favours, promises or advantages, in order that the said official acts or refrains from acting in the exercise of his official duties, related to a transaction of economic or commercial nature.

reflects a historical event in Argentina that the province of Buenos Aires ratified this Constitution and formally became a part of Argentina by signing the Pact of November 11, 1859.

- 2 Such treaties are those on human rights, including the American Convention on Human Rights and the International Pact on Civil and Political Rights.
- 3 Supreme Court decision, July 7-992- Ekmekdjian, Miguel A.v.Sofovich, Gerardo et al.
- 4 Moreover, there is a Supreme Court decision (Felicetti, Rovertó, dated 21/12/2000) that referred to the legal weight of the Recommendations of the Interamerican Commission on Human Rights, which states that although they are not legally binding in Argentina, they embody guidelines for the interpretation of the Human Rights Convention.
- 5 However, where the Court of Appeals issue a decision “en banc”, it binds on lower courts, etc. subject to its jurisdiction.

In addition, the draft bill states as follows:

It shall be punished with 1 to 6 years of imprisonment and perpetual special disqualification to hold a public office, whoever offers or gives to a foreign official, directly or indirectly, for that official or for a third party, any object of pecuniary value, or other benefits as gifts, favours, promises or advantages, in order that the said official acts or refrains from acting in the exercise of his official duties, related to a transaction of economic or commercial nature, whether or not within the official's authorised competence.

Thus, it would appear that the following three amendments to the current legislation are intended in the draft bill to: (1) broaden the scope of the public official from “a public official from another State” to “a foreign official”; (2) expressly provide for the case of advantages for third parties; and (3) include the act/ omission of the public official which is not within his/ her authorised competence that the briber intends to induce. Additionally, the draft bill also contains the definition of a “foreign official” (See discussion under 1.1.6 below.).

General Defences

The Argentine authorities refer to several general defences provided for in the general part of the APC, which might be applicable to the offence of bribery of a foreign public official under extremely limited circumstances.

Firstly, the Argentine authorities refer to the defence that applies to “ignorance or lack of knowledge of the objective elements of the crime” (“mistake of fact”). Secondly, they refer to the defence of “mistake of law”. The Argentine authorities state that this defence could be successfully invoked only where the briber exercised due diligence to know whether the act is prohibited by law. They further state that this defence does not apply even where the offender’s private lawyer wrongly advised him/ her that the act would not constitute an offence. Thirdly, they refer to the defence of “necessity”. The Argentine authorities confirm that this defence could not apply where the briber claims that bribing was the only way possible to keep him/ her in business. According to them, this defence requires that the offender had no alternative which would result in less damage than the commission of the offence. Thus, since usually there are several alternatives to the commission of the foreign bribery offence, this defence would not apply. Moreover, they confirm that this would not apply to any sort of “economic necessity” (e.g. closing down business) since it cannot cause more damage compared to bribery. In addition, the Argentine authorities confirm that this defence does not apply where the foreign public official solicits a person by telling him/ her that he/ she wouldn’t get the contract without a bribe, or in which a person is threatened with retribution.

1.1 The Elements of the Offence

1.1.1 any person

Article 258 bis and the draft bill apply to “whoever” gives or offers a bribe to a foreign public official. The Argentine authorities state that this only covers natural persons. The Argentine authorities confirm that there is no category of natural person that is excluded from this scope. However, pursuant to the Argentine Constitution, special procedures apply to certain categories of person when imposing on them criminal liability⁶.

1.1.2 intentionally

The Argentine authorities state that the offence of bribery could be committed only with “deliberate intention” to offer, promise or give a bribe. There is no case law that elaborates further on this. However, according to the Argentine authorities, “deliberate intention” requires knowledge of each element of the offence. Thus, it is necessary that the offender is aware of dealing with a foreign public official, of his/ her act of offering, promising or giving, of its consequences, and of the “aim” of the bribe to induce foreign public official’s act/ omission. In addition, the Argentine authorities state that any degree of knowledge of each element of the offence is sufficient to give rise responsibility and therefore, “*dolus eventualis*” is applicable to the offence. For instance, where the offender foresees the “consequences” of the bribing act, he/ she is punishable.

1.1.3 to offer, promise, or give

Article 258 bis and the draft bill refer to a person who “offers” or “gives” a bribe. However, since the provisions apply to giving of “promises”, it would appear that it also covers a person who “promises” a bribe to a foreign public official. The Argentine authorities confirm that a mere promise of a bribe is covered.

Moreover, the Argentine authorities confirm that article 258 bis and the draft bill apply irrespective of whether the briber promises/ gives a bribe in response to the solicitation by the foreign public official. However, they further state that the court may take into account such circumstances in determining the penalty.

1.1.4 any undue pecuniary or other advantage

Article 258 bis and the draft bill apply to the giving etc. of (1) any “object” of pecuniary value, and (2) “other benefits” such as “gifts, favours, promises or advantages”. The former

⁶ An impeachment process applies to the President, the Vice President, the Ministers, the Chief Cabinet of Ministers and the Supreme Court Justices (articles 53, 59 and 60 of the Constitution). A similar process performed by the Council of the Magistracy and a Jury of Impeachment applies to judges of lower courts (articles 114.5 and 115). With respect to members of the Congress, each chamber (i.e. the House of Representatives, the Senate) is empowered to remove one of its members by a two-thirds vote (article 66).

one covers pecuniary advantages. The Argentine authorities confirm that “object” and “other benefits” imply all pecuniary and non-pecuniary advantages, tangible and intangible (e.g. intellectual or social advantage). Moreover, they confirm that a promise of all advantages, pecuniary and non-pecuniary, tangible and intangible are covered by “other benefits”.

Article 258 bis and the draft bill do not specifically mention whether the advantage is “undue”.

The Argentine authorities confirm that where the advantage is permitted or required by the written law of the public official’s country, it would not constitute the offence, but where it is neither permitted nor required by the law thereof, it would constitute the offence even if it is not prohibited thereby, in accordance with Commentary 8.

The Argentine authorities confirm that the factors enumerated in Commentary 7, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage, would not be considerations for escaping liability. However, they state that these may be considered as mitigating circumstances.

1.1.5 whether directly or through intermediaries

Article 258 bis and the draft bill apply to bribes given, etc. to a foreign public official, “directly and indirectly”. The Argentine authorities state that this covers the case where the bribe is given etc. to the public official “personally or through intermediaries”. The Argentine authorities confirm that the term “indirectly” covers the case of bribing through an intermediary irrespective of whether or not the intermediary is aware of the briber’s intent. In case where the intermediary is aware of the briber’s intent, he/ she will be held responsible for the offence together with the briber.

1.1.6 to a foreign public official

Article 258 bis of the APC applies to bribes given, etc. to a “public official from another State”. Pursuant to article 77 of the APC, “public official” means “any person exercising a public function on an incidental or permanent basis, whether elected or appointed by appropriate authority”. However, the Argentine authorities confirm that the definition in article 77 applies only to the domestic bribery offences, but not to the foreign bribery offence. Thus, there is no autonomous definition for the term “public official from another State” elsewhere in Argentine law.

However, although the constituent elements of the offence in the Convention (Commentaries) are not directly applicable in Argentina (See the discussion above under “Convention as a Whole”), the Argentine authorities are of the opinion that the court could refer to the definition of “foreign public official” and “foreign country” in the Convention and the

Commentaries to interpret article 258 bis, since it contains the term “public official of another state”, which corresponds to these terms. Nevertheless, there still remain some issues of concern.

Firstly, since the current provision of the APC was enacted initially in order to implement the OAS Convention⁷, the scope of which is narrower than that of the Convention in respect of the coverage of foreign public official, it may appear uncertain whether the court would apply the definition in the Convention instead of that in the OAS Convention. However, the Argentine authorities states that as (1) the Convention came into force after the OAS Convention, and (2) the Convention is more specific on the issue of transnational bribery, the court would refer to the Convention in accordance with the general principles of “subsequent” and “specificity”. Moreover, the Argentine authorities confirm that in the case where Argentina becomes a party to a future convention with a less specific definition of foreign public official, the OECD Convention would prevail.

Secondly, since the APC establishes the offence of domestic bribery in respect of a judge under separate statutes from those for bribery of a “public official” in general, it is unclear whether judges would be covered by the term “public official”. Argentina confirms that the term “public official” of article 258 bis covers judges.

Finally, the Argentine authorities confirm that, since article 258 bis only refers to public official from “another State”, it does not cover agents, etc. of international organisations and public officials of organised foreign area or entity.

The draft bill applies to bribes given, etc. to a “foreign official”. The draft bill defines the term “foreign official” as follows:

1. any person holding a legislative, administrative, or judicial office of a foreign country, either appointed or elected, at a national or at a local level;
2. any person exercising a public function for a foreign country, including for a public agency or a public enterprise;
3. any official or agent of a public international organisation.

This definition uses the same terminology of the definition in Article 1.4a and b of the Convention. However, there is no definition of terms such as “public function”, “public agency”, “public enterprise”, “public international organisation”, etc. which are defined in

⁷ Article 1, second paragraph of the OAS Convention states as follows:

“Public official”, “government official”, or “public servant” means any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in the service of the State, at any level of its hierarchy.

Commentaries 12-18. The Argentine authorities state that the court would refer to these Commentaries to interpret these terms.

1.1.7 for that official or for a third party

Article 258 bis of the APC does not expressly refer to third party beneficiaries. The Argentine authorities state that, despite the lack of case law, where the third party is “someone in public official’s intimate circle”, it would be covered by the offence since “it is not difficult to imply that the bribe or its profits would later come back or benefit him”. They further explain that it requires proof of the fact that the advantage is given, etc. to the third party to benefit the public official. Thus, “someone in public official’s intimate circle” is required to be someone who shares patrimony with the public official (e.g. wife, children) or someone who has high level of intimacy with him/ her (e.g. mistress, close friends). Moreover, they confirm that article 258 bis does not cover the case where an advantage goes directly to a third party. This lack of coverage falls short of the standards of the Convention.

In contrast, the draft bill expressly addresses bribes “for that official or for a third party”. It would appear to apply in respect of the giving, etc. a bribe to a foreign public official, for him/her or a third party. The Argentine authorities confirm that a third party could be a legal entity. Argentina confirms that the draft bill covers the case where an advantage goes directly to a third party.

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

Article 258 bis applies where the briber gives, etc. a bribe to the foreign public official, in order that he/ she acts or refrains from acting in the exercise of his/her official duties. The Argentine authorities confirm that it does not cover the case where the briber’s intent is to induce the public official’s act/ omission which is not within his/ her competence but is in relation thereto. This does not meet the standards of the Convention and Commentary 19.

According to the Argentine authorities, it requires proof of law in the public official’s country in order to determine whether a certain act/ omission of the public official is in the exercise of his/ her official duties.

However, Argentina explains that there is a possibility that the court may interpret the law to cover the case where the briber gives a bribe to a public official to induce him/ her to exert his/ her influence on another public official which is outside the scope of his/ her duties.

The draft bill would, however, expressly apply where the official’s act/ omission that the briber intends to induce is “in the exercise of his official duties...whether or not within the official’s authorised competence.” The Argentine authorities confirm that the expression “in the exercise of his official duties” does not introduce additional requirements, but merely

addresses that the act/ omission should relate to the performance of the official's duties, in accordance with Article 1.4 c of the Convention and Commentary 19.

1.1.9 /1.1.10 in order to obtain or retain business or other improper advantage/ in the conduct of international business

Both article 258 bis and the draft bill require that the bribe given, etc. to a foreign public official be "related to a transaction of economic or commercial nature".

The Argentine authorities state that "an interest of an economic nature" is required thereunder. However, they confirm that article 258 bis and the draft bill would apply regardless if the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business, in accordance with Commentary 4.

The Argentine authorities confirm that "related to a transaction of economic or commercial nature" includes the purpose of obtaining or retaining business or other improper advantage. Moreover, it does not require it to be related to "international" business.

The Argentine authorities confirm that there is no exception for facilitation payments.

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”.

Complicity in the bribery of a foreign public official is established as a criminal offence under the general provisions of the APC.

Article 45 states that the following persons would be punishable by the same penalty as the perpetrator: 1) one who takes part in the commission of a criminal act; 2) one who provides assistance or co-operation without which the offence could not have been committed; and 3) one who directly abets another to commit a criminal act.

Pursuant to article 46, the following persons would be punishable by the penalty which is reduced to one third or a half from that of the full offence: 1) one who co-operates in any form in the commission of a criminal act; and 2) one who gives assistance by carrying out the preceding promise. The Argentine authorities confirm that the former includes all kinds of participation which is not essential, but facilitates the commission of the offence in any way, and thus, article 46 covers incitement, aiding and abetting, direct or indirect co-operation, and authorisation.

The Argentine authorities confirm that these provisions cover all forms of complicity required by the Convention including incitement, aiding and abetting or authorisation.

Thus, it would appear that the act of providing assistance, etc. without which the offence could not have been committed, is punishable by the same penalty as the full offence. Where the assistance, etc. only facilitates its commission, it is punishable under the mitigated penalty.

The Argentine authorities state that accomplices under these provisions are punishable regardless of whether the perpetrator is convicted of the offence.

1.3 Attempt and Conspiracy

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

Attempt

An attempt to commit every offence, including the offence of bribing a domestic or foreign public official, is punishable in Argentina under articles 42-44 of the APC. Pursuant thereto,

whoever begins the commission of an offence but does not complete it for circumstances beyond his or her will, is subject to the penalty reduced to one third or a half from that of the full offence. According to Argentina, both the case (1) where a briber offers or gives an advantage to a foreign public official, but the foreign public official does not become aware of it, and (2) where a briber offers an advantage to a foreign public official, but he/ she refuses it, constitute completed offences. The Argentine authorities consider a case as an attempt where a briber offers a bribe by mail, but the letter does not reach the public official.

Pursuant to article 43, where the offender “voluntarily desists from performing a crime”, he/ she shall be exempted from liability. The Argentine authorities state that this would apply to the case where a briber uses an intermediary to make a promise of a bribe or to deliver the bribe, but “voluntarily” halts the intermediary completing such a task.

Conspiracy

Conspiracy is not punishable under Argentine law. However, pursuant to article 210 of the APC, whoever takes part in an association or a group of three or more people having the purpose of committing an offence would be liable by the mere fact that the person belongs to that association, etc. (concept of “illicit association”). Under this provision, a member of the association, etc. is subject to imprisonment of 3-10 years, and the “head or organiser” is subject to imprisonment of no less than 5 years.

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 liability of legal persons for the bribery of a foreign public official”.

2.1 Criminal responsibility

The Argentine legal system does not establish criminal responsibility of legal persons.

However, the Argentine authorities state that they are currently preparing a draft bill establishing criminal liability of legal persons applicable to every offence including foreign bribery. According to the Argentine authorities, it will be ready to be proposed to the Congress by July 2001.

2.2 Non-criminal responsibility

Under the Argentine legal system there is no specific administrative liability of legal persons for bribery of a foreign public official.

However, the Argentine authorities state that under article 12 of the Charter of the General Inspectorate of Companies (Law No. 22.315), the General Inspectorate of Companies can impose administrative sanctions on entities such as corporations, associations and foundations as well as their directors, syndics, etc. for accounting offences. Penalties thereunder would be warning, publication of warning, or an administrative fine (See below 8.3 “Penalties”). In addition, Argentina states that where the bribery is connected with violation of anti-trust law, customs law, foreign exchange law, tax law, or money laundering law, it is possible to impose a monetary sanction on legal persons concerned. Moreover, they state that under the Charter of the General Inspectorate of Companies and other related laws (e.g. the Law on Business Associations), administrative fines or dissolution is available where the natural person acts beyond the scope of the charter of the company including bribing a foreign public official. The range of the administrative fines thereunder differs according to the category of legal

person. For instance, for companies in general, it is up to 6,801.47 Argentine Pesos⁸ under the Law on Business Associations. For companies which make public offers, it is 1,000-5,000,000 Argentine Pesos under the Act No.17.811. The Argentine authorities are of the opinion that the current Argentine legislation complies with the requirements of the Convention.

However, some issues of concern have been identified. Firstly, fines in connection with the violation of several aforementioned laws could be applicable only where the act in question violates one of these laws. Thus, they are not applicable to the offer or the promise of a bribe. Moreover, this would not allow for imposing sanctions on legal persons for the commission of the offence of foreign bribery in addition to those for these violations. Secondly, although these sanctions are also applicable to domestic bribery cases, Argentina explains that there has been no case where dissolution is applied in connection with economic transactions including domestic bribery. Thirdly, the amount of the administrative fine under the Law on Business Associations, etc. is quite low, or is only applicable to very limited category of legal persons. Therefore, it would appear that non-criminal liability under the current Argentine legal system is neither certain nor effective. Thus, together with the lack of criminal responsibility of legal persons, it is not in conformity with the requirements of Articles 2 and 3 of the Convention.

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 “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 Official

Pursuant to articles 258 and 259 of the APC, a natural person is liable for various forms of bribery of domestic public officials, in consequence of the reverse application of the passive bribery offences to active bribery. Thus, pursuant to articles 258 and 259, each following penalty is applicable to a natural person for the following domestic bribery offences:

8 1 Argentine Peso is valued at 1 U.S. dollar.

1. 1-6 years of imprisonment (“prison”) for: (a) the bribery of a public official related to his/ her duties⁹, and (b) the bribery of a person in order to unduly exert influence on a public official related to the his/ her duties¹⁰;
2. 2-6 years of imprisonment (“prison”) for: (a) the bribery of a judge of the Judicial Power or the Office of the Attorney General for obtaining the issuance of a judgement, etc.¹¹, (b) the bribery of a person in order to unduly exert influence on a judge of the Judicial Power, etc. for obtaining the issuance of a judgement, etc.¹², and (c) the bribery of 1.(a) and (b) above, where the offender is a public official¹³;
3. 3-10 years of imprisonment (“prison”) for the bribery of 2.(a) and (b) above, where the offender is a public official¹⁴.
4. 1 month-1 year of imprisonment (“prison”) for the bribery of a public official where there is no connection between the bribe and the act/ omission of the public official¹⁵. This applies only to the act of offering and giving of a bribe. According to Argentina, the bribe (i.e. “gift”) must be of an “economic significance”.

With respect to foreign bribery, imprisonment (“reclusion”) for 1-6 years and a “perpetual special disqualification to hold a public office” are applicable to a natural person.¹⁶

The Argentine authorities state that the significant differences between the two different imprisonment penalties (i.e. “prison” and “reclusion”) are (1) suspension of imprisonment is available only with “prison” of less than 3 years¹⁷, and (2) probation including suspension of judicial proceedings is possible only with “prison”.

Pursuant to article 22b of the APC, with respect to both domestic and foreign bribery offences, where the offence is committed “with the aim of monetary gain” a fine up to 90,000 Argentine Pesos¹⁸ may be imposed in addition to the imprisonment.

9 See article 256, 258 of the APC.

10 See article 256 bis (first paragraph), 258 of the APC.

11 See article 257, 258 of the APC.

12 See article 256 bis (second paragraph), 258 of the APC.

13 See article 256, 256 bis (first paragraph), 258 of the APC.

14 See article 256 bis (second paragraph), 257, 258 of the APC.

15 See article 259 of the APC.

16 See article 258 bis of the APC.

17 See article 26 of the APC.

18 1 Argentine Peso is valued at 1 U.S. dollar.

While the sanction for foreign bribery is of a more severe nature, the range of sanctions for foreign bribery offence is lower than those of domestic bribery offences (e.g. bribery of a judge, where the offender is a public official)¹⁹.

Articles 40 and 41 of the APC provide for guidelines for determining the severity of sanctions in each case. Pursuant thereto, the nature of the act, the means used to perform the act, the danger and the damage caused, purpose of the crime, etc. are factors in determining the sanctions.

3.3 Penalties and Mutual Legal Assistance

Pursuant to the International Co-operation in Criminal Matters Act (ICCMA)²⁰, which is applicable where there is no applicable treaty, mutual legal assistance is not conditional upon the length of the term of imprisonment provided for in the criminal law of either Argentina or the requesting state. Argentina confirms that a treaty-based MLA is also not conditional on such requirements.

3.4 Penalties and Extradition

Pursuant to article 6 of the ICCMA, which is applicable where there is no applicable treaty on extradition, the offence for which the extradition is requested must constitute an offence subject to a penalty of imprisonment whose average of the maximum term and the minimum term is at least 1 year under the law of both Argentina and the requesting state. In the case of Argentina (i.e. 1-6 year of imprisonment for foreign bribery), the average of the imprisonment sanction for foreign bribery offence is 3.5 years and therefore, fulfils this threshold. The Argentine authorities state that where the imprisonment sanction of the requesting state does not contain the minimum term, the “average” is calculated as half the term of the maximum. In addition, they state that where the requesting state has both fine and imprisonment sanctions for this offence, it is sufficient if the term of the imprisonment meets this requirement.

If the request is for an execution of a sentence, the sentence to be served shall be imprisonment of no less than 1 year at the time of the request.

According to Argentina, in case of treaty-based extradition, the requirement depends on each treaty, but basically, “the rule of one year” (i.e. the average of the maximum and the minimum terms equal to at least 1 year in both states) applies.

19 However, the imprisonment sanctions for offences such as theft (i.e. 1 month-6 years), fraud (i.e. 1 month-6 years), embezzlement (i.e. 2-10 years) and extortion (i.e. 5-10 years) are comparable to the foreign bribery offence.

20 This Act was amended by the Statute on Mutual Legal Assistance and Extradition (Law No 24.767).

3.5 Non-Criminal Sanctions for Legal Persons

As mentioned above in 2.2, there are no administrative sanctions for legal persons for the offence of bribery of a foreign public official.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

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

Forfeiture

Article 23 of the APC, which was amended by Law No.25.188, provides for forfeiture upon conviction, which states:

“The conviction entails the loss in favour of the National State, of the Provinces or the Municipalities, except for the compensation rights from the person affected by the offence or other third parties, of the things used in order to commit the crime and the things or benefits which are the product or advantage of the crime.

If those things are hazardous to public safety, forfeiture should be ordered, notwithstanding the affection of third parties, except their right of compensation, if they acted in good faith.

Whenever the perpetrator or accomplices acted on behalf of someone else, or as organs, members or administrators of a legal entity and the product or the advantage of the offence has benefited the principal or the legal entity, forfeiture will be directed towards them.

When the produce or the advantage of the offence would have benefited a third person for free, forfeiture would be headed towards the said person.

If the forfeited good has any useful or cultural value for any official or public welfare entity, either National, Provincial or Municipal authorities can order the goods to be delivered to these entities. If that is not the case, and the goods have commercial value, these authorities may order them to be sold. If the goods are illicit in nature, destruction must be ordered.”

Pursuant thereto, forfeiture of (1) “things” used in order to commit the crime, and (2) “things” or “benefits” which are the product or advantage of the crime, is possible. The former covers the bribe and the latter covers the proceeds of the bribe in respect of the foreign bribery offence (i.e. active bribery). The Argentine authorities confirm that “things or benefits” in the latter include intangible benefits. Moreover, they confirm that bribes in intangible forms are covered by “things” as long as they are of pecuniary nature.

Where “things” are “hazardous to public safety”, forfeiture is mandatory (second paragraph of article 23). However, Argentina states that “thing .. hazardous to public safety” includes those possessions which are hazardous for public safety, such as fire arms, illegal drugs, etc. and would not include bribes or its proceeds.

The Argentine authorities confirm that forfeiture of other “things” or “benefits” under the first paragraph, which is applicable to bribes and its proceeds in respect of the foreign bribery offence, is also mandatory.

Moreover, they confirm that, forfeiture from the legal entity under the third paragraph (i.e. where the offender or the accomplice acted on behalf of a third party or as “organs, members, or administrators” of a legal entity and if it obtained benefit from the offence), is mandatory. According to them, it is sufficient for applying this forfeiture if the natural person (i.e. the briber) is someone who can represent the company in respect of the transactions in question; he/ she does not have to be someone in a high managerial position.

The Argentine authorities state that where forfeiture is not possible for the reason that the bribe or proceeds belong to a third party not involved in the offence, an additional fine up to 90,000 Argentine Pesos (article 22 bis of the APC) may be imposed as a monetary sanction of comparable effect.

Pre-trial Seizure

Pursuant to article 231 of the Argentine Code of Criminal Procedure, the judge may order seizure of “objects”, related to crime, subject to confiscation or that could be used as evidence. And in “urgent cases”, the police may take such measures. The Argentine authorities confirm that “objects” covers both the bribe and its proceeds in respect of active bribery. Pursuant to article 518, the judge may order seizure of the “goods” of the defendant, or when appropriate, of “that claimed by civil channels” to guarantee the monetary sanction, civil compensation and costs after the approval of the indictment. Where there is a “risk of delay” such measures are applicable before the approval of the indictment.

Civil remedies may be claimed by a “victim” of the offence (article 29 of APC). According to Argentina, such claims, which take place either in the criminal trial or in the civil court after conviction, may be raised by a competitor who lost business or a contract due to the bribery, or by the company to which the briber belongs if it was forfeited of any property due to the bribery, but was unaware of it.

3.8 Civil Penalties and Administrative Sanctions

Pursuant to article 136 of the Regulations for Purchase, Transfer, and Contracting Goods and Services with the State of Argentina (Decree No. 436/ 2000), any person against whom a “legal action has been brought” for an offence including the one included in the OAS

Convention may not enter into a contract with Argentina. According to Argentina, no upper limit for the term of this sanction is provided by law. The Argentine authorities state that it is only applicable to natural persons having been indicted or convicted of the offence. Also, it would appear that it does not apply where the act is outside the scope of the OAS Convention.

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.

Article 1.1 of the APC provides for the rules on territorial jurisdiction. Pursuant thereto, the APC applies to offences (a) which are committed in the territory of Argentina or in the “areas subject to its jurisdiction” and (b) the effects of which will take place in the territory of Argentina or in the “areas subject to its jurisdiction”. Under Argentine law, “areas subject to its jurisdiction” includes on board an Argentine vessels in the high sea or an Argentine aircraft, etc.

The APC does not expressly elaborate on the degree of the physical connection that is required in order to be able to establish territorial jurisdiction. However, the Argentine authorities state that territorial jurisdiction is triggered where the offence takes place “partially” in Argentina. They confirm that any action performed toward the accomplishment of an offence would trigger territorial jurisdiction and a telephone call, fax or e-mail emanating from Argentina would be sufficient.

Argentina explains that with respect to foreign bribery, the “effects” could be the undue benefits or contracts obtained in exchange for the bribe. The Argentine authorities confirm that “effects” take place in Argentina not only where the benefits are sent to Argentina, but also where there are “side effects” in Argentina. For instance, Argentina states that it would trigger territorial jurisdiction in the following cases: (1) where the company which benefited from bribing has a branch office or was established in Argentina, and (2) where the contract obtained in exchange of the bribe is executed in Argentina.

4.2 Nationality Jurisdiction and Additional 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 requirement 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”.

The APC does not have nationality jurisdiction which applies generally to offences committed abroad. However, pursuant to article 1.2 of the APC, it applies to offences committed abroad where the offence is committed by “agents or employees of Argentine authorities performing their duties”. The Argentine authorities state that this rule applies where the offence is committed by public officials when they are performing official duties abroad. They confirm that “Argentine authorities” include public agencies or public enterprises.

In addition, Argentina is a party to several treaties²¹, which, according to Argentina, establishes nationality jurisdiction. However, Argentina confirms that these treaties do not apply to establish jurisdiction over Argentine nationals who commit the offence of bribery of a foreign public official abroad.

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 Argentine authorities state that there are no provisions on the consultation procedures under the Argentine law. However, they state that consultation with Parties is possible through diplomatic channels. However, Argentina has no experience on this matter.

21 Those include United Nations Convention against Illicit traffic in Narcotic Drugs and Psychotropic Substances, Rome Statute of the International Criminal Court and Treaty on International Criminal Law.

4.4 Review of Current Basis for Jurisdiction

The Argentine authorities state that the territorial jurisdiction under the Argentine legal system is a comprehensive one that it covers all cases that take place totally or partially in Argentina or bring any consequence thereto.

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

There are no special rules or principles governing investigations and prosecutions of bribery of foreign public officials. The investigation and prosecution of this crime could be initiated, suspended and terminated in the general circumstances provided for in the APC and the Argentine Code of Criminal Procedure.

The principle of mandatory prosecution prevails in Argentina. Pursuant to article 71 of the APC, all criminal actions “must” be brought *ex officio* except those that must be brought privately, or “private actions”²² which are not relevant to the foreign bribery offence. Thus, the bribery of a foreign public official is prosecuted *ex officio*. The Argentine authorities state that law enforcement officers are obliged to initiate proceedings as soon as they have acknowledged that there is a suspicion with probability that an offence has been committed. In addition, pursuant to article 29 of the Constitutional Law of the Office of the Attorney General (Law No. 24.946), which regulates duties of public prosecutors, proceedings for offences prosecuted *ex officio* shall be instituted immediately after having been notified of it. In addition, pursuant thereto, the proceedings shall not be suspended, interrupted, or terminated unless provided for by law.

Pursuant to articles 186, 188 and 195 of the Argentine Code of Criminal Procedure, the police, prosecutors and judges may receive a notice of an offence committed. If the police or the judge is notified of it, they must inform the public prosecutor of the circumstances in order that he/ she initiates investigative proceedings. If the prosecutor receives the first notice, he/ she must notify the circumstances to the judge. The Argentine authorities confirm

²² The exceptions under articles 72 and 73 include: 1) minor injuries caused by wilful misconduct or negligence, 2) libel or defamation of character, and 3) unfair competition, as provided in article 159.

that there is no limitation for persons to notify an offence, upon which prosecutors initiate proceedings²³. Thus, a complaint from a competitor is sufficient as such a notification.

Pursuant to article 59 of the APC, criminal proceedings shall be terminated under following circumstances: 1) the death of the accused, 2) amnesty being granted, 3) expiry of the statute of limitations, and 4) a waiver of the prosecution in private legal actions (not relevant to the offence of bribery). The Argentine authorities confirm that these are the only circumstances under which criminal proceedings could be terminated.

However, pursuant to the Argentine Code of Criminal Procedure, where the prosecutor decides that (1) there is no criminal offence involved, or (2) there is no merit for trial²⁴, the judge may dismiss the case²⁵. On the other hand, where the judge considers there is no criminal offence involved the judge may dismiss the case. Prosecutors can appeal this decision²⁶. The Argentine authorities state such proceedings for dismissal could take place at any stage of the investigation and the prosecution.

The Argentine authorities confirm that permission or authorisation of the Attorney General is not required for investigation and prosecution of the foreign bribery offence as well as other offences.

5.2 Considerations such as National Economic Interest

Argentina confirms that any considerations of the factors listed in Article 5 of the Convention are excluded in the investigation and prosecution of cases of bribery since as mentioned above in 5.1, criminal proceedings could be terminated only under the circumstances provided for in article 59 of the APC.

ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitations 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.

Statute of Limitations

23 Argentina states that even an anonymous notice would be sufficient.

24 Pursuant to article 336 of the Argentine Code of Criminal Procedure, this includes where the person does not possess criminal capacity and where there is a pardon excuse. Argentina states that pardon excuse is applicable to specific offences such as rape, thefts between relatives, etc. and is not relevant to the foreign bribery offence.

25 See article 348 of the Argentine Code of Criminal Procedure.

26 See articles 82, 180 and 195 of the Argentine Code of Criminal Procedure.

Argentine penal law provides for limitations periods for every offence, including bribery, and the length of the periods is related to the penalty provided for each offence. Pursuant to article 62 of the APC, for the foreign bribery offence, the limitation period is identical to that of the maximum term of imprisonment. Therefore, it is 6 years for the foreign bribery offence under article 258 bis. The period starts running as of midnight of the date of the commission of the offence. Where the offence is of continuous nature, it starts to run when it is no longer committed. However, the Argentine authorities confirm that the foreign bribery offence is not of continuous nature. According to them, the offence is committed when the act of offering, promising, or giving a bribe takes place.

Article 67 provides for the suspension and the interruption of the limitation period. Pursuant thereto, it is suspended in case of offences “for which a ruling is petitioned for preliminarily or harmful issues, which must be judged in another case”. The Argentine authorities state that this is relevant, for instance, to family matters where a previous “ruling” by a family judge is required before initiating criminal proceedings, but not to the foreign bribery offence.

It is suspended with respect to offences including the foreign bribery offence, insofar as “any of those who had taken part are performing the duties of a public office”. The Argentine authorities state that “those who had taken part” only applies to the offender, and therefore, with respect to the foreign bribery offence, it would only be applicable where the briber himself/ herself is an Argentine public official. In such case, the limitation period does not run (i.e. suspends) while the offender remains a public official. There is no upper limit.

In addition, it is interrupted when another offence is committed or “due to the results of the ruling”. The Argentine authorities state that “the results of the ruling” are legal actions that have direct consequence on the proceedings, for example, interrogation of the indicted and a formal judicial indictment. The limitation period is interrupted for as long as these legal actions are being carried out, following which a new limitation period begins.

Limitation Period for Investigation

There is a limitation period for investigation superimposed on the statute of limitations²⁷. The limitation period is 4 months for concluding the investigation. However, it may be extended due to the complexity or the importance of the case. The Argentine authorities state that cases of bribery of foreign public officials may be included in those considered as complex and/ or important which deserve extension. The Argentine authorities confirm that this deadline period could be extended without upper limit until the expiry of the statute of limitations (i.e. 6 years for foreign bribery). Moreover, they confirm that prosecutors are not obliged to conclude investigations within this deadline period and its expiry does not result in terminating the proceedings.

27 See article 207 of the Argentine Code of Criminal Procedure.

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.

Money laundering offences

Articles 277-279 of the APC, which were amended by the Statute on Money Laundering (Law No. 25.246), contain the relevant provisions on money laundering in respect of domestic and foreign bribery. Articles 277 and 278 enumerate acts of money laundering, etc. that are punishable thereunder. The Argentine authorities explain that domestic and foreign bribery offences qualify as predicate offences under articles 277-279. However, these articles do not apply to the perpetrator of the predicate offence (i.e. self-laundering).

Article 277.1 states that:

Any person that, after a crime has been committed, in which he/she has not taken part, may be condemned to a prison sentence from 6 months to 3 years in the following cases:

- (a) Aiding and abetting another party to avoid investigation by the authorities or hindering the procedures of the latter.*
- (b) Concealing, altering or removing traces, evidence or instruments of the offence or crime or aiding or abetting the perpetrator or accomplice in concealing, altering or removing these items.*
- (c) Acquiring, harbouring or concealing money, objects or documents obtained from an offence or crime.*
- (d) Not reporting a crime or not identifying the perpetrator or accomplice that he/she is already aware has taken place, when such person is bound to bring about criminal prosecution for an offence of this kind.*
- (e) Securing or aiding and abetting the perpetrator or accomplice to secure the product or benefit of the crime.*

The Argentine authorities state that “traces, evidence or instruments of the offence” (article 277.1.b), “money, objects or documents obtained from an offence”(article 277.1.c), and “the product or benefit of the crime” (article 277.1.e) include both the bribe and its proceeds including those in intangible forms, in respect of active bribery.

Pursuant to article 277.2, the penalty would double where the perpetrator commits the offence for obtaining monetary benefits or habitually takes part in committing the offence of concealment.

Pursuant to article 278.1.a, a person who converts, transfers, administers, sells, encumbers or uses money or any kind of goods, which in any manner “stem from a crime” is subject to penalty of imprisonment for 2-10 years and a fine of 2-10 times of the amount of such transactions that disguise the illicit origins of the money, etc. where the total amount of transactions exceeds 50,000 Argentine Pesos. The term of imprisonment would be no less than 5 years where the perpetrator carries out such transactions habitually or as a member of an organisation, etc. that continually commits offences of the same nature. Pursuant to article 278.1.c, where the total amount of such transactions is 50,000 Argentine Pesos or less, he/ she is punishable pursuant to the rules under article 277²⁸. Pursuant to article 278.2, a person who receives “money or other goods” from any illegal source in order to “use them in operation with an apparently lawful purpose” is liable pursuant to the rules under article 277. The Argentine authorities state that this offence is completed where a person receives the proceeds, etc. for the purpose of “laundering” them through transactions to disguise their origin as legal.

The Argentine authorities state that “stem from a crime” (article 278.1) and “money or other goods from any illegal source” (article 278.3) cover both the bribe and its proceeds including those in intangible forms, in respect of active bribery.

Under article 279.3, where a public official, etc. commits an offence under articles 277 or 278.1, when performing his/ her duties, he/ she is subject to “special disqualification” for 3-10 years in addition to imprisonment, etc.

Despite these provisions, article 279.1 states that where the penalties for the predicate offence are less severe than those for money laundering offences under articles 277-279, the penalties for such acts would be reduced to those of the predicate offence²⁹.

The Argentine authorities confirm that under these money laundering offences (articles 277-279), the offender must know that the benefit, etc. has a criminal origin; however, he/ she does not have to know that the benefit, etc. was gained through a specific offence.

Article 277.3 provides for a defence, which exempts the offender from liability, where he/ she commits an act enumerated in articles 277.1 and 278 on behalf of his/ her (1) spouse, (2) relative who does not exceed the fourth blood relation or second level kinship, (3) “close friend”, or (4) “person for whom special favour is owed”. This defence is not applicable

28 The Argentine authorities state that where an act is punishable “under the rules of 277”, articles 277.2 and 277.3 also apply.

29 Thus, it appears that under this rule, the penalty for article 278.1.a would be reduced where the predicate offences are the foreign bribery offence (i.e. imprisonment for 1-6 years) and the domestic bribery offences other than the aggravated one under article 258 second paragraph (i.e. imprisonment for 1-6 years, 2-6 years or 1 month-1 year), and the penalties for articles 277.1, 278.1.c and 278.3 would be reduced where the predicate offence is the mitigated domestic bribery under article 259 (i.e. imprisonment for 1 month-1 year) (See the discussion above in 3.1/ 3.2).

where the act fulfils article 277.1.e or the purpose of the act is obtaining monetary benefits. The Argentine authorities state that one is deemed a “close friend” where the level of intimacy goes beyond a mere friendship. They state that one is deemed a “person for whom special favour is owed” where there is a situation preceding the offence that drives the offender to act in favour of this person. However, they state that these two are “very peculiar, rare cases”.

The Argentine authorities confirm that articles 277-279 apply regardless of where the bribery takes place. However, article 279.4 states that these provisions are applicable even when the predicate offence was committed outside the “special”³⁰ application of this Code, in the case when it “had also been liable to a sentence in the place it was committed” The Argentine authorities state that article 279.4 requires that the predicate offence constitute an offence in the place it was committed (dual criminality). They confirm that this condition is deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute.

The Argentine authorities confirm that an act of self-laundering is not punishable under Argentine law.

Administrative Sanctions

The Statute on Money Laundering (Law No. 25.246) established the Financial Information Unit³¹ (FIU), which is in charge of requesting and receiving reports of suspicious transactions from several organisations and persons (e.g. financial entities, insurance companies).

Under this law, the FIU is also empowered to impose administrative monetary sanctions when natural or legal persons fail to inform about suspicious transactions or violate the law³². Moreover, the FIU notifies the Attorney General if it suspects an offence.

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

30 The Argentine authorities state that the term “special” (original term “*especial*”) is a mistake in the enactment. They are planning to amend the law to correct this term to “territorial” (original term “*espacial*”).

31 In the previous explanation it was translated “Financial Intellectual Unit”.

32 For instance, pursuant thereto, an administrative fine is imposed on legal persons whose agent committed an act enumerated in article 278.1 of the APC. The fine ranges from 2-10 times the value of the operations involved. Where the agent commits the aforementioned act with negligence or recklessness, the legal person is subject to an administrative fine that ranges from 20-60% of the value of the operations involved.

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 and Auditing Requirements/ Companies Subject to Requirements

Accounting Standards

The Argentine authorities state that the Law on Business Associations (Law No. 19.550) provides the general framework, including accounting standards, which companies have to comply with. Pursuant thereto, entities subject to obligations under this law include: general partnerships, statutory limited partnerships, limited liability companies, corporations, and companies registered abroad that establish branch offices, etc. in Argentina. Moreover, the Code of Commerce provides for accounting requirements applicable to “traders”, which is defined in article 1 as “all natural persons, who, having legal capacity to enter into contracts, exercise on their own acts of commerce, in a manner that becomes an usual profession” and to co-operative associations. Foundations, civil associations, mutual associations and public entities (including state-owned or state-controlled companies) are not subject to the requirements under these laws; however, they are subject to accounting standards or governmental supervision under specific law.

Pursuant to article 120 of the Law on Business Associations, entities subject to this law are obliged to have separate accountings, and to submit them to the relevant bodies provided for in the law. Pursuant to article 3 of the Law No. 22.315, corporations (except the ones controlled by the National Securities Commission), savings and loan companies, limited liability companies, etc. submit financial statements to the General Inspectorate of Companies. Moreover, under the Law on Business Associations, joint stock companies and limited liability companies whose stock capital exceeds 2,100,000 Argentine Pesos must submit annual financial statements, which include a balance sheet, profit and loss account and additional notes³³ (articles 62-65). The directors of companies must provide information in the annual report on the company situation³⁴ (article 66). In addition, registered offices of companies must keep copies of the balance sheet, profit and loss account and the statement of the net equity evolution, as well as the additional notes and information and make these documents available to partners and shareholders. Furthermore, “copies of the management”, annual reports and the auditor’s report shall also be available “when appropriate” (article 67).

Under the Code of Commerce, all “traders” must report their transactions and keep commercial accounts in which a true description and clear justification for each transaction are recorded (article 43). Traders must keep “book of original entries” and “inventory and balance sheet” (article 44). All transactions shall be entered in the book of original entries on a daily basis in chronological order and balance sheets must reflect a true and accurate financial situation of the company (articles 45, 51). In keeping books, insertion, deletion and

33 Additional notes refer to information including criteria used for valuing goods for sale, changes in the accounting procedures from the previous financial year.

34 Such information would include those such as reasons for substantial variations in the asset and liability entries, and explanations regarding the extraordinary expenses and income and their source.

modification of entries, etc. are forbidden (article 54). Books “considered as indispensable” under the Code of Commerce shall be submitted to the Companies Registry of the domicile (article 53).

In addition, Argentine law provides for accounting requirements which are applicable to specific categories of entities. For instance, with respect to insurance companies, there are requirements under the Insurance Companies and their Control (Law No. 20.091) to record and keep books, submit annual report, general balance sheet, profit and loss account, etc. to the supervisory authorities and publish annual balance sheet. With respect to financial entities, under the Statute on Financial Entities (Law No. 21.526) and the regulations, accounting records, books, correspondences, documents and papers of the financial entities shall be available for auditing, etc. by officers appointed by the Central Bank of the Argentine Republic, which is the supervisory body of financial entities³⁵.

The Argentine authorities confirm that pursuant to these requirements, the establishment of off-the-books accounts, the making of off-the books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents are prohibited.

Argentina states that financial statements and auditor’s report which are submitted to the public supervisory bodies (e.g. the General Inspectorate of Companies) are publicly available.

Audits

The Argentine authorities state that in general, entities are subject to auditing requirements under different legal norms. Some of them are subject to internal audits and some of them are to independent audits or external audits, and also to governmental supervision. For instance, corporations are subject to internal audits and those who fulfil one of the conditions under article 299 of the Law on Business Associations (e.g. operate licenses or public services, have a capital stock exceeding 2,100,000 Argentine Pesos) are also subject to governmental supervision³⁶. Mutual associations are subject to internal audits and governmental supervision³⁷. Cooperative associations³⁸ and financial entities³⁹ are subject to external audits and governmental supervision. In addition, financial statements submitted to the General

35 The Argentine authorities state that insurance companies and financial entities are subject to these requirements in addition to those under the Law on Business Associations.

36 See the Law on Business Associations.

37 See the Law No. 20.321 and the Decree 721/00.

38 See the Law No. 20.337.

39 See the Law No. 21.526 and the Updated Ordered Text of the Accounting Informative System for Quarterly/Annual Publication.

Inspectorate of Companies (see the discussion above under “Accounting Requirements”) must be accompanied by an opinion of a public accountant duly registered⁴⁰.

According to Argentina, with respect to governmental supervisions, the independence of auditors is guaranteed since the auditors are public officials that have no relationship with the audited entity. With respect to “syndics” (i.e. internal auditors), it is guaranteed indirectly, to the extent that he/ she will be liable under the APC (article 300.3, see below 8.3 “Penalties”) if he/ she authorises, etc. falsification of the company. In addition, the Law on Business Associations contains some provisions on disqualification in case of conflict of interests. Moreover, the Code of Ethics⁴¹, which is the regulation for accountants, states that, the professionals have to act always with integrity, veracity, independence and objectivity. It also provides for several norms to avoid conflict of interests⁴². Additionally, the Technical Resolution No. 7 of the Argentine Federation of the Professional Council of Economic Sciences states that external auditors must be independent from the entities being audited. It also provides for some cases of conflict of interests where the independence would not be guaranteed.

Under the Statute on Money Laundering (Law No. 25.246), professionals whose activities are regulated by the Professional Councils of Economic Sciences are obliged to report to the Financial Information Unity (FIU) any suspicious transactions, irrespective of the amount involved⁴³. In addition, auditors are required to report suspected criminal activities to the management of the entity⁴⁴. However, management is not obliged to report them to the competent authorities. Additionally, under the Law No. 22.315 the General Inspectorate of Companies can report suspected criminal activities and submit complaints to the police authorities, etc.

8.3 Penalties

Article 12 of the Charter of the General Inspectorate of Companies (CGIC) states that “the General Inspectorate of Companies shall impose penalties on the corporations, associations and foundations, on their directors, syndics or administrators and to every individual or entity that does not fulfil its obligation of furnishing information, provides false data or that in any way, infringes the obligations established by law, the by-laws or regulations, or hinders the performance of their duties.” The Argentine authorities confirm that such penalties are

40 See the Resolution 12/86 from the General Inspectorate of Companies.

41 This code was approved by the Professional Council of Economic Sciences.

42 For instance, the auditor’s fees cannot be subject to the result of the report.

43 An administrative fine is imposed for violating such obligation. A fine (ranges from 1-10 times the value of the transaction involved in the offence) is imposed by the FIU.

44 Argentina states that if the auditor fails to report suspected criminal activities, he/ she may be prosecuted for “concealment”.

applicable to omissions and falsifications in respect of the books, records, accounts and financial statements in accordance with Article 8.2 of the Convention.

Pursuant to article 13 of the CGIC and article 302 of the Law on Business Associations, penalties for corporations and companies organised abroad which ordinarily conduct business in Argentina would be an administrative fine up to 6,801.47 Argentine Pesos or warning, etc. A fine may also be imposed on their directors and syndics. Pursuant to article 14 of the CGIC, penalties for companies engaged in capitalisation and savings transactions, associations and foundations would be an administrative fine up to 115,438,623 Australes⁴⁵ or warning, etc.

In addition, article 300.3 of the APC states that “imprisonment from 6 months to 2 years shall be imposed on the incorporator, director, administrator, liquidator or syndic of a corporation or operating company or another legal person who, knowingly publishes, certifies or authorises an either false or incomplete inventory, balance sheet, profit and loss accounts, or the related reports, minutes, annual reports, or informs at the shareholders’ meeting, falsely or reluctantly, on material events to assess the company’s financial position, whatever the purpose sought when verifying them may be.”

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 criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

45 Approximately, 11,543.86 Argentine Pesos (1 Argentine Peso is valued at 10,000 Australes). 1 Argentine Peso is valued at 1 U.S. dollar.

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1/9.2 Criminal Matters/ Dual Criminality

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.

Argentina may provide mutual legal assistance on criminal matters on the basis of bilateral and multilateral treaties⁴⁶ to which Argentina is a party.

In the absence of a treaty, Argentina may provide MLA pursuant to the provisions of the International Co-operation in Criminal Matters Act (ICCMA) on the basis of reciprocity. Pursuant to article 68, MLA shall be provided even where the act for which assistance is requested does not constitute an offence in Argentina (non-requirement of dual criminality). However, where the request for MLA involves coercive measures⁴⁷ such as search and seizure, surveillance and wire-tapping, etc., provision of the assistance is conditional upon dual criminality. The Argentine authorities confirm that dual criminality is deemed to exist if the offence for which assistance is sought is within the scope of the Convention.

Argentina confirms that it can provide MLA, including coercive measures, in response to a request concerning criminal proceedings against a legal person for an offence within the scope of the Convention.

The Argentine authorities state that the central authority which decides on the action to be taken in response to a request of MLA is the Ministry of Justice and Human Rights or the Ministry of Foreign Affairs. It transfers the request to the competent authorities after analysing “formal aspects” of the request⁴⁸.

Article 74 of the ICCMA states that should the assistance require the participation of a judge, the Attorney General’s Office shall take part in the legal process. The Argentine authorities

46 Argentina is a party to the Inter-American Convention against Corruption, Protocol of Mutual Legal Assistance in Criminal Matters of MERCOSUR and Inter-American Convention on the International Return of Children. In addition, Argentina has concluded bilateral treaties on MLA with Australia, Brazil, Columbia, Hungary, Paraguay, Peru, Spain, Uruguay and U.S.A.

47 The forms of MLA that are available in addition to coercive measures include summoning persons, hearing the accused, witness or expert and providing official information or documents.

48 The same procedure applies to MLA on non-criminal matters.

state that judicial decisions are usually necessary for providing assistance “in most occasions”⁴⁹.

9.1.2 Non-criminal Matters

Argentina is a party to the Civil Procedure Convention and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which, according to the Argentine authorities, are themselves integrated into part of domestic legislation. The Argentine authorities state that under these legal instruments, Argentina may provide mutual legal assistance for non-criminal proceedings. Moreover, they state that they may provide MLA on non-criminal matters to countries which are party to neither convention on the basis of ICCMA.

The Argentine authorities state that there is no special requirements for providing MLA to other Parties in relation to non-criminal proceedings against a legal person for the purpose of establishing its liability or imposing on it sanctions for the bribery of a foreign public official. According to Argentina, it is possible to use coercive measures to provide assistance via the decision of a judge.

9.3 Bank Secrecy

Under article 39 of the Law No. 21.526, “institutions”⁵⁰ shall not disclose information on transactions of their clients. However, it also states that where judges require information regarding “legal matters” in accordance with the relevant legislation, bank secrecy rules may be relaxed in order to provide reports. The Argentine authorities confirm that this covers obtaining information regarding bank accounts such as the account holder’s name and the details of transactions.

The Argentine authorities confirm that “legal matters” include proceedings for providing MLA in relation to non-criminal proceedings against a legal person for bribery as well as in relation to criminal proceedings. In addition, it is also possible to provide information to the General Taxation Bureau for tax purpose where there is a decision of the judge to disclose the information. The Argentina authorities confirm that there are no additional conditions to be met in order for the judge to require such information.

Moreover, Argentina states that the judge may order coercive measures for obtaining information.

49 According to Argentina, such decisions include a decision on which means to use to provide certain assistance

50 Pursuant to article 2 of the Law No. 21.526, institutions subject to bank secrecy are commercial banks, investment banks, mortgage banks, finance companies, savings and loans corporations for housing or other real property and credit unions.

10. ARTICLE 10. EXTRADITION

10.1 /10.2 Extradition for Bribery of a Foreign Public Official/ Legal Basis for Extradition

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. 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”.

Argentina may grant extradition in relation to the offence of bribing a foreign public official on the basis of bilateral or multilateral treaties⁵¹, or on the basis of reciprocity under the provisions of the ICCMA where there is no applicable treaty.

The procedure in response to the request for extradition involves the following three steps:

1. The Executive Power decides whether to “accept” the request for extradition. Pursuant to article 23 of the ICCMA, it may accept the request where: (i) the crime for which the extradition is requested is punishable with a higher penalty, falls within the jurisdiction of the requesting state but not of Argentina, or (ii) the requesting state is in a better position to obtain evidence of the crime. According to Argentina, this decision is appealable. Argentina states that it determines whether the condition of “higher penalty” is met by comparison between the maximum terms of penalties.
2. The court decides whether to grant extradition pursuant to the conditions set forth in the ICCMA. According to Argentina, this decision is appealable.
3. The Executive Power makes a final decision. Argentina confirms that this decision is also appealable.

In addition, as mentioned above (see 3.4 “Penalties and Extradition”), pursuant to article 6 of the ICCMA, the act for which extradition is sought must constitute an offence subject to certain term of imprisonment in both Argentina and the requesting state. Where the purpose of the extradition is to execute a sentence imposed on the person in question, the sentence to be served shall be imprisonment for no less than 1 year.

51 Argentina is a party to Treaty on International Criminal Law, Montevideo, 1889, Inter-American Convention on Extradition, Inter-American Convention against Corruption, Rome Statute of the International Criminal Court and several other multilateral treaties on extradition in respect of other specific offences. In addition, Argentina has concluded bilateral treaties on extradition with Australia, Belgium, Bolivia, Brazil, Chile, Italy, Korea, Netherlands, Paraguay, Portugal, Spain, Switzerland, UK and Ireland, and U.S.A.

Moreover, articles 8, 10 and 11 of the ICCMA provide for circumstances under which extradition shall not be granted. Such circumstances are in particular⁵²:

- ? the offence for which extradition is sought is of a political nature⁵³(article 8.a) ;
- ? the person was prosecuted in the requesting state by a “special committee”⁵⁴ in contravention of section 18 of the Argentine Constitution (article 8.c);
- ? there are “special reasons of national sovereignty, security or public order or other interests essential to Argentina” (article 10). Argentina confirms that this does not include protection of national economic interests;
- ? criminal proceedings or the imposition of the penalty against the person in question is no longer possible under the law of the requesting state (article 11.a);

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. Where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

Pursuant to article 12 of the ICCMA, where extradition of an Argentine citizen is requested, he/ she may choose either to be extradited or to be tried in Argentina unless applicable treaty provides otherwise. Where he/ she chooses to be tried in Argentina, extradition shall be denied. However, in that case, he/ she shall be tried in Argentina as far as the requesting state co-operates to decline its jurisdiction over him/ her and transfers relevant evidence, etc.

10.5 Dual Criminality

52 Other circumstances under which extradition shall be refused are: (i) the offence is a military offence, (ii) there is sufficient evidence that extradition is sought for persecution for the reason of political beliefs, nationality, race, gender, etc., or there are grounds to assume that his/ her rights to defence may be endangered for such reasons, (iii) there are grounds to believe that the person may be subject to torture or other inhuman or degrading treatments, (iv) the penalty for the offence for which extradition is sought in the requesting state contains capital punishment and the state does not guarantee such punishment would not be imposed, (v) criminal proceedings have been concluded concerning the same act committed by the same person, (vi) the sentence for the execution of which the extradition is sought was imposed by default judgement and the requesting state does not guarantee to re-open the proceedings for the person in question to guarantee his/ her rights to defence, and (vii) the requesting state does not guarantee that the term of detention during the extradition process would be taken into account when executing the penalty.

53 The Argentine authorities does not consider the bribery of a foreign public official who holds a political office as of “political nature”.

54 According to Argentina, “special committee” refers to “*courts ad hoc*”, those not included in the established legal order.

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.

As mentioned above, dual criminality is required for extradition. However, the Argentine authorities consider it to be fulfilled if the offence for which extradition is sought is within the scope of the Convention if the requesting party has implemented the Convention. Moreover, where the requesting party has not implemented the Convention, the Argentine authorities consider it to be fulfilled if the act is unlawful where it occurred, even if under a different criminal statute.

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.

Argentina has not notified of the Secretary-General the responsible authorities.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

TAX DEDUCTIBILITY

Argentina confirms that it has never allowed tax deductibility of bribes. The Income Tax Law, which is applicable to taxation of both natural and legal persons provides for lists of deductible and non-deductible expenses. Neither list expressly refers to bribes. The Argentine authorities state that deductible expenses are only the ones that are enumerated in the Income Tax Law. However, it is not clear from the provisions whether bribes are excluded from the deductible expenses enumerated in the Income Tax Law⁵⁵. In particular:

55 Cited below are the provisions which appear to require clarification on whether or not they could include bribes.

Section 87

The following may also be deducted from the third category income with the limitations provided herein:

- a. The expenses and other expenditures inherent to the course of business.*
- e. The commissions and expenses incurred abroad as mentioned in section 8, to the extent that they are fair and reasonable.*
- i. The entertainment expenses actually incurred and duly evidenced in up to an amount equivalent to ONE POINT FIFTY (1.50%) of the total amount of remunerations paid to employees in the tax period.*

1. “the expenses and other expenditures inherent to the course of business” (section 87.a). The Argentine authorities confirm that bribes are not included therein;
2. “the commissions and expenses incurred abroad as mentioned in section 8 to the extent they are fair and reasonable” (section 87.e). The Argentine authorities state that these are export and import operation expenses, in order to obtain income subject to taxation. They state that since section 8 does not refer to bribes, they are excluded from this;
3. “the entertainment expenses.. up to an amount equivalent to 1.50 % of the total amount of remunerations paid to employees” (section 87.i). The Argentine authorities state that these may include travel, gratuitous receptions or gifts according to article 141 of the “implementing Decree 1344/98”;
4. “gifts to national, provincial and municipal tax authorities and to institutions contemplated in section 20.e” (section 81.c). They state that some terms were translated inappropriately (the precise translations are: “donations or grants” instead of “gifts”, and “treasury” instead of “tax authorities”);
5. “the properly evidenced losses, .. resulting from crimes committed against the taxpayers’ operating assets by their employees, to the extent they were not covered by insurance or compensation” (section 82.d). The Argentine authorities state that this item would not cover bribes. Moreover, they confirm that even in the case where management of a legal entity is unaware of bribery by an employee, the legal entity must firstly sue the employee for damages (or losses) in order to remedy them; it does not allow remedies through tax deduction instead of civil compensation.

Section 81

The following may be deducted from the fiscal year’s income, whatever the source of income may be and with the limitations provided herein:

- c. Gifts to national, provincial and municipal tax authorities and to institutions contemplated in clause e) of section 20, made under the conditions established by the regulations and up to the FIVE PERCENT (5%) limit of the fiscal year’s net income. The regulations shall also establish the procedure to be followed when the gifts are made by partnerships.*

Section 82

The following may also be deducted from the first, second, third and fourth category income, with the limitations provided herein:

- 4. The properly evidenced losses, in the Tax Authorities’ (DIRECCION GENERAL IMPOSITIVA) opinion, resulting from crimes committed against the taxpayers’ operating assets by their employees, to the extent they were not covered by insurance or compensations.*

As regards these expenses, Argentina confirms that bribes are excluded from their scope. However, no case law has been submitted to support such interpretation. Moreover, there remains some uncertainty as to whether bribes could be deducted if they are disguised as expenses (e.g. the entertainment expenses) and how it would be determined in practice whether certain expenditure is a legitimate commission or a bribe.

Moreover, the Argentine authorities state that under Argentine tax law, only the income from legal activities is taxable. They further state that therefore, it is not possible to deduct bribes neither as net losses from unlawful operations as provided for in section 88.j (*“Irrespective of the categories, the following items shall not be deductible: .. j. The net losses resulting from unlawful operations.”*), nor as expenses. This explanation raises a doubt as to the taxability of proceeds of a bribe since proceeds of a bribe are derived from an “unlawful” activity of bribery. Argentina confirms that proceeds of a bribe are taxable since despite their criminal origin, proceeds are derived from legitimate activities such as valid contracts. However, there is no provision in the tax law which determines whether certain income producing activities could be “legal” for the purpose of taxation.

Argentina states that Argentine tax authorities are sufficiently empowered to inquire whether a certain expense constitutes a bribe. According to the Argentine authorities, for the tax authorities to refuse the deduction of an expense, it is sufficient that there is a suspicion that it might be a bribe.

In Argentina, public officials, including tax authorities are obliged to report suspected criminal activities to the “judiciary” (article 177 of the APC). Pursuant to the Decree 1162/00, public officials comply with such obligation under article 177 of the APC, if they report suspected criminal activities to the Anticorruption Office, which is in charge of (1) investigation of corruption within public administration, and bringing the case before the court, and (2) improving transparent public management, etc.

EVALUATION OF ARGENTINA

General Remarks

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

Argentina made an amendment to the Argentine Penal Code (APC) which establishes under article 258 bis, the offence of bribing a foreign public official, in order to implement the Inter-American Convention against Corruption (the OAS Convention). The Working Group based its evaluation on this existing law and considered that as concerns the specific elements of the offence identified below, it does not fully conform to the standards of the OECD Convention. In particular, the Working Group notes that the existing law lacks an effective liability of legal persons. The Working Group noted that a draft bill has been prepared to specifically implement certain provisions of the Convention, particularly some of the elements of the offence and the definition of foreign public official. It urged the Argentine authorities to introduce its implementing legislation into Congress as soon as possible to address these issues, so as to fully comply with all of the Convention's requirements. As has been the practice of the Group, it will review the new legislation once it has been enacted.

Specific Issues

1. Elements of the Offence

Article 258 bis of the APC does not address certain elements of the offence of the bribery of a foreign public official and as such does not fully comply with the Convention. These elements are:

(i) Definition of Foreign Public Official

The Group expressed concerns about the possible non-autonomous definition of foreign public official in the existing Argentine law. It noted the explanation of the Argentine authorities that the draft bill would introduce an autonomous definition of foreign public official. In particular, the Group noted that article 258 bis of the APC applies only to the bribery of a public official from "another State". Therefore, the current Argentine legislation does not criminalise the bribery of agents, etc. of international organisations and public officials of organised foreign area or entity.

(ii) Third Parties

Article 258 bis does not expressly apply to the case where the bribe is for the benefit of a third party. The Argentine authorities explain that, despite the lack of case law, it would cover the case where the third party is “someone in public official’s intimate circle”. They further state that: (1) it requires proof of the fact that the advantage is given, etc. to the third party to benefit the public official. Thus, “someone in public official’s intimate circle” is required to be someone who shares patrimony with the public official or someone who has high level of intimacy with him/ her (e.g. mistress, close friends); and (2) it does not cover the case where an advantage goes directly to a third party.

(iii) In order that the official act/ refrain from acting in relation to the performance of official duties

Article 258 bis does not cover the case where the briber’s intent is to induce the public official’s act/ omission which is not within his/ her competence, but is in relation thereto. However, Argentina explains that there is a possibility that the court may interpret the law to cover the case where the briber gives a bribe to a public official to induce him/ her to exert his/ her influence on another public official which is outside the scope of his/ her duties.

The Argentine authorities acknowledge that these issues are not fully covered by their legislation, but informed the Group that these issues will be addressed once the draft bill is enacted.

2. Responsibility of Legal Persons

The Argentine legal system does not provide for criminal liability of legal persons for the offence of bribery. However, the Argentine authorities explain that Argentine law contains several legal instruments that enable it to impose the following administrative sanctions on legal persons involved in the foreign bribery offence: (1) administrative fines are available where the case is connected with violation of anti-trust law, customs law, foreign exchange law, tax law, or money laundering law; and (2) administrative fines or dissolution is available under the Charter of the General Inspectorate of Companies (or other related laws, such as the Law on Business Associations) where the natural person acts beyond the scope of the charter of the company including bribing a foreign public official. Thus, the Argentine authorities are of the opinion that the current Argentine legislation complies with the requirements of the Convention.

However, some issues of concern have been identified. Firstly, the fines in connection with the violation of several aforementioned laws could be applicable only where the act in question violates one of these laws. Thus, it is not applicable to the offer or the promise of a bribe. Moreover, this would not allow for imposing sanctions on legal persons for the commission of the offence of foreign bribery in addition to those for these violations. Secondly, although these sanctions are also applicable to domestic bribery cases, Argentina explains that there has been no case where dissolution is applied in connection with economic

transactions including domestic bribery. Thirdly, the amount of the administrative fine under the Law on Business Associations is quite low (e.g. up to 6,801.47 Argentine Pesos for companies in general, 1 Argentine Peso is valued at 1 U.S. dollar), or is only applicable to very limited category of legal persons (e.g. 1,000-5,000,000 Argentine Pesos for companies which make public offers).

3. Imprisonment sanctions for natural persons

The sanctions under article 258 bis for foreign bribery offences are imprisonment of 1-6 years including perpetual disqualification to hold a public office. With respect to the domestic bribery, the sanctions are imprisonment of 1-6 years for the principal offence, 2-6 years or 3-10 years for the aggravated offences (e.g. bribery of a judge, the offender is a public official). There is no aggravated offence for the foreign bribery. However, the Argentine authorities explain that the imprisonment sanction for the foreign bribery offence is “reclusion” which is a more severe penalty than “prison” which applies to the domestic bribery offences. The significant differences between the two different imprisonment penalties are (1) suspension of imprisonment is available only with “prison” of less than 3 years, and (2) probation including suspension of judicial proceedings is possible only with “prison”.

4. Jurisdiction

Argentina does not establish jurisdiction over its nationals who commit this offence abroad unless they are Argentine public officials. There is no nationality jurisdiction in general with respect to all offences unless provided in treaties. The Working Group noted this conforms to the requirement of Article 4.2 of the Convention. However, the Group recommends that, in light of the requirement under Article 4.4 of the Convention to review the effectiveness of jurisdiction, this issue should be examined on a horizontal basis in Phase 2.

5. Tax Deductibility

Argentina states it has never permitted tax deductibility of bribes. Argentine tax law provides for lists of expenses which are deductible and non-deductible. Bribes are not expressly covered by either of them. The Argentine authorities explain that only the income from legal activities is taxable. Therefore, it is not possible to deduct neither “net losses resulting from unlawful operations” (section 88.j) nor the bribes as expenses. No case law has been submitted to support such interpretation.

The Working Group expressed some concerns that bribes might be deducted if they are disguised as: (1) “the expenses and other expenditures inherent to the course of business” (section 87.a), (2) “the entertainment expenses .. up to an amount equivalent to 1.50 % of the total amount of remunerations paid to employees” (section 87.i), which include travel, gratuitous receptions or gifts, and (3) “the properly evidenced losses, .. resulting from crimes committed against the taxpayers’ operating assets by their employees, to the extent they were not covered by insurance or compensation” (section 82.d). In addition, the Working Group remains uncertain how it would be determined in practice whether a certain expenditure is a legitimate commission or a bribe. Therefore, the Group recommends that these issues be monitored in Phase 2.