Implementing the OECD Anti-Bribery Convention

REPORT ON KOREA

Foreword

South Korea signed, together with thirty-three other countries, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention) in 1997. Today, thirty six countries are Party to this Convention. After enactment of the necessary implementing legislation, South Korea ratified the OECD Convention and deposited the ratification instrument with the OECD in January 1999.

This report surveys the legal provisions and the institutions in place in South Korea to combat bribery of foreign public officials and evaluates their effectiveness. It examines the mechanisms introduced, in both the public and private sectors, to prevent and detect acts of bribery of foreign public officials. It also reviews the effectiveness of mechanisms for investigating and prosecuting the offence of bribery of foreign public officials and related offences such as fraud and money-laundering. The report concludes with specific recommendations regarding prevention and detection, as well as prosecution and punishment. Key legal provisions to deter, prevent and fight corruption as submitted by South Korea to the review process are also included.

Review of the implementation by South Korea of the OECD Anti-Bribery Provisions is part of the wider mandate of the OECD Working Group on Bribery in International Business Transactions. This group is entrusted with the systematic and detailed monitoring and follow-up by all countries party to the OECD Anti-Bribery Convention.

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Introduction[1]

Nature of the On-Site Visit

From 2 to 6 February 2004, Korea underwent the Phase 2 on-site visit by a team from the OECD Working Group on Bribery in International Business Transactions (Working Group). Pursuant to the procedure for the Phase 2 self and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and the 1997 Revised Recommendation (Revised Recommendation), the purpose of the on-site visit was to study the structures in place in Korea to enforce the laws and rules implementing the Convention and to assess their application in practice as well as monitor Korea's compliance in practice with the Revised Recommendation.

The OECD team was composed of lead examiners from Australia and Finland as well as representatives of the OECD Secretariat. During the on-site visit meetings were held with officials from the following ministries and other government bodies: Ministry of Foreign Affairs and Trade, Ministry of Justice, Supreme Public Prosecutor's Office, National Police Agency, Supreme Court of Korea, Korea Independent Commission against Corruption (KICAC), Ministry of Finance and Economy, Public Procurement Service, Korea International Cooperation Agency (KOICA), National Tax Service, Financial Supervisory Service, Board of Audit and Inspection, Korea Fair Trade Commission, Korea Export Insurance Corporation (KEIC), Export-Import Bank of Korea (Eximbank), Small and Medium Business Administration, and Korea Trade-Investment Promotion Agency (KOTRA). In order to gain a regional perspective, the lead examiners also met with representatives of the Seoul District Public Prosecutor's Office (DPPO), Busan DPPO, Incheon DPPO, Seoul Metropolice Agency, and Gyoung-gi Provincial Police Agency. The Korea Electric Power Corp. (KEPCO), a state-owned company, also participated in the meetings.

Additionally, the OECD team met with representatives of the following civil society organisations: The People's Solidarity for Participatory Democracy, Citizens' Coalition for Economic Justice, Transparency International-Korea, Federation of Korean Industries, and Federation of Korean Trade Unions. The private sector was represented by the Korea Stock Exchange, KOSDAQ Committee, Korea Accounting Institute, Korea Accounting Standards Board, Korean Institute of Certified Public Accountants, Korea Corporate Governance Service, Woori Bank, Kookmin Bank, Samil PricewaterhouseCoopers, Anjin Deloitte LLC., Ahakwon Accounting Corp., Young Wha Accounting Corp., and KPMG Samjong Accounting Corp. The following companies participated: Hyundai Corp., Hyundai Motor Corp., SK Corp., SK Chemicals, POSCO, LG Corp., LG International Corp., Samsung Electronics Co. Ltd., Powwel Electronic Lnd. Co. Ltd., Atecsystem, and

Nextech Co., Ltd. Media representatives from the following newspapers participated: The Hankyoreh, The Kyunghyang Shinmun, and Joongang Ilbo. The Korean legal profession was represented by the Korean Bar Association and a defence lawyer.

In preparation for the on-site visit, the Korean authorities provided the Working Group with Responses to the Phase 2 Questionnaire and responses to a supplementary questionnaire, which contained specific questions about the implementation of the Convention in Korea. In addition, the Korean authorities supplied relevant legislation and case law. These materials were reviewed and analysed by the OECD team, and independent research was done to obtain non-governmental viewpoints as well. Following the on-site visit, the Korean authorities provided follow-up information requested by the OECD team.

The OECD team appreciates the hard work and professionalism dedicated by the Korean authorities to preparing for and carrying out the on-site visit. The OECD team was provided with access to all the persons and bodies whose presence was requested at the meetings, ensuring a thorough review of Korea's anti-foreign bribery efforts. Moreover, the Korean authorities assisted the OECD team by translating extensive documentation.

Observations about System of Government and Legal System

Korea[2] is a republic with powers shared between the president, who is the head of the executive branch, and the legislature (National Assembly) and courts.[3] Korea has had democratically elected civilian governments since 1987, the same year that the present Constitution came into force.[4] The Government is traditionally highly centralised, but recent efforts have been made to devolve powers to the local authorities.[5]

The highly centralised justice system is the responsibility of the central government.[6] It is comprised of a three-tier court system[7] and a separate Constitutional Court. Investigations of crimes are the responsibility of public prosecutors, and may be performed by judicial police officers under the direction of public prosecutors. Public prosecutors' responsibilities also include the institution of public prosecutions and the direction and supervision of the execution of criminal judgements.[8] The Korean National Police Agency consists of six National Bureaus[9] and fourteen Regional Police Agencies[10].

Korea experienced political upheaval over many years of autocratic governments. In response, strong protests were made by a vocal civil society, led mainly by university students and labour unions.[11] The legacy of this difficult period is a strong civil society, which has spearheaded many government reforms, including anti-corruption and transparency initiatives[12].

Economic Factors

Today, Korea's economy is one of the Four Tigers of East Asia, and has rapidly integrated into the modern world economy.[13] Just three decades ago Korea's GDP per capita was comparable to the poorest nations of Asia and Africa. But during the late 1980's, economic progress was achieved through a system of close ties between the government and business, directed credit, import restrictions, sponsorship of specific industries, and a strong labour force. Raw materials were imported instead of consumer goods, and saving and investment were encouraged rather than consumption.[14] Korea's accession to the OECD in December 1996 represented the culmination of two decades of hard work and nation building by the Korean People and the Government.

Then the Asian financial crisis of 1997-99 forced the Government to address inherent weaknesses in the foundation of Korea's economic system, including high debt/equity ratios, massive foreign borrowing and an undisciplined financial sector. To redress these problems, Korea is moving away from centrally planned, government-directed investment toward a more market economy. Extensive financial reforms have restored stability to markets, and the economy is growing again. [15]

Korea's major export partners in 2003 were China ($35 billion/18.1%) the United States (US $34 billion/17.7%), and Japan ($17 billion/8.9%). Its major export goods in the same year were heavy industrial products (79.8%), which include electric and electronic machines, semiconductors (35.2%) and motor vehicles (9.0%). Korea's major import partners in 2003 were Japan ($36 billion/20.3%), the United States ($25 billion/13.9%) and China ($22 billion/12.3%). Its major import goods in the same year were raw material & fuel (49%), capital goods (38%) and consumer goods (13%)[16]. The top countries for investment by Korean firms overseas in 2003 were: China ($2.49 billion), the United States ($730 million, which represents a 48.6% drop from 2001) and Vietnam ($700 million, including a $480 million project by the Korea Gas Corporation to develop natural gas fields). In 2003, the top countries for foreign direct investment in Korea were EU ($3.1 billion), the United States ($1.2 billion) and Japan ($0.5 billion). [17]

General Observations about Korea's Implementation of the Convention and 1997 Recommendation

The financial crisis also revealed weaknesses in Korea's social and political structures, including systemic corruption and inadequate transparency in governmental decision-making. In the last six years the Korean government has made impressive efforts to address these problems by passing several laws. These include the Foreign Bribery Prevention Act (FBPA), enacted on 28 December 1998 to implement the Convention, and the following laws and amendments, which came into force after the Phase 1 examination of Korea by the Working Group in July 1999:

- The Anti-Corruption Act, enacted in August 2001, and pursuant to which the Korea Independent Commission against Corruption (KICAC) was established in January 2002.
- The Proceeds of Crime Act and the Financial Transactions Reports Act, two anti-money laundering laws enacted in September 2001, and pursuant to which the Korea Financial Intelligence Unit was established in November 2001.
- The Corporate Restructuring Promotion Act, enacted in 2001, which includes provisions on internal company controls and enhanced accounting transparency for certain companies with "insolvency signs". These provisions are now included in the Act on External Audit of Stock Companies.
- The Act on Real Name Financial Transactions and Guarantee of Secrecy, enacted in March 2001, which ensures that financial institutions conduct financial transactions on the basis of the real names of persons involved in transactions.
- Amendments to the Board of Audit and Inspection Act.

At the on-site visit, the determination of the Korean authorities to fight corruption was evident. They openly discussed the need to fight corruption in Korean society and

cultural resistance to changing business practices. The Korean government recognizes the important contributions to the reform process of civil society groups such as the Citizen's Coalition for Economic Justice and the People's Solidarity for Participatory Democracy, and considers them partners in the process of enacting relevant laws. By 2010, the Korean government aims to rank 10th in Transparency International's "Corruption Perceptions Index".[18]

Cases involving the Bribery of Foreign Public Officials

The Korean government stated that considerable progress had been made in implementing the new laws. For instance, many cases of bribery of domestic public officials have been detected. This is likely due in part to the priority that has been placed on the investigation and prosecution of domestic corruption cases. According to the Ministry of Justice, an Anticorruption Special Investigation Headquarters has been established in the Special Investigation Department of the Supreme Public Prosecutor's Office, which consists of the Director and nine prosecutors. In addition, each of the 13 District Public Prosecutor's Offices and 42 branch offices has an Anticorruption Special Investigation Department or an anti-corruption team, with a total of 140 public prosecutors involved in bribery prosecutions.

Specialised units have not been established to investigate and prosecute cases involving bribery of foreign public officials. However, by the time that the OECD team arrived in Korea, two cases had been adjudicated pursuant to the FBPA. These cases demonstrate that the Korean authorities are tackling foreign bribery cases, and that combating foreign bribery is taking on more prominence in the government's agenda. Furthermore, the cases illustrate how Korea is enforcing the Convention and Revised Recommendation.

Aulson and Sky Case

The first adjudicated case involves the bribery of a U.S. military officer at the U.S. military base in Korea in order to obtain confidential information to assist a company, Aulson and Sky, in successfully bidding on three U.S. military contracts worth US $24.7 million. The CEO of the Korean company paid US $400,000 to the military officer through several transactions. Each time the money was transferred to the military officer through his wife. In October 2001, a US Grand Jury indicted the U.S. military officers and his wife on several counts related to the bribery transactions. In the U.S. District Court, the military officer pleaded guilty to bribery and other related charges and received 54 months in jail. His wife pleaded guilty to making a false statement and received two years of probation. On 20 August 2002, the Seoul District Court sentenced the CEO of Aulson and Sky to imprisonment for 18 months and a fine of 10 million won (US $8,500 or €6,700)[19]. The company was fined 100 million won (US $85,000 or €67,000). On appeal to the Seoul District Court, Criminal Department III, the sentence of imprisonment for the CEO was suspended for three years from the date of imposition, and the sentence of the company was confirmed.

During the on-site visit, the Korean authorities confirmed that they had investigated another case involving the bribery of the same U.S. military officer by another Korean company, which did not result in an indictment due to insufficient evidence. However the U.S. District Court convicted the person who acted as an intermediary in the bribery of the military officer. The Korean authorities also confirmed that they did not request mutual legal assistance from the U.S. in respect of this case.

Seo Case

The second adjudicated case involves the bribery of a public official of the U.S. Defence Ministry by the CEO of a Korean company, in Korea. At the on-site visit, the Korean authorities provided the OECD with a translation of the indictment of the CEO, which is dated 26 November 2003. According to the indictment, the defendant was the CEO of a company, which was a supplier to the U.S. Army in Korea. The defendant and other suppliers conspired to wrongfully raise the bidding price of products by bribing employees of a U.S. Construction Battalion located in Seoul. An audit team of the U.S. Army discovered the bribery transactions, and as a result the defendant and others lost access to the bidding process. Then the defendant and others conspired to bribe an official of the U.S. Army by offering him US $20,000 in order for him to help stop the investigation into their conduct and lift the restriction against their bidding. During the on-site visit the representatives of the Supreme Court of Korea informed the lead examiners that the defendant was sentenced to 10 months of imprisonment and fined 10 million won (US $8,500 or €6,700) on 29 January 2004 by the court of first instance, but that the period for launching an appeal had not yet expired. They also indicated that the company in question was not prosecuted because it did not constitute a legal person.[20] They were not sure whether the co-conspirators had been prosecuted.

Following the on-site visit, the Korean authorities provided additional documentation about the Seo Case, which clarified that four natural persons including the defendant, Seo, were indicted for offering bribes to U.S. Army staff members. All the natural persons were directors of enterprises. The enterprise for which Seo was a director was indicted for bribery, but, according to the Korean authorities, only the natural persons were punished because the enterprises did not have the character of legal persons.

Focus of Report

Taking account of the information obtained by the OECD team during the on-site visit, and from the Responses to the Phase 2 Questionnaire and other sources, the analysis that follows focuses on ways in which Korea needs to increase the effectiveness of its measures for the prevention, detection and enforcement of the offence of bribing a foreign public official.

Notes

1. This report was examined by the Working Group on Bribery in June 2004.
2. Official name is the Republic of Korea.
3. According to the Constitution, the Prime Minister is appointed by the President with the consent of the National Assembly. He/she shall assist the President and direct the Ministries of the Executive Branch under order of the President.

4. The Constitution prescribes the rights and duties of citizens, the powers of the legislature, executive and courts and includes provisions on local autonomy.

5. Korea is divided administratively into 9 provinces and seven metropolitan areas (Seoul, Busan, Incheon, Daegu, Gwangju, Daejeon, and Ulsan).

6. Bureau of Justice Statistics, World Factbook of Criminal Justice Systems, 1993.

7. 1. The Supreme Court of Korea, 2. five High Courts, and 3. eighteen District Courts, which are divided into geographic districts and are the only courts of original jurisdiction.

8. Article 4 of Public Prosecutor's Office Act.

9. The National Bureaus include a Criminal Affairs Bureau and several Investigation Divisions.

10. Each Regional Police Agency has its own Investigation Division(s).

11. Background Note: South Korea (U.S. Department of State, Bureau of East Asian and Pacific Affairs, March 2004)

12. While the on-site visit was in progress political opponents of the President's Government were alleging authorities were focusing on opposition figures more than supporters of the Government. However, senior supporters of the Government were facing corruption charges. Additionally, statements from civil society participants suggested there had been a genuine crack-down on corruption during the previous 12 months.

13. In 2002, Korea's GDP was US $476.7 billion, ranking 10th of the OECD countries. (OECD Database)

14. The World Factbook: South Korea (CIA, 18 December 2003).

15. ibid.

16. The statistics concerning imports to and exports from Korea are from: Statistical Handbook of Korea 2002 (Korea National Statistical Office, Chapter 11).

17. Ministry of Commerce, Industry and Energy.

18. In 2003, Transparency International gave Korea a score of 4.3, and ranked it 50th out of 133 countries. The Corruption Perceptions Index measures perceptions of the degree of corruption as seen by business people, academics and risk analysts, according to their responses to surveys. The scores range between 10 (highly clean) and 0 (highly corrupt).

19. The conversion of Korean won into US dollars and Euros represents the Interbank rate for 13 February 2004.

20. During the on-site visit a representative of the Supreme Court explained that the company in question was not a legal person because it was a small company owned by the defendant, whereas a representative of the Ministry of Justice stated that the size of the legal person was not relevant; the body did not constitute a legal entity. Following the on-site visit the Korean authorities clarified that the body did not qualify as a legal person in accordance with the relevant legislation.

Measures for Preventing and Detecting the Bribery of Foreign Public Officials

Government Awareness and Training

Key Ministries

Discussions with The Ministry of Justice (MOJ)[1] and the Ministry of Foreign Affairs and Trade (MOFAT) demonstrated a fairly high level of awareness of the Convention and the FBPA. In February 1999, MOJ published the Explanatory Manual on the Convention and the FBPA, which was provided to prosecutors, police and the Korean Business Federation.[2] Furthermore, in May 2003, MOJ organised the "Third Global Forum and Eleventh International Anti-Corruption Conference", in part to promote public awareness of the need to fight corruption.[3] MOFAT published articles relating to the Convention in a variety of periodicals and pamphlets. Several articles appeared in the MOFAT publication "OECD Focus", which was distributed to over 1,000 entities including government agencies, academic institutions, businesses and political parties. The Institute of Foreign Affairs and National Security (IFANS) distributed material on trans-national bribery to all overseas embassies, domestic government agencies and academic institutions.

Investigative, Prosecutorial and Judicial Authorities

During the on-site visit, the representative of the National Police Agency (NPA) stated that although directives and educational programs concerning the Convention and FBPA were provided at the provincial level, the quality of these programs was not completely satisfactory due to the absence of cases to serve as examples. He also stated that he is not sure whether individual police officials have an adequate level of awareness of the FBPA. Further training on the FBPA is now being planned by the Inspection Department of the NPA.

Prosecutors[4] who conduct special investigations receive education on corporate accounting, fund tracing and computer investigation. These programs do not specifically target the implementation of the FBPA. The Responses to the Phase 2 Questionnaire state that the Supreme Public Prosecutor's Office[5] ordered its prosecutors to enforce the FBPA in September 2003. The Korean authorities clarified following the on-site visit that the purpose of the order was to encourage the authorities to be more attentive to foreign bribery and report cases, if confirmed, to the Supreme Public Prosecutor's Office.

The Judicial Research and Training Institute (JRTI), established in 1971 under the Supreme Court of Korea, provides both theoretical and practical training to judges, apprentice judges and judicial trainees admitted by the Supreme Court. Programs for judges include courses on specialised areas of the law. Courses addressing the Convention and the FBPA have not been provided by JRTI. However, the Sentence Studies Committee of the Supreme Court (a committee where judges share information on committal cases), discussed sentencing in bribery cases at its September 2003 meeting.

Agencies indirectly involved in Implementation of the Convention

In July 2003, The Korea Independent Commission against Corruption (KICAC)[6] published an anti-corruption textbook for new university students and corporate employees entitled, "Work and Ethics." Three thousand copies of the book were distributed to over 400 universities nationwide and over 400 major corporations. The book contains the Convention and the FBPA, and explains how the Convention was established. However, apart from the textbook, it appears that at the time of the on-site visit KICAC's awareness activities focused mainly on domestic corruption. In May 2004, following the on-site visit, KICAC published and distributed 1 000 copies of the "OECD Convention Guidebook" to raise awareness of the Convention among domestic companies and government agencies.[7]

The Korea Financial Intelligence Unit (KoFIU)[8] issued guidelines and typologies to assist financial institutions in the detection of money laundering transactions. These documents do not provide information on how to detect money laundering transactions involving the proceeds of bribing foreign public officials. Moreover, the impression given at the on-site was that KoFIU officials have a low level of awareness of the Convention and the FBPA.

The Korea Export Insurance Corporation (KEIC) and the Export-Import Bank of Korea (Eximbank) recently included in their applications for export credit support an undertaking/declaration that applicants have not engaged and will not engage in bribery in the transaction. The Integrity Pact for Suppliers adopted by the Public Procurement Service contains a pledge to not provide authorities with illegal benefits including bribery money and entertainment, and provides for cancellation of the contract where a supplier is found to have bribed a relevant official(s). However, the Integrity Pact does not refer expressly to the bribery of foreign public officials. The representative of the Ministry of Finance and the Economy concerning public procurement was not aware of the Convention and the FBPA. The representative of the Financial Supervisory Service (FSS) explained that FSS employees are "aware" of OECD policies. The Korean National Tax Service, the Korea Board of Audit and Inspection and the Korea International Cooperation Agency (KOICA) have not engaged in any awareness-raising activities or training programs specifically targeting the Convention and the FBPA.

Level of Awareness of the General Public and Business Community

Large Companies

One major corporation informed the OECD team that it had distributed a booklet on the Convention to all of its employees. Another indicated that it provided corporate-wide training on the FBPA when it was introduced in 1999, and continues to provide training for employees transferred abroad. Its internal code of conduct states that employees should not be involved in foreign bribery, but does not specifically refer to the FBPA. Another major corporation adopted a code of conduct with a general clause pertaining to corruption. It also provided a detailed training program about the Convention, in which fifty percent of its employees participated. The code of ethics of a major state-owned corporation states that the bribery of domestic or foreign officials is "wrong", but it has not provided educational programs dealing with foreign bribery.

At the on-site visit, Transparency International-Korea (TI) discussed the findings of its third survey on business ethics of the 300 largest Korean companies. Of the 113

companies that responded to the survey, 79 had a code of ethics. However, 24 of those with codes of ethics were not aware of the Convention or the FBPA.

Small and Medium-Sized Enterprises

Small and medium-sized enterprises (SMEs) comprise an extremely important part of the Korean economy, and account for a large portion of its exports.[9] Moreover, many SMEs are transferring their factories abroad.[10] However, most of the small and medium sized enterprises that participated in the on-site visit did not have an adequate appreciation of the potential for their agents abroad to bribe foreign public officials.

One SME received information about the Convention and the FBPA from the Small and Medium Business Administration (SMBA), a government agency responsible for fostering and promoting Korean SMEs,[11] and another had only heard about the Convention and the FBPA recently through the media. SMBA stated that it is drafting a model code of conduct and that it is considering including a provision prohibiting the bribery of foreign public officials. The representatives of the Korea Trade-Investment Promotion Agency (KOTRA), a government agency that promotes Korean foreign trade,[12] stated that KOTRA has emphasised to its clients that they should not bribe foreign public officials, but has not informed them that such bribery constitutes an offence.

Legal Profession

A representative of the Korean Bar Association (KBA) reported a "general interest" in the Convention and the FBPA. He stated that during training courses that are provided twice a year for members of the Bar, certain classes had addressed the Convention and the FBPA.

General Public

The Citizens' Coalition for Economic Justice (CCEJ),[13] which participated in the on-site visit, reported that the Korean general public has a high level of awareness of the Korean government's fight against domestic corruption, especially in light of the intense media attention that has been given to recent corruption investigations involving politicians. On the other hand, the level of awareness of the Convention and the FBPA is believed to be quite low. The People's Solidarity for Participatory Democracy[14] believes that the Korean public's tolerance of corruption is decreasing, and provided examples to demonstrate this. Representatives of Korean newspapers reported a low level of public knowledge of the Convention and the FBPA.

Commentary

The lead examiners congratulate the Korean Ministry of Justice and the Ministry of Foreign Affairs and Trade on their activities for raising awareness of the Convention and the FBPA. However, the lead examiners recommend that further steps to raise awareness be undertaken within the National Police Agency, Supreme Public Prosecutor's Office and Judicial Research and Training Institute, as well as within agencies indirectly involved in the implementation of Convention, including the Korea Board of Audit and Inspection and the Korea International Cooperation Agency (KOICA). The lead examiners also recommend that increased efforts to raise awareness be undertaken by relevant Korean government agencies that provide advice

and support to SMEs, such as the Korea Trade-Investment Promotion Agency (KOTRA) and Small and Medium Business Association (SMBA), as awareness of the Convention and FBPA by SMEs is particularly low.

Furthermore, the lead examiners recommend that the National Police Agency, Public Prosecutor's Offices and the Judicial Research and Training Institute provide training programs specifically on the Convention and the FBPA for current members and new recruits.

Detection through Systems for Disclosure and Reporting

Reporting by General Public of Violations of the FBPA Perpetrated by Public Officials or Public Institutions

Violations Perpetrated by Public Officials

The establishment of the Korea Independent Commission against Corruption (KICAC) in 2002 represents a significant instrument in the fight against government corruption in Korea. By providing the public with an accessible and relatively secure means of reporting suspicions of corruption, Korea has introduced an innovative and effective way to bring suspicions to the attention of the Korean authorities. Pursuant to article 25 of the Anti-Corruption Act (ACA)[15], "any person who becomes aware of an act of corruption may whistle-blow[16] such act of corruption to the (Anti-Corruption) Commission[17]" (KICAC). Additionally, pursuant to article 26, a public official is obligated to report without delay an "act of corruption" committed by another public official, or cases where he/she has been forced or proposed by another public official to commit an act of corruption, to any investigative agency, the Board of Audit and Inspection, or KICAC.

An "act of corruption" is defined under article 2.3 of the ACA as an act of "any public official" involving an abuse of position or authority or violation of the law in connection with official duties for the purpose of seeking gains for himself/herself or any third party.[18] In the absence of specific language referring to foreign public officials, it seems that the ACA is only intended to apply in relation to acts of any domestic public official. Moreover, the purpose of the ACA, as articulated in article 1, is to combat corruption in the domestic civil service.[19] Thus KICAC's jurisdiction concerning the receipt of reports of the bribery of foreign public officials appears limited to acts of foreign bribery perpetrated by domestic public officials. Following the on-site visit, the Korean authorities indicated that KICAC is endeavouring to amend the ACA in order to expand its scope to include corruption in the private sector. They believe that such an amendment will result in coverage of the bribery of a foreign public official by any person.

KICAC is obligated to refer a report to the Board of Audit and Investigation, an investigative agency or an agency in charge of supervising the relevant public institution (hereinafter referred to as an "investigative authority"), where "necessary" to conduct an investigation.[20] KICAC does not have investigative powers, but it may confirm certain matters with the whistle-blower (e.g. name, address and occupation of the whistle-blower, and the details of the whistle-blowing) as well as request him/her to submit necessary materials for the purpose of ascertaining the truth of those matters.

The representative of the Ministry of Foreign Affairs explained that whenever a report is made to KICAC, the Commissioners must consider whether there is sufficient evidence for it to be referred to the investigative authorities;[21] thus one of KICAC's roles is to refer cases that warrant further attention to the law enforcement authorities. The Korean authorities explained following the on-site visit that the Enforcement Decree issued pursuant to the ACA provides rules on the referral of cases. In 2002, KICAC referred 59.6% of cases (68 out of 114) that it received to the law enforcement authorities. In 2003, that figure rose to 78.3% (94 out of 120 cases).

Violations Perpetrated by Public Institutions

Pursuant to article 40 of the Anti-Corruption Act (ACA), any Korean citizen aged twenty or over has the right, by presenting a petition, to request the Board of Audit and Inspection to audit and inspect a public institution in the event that the execution of administrative affairs by that institution "seriously harms the public interest due to the violation of Acts and subordinate statutes or the involvement in an act of corruption".[22] The petition must be signed by not less than 300 citizens in order for the Board of Audit and Inspection to consider the request.[23] Thus, pursuant to article 40, members of the public have at their disposal a mechanism for reporting and obtaining the audit and inspection of public institutions involved in the bribery of foreign public officials.

Article 40 provides an important tool for reporting and requesting the investigation of public institutions suspected of involvement in the bribery of foreign public officials, where it is difficult or impossible to identify a particular individual(s) involved in the corrupt transaction, or corruption (including foreign bribery) seems to be a generalised problem within a public institution. Although it appears that obtaining the signature of 300 citizens on the petition would be a very difficult undertaking, the Korean authorities report that from January 2002 to February 2004, 82 cases were reported to the Board of Audit and Inspection. Twelve of these cases were dismissed because they did not meet the definitional requirements under article 2 of the ACA. Sixteen cases were rejected because they did not involve corrupt activities by public agencies, ten cases were referred to local or provincial governments and twenty-three cases were withdrawn.

Commentary

The lead examiners congratulate Korea on the enactment of the Anti-Corruption Act and the establishment of the Korea Independent Commission against Corruption (KICAC), and believe that they provide an excellent framework to encourage the Korean public to report incidents of corruption, including the bribery of foreign public officials perpetrated by Korean public officials and public institutions.

The lead examiners welcome the initiative of KICAC to broaden the scope of the Anti-Corruption Act to cover the bribery of foreign public officials by any person.

Reporting by Tax Authorities

Korean tax legislation does not expressly prohibit the deduction of bribe payments. As well, the legislation's list of non-deductible items does not arguably support such a prohibition. During the Phase 1 examination, the Korean authorities explained that bribe payments to foreign public officials are not deductible because they do not constitute "expenses or losses that are related to business and commonly recognized as ordinary and

normal" pursuant to article 19(2) of the Corporate Tax Act (CTA) and the Income Tax Act (with respect to individual taxpayers). No case law has been provided in support of this position. Furthermore, the full text of article 19(2) appears to support the opposite interpretation as it also permits deductions for losses or expenses "related to profit-making activities", which would appear to include bribe payments to foreign public officials.[24]

Officials from the Korea National Tax Service indicated during the on-site visit that it is widely understood that bribe payments are not deductible since they are not considered to be business-related expenses. A member of the criminal defence bar expressed a similar belief. However, the Korean authorities have not specifically directed their tax examiners to deny deductions for bribe payments, nor have they made information to this effect publicly available. Moreover, the Responses to the Phase 2 Questionnaire state that it would be difficult for tax officials to detect bribe payments because the information obtained from tax payers only describes an "outflow of money".

Pursuant to article 81-8 of the Framework Act on National Taxes, tax officials are prohibited from disclosing information submitted by a taxpayer to the law enforcement authorities except where there is a court order. Thus it seems that law enforcement authorities can only obtain such information indirectly as the result of, for instance, a report made pursuant to the Tax Evaders Act, or directly as the result of the making of a request pursuant to article 81-8.3 "by the submission order of a court or a warrant issued by a judge".

Pursuant to article 234.2 of the Criminal Procedure Act, a Korean public official who discovers a crime in the course of performing his/her duties must report the matter to the Public Prosecutor's Office. The Korean authorities explained that this provision overrides a tax official's duty of confidentiality by reason of article 81-8.5 of the Framework Act on National Taxes, which permits disclosure of information submitted by a taxpayer when such information "is requested pursuant to the provisions of other laws". However, no cases were provided in support of this proposition.

Commentary

In the absence of case law supporting the Korean authorities' view that bribe payments are not tax deductible, the lead examiners remain concerned that the absence of an express denial of the tax deductibility of bribe payments, and the broad wording of the provision in the tax law describing allowable expenses, could result in the allowability of tax deductions for bribes to foreign public officials. Thus the lead examiners recommend that Korea amends its tax legislation to clarify that bribes to foreign public officials in violation of the FBPA are not tax-deductible. They also recommend that Korea expressly communicates to tax examiners the non-tax deductibility of bribes and the need to be attentive to any outflows of money that could represent bribes to foreign public officials, through the issuance of guidelines or manuals, and training programmes. The lead examiners also recommend that the Korean authorities bring the OECD Bribery Awareness Handbook for Tax Examiners to the attention of the National Tax Service.

Additionally, the lead examiners recommend that the Working Group follows up the application of the Framework Act on National Taxes and Criminal Procedure Act to disclosure by the National Tax Service to the competent authorities of evidence of foreign bribery detected during tax audits spontaneously without any requests.

Reporting by Korea International Cooperation Agency, Export-Import Bank of Korea and Korea Export Credit Insurance Corporation

Since the Korea International Cooperation Agency (KOICA), Export-Import Bank of Korea (Eximbank) and the Korea Export Insurance Corporation (KEIC) provide contract opportunities to Korean companies involved in international business, they could become aware of violations of the FBPA perpetrated by applicant and client companies. Thus a policy or legal requirement for reporting suspicions of such violations would be an important tool for the detection of foreign bribery.

The representative of the Export-Import Bank of Korea (Eximbank) indicated that it is "advised" that suspicions of the bribery of foreign public officials involving applicants and contractors be reported to the law enforcement authorities. It appears that reports would be made as a matter of policy, but that there is not a legal obligation to do so.

With respect to the Korea Export Insurance Corporation (KEIC), there is no legal obligation to report suspicions of violations of the FBPA perpetrated by applicants and contractors to the law enforcement authorities. Nevertheless, KEIC's policy requires the reporting of bribery of foreign public officials involving applicants and contractors where there is "sufficient and credible evidence". At the on-site visit the representative of KEIC informed the lead examiners that the KEIC website reported rumours of a payment by a Korean company to a foreign public official for the purpose of obtaining permission to export goods to the foreign country. Following the on-site visit the Korean authorities confirmed that there was insufficient evidence to report the case to the law enforcement authorities, and that the case was discussed on the website as a deterrent measure.

The Korea International Cooperation Agency (KOICA) has not established a process for dealing with and reporting suspicions of the bribery of foreign public officials involving applicants and contractors to the law enforcement authorities.

Commentary

The lead examiners recommend that the Korean authorities review the policies and procedures of the Korea International Cooperation Agency, with a view to ensuring that where, in the course of transacting business with a company credible evidence arises that a violation of the FBPA has occurred, there is a consistent and reliable framework for disclosing the suspicions forthwith to the law enforcement authorities.

Reporting by Foreign Representations

Korean overseas representations, including embassy personnel, are often requested by Korean companies abroad to provide advice on doing business in the countries in which they are located. Thus, in performing this role, they could learn of incidents of Korean companies or individuals that have bribed or plan to bribe foreign public officials. It is therefore important that foreign representations are provided with specific instructions on the steps to take, including the reporting of such suspicions to the law enforcement authorities in Korea, where credible allegations emerge. Although the Institute of Foreign Affairs and National Security (IFANS) has covered the subject of bribery in its publication "Major International Issues Analysis Series", which was distributed to all overseas embassies, it does not appear that specific instructions have been issued concerning the reporting of violations of the FBPA to the law enforcement authorities in Korea.

Commentary

The lead examiners recommend that specific instructions be issued to Korean overseas representations, including embassy personnel, concerning the steps that should be taken where credible allegations arise that a Korean company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Korea.[25] ***They also recommend that foreign embassies play a pro-active role in making companies entering foreign markets aware of the Convention and the FBPA.***

Detection through the Anti-Money Laundering System

Generally

At the time of the Phase 1 examination of Korea, neither the bribery of domestic public officials nor the bribery of foreign public officials was a predicate offence for the purpose of the offence of money laundering. The Proceeds of Crime Act (PCA), which establishes the offence of money laundering and the reporting obligations of persons employed by financial institutions[26], and the Financial Transactions Reports Act (FTRA), which establishes the Korean Financial Intelligence Unit (KoFIU) and the reporting obligations of financial institutions regarding suspicious transactions, as well as the rules concerning the provision of information by KoFIU to law enforcement agencies, came into force in November 2001. Thus the Phase 2 examination has provided the Working Group on Bribery in International Business Transactions (Working Group) with its first opportunity to review the legal and procedural framework of Korea's anti-money laundering system. The overall purpose of this review is to assess the effectiveness of Korea's anti-money laundering system for reducing the incentive for bribing foreign public officials, and detecting such bribery where the proceeds have been laundered.

Offence of Money Laundering

Article 3 of the Proceeds of Crime Act establishes the offence of "concealing and disguising criminal proceeds", punishable by imprisonment for up to 5 years or a fine of no more than 30 million won (US $25,600 or €20,000) where a person does one of the following:

i) Disguises the acquisition or disposition of criminal proceeds.

ii) Disguises the origin of criminal proceeds.

iii) Conceals proceeds for the purpose of encouraging specific crimes or disguising criminal proceeds as legitimately acquired.

The Ministry of Justice confirmed that the level of knowledge required for the offence of money laundering includes a belief that the property in question represented "criminal proceeds", but that cases are not covered where the person involved should have known that the property represented "criminal proceeds".

Article 2 of the Proceeds of Crime Act defines "criminal proceeds" for the purpose of applying the offence of money laundering pursuant to article 3 of the Act, and the reporting obligations of financial institutions under article 5 of the Act and article 4 of the Financial Transactions Reports Act. Pursuant thereto, "criminal proceeds" include funds or properties "related to" a crime under article 3.1 of the FBPA. At the time of the on-site

visit, a representative of the Ministry of Justice stated that, speaking as a prosecutor, it was his opinion that article 3 of the PCA applies to the laundering of the bribe (including the conversion of the bribe, but not the proceeds of bribery obtained by the briber.[27] He explained that the application of the notion of "criminal proceeds" is limited in this way because a clear concept of the confiscation of the proceeds of bribery had not emerged in Korea due to the difficulties in quantifying the proceeds.

The definition of "criminal proceeds" under article 2 of the Proceeds of Crime Act applies to the laundering of funds or properties related to violations of the FBPA perpetrated by natural persons, but not legal persons.[28] However, the Korean authorities explained following the on-site visit that since it is a precondition to the punishment of a legal person that a natural person has already been the subject of punishment, the proceeds of crime of a legal person are never different from the proceeds of crime of a natural person; thus there is no loophole in punishment.[29]

Commentary

Given the newness of the offence of money laundering, the lead examiners recommend a reassessment of its application to the laundering of funds and property related to violations of the FBPA once there has been sufficient practice. In particular, the lead examiners recommend that this follow-up include a review of the application of the offence of money laundering to 1.the laundering of the proceeds of bribing a foreign public official obtained by the briber, and 2. the laundering in relation to violations of the FBPA perpetrated by legal persons.

Money Laundering Reporting

The Role of the Korea Financial Intelligence Unit

KoFIU was created pursuant to the FTRA as the central governmental organ for processing financial intelligence. KoFIU has two main areas of responsibility. First, it is responsible for analysing suspicious transaction reports (STRs) that it receives from financial institutions. If it determines that an STR and the consequent analysis are necessary to an investigation, KoFIU will forward the same to a relevant law enforcement agency.

The second main area of responsibility of KoFIU is to ensure that financial institutions comply with the reporting requirements prescribed by the FTRA. To this end, the FTRA vests KoFIU with the power to supervise and inspect financial institutions. Presently, KoFIU regularly inspects financial institutions to determine their effectiveness in detecting suspicious transactions. It also inspects annually the overall internal reporting system and education programmes of financial institutions. From time to time, KoFIU conducts additional special inspections to deal with specific matters that may arise. Because of its limited resources, KoFIU conducts these inspections jointly with the Korea Financial Supervisory Service, another governmental agency. KoFIU also provides guidelines and typologies to financial institutions to assist them in identifying suspicious transactions. The representative of KoFIU stated that these materials do not address the bribery of foreign public officials, and was not sure whether they contain information about domestic bribery. However, this year KoFIU plans to distribute a new typologies book which would discuss bribery cases, if there are any.

During the on-site visit, it was apparent that KoFIU is a well-run organization which plays a vital role in combating money laundering in Korea. Representatives of KoFIU demonstrated a high level of knowledge on the Korean legislative scheme and international standards on money laundering. KoFIU is more than a passive recipient of STRs, as it proactively seeks information from law enforcement agencies and financial institutions when it analyses STRs. In addition to making requests for information from financial institutions, KoFIU may also search and seize information from financial institutions when investigating international transactions and hopes to soon acquire similar powers when investigating domestic transactions. Plans are underway to provide KoFIU with direct on-line access to information kept by other law enforcement agencies. On a policy level, KoFIU meets regularly with law enforcement, prosecutors and financial institutions through a consultation committee to ensure the reporting system is cohesively implemented.

Reporting of Suspicious Transactions by Financial Institutions

Entities subject to Reporting Requirements

Pursuant to the FTRA, the obligation to report suspicious financial transactions applies only to "financial institutions", which includes commercial banks, credit banks, merchant banks, mutual savings and finance companies, agricultural and fisheries cooperatives, credit cooperatives, trust companies, securities and futures companies, brokerages and insurers. Notably missing are non-financial businesses and professions, such as lawyers, real estate agents, accountants and casinos, that engage in financial transactions with and on behalf of customers and clients. During the on-site visit, representatives of KOFIU agreed that the legislation is lacking in this regard, and indicated that Korea intends to remedy this deficiency by amending its legislation in the near future.

Threshold for Triggering Reporting Obligations

There are two concurrent reporting requirements in the legislative framework. Under the PCA, employees of financial institutions must report to a competent law enforcement agency if they find out that property in relation to a financial transaction is proceeds of crime, or if a customer launders or attempts to launder illegal proceeds. Failure to do so may result in a fine of up to 10 million Won (approximately US $8,500 or €6,700) and imprisonment of up to two years. The financial institution concerned may also be fined.

Under the FTRA, financial institutions must file an STR with KoFIU whenever there are reasonable grounds to suspect that a transaction involves illegal assets or money laundering, provided that the amount of the transaction exceeds 20 million Won (approximately US $17,000 or €13,400) in the case of a domestic transaction or US $10,000 (approximately €7,882 or 11.764 million Won) in the case of an international transaction. Financial institutions must also report to KoFIU if there are reasonable grounds to suspect that a client has structured financial transactions to avoid these monetary limits. A breach of these reporting requirements may result in a fine of up to 5 million Won (approximately US $4,250 or €3,350). For suspicious transactions that fall below these monetary limits, a financial institution is not obliged to report but may choose to do so.

On its face, these two concurrent reporting requirements may appear confusing since they are triggered by different thresholds and require reporting to different government agencies. Nevertheless, during the on-site visit, both KoFIU and representatives from the financial institutions demonstrated a clear understanding of the differences between the two requirements.

However, it would appear that the monetary thresholds that trigger mandatory reporting (especially the higher threshold for domestic transactions) may lead to under-reporting of suspicious transactions. Representatives of KoFIU concurred with this observation and stated that Korea hopes to harmonize the threshold for domestic and foreign transactions in the near future and to ultimately eliminate the monetary thresholds entirely.

A further source of potential under-reporting is the absence of a requirement to report cash transactions over a certain amount regardless of whether a financial institution suspects wrongdoing. Representatives of the KoFIU advised that presently there is only a requirement to report importing and exporting of cash and monetary instruments, but they expect the legislation will be amended in the near future to require cash transaction reporting from all financial institutions.

As noted above during the discussion of the offence of money laundering, laundering of the proceeds of bribery (as opposed to the bribe) is not an offence in Korea, nor is the laundering of proceeds related to violations of the FBPA by legal persons. It is unclear whether the absence of coverage of these matters deters financial institutions from reporting the laundering of such proceeds.

Resources of KoFIU

As noted earlier, KoFIU is tasked with both the analysis of STRs and the supervision of financial institutions to ensure compliance with the reporting obligations under the FTRA. It is apparent that these tasks require a significant amount of resources. Since the inception of KoFIU, the number of STRs filed by financial institutions has grown at an exponential rate. From November 2001 to January 2004, KoFIU received 2,289 reports from financial institutions. It has completed the analysis of 1,683 reports, of which 603 have been forwarded to law enforcement agencies. KoFIU is staffed with 24 members from the Ministry of Finance and Economy and 22 members from various law enforcement agencies. Because of limited resources, some of the inspections of financial institutions are conducted jointly with the Korea Financial Supervisory Service. During the on-site visit, representatives of KoFIU indicated that they have just enough resources to meet their present workload, but if the number of STRs continues to increase and initiatives such as cash transaction reporting are implemented, KoFIU might not be able to effectively meet its obligations.

Commentary

The lead examiners commend Korea for enacting a comprehensive legislative scheme to combat money laundering and for creating KoFIU to implement the legislation. Korea's anti-money laundering regime appears to be functioning well even though it is still in relative infancy. However, given the newness of the system, the lead examiners recommend revisiting this issue once there has been sufficient practice. Further, they recommend that the follow-up focus on the effectiveness of the system in view of: 1. the monetary thresholds for reporting suspicious transactions, 2. the absence of coverage of non-financial businesses and professions, 3. the information in guidelines

and typologies concerning foreign bribery, 4, the level of resources of KoFIU, and 5. the absence of coverage of the proceeds of a bribing a foreign public official in the notion of "criminal proceeds".

Whistleblower Protection

As mentioned earlier, the Anti-Corruption Act (ACA) entrusts KICAC with the protection of whistleblowers. The ACA prohibits an employer from changing a whistleblower's working conditions or imposing disciplinary measures against a whistleblower as retaliation. KICAC may investigate complaints of reprisals and request a private-sector employer to protect a whistleblower from further reprisals. If necessary, KICAC may ask the police to provide physical protection to a whistleblower. At present, the Korean authorities are considering the implementation of a witness protection programme that may be used to protect whistleblowers who testify.

This legislative scheme is generally impressive. However, as mentioned earlier, it does not expressly apply to acts of foreign public officials, since an "act of corruption" is defined as the act of "any public official". In order to clarify that whistleblower protections are available under the ACA to persons who whistle-blow acts of foreign public officials to KICAC, the Korean authorities are considering an amendment to the ACA. Until now no cases of foreign bribery have been reported to KICAC.

A further concern is that whistleblower protection under the Act applies only to persons who report to KICAC and not those who report to other law enforcement agencies (such as the police or a prosecutor). Law enforcement authorities stated during the on-site visit that they do protect a whistleblower who approaches them, even though they are not required by law to do so. However, it is not clear whether law enforcement provides such whistleblowers with the full range of protection under the ACA, e.g. protection from reprisals in the workplace.

Commentary

The lead examiners commend Korea for enacting a comprehensive law for the protection of whistleblowers. To strengthen its efforts in this area, they recommend that Korea considers extending whistleblower protection provided by the ACA to those who report foreign bribery to KICAC, and to those who report suspicions of foreign bribery to government agencies other than KICAC.

Detection through Systems for Accounting and Auditing

Accounting Standards

It is the view of a representative of the Korea Accounting Standards Board (KASB) of the Korea Accounting Institute, Korea's accounting standards-setting body,[30] that Korean accounting standards are in compliance with Article 8.1 of the Convention. Neither the Korean Financial Accounting Standards (KFAS) nor Korea's legislation expressly forbids the activities enumerated in Article 8.1 of the Convention, namely, "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". However, representatives of the KASB and the accounting profession confirmed during the on-site visit that the principles embodied in the KFAS implicitly prohibit such activities.[31]

The representatives of the KASB also stated that the board is preparing reforms which will align Korean accounting standards with International Accounting Standards and not national interests. The KASB expects to complete a draft of the reforms by May 2004 before submitting them to the FSC for approval.

Not all companies in Korea, however, are legally-bound to apply the KFAS. Stock companies with assets of 7 billion won or more (approximately US $5.95 million or €4.69 million) are required to prepare their financial statements in accordance with the KFAS.[32] In addition, the Korean authorities indicate that pursuant to the Securities and Exchange Law all listed companies are required to apply the KFAS.[33] Public sector entities are also subject to the KFAS.[34] The Small and Medium-sized Enterprise Act subjects smaller companies to the same standards with a few exceptions.

Additional accounting requirements apply to group entities including enterprise groups (*chaebols*). Each entity is required to prepare a combined financial statement in addition to a separate financial statement for each separate entity.[35] Consolidated accounts are required where a company has 30% ownership and substantial influence over another company, or 50% or more ownership.

Penalties for Accounting Violations

Even in situations where the KFAS applies with the force of law, it appears that the sanctions for the activities described in Article 8.1 of the Convention are not "effective, proportionate and dissuasive" as required by Article 8.2. Pursuant to article 20 of the Act on External Audit of Stock Companies[36], an individual who prepares false financial statements contrary to the KFAS is punishable either by a fine of 30 million won (approximately US $25,500 or €20,100) or imprisonment of three years, not both.[37] The inability to impose a fine and imprisonment concurrently, and the comparatively small fine and short period of imprisonment, significantly reduce the deterrent effect of this provision.[38]

Pursuant to article 21 of the Act on External Audit of Stock Companies, a legal person is only liable to the same range of fine that is available for a natural person (i.e. representative, agent or employee of the company) when there has been a finding of fact that the natural person committed the accounting violation.

In addition, article 447 of the Commercial Act requires directors of a company to prepare financial statements (including a balance sheet, a profit and loss statement, and a statement of appropriation of earned surplus or statement of disposition of deficit) and a business report at each period for the settlement of accounts. The directors must submit these documents to a statutory auditor, who shall prepare an audit report. The financial statements, business reports and audit reports are then presented to the company's general meeting. A person who makes a false report to, or conceals facts from, the government authorities, general meetings or meetings of bondholders is subject to a fine for negligence not exceeding 5 million won (approximately $4,250 US or €3,350).[39]

In sum, these fines are so low that they are merely the cost of doing business. Further, the fines that have recently[40] been imposed by the courts under the Act on External Audit of Stock Companies are at the low end of the range. In one case, the court imposed imprisonment for 2 years and an "additional charge" of 470,858,000 won (less than US $427,000 or €333,000) Since fines under the Act on External Audit of Stock Companies are limited to 30 million won, and a fine is only available where imprisonment is not imposed, it is not clear what the "additional charge" refers to. On

appeal the term of imprisonment was reduced to 18 months and suspended for 3 years. In another case the court imposed a fine of 10 million won (US $8,500 or €6,700). A violation under the Certified Public Accountant Act resulted in a fine of 5 million won (US $4,250 or €3,350). Sanctions for loan fraud based on accounting fraud, which appear to have been imposed under the Criminal Act, have resulted in terms of imprisonment for the relevant CEOs ranging between 2 ½ years and 4 years. Out of six cases the sentences were suspended in four, and in one case the period for making an appeal has not expired. Fines were not imposed in any of these cases. The Korean authorities did not provide cases where legal persons were sanctioned for accounting offences.

Commentary

The lead examiners welcome the efforts of the Korea Accounting Institute to align Korean accounting standards with International Accounting Standards. They recommend that Korea considers increasing the penalties for false accounting so that they are effective, proportionate and dissuasive.

Auditing Standards, Reporting Requirements and Penalties for Auditing Violations

Companies subject to External Audits

Article 2 of the Act on the External Audit of Stock Companies provides that any stock company of which the amount of total assets as of the end of the preceding fiscal year is equal to or greater than the amount prescribed in the relevant Presidential Decree--7 billion won (US $5.95 million or €4.69 million)--is subject to an external audit.[41] The Korean authorities indicated that pursuant to a recent amendment to the Act, listed and "pre-listed" companies with assets between 1 billion won (approximately US $860,000 or €704,000) and 7 billion won are also required to be externally audited. Article 2 provides an exemption from an external audit for stock companies to which the Framework Act on the Administration of Government-Invested Institutions applies, and for other companies pursuant to the Presidential Decree. A representative from the Financial Supervisory Service clarified that the exemption under the Act and the Presidential Decree applies to companies that are government owned or influenced, government invested and companies in liquidation, but that other laws subject them to an external audit.

The Board of Audit and Inspection of Korea (BAI) audits government agencies as well as state-owned companies. The representative of BAI indicated that the agencies that are audited by the Board of Audit and Inspection include the Export-Import Bank of Korea, Korea Export Insurance Corporation, and Public Procurement Service. Following the on-site visit, the Korean authorities confirmed that the Korea International Cooperation Agency (KOICA) is subject to an audit by BAI when BAI deems it necessary and upon the request of the Prime Minister. Further, BAI stated following the on-site visit that it does not in principle audit private companies, but that it would audit private companies that receive funds or other assistance from public agencies, such as the export credit agencies, where there is a report of foreign bribery, and did not believe that the responsible agencies have the authority to perform audits of client companies.[42] The Korea Export Insurance Corporation and the Export-Import Bank confirmed that they do not have the right to perform audits of client companies where there is a report of foreign bribery.[43]

Reporting Requirements

Article 10 of the Act on the External Audit of Stock Companies establishes the following reporting obligations in respect of external auditors:

i) An auditor shall notify the statutory auditor or the audit committee and report to the shareholders' meeting any wrongdoing or violation of the law committed by a director.

ii) An auditor shall notify the statutory auditor or the audit committee of a violation of the accounting standards by a company.

iii) The statutory auditor or audit committee shall notify the auditor of any wrongdoing or violation of the laws committed by a director.

Thus, reporting requirements concerning violations of the law only apply to acts of directors, and there is no requirement under the law that these indications be reported to the law enforcement authorities. Additionally, since article 9 establishes the confidentiality of information obtained in the course of performing audit duties unless an exception is provided by the law, and a penalty for divulging confidential information in violation of article 9 is provided under article 20(1)3,[44] it would appear that there is a prohibition against reporting information regarding wrongdoings committed by persons other than directors, and that reporting to the law enforcement authorities in any case is prohibited.

At the on-site visit there appeared to be an absence of clarity concerning the reporting obligations on auditors and management. A representative of the Korean Accounting Institution believed that perhaps management has an obligation to report the bribery of a foreign public official to the law enforcement authorities. The representative of one enterprise group (*chaebol*) was not sure whether management must report fraud or bribery directly to law enforcement authorities, one stated that matters concerning general corruption or fraud are dealt with internally, and another stated his company's code of ethics refers to the Convention and the FBPA, but does not specify any reporting obligations for cases where foreign bribery is suspected. However, two of the enterprise groups had taken the important step of instituting computer network systems available to employees and the public for the purpose of making confidential reports of wrongdoing to the companies' management.

The representative of the Financial Supervisory Service stated that there is no formal requirement for external auditors of financial companies to report indications of violations of the law other than those perpetrated by directors to the internal audit committees and corporate governance committees**.** However, the Korean authorities state that such reporting does occur in practice pursuant to the Korean Accounting Standards.

Penalties for Auditing Violations

The penalty under article 635 of the Commercial Act for the acts of certain persons, including auditors, for the false reporting to, or concealing of facts from, government authorities and general meetings or meetings of bondholders, is a fine for negligence not exceeding 5 million won (US $4,250 or €3,350). The penalty provided by article 20 of the Act on the External Audit of Stock Companies for the failure to report, contrary to article 10 of the Act, of a wrongdoing or violation of the law perpetrated by directors, and for the making of a false statement in an audit report by specific persons, including "persons in charge of the accounting affairs of a company", is imprisonment of not more

than 3 years or a fine not exceeding 30 million won (US $25,500 or €20,100). The penalty for the disturbance of an external audit by fraud or other improper means is up to 2 years of imprisonment or a fine not exceeding 20 million won (US $17,000 or €13,400). For the same reasons as provided in the discussion above on the penalties for accounting violations, it appears that the penalties for auditing violations are not "effective, proportionate and dissuasive".

The Korean authorities provided two recent decisions[45] concerning auditing violations. In these cases, which appear to have been dealt with under the criminal provisions of the Act on the External Audit of Stock Companies,[46] the penalties are at the low end of the range. In the first case, which involved the false estimation of stock value,[47] the court imposed a fine of 5 million won (US $4,250 or €3,350). In the second case, which involved the failure of an auditor to report to the director or the supervisor of the company and the general shareholders' meeting the misappropriation of 5 billion won by the director of the company, the court imposed a fine of 10 million won (US $8,500 or €6,700). Legal persons were not sanctioned in either of these cases.

Commentary

The lead examiners recommend that the Korean authorities consider taking measures to ensure that government and government-funded agencies that provide contracting opportunities to Korean companies, such as the KEIC, the Export-Import Bank and KOICA, have the authority to audit companies suspected or convicted of bribing foreign public officials, to determine whether funds obtained from the agency in question have been used as part or all of the bribe.

The lead examiners also recommend that Korea consider taking improved measures for requiring external auditors to report indications of possible illegal acts of bribery to the competent authorities, and that information about such a requirement should be made readily available to companies involved in international business transactions.

Furthermore, the lead examiners recommend that Korea considers increasing the penalties for fraudulent auditing.

Notes

1. The Minister of Justice is the supreme superintendent of all public prosecutors and as such generally directs and supervises all public prosecutors through general methods including Ministerial rules. In respect of specific cases, the Minister only has the authority to direct and supervise the Prosecutor General.
2. The MOJ Explanatory Manual is discussed in more detail later in this report.
3. These meetings involved collaboration and consultations with business, labour and NGOs, including Transparency International—Korea.
4. Under the Public Prosecutors' Office Act, Korean public prosecutors are responsible for directing the police to investigate crimes and for conducting prosecutions.
5. The Supreme Public Prosecutors' Office is under the authority of the Prosecutor General, who has the power to supervise and direct all other public prosecutors, although in practice he/she exercises direct control only in serious cases of national importance. The Prosecutor General is appointed by the President, and serves a two-year non-renewable term.
6. KICAC is discussed in further detail later in this report.
7. The Korean authorities indicate that the 70 page booklet discusses the contents of the Convention, provides examples, and emphasises the necessity of complying with the Convention.
8. KoFIU is discussed in further detail later in this report.
9. As of 2002, SMEs accounted for 99.7% of enterprises, 84% of the workforce, 48 % of output and 43% of exports (OECD Economic Surveys: Korea, 2003, at p. 162; and OECD Territorial Reviews: Korea, 2001, Chapter 4).
10. The Citizen's Coalition for Economic Justice (CCEJ) stated at the on-site visit that many SMEs are transferring their factories to China.
11. SMBA promotes Korean SMEs by, for instance, assisting them in improving their structure and increasing their international competitiveness.
12. KOTRA promotes Korean foreign trade through daily activities as well as strategic projects that enable Korean companies to identify new overseas marketing opportunities for their goods and services and assist their promotional activities.
13. CCEJ, founded in 1989, was involved in the establishment of the Real Name Financial Transactions System.
14. PSPD, founded in 1994, played a key role in introducing chaebol and political reform, and campaigned for an anti-corruption law.
15. The Anti-Corruption Act came into force in August 2001.
16. Note that the issue of whistleblower protection under the Anti-Corruption Act is discussed later in this Report.

17. KICAC was established under article 10 of the Anti-Corruption Act by the President. Its responsibilities include receiving reports from the public pursuant to article 25, as well as formulating and recommending policies and institutional improvement measures for preventing corruption in public institutions, evaluating the implementation of policy measures, and providing education and awareness on the prevention of corruption. It shall consist of nine members, including one chairman and two standing members. The Chairman and standing members shall be appointed by the President and the non-standing members shall be appointed or commissioned by the President. Of the non-standing members, three shall be appointed or commissioned on the recommendation of the National Assembly, and the other three on the recommendation of the Chief Justice of the Supreme Court.

18. The definition also covers an act of causing damages to the property of any public institution in violation of Acts and subordinate statutes, in the process of executing the budget of the relevant public institution, acquiring, managing or disposing of the property of the relevant public institution, or entering into and executing a contract to which the relevant public institution is a party.

19. Article 1 states: "The purpose of this Act is to serve to create the clean climate of the civil service and society by preventing and regulating the acts of corruption efficiently".

20. Where the report concerns an act of corruption allegedly committed by a "high-ranking public official", and an investigation is deemed necessary, the Commission shall file an accusation with the prosecution against him/her in its name. High-ranking public officials are the following: 1. A public official with the rank of Vice Minister or higher; 2. The Special Metropolitan City Mayor, Metropolitan City Mayor, or Do governor; 3. A police officer with the rank of superintendent general or higher; 4. A judge or a public prosecutor; 5. A military officer with the rank of general; and 5. A Member of the National Assembly.

21. Pursuant to article 30 of the Anti-Corruption Act, the investigative agency to which the Anti-Corruption Commission refers a report shall conduct an investigation of the case within a specified period, and notify the Commission of its findings within 10 days of concluding its investigation. The Commission may ask the investigative agency to re-launch its investigation, audit, etc, by presenting reasonable grounds, and the investigative agency must notify the Commission of its findings.

22. With respect to the administrative affairs executed by the National Assembly, courts, the Constitutional Court, Election Commissions, or the Board of Audit and Inspection, such request shall be made to the Speaker of the National Assembly, the Chief Justice of the Supreme Court, the President of the Constitutional Court, the Chairman of the National Election Commission, or the Chairman of the Board of Audit and Inspection, respectively.

23. The number of required signatures needed in a petition is prescribed by Presidential Decree.

24. Article 19(2) reads: "Except as otherwise prescribed by this Act and any other Acts, expenses under paragraph (1) shall be those losses or expenses which are incurred in connection with the business of a corporation and which are generally accepted as normal or directly related to profit-making activities."

25. The lead examiners note that this is a general issue for many Parties.

26. The Proceeds of Crime Act also contains provisions on the confiscation of criminal proceeds and mutual legal assistance.

27. The Korean authorities draw attention to articles 3.1 and 4.1 of the FBPA, which provide the authority for imposing a fine up to twice the amount of profit where the profit obtained through the offence exceeds the prescribed limits.

28. The definition of "criminal proceeds" in article 2 of the Proceeds of Crime Act does not apply to funds or properties related to crimes under article 4 of the FBPA, which establishes the liability of legal persons for the bribery of a foreign public official. It only refers to article 3.1 of the FBPA, which establishes the liability of natural persons for the offence.

29. The Korean authorities clarified that this would be the case regardless if the legal person and the natural person are punished together or separately.

30. Although Article 13(1) of the Act on External Audit of Stock Companies designates the Financial Services Commission (FSC) with the responsibility of setting accounting standards, the FSC has delegated this function to the Korea Accounting Institute pursuant Article 13(4) of the Act.

31. For instance, Article 3(1) of the KFAS requires accounting information to be "fairly prepared and reported on the basis of objective data and evidence." Article 3(3) mandates adequate disclosure of "significant accounting policies and financial information". Under Article 3(7), the accounting must "reflect the economic substance of transactions". Article 10(1) requires a balance sheet to "present fairly all assets, liabilities, and stockholders' equity". Under Article 43(1), the statement of income must also present "all revenue earned in the current accounting period, and all matching costs and expenses incurred in producing the revenue." Article 5.1 of the Act on External Audit of Stock Companies also requires that "an auditor shall conduct an audit in accordance with the audit standards which are generally accepted as fair and reasonable."

32. Articles 2 and 13(3) of the Act on External Audit of Stock Companies and the associated Presidential Decree.

33. See Securities and Exchange Act, article 194-3.1 and associated Presidential Decree, article 84-30; and Regulation on Securities Issuance and Disclosure, article 2.

34. For instance, see Framework Act On Administration of Government-Invested Institutions, article 20.1; Presidential Decree on the Korea Development Bank Act, article 35-10; Presidential Decree on the Export-Import Bank of Korea Act, article 17-11; The Korea Gas Corporation Act, article 18-1; and Inchon International Airport Corporation Act, article 18.

35. Related party transaction has been removed from the combined financial statement.

36. The Korean authorities point out that the Act on External Audits of Stock Companies also provides for administrative penalties, such as a prohibition from issuing securities, recommendation to dismiss officers, and the appointment of an auditor.

37. Article 20(1)8 of the Act on External Audit of Stock Companies.

38. The Korean authorities indicate that the Financial Supervisory Service (FSS) and Securities Futures Committee (SFC) have the authority to impose a civil sanction not exceeding 2 billion won on listed companies for violating the KFAS.

39. Articles 447 to 447-4 and 635(1).5 of the Commerce Act.

40. These penalties were imposed between February 2001 and November 2003.

41. Note that financial companies are audited by the Financial Supervisor Service (FSS), which has the authority to undertake investigations and impose administrative sanctions on auditors and auditing firms.

42. The representative from BAI added that these audits would be limited to the funds or other assistance received from the public agencies.

43. The Korean authorities indicate that according to KEIC's insurance policy, KEIC has the right to require relevant information from a policy holder in order to investigate a claim.

44. Pursuant to article 10.1(3) of the Act on the External Audit of Stock Companies, the penalty for divulging confidential information in violation of article 9 is imprisonment for not more than 3 years or a fine not exceeding 30 million won.

45. These cases were decided in November 2003 and December 2003.

46. The Korean authorities point out that the Act on External Audit of Stock Companies also provides administrative penalties for violations of the KFAS by external auditors and CPAs belonging to auditing firms. Pursuant thereto the Financial Supervisory Service (FSS) and Securities Futures Committee (SFC) have the authority to, for instance, cancel their registration or suspend them from working for the Finance and Economy Minister.

47. In this case, the auditors accepted 28 million won to prepare the false estimates.

Mechanisms for the Prosecution of Foreign Bribery Offences and the Related Accounting and Money Laundering Offences

Exceptions and Defences to the Offence of Bribing a Foreign Public Official

Mistake of Law and Relationship with Government Advice

According to the Korean authorities the Ministry of Justice may provide opinions to the public regarding the interpretation of the criminal law, including the FBPA. Members of the public normally request such opinions from the Supreme Public Prosecutor's Office or the Ministry of Justice. If a request is submitted to the police or a public prosecutor, it is forwarded to the Ministry of Justice.[1] The Korean authorities do not believe that these bodies have received any requests for opinions concerning the interpretation of the FBPA.

According to the Koran authorities, although not binding on the courts, an erroneous opinion provided by the Ministry of Justice may be the basis of the defence of mistake of law where it is relied on by the recipient. Pursuant to article 16 of the Criminal Act,[2] a person who commits a crime not knowing that his/her act constitutes a crime under existing Acts and subordinate statutes shall not be punishable if the misunderstanding is based upon reasonable grounds.

The Ministry of Justice confirmed that the main resource for providing opinions concerning the interpretation of the FBPA is the Explanatory Manual on the Convention and the FBPA, published by the Ministry in February 1999.[3] This document has been provided to prosecutors and the National Police Agency, which in turn distributed it to each police station. It has also been provided to the Korean Business Federation, which disseminated it to the business sector. The Explanatory Manual includes answers to frequently asked questions, and provides interpretive guidelines on the elements of the offence of bribing a foreign public official, relevant defences and jurisdictional issues.

The Explanatory Manual is a very useful source of information about the Ministry of Justice's interpretation of the Convention and the FBPA. It is presented in an accessible format, and addresses many of the major issues under the Convention. By and large it should provide the relevant authorities with appropriate and accurate information about the implementation of the Convention and the FBPA. However, some parts of the manual may be interpreted in a manner which is inconsistent with the Convention and the FBPA, and could cause confusion or result in the provision of incomplete or misleading advice.

Social Customs

Article 20 of the Criminal Act[4] states that "an act which is conducted…in pursuance of accepted business practices, or other action which does not violate the social rules, shall not be punishable". Contrary to Commentary 7 on the Convention[5], this provision appears to provide an exception to the offence of bribing a foreign public official in the situation where the act of bribery is accepted by local custom or tolerated by the local authorities (i.e. the customs of the country for which the foreign public official acts).[6] The Korean authorities confirmed this impression in the Responses to the Phase 2 Questionnaire.[7] However, the Explanatory Manual published by the Ministry of Justice states that "in principle" the FBPA applies without regard to perceptions of local customs or the tolerance of improper payments by the local authorities.

It is the opinion of the representative of the Supreme Public Prosecutor's Office that the exception under article 20 is not an obstacle to the implementation of the foreign bribery offence because it does not apply once a payment has been determined to be a bribe. In addition, in determining whether a payment constitutes a bribe, the social customs in Korea are relevant. This opinion appears to be based upon jurisprudence concerning the passive bribery of domestic public officials,[8] which would necessarily have only considered the social customs of Korea. Thus, arguably, there could be some latitude for the exception to be applied differently in the context of the bribery of a foreign public official. However, the Korean authorities state that article 20 has been strictly interpreted based upon historical social and cultural experiences in Korea.

Social Courtesy

An academic article[9] indicates that pursuant to a Supreme Court Judgement,[10] a payment or a gift offered as a social courtesy does not constitute a crime, because it is not given in consideration of an official's act. It further states that the exception "could and should have been defined with bright lines" given that determining whether it applies requires a "delicate balancing act".

Permitted or required by the Law of the Foreign Public Official's Country

Article 3.2.a of the FBPA provides a defence to the offence of bribing a foreign public official where "such payment is permitted or required by the law of the foreign public official's country". This defence is intended to capture the one described in Commentary 8 on the Convention. However, it is not entirely consistent with Commentary 8 as it does not limit consideration of the law of the foreign public official's country to the "written law or regulation…including case law". Thus, an argument could be made that article 3.2.a provides a broader defence than Commentary 8. However, the Explanatory Manual published by the Ministry of Justice states that this defence is limited in application to cases where the payment is permitted or required by the "written law or regulation of the foreign public official's country".

Small Pecuniary or other Advantage

Article 3.2.b of the FBPA provides a defence where a "small pecuniary or other advantage is promised, given or offered to a foreign public official engaged in ordinary and routine work, in order to facilitate the legitimate performance of the official's business". This defence is intended to implement Commentary 9 on the Convention concerning "small facilitation payments". However, article 3.2.b departs from the language of Commentary 9 in two main respects: 1. Article 3.2.b is not restricted to "payments", but applies to "pecuniary or other advantages"; and 2. Article 3.2.b does not provide the example of "issuing licenses or permits".

With respect to the first point, the representative of the Supreme Public Prosecutor's Office explained that Korea chose to cover "small pecuniary or other advantages" in order to be consistent with the language describing a bribe under article 3.1 of the FBPA and article 1.1 of the Convention (i.e. pecuniary and non-pecuniary advantages). With respect to the second point, the Korean authorities stated that Korean statutes customarily do not include specific examples.

Commentary

The lead examiners believe that the Explanatory Manual published by the Ministry of Justice is an excellent resource for the police, prosecutors and officials of the Ministry of Justice in providing opinions to the business community concerning the interpretation of the FBPA and the Convention. However, they caution that since reliance on erroneous or misleading advice could result in the application of the defence of mistake of law in article 16 of the Criminal Act, it is necessary for the Korean authorities to carefully review the Explanatory Manual to ensure that the guidelines contained therein are consistent with the Convention and the FBPA.

The lead examiners recommend that Korea ensures that the defence of social customs under article 20 of the Criminal Act is not applicable to the offence of foreign bribery under the FBPA. They also recommend following up the application of the exception to bribery of payments or gifts offered as a social courtesy.

Furthermore, the lead examiners recommend that the application of the exception for "small pecuniary or other advantages" be reviewed once there has been sufficient practice under the FBPA.

Application of Elements of the Offence required by the Convention

Legal Effect of the Convention

It is necessary to consider the legal effect of the Convention in Korea in order to determine whether any possible deficiencies in the offence of bribing a foreign public official in the FBPA could be rectified by directly applying the Convention, or by using the Convention as a tool for interpreting the offence. In Phase 1 the Korean authorities explained that, since pursuant to the Korean Constitution, the Convention has the same legal effect as any legislation passed by the National Assembly, the provisions of the FBPA would be interpreted strictly in accordance with the Convention. Nevertheless, this explanation does not clarify which instrument takes precedence when the offence as described in the FBPA is inconsistent in some respect with the Convention.

The representative of the Supreme Public Prosecutor's Office explained that in cases where there is an inconsistency[11] between a domestic law and a treaty, legal theory in Korea dictates that the newer law prevails and that a special law prevails over the more general. According to this theory, it appears that since both the Convention and the FBPA are "special" laws, and the FBPA came into force following the Convention in Korea,[12] the FBPA prevails over the Convention. The representative of the Supreme Public Prosecutor's Office also explained that in the context of criminalisation, in order for a treaty to be directly applied it must contain a statement of punishment, which is not the case in respect of the Convention. Moreover, article 13.1 of the Korean Constitution could be interpreted as authority for the strict interpretation of criminal offences in accordance with the elements expressly provided therein.[13] This was confirmed by a statement of the representative of the defence bar who participated in the on-site visit.

In view of the legal theory in Korea on the application of treaties to criminal offences, it appears prudent to interpret the offence of bribing a foreign public official as it is constituted in article 3 of the FBPA independently without importing an element of the offence not found in the FBPA from Article 1 of the Convention.

Bribing through Intermediaries

Article 3.1 of the FBPA does not expressly state that the offence of bribing a foreign public official applies where the bribe is made through an intermediary. However, the Explanatory Manual published by the Ministry of Justice states that the person who directs another person to bribe a foreign public official can be subject to criminal punishment as an accomplice. This was confirmed by the representative of the Supreme Public Prosecutor's Office, who explained that the legal authority for this approach is contained in the general provision on complicity in the Criminal Act.[14] He also clarified that a person who bribes through an intermediary cannot be punished where the intermediary does not deliver the offer, promise or gift to the foreign public official.

The Korean authorities referred to the decision in the "Aulson and Sky Case" in which the defendant, who provided the bribe through the wife of the foreign public official, was convicted under the FBPA. The Korean authorities confirmed that the defendant did not raise an argument about the coverage of bribes through intermediaries before the court. In addition, the Korean authorities caution that since this case did not reach the Supreme Court it "lacks a coherent interpretation of the Convention and the implementing legislation". In any case, the lead examiners were satisfied that the general provision in the Criminal Act on complicity does in practice establish the liability under the FBPA for the bribery of a foreign public official through an intermediary.

Non-application of Law on Attempts

The Korean authorities confirmed that attempts to bribe a foreign public official are not punishable under the FBPA.[15] This raises the issue about whether an offer, promise or gift, that does not result in the provision of a benefit by a foreign public official or is not accepted by the public official (or does not come to his/her attention) constitutes a completed offence. In the Responses to the Phase 2 Questionnaire, the Korean authorities state that due to the absence of coverage of attempts, the kinds of situations that will not be covered include the following:

- The briber has expressed the intent to bribe but this intention has not yet been conveyed to the public official.
- A letter or e-mail concerning a bribe has been sent but the public official has not yet received it.
- A bribe has been sent by mail but for some reason it has not been delivered to the public official.

Article 133(1) of the Criminal Act establishes the offence of promising, delivering or manifesting a will to deliver a bribe to a domestic public official, punishable by imprisonment for not more than five years or by a fine not exceeding 20 million won. Article 133(2) clarifies that article 133(1) also applies to a person who, for the purpose of promising, etc. to deliver a bribe, delivers money or goods to a third party.[16] The lead examiners wondered whether article 133(1) essentially covers attempts, with the result that there is unequal treatment between domestic and foreign bribery in this respect, contrary to article 1.2 of the Convention. The Korean authorities indicated that the language in article 133(1) is not intended to cover attempts to bribe domestic public officials, and therefore the situations described in the preceding paragraph are also not covered in respect of domestic bribery. However, supporting case law was not provided.

The representative of the Supreme Public Prosecutor's Office confirmed that if difficulties arise in prosecuting cases involving attempts to bribe a foreign public official through an intermediary due to the difference between article 133(2) and the FBPA, the law would be amended accordingly.

Commentary

The lead examiners recommend following up the non-applicability of the law on attempts to foreign bribery, including attempts through intermediaries.

Definition of Foreign Public Official

Persons exercising a Public Function for a Public Enterprise

The definition in article 2 of the FBPA of a foreign public official includes an executive or employee of an "enterprise over which a foreign government holds over 50 percent of its subscribed capital or exercises *de facto* or effective controlling power over its overall management, including the decision of major business and the appointment or dismissal of its executives", where he/she exercises a public function for a foreign government.

This definition appears to establish a higher threshold for the determination that an enterprise constitutes a public enterprise than the one under Commentary 14 on the Convention in the following two respects:

- Article 2.2.c of the FBPA requires that the foreign government holds over 50 percent of the enterprise's subscribed capital or exercises "*de facto* or effective" control over its overall management. On the other hand, Commentary 14 defines a public enterprise as an enterprise in which a foreign government(s) exercises "dominant influence", which includes the case where the government(s) holds the majority of the enterprise's subscribed capital, controls the majority of votes attaching to shares issued by the enterprise, or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board. According to Korean authorities, "*de facto* or effective control" in the FBPA encompasses the concept of "dominant influence" as defined in Commentary 14. No case law was provided in support of this proposition.
- Commentary 14 specifies that dominant influence exercised "directly or indirectly" over an enterprise by a foreign government(s) is sufficient. In contrast, article 2.2.c of the FBPA does not specify that indirect control is a sufficient trigger. According to Korean authorities, "*de facto* or effective control" in the FBPA also encompasses the concept of indirect control as defined in Commentary 14. No case law was provided in support of this proposition.

North Korean Public Officials

The Korean authorities confirmed that pursuant to the domestic law and Constitution of Korea, North Korea is not considered a state according to the accepted meaning under international law, and that, therefore, North Korean public officials are not covered by the definition of a foreign public official in the FBPA. Moreover, the Korean authorities do not believe that a North Korean public official is a domestic public official for the

purpose of applying the domestic bribery offences under the Criminal Act. Thus, the bribery of North Korean public officials is not expressly covered under the laws of Korea.

The absence of express coverage of the bribery of North Korean officials could represent a significant gap, in view of the growing economic ties between the Republic of Korea and North Korea. Trade between them has increased steadily, rising from US $221 million in 1998 to US $724 million in 2003.[17] In addition, companies from the Republic of Korea have invested US $1.16 billion in North Korea in the eight years leading up to October 2003. In June 2000, President Kim Dae-jung of the Republic of Korea met North Korean leader Kim Chong-il in a historic summit, at which time it was agreed that further talks would be held to expand their economic relations. Additional talks resulted in an agreement for the construction of an industrial complex in the North Korean city of Gaesong and the opening of cross-border rail and road links.[18]

The Korean authorities recognize the risk of bribery of North Korean public officials, and have addressed such bribery in the past. The Foreign Exchange Control Act, which expressly prohibits payments to North Korea, was used in 2000 to prosecute a case involving payments to a North Korean official. The representative of the Ministry of Foreign Affairs and Trade stated that he believes cases of bribing North Korean officials can also be addressed by the National Security Law.

Commentary

The lead examiners recommend that the issue of what constitutes "de facto or effective control" by a foreign government(s) over an enterprise, including whether it is triggered through indirect control, be followed-up when there has been adequate experience in implementing the FBPA.

Additionally, the lead examiners are concerned that the bribery of North Korean public officials is not expressly covered by the FBPA or other laws. They note that the Foreign Exchange Control Act has been successfully used in a case involving the bribery of the North Korean leader, and that the National Security Law can also address such cases, but feel that it would be prudent to follow-up this issue once other relevant cases have come to light.

Third Party Beneficiaries

As identified in Phase 1, article 3.1 of the FBPA does not expressly apply to the case where there is a third party beneficiary. In addition, in Phase 1 the Korean authorities stated that article 3.1 covers the case where the benefit is directed to a foreign public official for the benefit of a third party, but that they were doubtful whether the Convention requires that the situation be covered where an agreement has been reached between a briber and a foreign public official to transmit a bribe directly to a third party. The position of Korea, described at the Phase 2 on-site visit by the representative of the Supreme Public Prosecutor's Office, is that the language in Article 1 of the Convention is unclear in this respect[19], and at the time that the FBPA was enacted the notion of paying bribes directly to third parties had rarely been observed in the domestic bribery context. However, he confirmed that the case where a benefit is delivered directly to a third party is covered under the Criminal Act in relation to the offence of bribing a domestic public official,[20] and if in the future difficulties arise as a result of the difference between this provision and the FBPA, the FBPA will be amended accordingly.

Commentary

The lead examiners recommend that Korea clarifies that article 3.1 of the FBPA covers the situation where a bribe is transmitted directly to a third party, consistent with the offence of bribing a domestic public official under the Criminal Act.

Statute of Limitations

During the on-site visit, the lead examiners raised questions about the adequacy of the limitations period that applies to an offence under the FBPA.[21] Under article 249 of the Criminal Procedure Act, the limitations period for an offence is determined according to the maximum sentence of imprisonment that can be imposed. With respect to the offence under article 3 of the FBPA, the limitations period is five years. The limitations period is suspended in relation to an accused and any accomplices when a prosecution is initiated against the offender. It is also suspended when the accused stays outside of Korea's jurisdiction for the purpose of avoiding prosecution. The lead examiners believe that a limitation period considerably longer would ensure that investigations be conducted properly and more efficiently[22]. While this would not accord with the rule under the Criminal Procedure Act, which links the limitation period to the maximum term of imprisonment, the lead examiners believe that it would be appropriate to make a special exception from this rule for foreign bribery, due to the comparatively longer time needed for its detection and investigation.

The Korean authorities believe the limitations period for the FBPA is sufficient to ensure investigations are conducted properly, and they note that Korea has successfully prosecuted two foreign bribery cases under the five-year limitations period. Further, they have not encountered difficulties with the investigation of domestic bribery offences, even though these offences involve the same or shorter limitations periods. They added that it is inappropriate to raise the maximum punishment of an offence solely to extend the limitations period. In the alternative, providing a special statute of limitations for foreign bribery might produce an imbalance with other crimes. Moreover, the Korean authorities believe that their statute of limitations for foreign bribery compares favourably with those of other Parties. Nevertheless, they will consider lengthening the period if it proves to be an obstacle to investigations and prosecutions.

Commentary

The lead examiners recommend that the adequacy of the statute of limitations for the foreign bribery offence be followed up.

Liability of Legal Persons

Generally

Article 4 of the FBPA[23], which establishes the criminal responsibility of legal persons for the bribery of a foreign public official, represents a significant legislative milestone in Korea's anti-corruption efforts, as legal persons are not liable under the Criminal Act for the bribery of domestic public officials. Article 4 provides a fine of up to 1 billion won (€670,000 or US $850,000) in the event that a representative, agent, employee or other individual working for the legal person has committed the offence under article 3.1 of the FBPA in the relation to its business. Where the profit obtained through the offence exceeds 500 million won, the legal person shall be subject to a fine up to twice the

amount of the profit.[24] A legal person is not subject to the foregoing sanctions where it has paid "due attention" or exercised "proper supervision" to prevent the offence against the FBPA.

It is a positive sign that in Korea's first case adjudicated under the FBPA, the Aulson and Sky Case, a legal person was convicted and sentenced for the bribery of a foreign public official.[25] In the Seoul District Court on 20 August 2002, the defendant, Aulson and Sky Ltd., was sentenced to a fine of 100 million won (€67,000 or US $85,000). On appeal to the Seoul District Court, Criminal Department III, the sentence of Aulson and Sky Ltd. was upheld.

Standard of Liability

Since article 4 of the FBPA has only been applied once, it is difficult to ascertain whether any apparent problems in the text of the offence would translate into problems in application. Two potential obstacles to the effective enforcement of the liability of legal persons for the foreign bribery offence have been identified--one in respect of the nature of the act for which the legal person is liable, and the other concerning the exemption from sanctions.

In relation to the Business of the Legal Person

The Korean economy is dominated by "enterprise groups"[26] (commonly known as *chaebols*). Enterprise groups are large multi-company business groups with a relatively high rate of internal ownership rather than units owned by a single holding company.[27] They are often family-owned and managed, and exercise monopolistic or oligopolistic control over industries. Usually, the owner family exerts control over the entire group through small direct stakes in a few key companies, thus creating intricate business and financial relationships between the owner family and its affiliates. The sister companies often do not operate at arm's length because their officers, directors and shareholders are frequently members of the same family. Moreover, enterprise groups have been associated with a certain level of corruption due to corporate ties to the state during the thirty years of military rule.[28] Since the 1997 financial crisis, the Korean government has taken steps to increase transparency in the governance of enterprise groups.[29]

The lead examiners are concerned that the FBPA may not cover a company that bribes for the benefit of a sister company in the same enterprise group. Article 4 restricts the liability of a legal person to the acts of a representative etc. of a legal person in relation to the business of the legal person. When a representative etc. of one company bribes for the benefit of a sister company, the bribe is arguably in relation to the business of the sister company, not the company of the briber. In addition, the Explanatory Manual published by the Ministry of Justice states that "it should be clear that fundamentally, the fact that bribery has been committed concerning the affairs of a legal entity leads to criminal responsibility of the related legal body".

The representative of the Supreme Public Prosecutor's Office believes that since companies in the same enterprise group often have interlocking shareholdings and common directors, courts will likely consider a bribe by a representative etc. of one company for the benefit of a sister company to be "in relation to the business of" both companies.

Exemption from Sanctions for Paying Due Attention or Exercising Proper Supervision

Pursuant to article 4 of the FBPA, a legal person is not subject to sanctions for the bribery of a foreign public official if it "has paid due attention or exercised proper supervision to prevent the offence against" the FBPA. This exemption does not provide information about what constitutes "due attention" or "proper supervision". For instance, who qualifies as the legal person for the purpose of paying due attention and exercising proper supervision, since the exemption is not restricted to the acts of management or persons with a high degree of supervisory authority? What forms of supervision would be sufficient to trigger the exemption?

The representative of the Supreme Public Prosecutor's Office stated that the exemption is triggered when a director or "superior person" exercises due attention. On the other hand, the Explanatory Manual published by the Ministry of Justice does not provide this clarification, and states that "it is difficult to standardize the extent of attention or supervision in deciding whether a legal person can be exempted from criminal punishment".[30] In addition, the Explanatory Manual suggests that a company could be exempted from liability if management had in place a policy prohibiting bribery, in the form of a code of conduct, a website posting, or contained in the contract of employment. It is further stated that if bribery occurs regardless of "this kind of management", it is an "individual scandal" that is unrelated to the company. The Korean authorities stress that the purpose of the Explanatory Manual in this respect is to provide examples of how Korean companies prevent foreign bribery, and is not intended to suggest that these are ways of escaping liability.

Potentially, the exemption under article 4 can be far-reaching if a legal person escapes liability upon the mere showing that it had an anti-bribery policy in, for example, its code of conduct. The exemption could be tightened so that a company must demonstrate that it operated a full compliance programme. In addition, the appropriateness of the exemption is questionable in cases where a person with operational and management authority (as opposed to a person under his/her supervision) commits the bribery offence personally, orders a lower level employee to do so, or fails to take steps to stop bribery activity of which he/she is aware.

Commentary

The lead examiners remain concerned that article 4 of the FBPA, which establishes the liability of legal persons for the offence of bribing a foreign public official, might not apply to cases where the bribe has been given by a representative, agent, employee etc. of a legal person in relation to the business of another legal person in the same enterprise group, and that the exemption for paying due attention and exercising proper supervision might be too broadly construed. The lead examiners therefore recommend that these issues be followed-up once there has been sufficient practice under the FBPA.

Jurisdiction

The Korean authorities explained in the Responses to the Phase 2 Questionnaire that a legal person can be subject to territorial jurisdiction if the actual perpetrator of the offence of bribing a foreign public official is subject as well to such jurisdiction. However, under article 4 legal persons are only liable where a representative, agent, employee or other

individual working for the legal person commits the offence "as set out in article 3.1", which is restricted to promising, giving or offering a bribe to a foreign public official (i.e. article 3.1 does not refer to complicity). Thus, there does not appear to be a legal basis for establishing territorial jurisdiction over a Korean legal person when the bribe takes place abroad, even where someone in the legal person authorized or incited the bribery or conspired to bribe in Korea. However, the Korean authorities believe that this situation is covered by the general provisions on complicity in the Criminal Act.

Additionally, it is not clear that nationality jurisdiction can be established over legal persons in Korea. The Korean authorities state in the Responses to the Phase 2 Questionnaire that "general legal interpretation suggests that nationality jurisdiction will apply (to legal persons) in the same manner as provided upon natural persons", but this view is not shared by one academic[31]; nor has supporting case law been provided. Following the on-site visit, the Korean authorities stated that they are confident that the courts will accept nationality jurisdiction over legal persons. In any case, consistent with the statement of the Korean authorities concerning the establishment of territorial jurisdiction over a legal person, it appears that nationality jurisdiction can only be applied if the natural person who bribes abroad is subject to it as well. However, the Korean authorities point out that were a director or employee who is a Korean national directs abroad a non-Korean to bribe a foreign public official, Korea may have jurisdiction over the legal person to which the director or employee belongs.

Commentary

The lead examiners are concerned that Korea may not have jurisdiction over a legal person for the bribery of a foreign public official abroad where the natural person who perpetrated the offence is not a Korean national, even where the offence is authorized or incited in Korea. Since enterprise groups frequently use local intermediaries to transact business abroad, the lead examiners recommend that this issue should be followed up once there has been sufficient practice under the FBPA. In addition, the lead examiners recommend following-up the application of nationality jurisdiction in general to legal persons for the foreign bribery offence once there has been sufficient practice under the FBPA.

Requirement under the FBPA of Conviction and Sanction for the Natural Person

Article 4 of the FBPA states that a legal person shall be subject to the fine penalty "in addition to the imposition of sanctions on the actual performer". The representative of the Supreme Public Prosecutor's Office confirmed that the actual perpetrator must be identified, but explained that regardless of the language in article 4, there are two options for proceeding: 1. The natural person is identified but not proceeded against pursuant to the FBPA. In this case the court must make a finding of fact that the natural person bribed a foreign public official.[32] 2. The natural person is proceeded against pursuant to the FBPA. In this case the legal person is only found guilty if the actual perpetrator is convicted and sanctioned, unless the imposition of sanctions on the natural person is impossible for procedural reasons. The Korean authorities confirm that the legal person can be convicted and sanctioned if the sanction against the natural person is suspended, or if amnesty applies to him/her.

In the Aulson and Sky Case, the actual perpetrator was convicted and sanctioned. In the absence of other cases involving violations under the FBPA by legal persons, it is difficult to assess the effectiveness of article 4, in particular whether in practice the courts

would normally require the conviction and sanctioning of the actual perpetrator in order to impose sanctions on the legal person.

Commentary

Once there has been sufficient practice under the FBPA, the lead examiners recommend following-up the implementation of article 4 to determine whether in practice legal or procedural obstacles have been encountered in proceeding against the legal person where the actual performer(s) has not been proceeded against, or has not been convicted and/or sanctioned.

Sanctions

Sanctions under the FBPA

Sanctions for Natural Persons

Under article 3.1 of the FBPA, the bribery of a foreign public official is punishable by a maximum of five years of imprisonment or a fine of up to 20 million won (US $17,000 or €13,400). If the profit obtained through the offence exceeds a total of 10 million won (US $8,500 or €6,700), an offender shall be subject to a fine of up to twice the amount of the profit. Under the Korean Criminal Act domestic bribery is punishable by a maximum term of imprisonment of 5 years or a maximum fine of 20 million won. The authority to impose a fine up to twice the amount of the profit when the profit exceeds a certain limit has not been established for the domestic bribery offence.

In the Auson and Sky Case, the court of first instance imposed a fine of 10 million won (US $8,500 or €6,700) concurrently with a term of imprisonment of 18 months. In the Seo Case, the court of first instance imposed a fine of 10 million won concurrently with a term of imprisonment of 10 months.

Article 3.3 of the FBPA states that "the prescribed amount of the fine shall be concurrently imposed on the person when sentenced to imprisonment for the offence prescribed in paragraph 1". Thus article 3.3 appears to limit the availability of a fine to cases where imprisonment has been imposed. This interpretation is also found in an academic article.[33] Indeed in the Aulson and Sky Case and Seo Case, terms of imprisonment were imposed concurrently with fines. However, the Korean authorities explained that article 3.3 is intended to signal that a fine should be imposed where a term of imprisonment is imposed, but that it is also possible for the courts to provide for a fine penalty without imprisonment.

Sanctions for Legal Persons

Article 4 of the FBPA establishes the liability of legal persons for the bribery of foreign public officials in particular circumstances, which are discussed earlier in this report. The liability of legal persons has not been established under the Criminal Act for the bribery of domestic public officials.

Under article 4, the maximum fine for a legal person is 1 billion won (US $850,000 or €670,000). If the profit obtained through the offence exceeds a total of 500 million won (US $425,000 or €335,000) the legal person shall be subject to a fine up to twice the amount of the profit. In the Aulson and Sky Case the company was fined 100 million won

(US $85,000 or €67,000). The total amount of the bribes was US $400,000 (471 million won or €315,000). Thus the bribes totalled approximately 4.7 times the amount of the fine. Moreover, the contracts in question were worth substantially more than the amount of the fine--20 billion won (US $17 million or €13.4 million).[34]

Factors affecting the application of Sanctions to Natural and Legal Persons

Link between the Fine and the Profit

As mentioned above, natural and legal persons shall be subject to fines up to twice the amount of the profit where the profit exceeds the prescribed thresholds. Guidelines on how to calculate the profit from bribery have not been issued, and thus it is uncertain how it would be quantified in practice. During the on-site visit, representatives of the Supreme Public Prosecutor's Office and the Ministry of Foreign Affairs and Trade were unable to provide a method for the computation of the profit. One of the defence lawyers in the Aulson and Sky Case explained that the court was unable to calculate the profit of Aulson and Sky. On the other hand, the representative of the Ministry of Justice stated that he believes the court estimated the profit by comparing the financial situation of Aulson and Sky with other companies that had properly participated in the bidding process.

As discussed earlier, the Ministry of Justice explained that "criminal proceeds" under the Proceeds of Crime Act do not cover the proceeds of bribing (i.e. only the bribe) because of the difficulties in quantifying them. Since profit commonly refers to the gross proceeds of a transaction less the costs of the transaction, quantifying the profit does not avoid the difficulty of calculating the proceeds, necessitating sophisticated financial analysis. Furthermore, linking the fine to the profit raises questions about how effective, proportionate and dissuasive fines can be where the proceeds from bribing a foreign public official are substantial, but the person or company is able to show a small profit or loss from the transaction.

Absence of Confiscation of the Proceeds

Article 5 of the FBPA states that the bribe shall be confiscated where it is in the possession of the offender, including a legal person, or it is obtained by a person other than the offender, with knowledge. Thus, the proceeds of bribing a foreign public official (e.g. proceeds derived from a contract won through giving a bribe) are not subject to confiscation. The representative of the Ministry of Foreign Affairs and Trade explained that the confiscation of the proceeds of bribery is too severe a sanction, and the representative of the Supreme Public Prosecutors Office stated that the Korean legal system is not familiar with it. Korea confirms that pursuant to article 5, the bribe can be confiscated from a natural person or a legal person that is not punishable pursuant to article 4 of the FBPA.

Suspension of Sanctions

Pursuant to article 62(1) of the Criminal Act, the execution of a sentence may be suspended[35] for a period of not less than one year or more than five years, in cases where a sentence of imprisonment of not more than three years applies and there are extenuating circumstances.[36] In the Aulson and Sky Case, the sentence of imprisonment for the CEO

was suspended for three years on appeal. The representative of the Supreme Prosecutor's Office stated that the percentage of suspended sentences for bribery cases is "high". An academic article estimates the rate at 60.3 percent, and remarks that this is relatively high in comparison to the rate for theft, fraud and burglary.[37] Representatives of the Supreme Court of Korea indicated that out of sixteen defendants in cases involving the passive bribery of domestic public officials, 53 percent received suspended sentences. They further stated that the Sentence Study Committee of the Supreme Court[38] recently agreed that sentences for the passive bribery of domestic public officials should not be suspended where the bribe amounts to more than 30 million won (US $25,500 or €20,100).

Commentary

The lead examiners recommend that Korea takes steps to ensure that the actual fines for foreign bribery are effective, proportionate and dissuasive, especially in light of the absence of the confiscation of the proceeds of bribery. The issue of sanctions should be followed-up once there has been adequate practice under the FBPA, particularly with respect to (1) the determination of the profit in calculating the fine; and (2) the impact of the absence of the confiscation of the proceeds of bribery. Further, for the purpose of making a complete assessment of Korea's implementation of article 3 of the Convention, the lead examiners recommend that the Korean authorities compile statistical information on the sanctions imposed for violations of the FBPA, including confiscation of the bribe and the suspension of sentences.

Indirect Sanctions

Generally

Pursuant to the obligation under article 3.4 of the Convention,[39] the Korean authorities are considering the introduction of regulations for the purpose of establishing additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.[40] One such sanction under consideration is disbarment from participating in public procurement contracts. The Korean authorities have not specified a time frame for the introduction of these regulations.

In the absence of current additional civil and administrative sanctions for an offence under the FBPA, it is expedient to review the approach of the main agencies in Korea involved in providing contracting and financing opportunities to Korean firms, where their clients have been convicted of the bribery of foreign public officials. For this purpose, the on-site visit included discussions with the following agencies: 1. The Public Procurement Service; 2. The Korea International Cooperation Agency; 3. The two export credit agencies—the Korea Export Insurance Corporation, and the Export-Import Bank of Korea; and 4. The Ministry of Finance and Economy concerning privatization.

Public Procurement Service

The Public Procurement Service (PPS) is the central government agency responsible for procuring commodities and arranging contracts for construction projects involving government facilities. In 2002, the Korean government established a nation-wide integrated government procurement system for the purpose of simplifying the process and increasing transparency. One of the reforms undertaken to increase efficiency and prevent corruption was the establishment of an e-procurement system. The representative

of the PPS indicated that there are few exceptions to the use of the tender process for supply contracts.

Pursuant to the "Integrity Pact[41], which is incorporated into all suppliers' contracts, officers and representatives of supplier companies make several pledges, including the promise to not provide any public officials concerned with any illegal benefits including bribes and entertainment. The following measures are available for the purpose of sanctioning enterprises that are determined to have violated the Integrity Pact:

i) Non-participation in PPS bids and bids by relevant end-user organisations for a period of one to two years from the date when sanctions by the PPS were imposed.

ii) To accept cancellation of the contract, before its implementation, and termination or cancellation of part or the whole of the contract, after implementation, where they are found to have provided relevant officials with bribes or entertainment.

The Public Procurement Service indicated that in 2001 there were no disqualifications for bribery, in 2002 there were three, and in 2003 there was one.

Korea International Cooperation Agency

The Korea International Cooperation Agency (KOICA) oversees development cooperation programs to support the economic and social development of countries, and provides contracting opportunities to Korean firms to facilitate the transfer of Korea's development experience and know-how as well as various forms of material assistance. In 2000, KOICA provided 51,276 million won in support for 133 developing countries as well as 11 international organizations. Asia accounted for almost 50 percent of the total program budget, with Africa and the Eastern Europe and CIS countries accounting for 9.3 percent and 8.2 percent respectively. In the same year KOICA's main partner countries were China, Vietnam, Indonesia Sri Lanka, Philippines, Egypt, Ethiopia, Kazakhstan, Uzbekistan, Nepal, Mongolia and Peru.[42]

KOICA has not yet incorporated anti-foreign bribery provisions in its bilateral aid funded procurement contracts, though it has broad regulations for imposing restraints on firms that make a successful bid by dishonest means. This suggests that KOICA needs to take further action to disqualify firms from participating in contracts with KOICA, and to cancel or terminate contracts when firms are found to have bribed foreign public officials.

Export Credit and Credit Guarantees

Korea has two official export credit agencies—the Korea Export Insurance Corporation[43] (KEIC) and the Export-Import Bank of Korea (Eximbank). At the on-site visit, it was reported that the undertaking/declaration in requests to Eximbank now meets the standard under the Action Statement on Bribery and Officially Supported Export Credits, and that KEIC requires an undertaking/declaration concerning mid to long term credits .

According to the responses of Korea to the 2002 Survey, KEIC and Eximbank have met the obligation under the Action Statement regarding the taking of appropriate action, such as denial of payment or indemnification, where the involvement of a beneficiary in the bribery of a foreign public official contrary to the Convention is proved after credit, cover or other support has been approved. KEIC and Eximbank also meet the obligation

under the Action Statement regarding the requirement to refuse the approval of credit, cover or other support if there is sufficient evidence that foreign bribery was involved in the award of the export contract.[44]

Privatization

In Korea, privatization is not handled through a central agency, but through the respective ministries responsible for the entities being privatized. Korea is actively privatizing certain sectors, including the railway system, electric power, gas companies and banks. The privatization program, which was launched following the 1997 financial crisis, targeted 11 companies. The entities that remain to be privatized include the Korean Electric Power Corporation, which will be privatized pursuant to a ten-year plan. In addition, the government has announced plans to reduce its holdings in the banking sector, of which it owns two of the eight nation-wide banks, almost 50 percent of two others, and two of six local banks.[45]

At the on-site visit the Korean authorities could not state with certainty whether the eligibility criteria for participating in privatization bids include the absence of a conviction for the offence of bribing a foreign public official.

Commentary

The lead examiners recommend that Korea ensures that authorities responsible for development aid and privatisation can take appropriate actions, such as informing the competent authorities or imposing non-criminal sanctions, where persons and companies are determined to have bribed foreign public officials. They also recommend that the Korea International Cooperation Agency adds anti-corruption provisions to its bilateral aid-funded procurement contracts.

In addition, it is recommended that the Korean government examines the eligibility requirement for participating in privatization bids, so that participation could be denied as a sanction for foreign bribery in appropriate cases.

Notes

1. A question concerning the FBPA would likely be submitted to the Second Criminal Division or the International Affairs Division of the Ministry of Justice. Opinions are provided in writing and recorded with a serial number.

2. Article 8 of the Criminal Act states that the general provisions of the Act apply to such crimes as are provided by other Acts and subordinate statutes unless provided otherwise by such Acts and subordinate statutes. The defence under article 16 is included in the general provisions of the Criminal Act.

3. The Ministry of Justice intends to update the Explanatory Manual in light of cases that have been successfully prosecuted in other countries.

4. This provision is also applicable to the FBPA by virtue of article 8 of the Criminal Act.

5. Commentary 7 states that "It is also an offence irrespective of, inter alia, 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."

6. The Korean authorities emphasise that Korean social customs do not permit the giving of bribes.

7. For instance, in the Responses to the Phase 2 Questionnaire it is stated that “the Korean courts have held that monetary funds that were given within the realm of social customs according to general societal norms would not be considered as given in relation to the performance of official duties and thus would not be punishable”. And in another part it is stated that “in the case of domestic public officials, various cases exist where the defendant was able to defend against charges of bribery by demonstrating that the payment in question was within the realm of social custom”.

8. For instance, in case 2001 No. 3579 of the Supreme Court, it was held that when a government official receives money, valuables or favours from a person related to his/her duty, the money, etc. is considered related to the official’s duties unless there are clear circumstances indicating that it was given because of social customs or that it was a necessity arising form a personal relationship between the parties.

9. Independence and Corruption in Korea (Craig P. Ehrlich, Dae Soeb Kang, Columbia Journal of Asian Law).

10. June 7, 1955, 4288 Hyungsang 129.

11. For instance, the domestic law contains a provision that is in conflict with a provision in the treaty, or is silent on a matter covered by the treaty.

12. Korea deposited the instrument of ratification with the OECD on 4 January 1999, and the FBPA entered into force on 15 February 1999.

13. Article 13.1 of the Korean Constitution states that no citizen shall be prosecuted for an act which does not constitute a crime under the statute in force at the time when it was committed. Although this provision appears to principally address the non-retroactive

application of criminal offences, it could, arguably, also be interpreted as authority for the strict interpretation of criminal offences.

14. Note that article 30 of the Criminal Act punishes persons who have "jointly" committed a crime as principal offenders, and that pursuant to article 31 a person who "instigates" another to commit a crime is subject to the same punishment as the person who actually commits the crime.

15. Note that pursuant to article 29 of the Criminal Act, "the punishment for attempted crimes shall be specifically provided in each article concerned". The Criminal Act and the FBPA does not provide a punishment for attempted bribery.

16. The representative of the Supreme Public Prosecutor's Office highlighted that this provision only applies where the money or other valuable thing is delivered to the intermediary.

17. The Republic of Korea's chief exports to North Korea are chemical industrial products, textiles, steel, and agricultural products. North Korea's chief exports to the Republic of Korea are agricultural, fishery and textile products. [Inter-Korean Trade Rises 12.9 Percent Last Year (Ministry of Unification, Republic of Korea, January 26, 2004)].

18. The park, which aims to attract investment from firms in the Republic of Korea, is being developed by Hyundai Asan, which intends to invest 220 billion won in the project by 2007. The project is designed to house small firms, and to date 900 companies from the Republic of Korea have applied to move into the complex. [Gaeseong Complex to Accommodate Small Firms: Minister (Korean Overseas Information Service, September 9, 2002); Gaesong Complex Watershed in S-N Cooperation (Korea.net, June 30, 2003)] Some other major investment projects in North Korea involving firms from the Republic of Korea include the following: 1. The Korea Electric Power Corporation's project to build two nuclear reactors; 2. A tourism project at Mount Geumgang, in which Hyundai Asan, Hyundai Merchant Marine and Hyundai Engineering and Construction have invested US $144.81 million. The state-run tourism organization, KNTO, has so far invested US $71.91 million; 3. Projects to establish plants to produce vehicles, bottled water, computer software, computer and telecommunications equipment, and research and development in corn breeding. [NK Takes in $1.2 Billion in ROK Investment (Korea.net, October 29, 2003); KNTO to Send Team to NK (Korea.Net, November 15, 2003)].

19. Article 1 covers the provision of an offer, etc "to a foreign public official, for that official or for a third party".

20. Article 130 of the Criminal Act states that the bribery of a domestic public official applies where money or goods are delivered "to a third party".

21. During the Phase 1 round of examinations of certain countries, the Working Group agreed that the length of the statute of limitations is a general issue for a comparative analysis that should be taken up at a later stage. The lead examiners believe that such an analysis should be carried out as a matter of priority**.**

22. Members of civil society interviewed during the on-site visit stated they would be supportive of extending the limitation period to 15 years.

23. The full text of article 4 of the FBPA is as follows:

> "In the event that a representative, agent, employee or other individual working for a legal person has committed the offence as set out in article 3.1 in relation to its business, the legal person shall also be subject to a fine up to 1 billion won in addition to the imposition of sanctions on the actual performer. In the case that the profit obtained through the offence exceeds a total of 500 million won, it shall be subject to a fine up to twice the amount of the profit. If the legal person has paid due attention

or exercised proper supervision to prevent the offence against this Act, it shall not be subject to the above sanctions."

24. The sanctions for legal persons are discussed in more detail later in this report.

25. See description of this case in Introduction.

26. The term "enterprise groups" is defined in article 2 of the Monopoly Regulation and Fair Trade Act.

27. Beginning in the 1960's, Korea encouraged the development of *chaebols* in the pursuit of national security and rapid industrialization.

28. Mutually dependent relationships between the chaebols and the financial sector, which was controlled by the government in the 1960s and 1970s, evolved, since, in order to obtain favourable credit, business was forced to maintain good relations with the government. Loans were often obtained in order to sustain highly leveraged and not necessarily productive firms. The financial collapse in the late 1990's has often been in part linked to this practice. [For a much more detailed analysis of chaebols and their influence on the Korean economy, see: Korea: Democracy and Reforming the Corporate Sector (Meredith Woo-Cummings, Center for International Private Enterprise, 2001), Hyundai falls, South Korea Rises (Asia Times Online, June 3, 2000), LG's Restructuring Marked a Sharp Break with Tradition (LG Press Coverage, September 11, 2003), Korea's President Takes on Big Business (Mary Hennock, BBC News World Edition, 20 March 2003).]

29. The reform initiative resulted in the following: 1.The role of the board of directors, which must now include outside directors, has been strengthened; 2.Business groups with more than 2 trillion won in assets (approximately US $1.71 billion or €1.33 billion are required to file combined financial statements; 3. Accounting standards have been upgraded. [See: OECD Economic Surveys: 2003 (Korea, at pp. 127-128), and OECD Economic Surveys: 2001 (Korea, at page 128)]

30. It is stated further that whether the exemption applies depends upon "general circumstances such as the motive and background that led to the bribery, intervention of exclusive members of the legal person, whether it was informed earlier, and how much effort was usually made by the corporation to prevent bribery, etc", and companies involved in international business must prevent violations of the law by all employees and executives of the company "through sufficient necessary management".

31. Korea Implementation of the OECD Bribery Convention: Implications for Global Efforts to Fight Corruption (Jong Bum Kim, Pacific Basin Law Journal, Fall 1999/Spring 2000, vol. 17, nos. 2 & 3).

32. However, following the on-site visit, in clarifying an issue concerning the money laundering offence, the Korean authorities stated that "if a legal person is the subject of punishment, then as a precondition a natural person would already have been the subject of punishment".

33. Korea Implementation of the OECD Bribery Convention: Implication for Global Efforts to Fight Corruption (Jong Bum Kim, Pacific Basin Law Journal, Fall 1999/Spring 2000, vol. 17, nos. 2&3, at page 269).

34. According to the grand jury indictment filed against the CEO of Aulson and Sky in the U.S. Federal Court, the total value of the contracts was $24.7 million (approx. 29 billion won or €19.5 million). The differential is likely due to a change in the exchange rate.

35. Article 62(2) permits the suspension of a part of the punishment, where punishments are to be imposed concurrently. Article 65 states that "after a suspension of sentence is

rendered, and the term of suspension has fully elapsed without the sentence being nullified or revoked, the sentence shall lose its validity".

36. The extenuating circumstances, which are listed under article 51 of the Criminal Act, include the age, character and conduct, intelligence and environment of the offender; the motive for the crime, means and the result; and circumstances after the crime.

37. Independence and Corruption in Korea (Craig P. Ehrlich, Dae Soeb Kang, Columbia Journal of Asian Law).

38. This committee is not an official organisation, but a private body consisting of judges. The committee's opinions do not amount to official guidelines on sentencing.

39. Article 3.4 of the Convention requires each party to "consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official".

40. See 2-18 of Explanatory Manual published by the Ministry of Justice.

41. Revisions to the Integrity Pact became effective on 1 March 2004, and are reflected in the discussion in this paragraph.

42. Annual Report, 2001 (KOICA).

43. During 2001, the Korea Export Insurance Corporation supported 17.6 percent of Korea's total exports.

44. In this respect, the Action Statement on Bribery and Officially Supported Export Credits states that "if there is sufficient evidence that such bribery was involved in the award of the export contract, the official export credit or export credit insurance provider shall refuse to approve credit, cover or other support".

45. OECD Economic Surveys: Korea, 2003 (See pages 60-62, 130-132 and 170).

Recommendations

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Korea, the Working Group (i) makes the recommendations to Korea under part 1, and (ii) will follow-up the issues in part 2 when there has been sufficient practice in Korea in respect of cases involving the bribery of foreign public officials.

Recommendations for Ensuring Effective Prevention and Detection of Foreign Bribery

With respect to promoting awareness of the Convention and the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions (FBPA), the Working Group recommends that Korea takes steps to increase awareness of the investigative, prosecutorial and judicial authorities, including the provision of training programmes on the Convention and the FBPA for current and future members of these bodies; agencies indirectly involved in implementing the Convention; and SMEs, particularly through agencies that advise and support them (Revised Recommendation, Paragraph I).

With respect to the prevention and detection of foreign bribery through accounting requirements, external audit and internal company controls, the Working Group recommends that Korea:

(a) Considers requiring the reporting of indications of bribery to the competent authorities by external auditors or management committees (Revised Recommendation, Paragraphs V.B.iii and iv);[1] and

(b) Considers ensuring that government and government-funded agencies that provide contracting opportunities to Korean companies, such as the Korea Export Insurance Corporation (KEIC), the Export-Import Bank and the Korea International Cooperation Agency (KOICA), have the authority to audit companies suspected or convicted of bribing foreign public officials to determine whether funds obtained from the agency have been used as part or all of the bribe (Revised Recommendation, Paragraph V.B.i).

With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Korea:

(a) Considers extending the whistleblower protection provided by the Anti-Corruption Act to those who report foreign bribery to KICAC, and to those who report suspicions of foreign bribery to government agencies other than KICAC (Revised Recommendation, Paragraph I);

(b) Reviews the disclosure policies and procedures of the Korea International Cooperation Agency to ensure that there is disclosure to the competent authorities where, in the course of transacting business with a company, credible evidence arises that a violation of the FBPA has occurred (Revised Recommendation, Paragraph I);[2]

(c) Ensures Korean overseas representations are more pro-active in making Korean companies doing business in foreign markets aware of the Convention and the FBPA, and advises Korean overseas representations on the steps that should be

taken (including reporting the matter to competent authorities) when there are credible allegations that a Korean company or individual has bribed or taken steps to bribe a foreign public official (Revised Recommendation, Paragraph I);[3] and

(d) Ensures that the defence of social customs under article 20 of the Criminal Act is not applicable to the offence of foreign bribery under the FBPA (Convention, Article 3.1).

With respect to measures to disallow the deductibility of bribe payments to foreign public officials, the Working Group recommends that Korea:

(a) Amends its tax legislation to clarify that bribes to foreign public officials in violation of the FBPA are not tax-deductible (Revised Recommendation, Paragraph IV); and

(b) Communicates effectively to tax examiners (through training programmes, guidelines or manuals, and distribution of the OECD Bribery Awareness Handbook for Tax Examiners) the non-deductibility of bribes and the need to be attentive to any outflows of money from a taxpayer that could represent bribes to foreign public officials (Revised Recommendation, Paragraphs I and IV).

Recommendations for Ensuring Effective Prosecution and Sanctioning of Foreign Bribery Offences

With respect to measures for ensuring the effective prosecution of foreign bribery offences, the Working Group recommends that Korea:

(a) Clarifies that article 3.1 of the FBPA covers the situation where a bribe is transmitted directly to a third party, consistent with the offence of bribing a domestic public official under the Criminal Act (Convention, Article 1.1); and

(b) Reviews the Explanatory Manual published by the Ministry of Justice to ensure that the guidelines contained therein are consistent with the Convention and the FBPA (Convention, Article 1.1).

With respect to measures for ensuring effective sanctioning of foreign bribery offences and accounting and auditing offences (where relevant), the Working Group recommends that Korea:

(a) Takes steps to ensure that the actual fines for foreign bribery are effective, proportionate and dissuasive, especially in light of the absence of the confiscation of the proceeds of bribery, and considers increasing the penalties for false accounting and fraudulent auditing (Convention, Articles 3.1 and 8.2; Revised Recommendation, Paragraph V.A.iii);

(b) Compiles statistical information on the sanctions imposed for violations of the FBPA, including confiscation of bribes and suspensions of sentences (Convention, Articles 3.1 and 3.3); and

(c) Ensures that the authorities responsible for development aid and privatisation can take appropriate actions, such as considering informing the competent authorities and the possible addition of non-criminal sanctions, where persons and companies are determined to have bribed foreign public officials (Convention, Article 3.4; Revised Recommendation, Paragraph VI.ii).[4]

Follow-up by the Working Group

The Working Group will follow-up the following issues once there has been sufficient practice under the FBPA:

(a) With respect to the offence of bribing a foreign public official under the FBPA, application of the following:

  (i) The exception for "small pecuniary or other advantages" (Convention, Article 1.1; Commentary 9 on the Convention);

  (ii) Jurisprudence that provides an exception to bribery where a payment or gift is offered as a social courtesy (Convention, Article 1.1);

  (iii) Non-applicability of the law on attempts to foreign bribery, including attempts through intermediaries (Convention, Article 1.2);

  (iv) The definition of "foreign public official" to persons performing public functions for foreign public enterprises, in particular the interpretation of "de facto or effective control" by a foreign government(s), and the non-application of the definition to the bribery of North Korean public officials (Convention, Article 1.4; Commentary 14 on the Convention); and

  (v) The adequacy of the statute of limitations for the foreign bribery offence (Convention, Article 6).

(b) With respect to the liability of legal persons for the offences of bribing a foreign public official pursuant to article 4 of the FBPA and fraudulent accounting pursuant to article 21 of the Act on External Audit of Stock Companies, the application of these provisions (where appropriate) to the following situations:

  (i) A bribe is given by a representative, agent, employee, etc. of a legal person in relation to the business of another legal person in the same enterprise group (chaebol) (Convention, Article 2);

  (ii) A legal person pays due attention or exercises proper supervision to prevent foreign bribery (Convention, Article 2);

  (iii) A conviction/sanction has not been imposed on the natural person responsible for the offences of foreign bribery and fraudulent accounting (Convention, Articles 2 and 8.2); and

  (iv) Foreign bribery that is committed abroad, including bribery by a natural person who is not a Korean national where the legal person has been complicit in the bribery offence (Convention, Articles 2 and 4.1).

(c) Sanctions under the FBPA, particularly regarding (1) the determination of profit in calculating the fine, where the profit exceeds the prescribed thresholds; and (2) the impact of the absence of authority to confiscate the proceeds of bribery (Convention, Articles 3.1 and 3.3);

(d) The application of the money laundering offence to the laundering of funds and property related to violations of the FBPA, including the laundering of proceeds of foreign bribery obtained by the briber and laundering in relation to violations of the FBPA perpetrated by legal persons (Convention, Article 7; Revised Recommendation, Paragraphs II.i and III);

(e) The effectiveness of Korea's money laundering reporting system, particularly in view of (i) the monetary thresholds for reporting suspicious transactions; (ii) the absence of coverage of non-financial businesses and professions; (iii) the information in guidelines and typologies concerning foreign bribery; (iv) the level of resources of KoFIU; and (v) the exclusion of proceeds of foreign bribery from the notion of "criminal proceeds" (Revised Recommendation, Paragraph I); and

(f) The application of the Framework Act on National Taxes and the Criminal Procedure Act to disclosure by the National Tax Service to the competent authorities of evidence of foreign bribery detected during tax audits spontaneously without any requests (Revised Recommendation, Paragraph I).

Notes

1. The Working Group notes that this is a general issue for many Parties.
2. The Working Group notes that this is an issue for many Parties. The recommendation shall not be interpreted as a suggestion that the policies of the Korea International Cooperation Agency do not meet the standards set out in the Recommendations of the Development Co-operation Directorate.
3. The Working Group notes that this is a general issue for many Parties.
4. This recommendation shall not be interpreted as a suggestion that the policies of the Korea International Cooperation Agency do not meet the standards under the Recommendations of the Development Co-operation Directorate.

APPENDIX 1

Evaluation of Korea by the OECD Working Group (July 1999)

Legal Framework

Evaluation of Korea[1]

General Remarks

The Working Group congratulated Korea on the rapid implementation of the Convention through the enactment of the Foreign Bribery Prevention Act (FBPA) on December 28, 1998, prior to its ratification of the Convention. Korea was the latest country to join the OECD but was one of the first countries to pass legislation implementing the OECD Convention.

The FBPA generally conforms to the requirements of the Convention. In addition, the Convention has the same legal effect as domestic legislation, and, thus, the Korean authorities will interpret the FBPA strictly in accordance with the Convention. The Working Group notes that Korea's money laundering legislation does not currently apply to bribery, but is pleased that a bill extending the predicate offences to bribery is pending, and hopes that Korea's implementation of the Convention will provide an impetus for the bill's passing into law in the near future.

The Working Group has identified below specific issues for clarification, and notes that in some cases the need for clarification is due to a difference of opinion with the Korean authorities on the interpretation of certain provisions in the Convention and possibly also to problems of translation. The Working Group also notes that some of the issues identified may need to be clarified in general, not just in relation to Korea.

Specific Issues

Terms used for describing the subject of the bribe

Article 3.1 of the FBPA criminalises the promising, giving and offering of a "bribe". The Korean authorities indicated that this corresponds to the terminology used in describing the domestic offence, and that a more correct translation from the Korean language would be "corrupt thing". On the other hand, article 3.2, which contains two exceptions to the offence, describes the subject of the bribe as a "payment" in the first exception and a "small pecuniary or other advantage" in the second exception. The Working Group was concerned that the difference in terminology could present application problems.

In response, the Korean authorities explained in detail that following the wording of the Commentaries to the Convention, the exceptions incorporate more neutral terminology than the

1. This evaluation was completed by the Working Group on Bribery in July 1999.

word "bribe" because the purpose of article 3.2 is to clarify that certain acts do not constitute bribes under article 3.1. The Korean authorities do not believe that this could present problems in application.

The Working Group understood the rationale for the mixture of terms in articles 3.1 and 3.2, but recommended that this issue be followed up in Phase 2 of the evaluation process to monitor whether difficulties in applying the different terms occur in practice.

Small payments

Article 3.2.b. of the FBPA establishes an exception to the offence under article 3.1 in relation to a "small pecuniary or other advantage" for routine or ordinary work.

The Working Group was concerned that the lack of judicial and legislative guidance in interpreting the exception in article 3.2.b. would make it difficult to know with enough certainty what constitutes an offence under article 3.1, in particular with reference to the smallness of the payment or other advantage.

The Korean authorities indicated that as the FBPA is new legislation, there is not yet a body of case law to provide guidance on the scope of this exception, but it was their opinion that article 3.2.b. defines the scope of the exception sufficiently. They also explained that in the Korean legal system the principle burden of proof is on the prosecutor, but the courts have recognized a shifting of the burden of proof to the alleged offender to show that his/her actions fall within an exception to an offence.

The Working Group recommended that this issue be followed in Phase 2 of the evaluation process to monitor the development of case law on this exception.

Third parties

Article 3.1 of the FBPA criminalises the promising, giving and offering of a bribe "to a foreign public official". It does not expressly cover the case where a third party receives the benefit. The Korean authorities explained that article 3.1 covers the case where the benefit is directed to the foreign public official for the benefit of a third party, and the case where the benefit is directed to a third party for the benefit of a foreign public official. They indicated that if in addition the Convention requires that the situation be covered where an agreement is reached between the briber and the foreign public official to transmit the bribe directly to a third party (e.g. spouse, friend or political party), they would apply a corresponding interpretation to article 3.1 of the FBPA. However, they expressed doubts as to whether this case is covered by the Convention.

Seizure and confiscation

Article 5 of the FBPA provides for the confiscation of the bribe from the offender or a person other than the offender who obtained the bribe with knowledge. The Korean authorities explained that where the bribe is converted into another form it could not be confiscated under article 5, but there would be discretionary power, pursuant to article 48(3) of the Criminal Code, to order confiscation of the item or forfeiture of "property equivalent in value to that item", depending on the nature of the conversion.

Jurisdiction

It was noted that where a non-Korean who works for a Korean company bribes a foreign public official abroad, Korea does not have jurisdiction over the non-Korean even if he/she is found in Korea and there is no request for extradition or extradition is denied. The Korean authorities stated that it is controversial whether they have jurisdiction over the Korean company in such a case.

The Working Group agreed that the issue of jurisdiction in these cases is a general issue that needs to be pursued further with a view to ensuring the effective application of the Convention.

APPENDIX 2

Principal Legal Provisions

Act on Preventing Bribery of Foreign Public Officials in International Business Transactions

Article 1
Purpose

This Act is aimed at contributing to the establishment of sound practice in international business transactions and at providing for the details necessary for the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Co-operation and Development, by means of criminalising the act of bribery of foreign public officials in international business transactions.

Article 2
Scope of Foreign Public Official

The term "foreign public official" refers to any person who falls within one of the followings:

1. any person, whether appointed or elected, holding a legislative, administrative or judicial office of a foreign government (here and after, including all levels of government from national to local);
2. any person who falls within one of the followings and exercises public function for a foreign government:
   a. any person conducting a business, in the public interest, delegated by a foreign government;
   b. any person working for a public organization or agency established by law to carry out specific business in the public interest;
   c. an executive or employee of any enterprise over which a foreign government holds over 50 percent of its subscribed capital or exercises substantial controlling power over its overall management including the decision of major business and the appointment or dismissal of its executives. This sub-paragraph shall not be applicable to an executive or employee of those enterprises operating on a competitive basis equivalent to entities of ordinary private economy, without preferential subsidies or other privileges;
3. any person working for a public international organization.

Article 3
Criminal Responsibility of Bribery

1. Any person, promising, giving or offering bribe to a foreign public official in relation to his/her official business in order to obtain improper advantage in the conduct of international business transactions, shall be subject to a maximum of 5 years' imprisonment or a fine up to 20,000,000 won. In the event that the profit obtained through the offence exceeds a total of 10,000,000 won, the person shall be subject to a maximum of 5 years' imprisonment or a fine up to twice the amount of the profit.
2. Those persons shall not be subject to paragraph 1 above if:
   a. such payment is permitted or required by the law of the foreign public official's country;

   b. small pecuniary or other advantage is promised, given or offered to a foreign public official engaged in ordinary and routine work, in order to facilitate the legitimate performance of the official's business.

3. The prescribed amount of fine shall be concurrently imposed on the person when sentenced to imprisonment for the offence prescribed in paragraph 1.

Article 4
Responsibility of Legal Persons

In the event that a representative, agent, employee or other individual working for legal person has committed the offence as set out in Article 3(1) in relation to its business, the legal person shall also be subject to a fine up to 1,000,000,000 won in addition to the imposition of sanctions on the actual performer. In case that the profit obtained through the offence exceeds a total of 500,000,000 won, it shall be subject to a fine up to twice the amount of the profit. If the legal person has paid due attention or exercised proper supervision to prevent the offence against this Act, it shall not be subject to the above sanctions.

Article 5
Confiscation

In case that the offender under this Act (including legal persons punishable pursuant to Article 4) is in possession of the bribe given in the commission of offence as prescribed in this Act or that the bribe is obtained by a person other than the offender, with knowledge, after the offence has been committed, the bribe shall be confiscated.

Addendum

This Act shall enter into force on the date upon which the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Co-operation and Development enters into force for the Republic of Korea.

APPENDIX 3

Suggested Further Reading

Articles

- Kang, D.S. and Ehrlich, C.P. (2002), "Independence and Corruption in Korea", Columbia Journal of Asian Law, 16:1
- Kim, J.B. (2000), "Korea Implementation of the OECD Bribery Convention: Implications for Global Efforts to Fight Corruption", Pacific Basin Law Journal, Fall 1999/Spring 2000, vol. 17, nos. 2 & 3

Legislation

- The Anti-Corruption Act
- The Proceeds of Crime Act
- The Financial Transactions Reports Act
- The Board of Audit and Inspection Act
- Act on External Audit of Stock Companies

Other

- Phase 1 Review of Implementation of the OECD Convention and 1997 Recommendation
- Korea Independent Commission Against Corruption, http://www.kicac.go.kr/
- Statistical Handbook of Korea 2002

APPENDIX 4

i) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Commentaries on the Convention on Combating Bribery of Foreign Public Officials
in International Business Transactions
(Adopted by the Negotiating Conference on 21 November 1997)

ii) Revised Recommendation of the Council on Combating Bribery in International Business Transactions

Annex
Agreed Common Elements of Criminal Legislation and Related Action

iii) Recommendation of The Council on the Tax Deductibility of Bribes to Foreign Public Officials

iv) Parties to the Convention

Countries Having Ratified/Acceded to the Convention

(i) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

Preamble

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

Have agreed as follows:

Article 1

The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".

4. For the purpose of this Convention:

   a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;

   b) "foreign country" includes all levels and subdivisions of government, from national to local;

   c) "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

Article 2

Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3

Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

3. Each Party shall take such measures as may be necessary 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.

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4

Jurisdiction

1. Each Party shall 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.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

Article 5

Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They 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.

Article 6

Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

Article 7

Money Laundering

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

Article 8

Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit 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, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

Article 9

Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.

3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Article 10

Extradition

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.

2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

Article 11

Responsible Authorities

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

Article 12

Monitoring and Follow-up

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

Article 13

Signature and Accession

1. Until its entry into force, this Convention shall be open for signature by OECD members and by non-members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.

2. Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

Article 14

Ratification and Depositary

1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.

2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

Article 15

Entry into Force

1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares set out in DAFFE/IME/BR(97)18/FINAL (annexed), and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.

2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

Article 16

Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

Article 17

Withdrawal

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, co-operation shall continue between the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

Annex
Statistics on OECD Exports

	OECD EXPORTS		
	1990-1996	1990-1996	1990-1996
	US$ million	%	%
		of Total OECD	of 10 largest
United States	287 118	15,9%	19,7%
Germany	254 746	14,1%	17,5%
Japan	212 665	11,8%	14,6%
France	138 471	7,7%	9,5%
United Kingdom	121 258	6,7%	8,3%
Italy	112 449	6,2%	7,7%
Canada	91 215	5,1%	6,3%
Korea (1)	81 364	4,5%	5,6%
Netherlands	81 264	4,5%	5,6%
Belgium-Luxembourg	78 598	4,4%	5,4%
Total 10 largest	**1 459 148**	**81,0%**	**100%**
Spain	42 469	2,4%	
Switzerland	40 395	2,2%	
Sweden	36 710	2,0%	
Mexico (1)	34 233	1,9%	
Australia	27 194	1,5%	
Denmark	24 145	1,3%	
Austria*	22 432	1,2%	
Norway	21 666	1,2%	
Ireland	19 217	1,1%	
Finland	17 296	1,0%	
Poland (1) **	12 652	0,7%	
Portugal	10 801	0,6%	
Turkey *	8 027	0,4%	
Hungary **	6 795	0,4%	
New Zealand	6 663	0,4%	
Czech Republic ***	6 263	0,3%	
Greece *	4 606	0,3%	
Iceland	949	0,1%	
Total OECD	**1 801 661**	**100%**	

Notes: * 1990-1995; ** 1991-1996; *** 1993-1996
Source: OECD, (1) IMF

Concerning Belgium-Luxembourg: Trade statistics for Belgium and Luxembourg are available only on a combined basis for the two countries. For purposes of Article 15, paragraph 1 of the Convention, if either Belgium or Luxembourg deposits its instrument of acceptance, approval or ratification, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 per cent of combined total exports of those ten countries, which is required for entry into force under this provision.

Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

General:

1. This Convention deals with what, in the law of some countries, is called "active corruption" or "active bribery", meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery", the offence committed by the official who receives the bribe. The Convention does not utilise the term "active bribery" simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

2. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.

Article 1. The Offence of Bribery of Foreign Public Officials:

Re paragraph 1:

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country.

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

5. "Other improper advantage" refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.

6. The conduct described in paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity.

7. It is also an offence irrespective of, *inter alia*, 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.

8. It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.

9. Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

10. Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offences described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offences covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

11. The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4:

12. "Public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

13. A "public agency" is an entity constituted under public law to carry out specific tasks in the public interest.

14. A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, *i.e.*,

on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

16. In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

17. "Public international organisation" includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.

18. "Foreign country" is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

19. One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office – though acting outside his competence – to make another official award a contract to that company.

Article 2. Responsibility of Legal Persons:

20. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

Article 3. Sanctions:

Re paragraph 3:

21. The "proceeds" of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.

22. The term "confiscation" includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.

23. Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.

Re paragraph 4:

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Article 4. Jurisdiction:

Re paragraph 1:

25. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

Re paragraph 2:

26. Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offences, the reference to "principles" includes the principles upon which such selection is based.

Article 5. Enforcement:

27. Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, "1997 OECD Recommendation"), which recommends, *inter alia*, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

Article 7. Money Laundering:

28. In Article 7, "bribery of its own public official" is intended broadly, so that bribery of a foreign public official is to be made a predicate offence for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

Article 8. Accounting:

29. Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offences referred to in Article 8 will generally occur in the company's home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

Article 9. Mutual Legal Assistance:

30. Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re paragraph 1:

31. Within the framework of paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2:

32. Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.

Article 10. Extradition

Re paragraph 2:

33. A Party may consider this Convention to be a legal basis for extradition if, for one or more categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

Article 12. Monitoring and Follow-up:

34. The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:

i) receipt of notifications and other information submitted to it by the [participating] countries;

ii) regular reviews of steps taken by [participating] countries to implement the Recommendation and to make proposals, as appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following complementary systems:

-- a system of self evaluation, where [participating] countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;

-- a system of mutual evaluation, where each [participating] country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the [participating] country in implementing the Recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

...

v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

35. The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For non-members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.

36. The follow-up of any aspect of the Convention which is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the Parties to the Convention and, as appropriate, the participants party to another, corresponding instrument.

Article 13. Signature and Accession:

37. The Convention will be open to non-members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by non-members in this Working Group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the Working Group, which follows from the relationship of the Convention to other aspects of the fight against bribery in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to non-members to adhere to the 1997 OECD Recommendation and to participate in any institutional follow-up or implementation mechanism, i.e., in the Working Group. The current procedures regarding full participation by non-members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organisation, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.

(ii) Revised Recommendation of the Council on Combating Bribery in International Business Transactions

Adopted by the Council on 23 May 1997

The Council,

Having regard to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Considering that enterprises should refrain from bribery of public servants and holders of public office, as stated in the OECD Guidelines for Multinational Enterprises;

Considering the progress which has been made in the implementation of the initial Recommendation of the Council on Bribery in International Business Transactions adopted on 27 May 1994, C(94)75/FINAL and the related Recommendation on the tax deductibility of bribes of foreign public officials adopted on 11 April 1996, C(96)27/FINAL; as well as the Recommendation concerning Anti-corruption Proposals for Bilateral Aid Procurement, endorsed by the High Level Meeting of the Development Assistance Committee on 7 May 1996;

Welcoming other recent developments which further advance international understanding and co-operation regarding bribery in business transactions, including actions of the United Nations, the Council of Europe, the European Union and the Organisation of American States;

Having regard to the commitment made at the meeting of the Council at Ministerial level in May 1996, to criminalise the bribery of foreign public officials in an effective and co-ordinated manner;

Noting that an international convention in conformity with the agreed common elements set forth in the Annex, is an appropriate instrument to attain such criminalisation rapidly;

Considering the consensus which has developed on the measures which should be taken to implement the 1994 Recommendation, in particular, with respect to the modalities and international instruments to facilitate criminalisation of bribery of foreign public officials; tax deductibility of bribes to foreign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement;

Recognising that achieving progress in this field requires not only efforts by individual countries but multilateral co-operation, monitoring and follow-up;

General

I) **RECOMMENDS** that member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

II) **RECOMMENDS** that each member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal:

i) criminal laws and their application, in accordance with section III and the Annex to this Recommendation;

ii) tax legislation, regulations and practice, to eliminate any indirect support of bribery, in accordance with section IV;

iii) company and business accounting, external audit and internal control requirements and practices, in accordance with section V;

iv) banking, financial and other relevant provisions, to ensure that adequate records would be kept and made available for inspection and investigation;

v) public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with section VI for procurement contracts and aid procurement;

vi) civil, commercial, and administrative laws and regulations, so that such bribery would be illegal;

vii) international co-operation in investigations and other legal proceedings, in accordance with section VII.

Criminalisation of Bribery of Foreign Public Officials

III) **RECOMMENDS** that member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.

DECIDES, to this end, to open negotiations promptly on an international convention to criminalise bribery in conformity with the agreed common elements, the treaty to be open for signature by the end of 1997, with a view to its entry into force twelve months thereafter.

Tax Deductibility

IV) **URGES** the prompt implementation by member countries of the 1996 Recommendation which reads as follows: “that those member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal.”

Accounting Requirements, External Audit and Internal Company Controls

V) **RECOMMENDS** that member countries take the steps necessary so that laws, rules and practices with respect to accounting requirements, external audit and internal company controls are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business.

A) Adequate accounting requirements

i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.

ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.

iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

B) Independent External Audit

i) Member countries should consider whether requirements to submit to external audit are adequate.

ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.

iii) Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies.

iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

C) Internal company controls

i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.

ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.

iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.

iv) Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

Public Procurement

VI) **RECOMMENDS:**

i) Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement;

ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that member's national laws and, to the extent a member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.[1]

iii) In accordance with the Recommendation of the Development Assistance Committee, member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts.[2]

International Co-operation

VII) **RECOMMENDS** that member countries, in order to combat bribery in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

i) consult and otherwise co-operate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition;

ii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;

iii) ensure that their national laws afford an adequate basis for this co-operation and, in particular, in accordance with paragraph 8 of the Annex.

Follow-up and Institutional Arrangements

VIII) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a programme of systematic follow-up to monitor and

1. Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence.

2. This paragraph summarises the DAC recommendation, which is addressed to DAC members only, and addresses it to all OECD members and eventually non-member countries which adhere to the Recommendation.

promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:

i) receipt of notifications and other information submitted to it by the member countries;

ii) regular reviews of steps taken by member countries to implement the Recommendation and to make proposals, as appropriate, to assist member countries in its implementation; these reviews will be based on the following complementary systems:

- a system of self-evaluation, where member countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;
- a system of mutual evaluation, where each member country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the member country in implementing the Recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;

v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

IX) **NOTES** the obligation of member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the OECD Convention.

X) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises to review the implementation of Sections III and, in co-operation with the Committee on Fiscal Affairs, Section IV of this Recommendation and report to Ministers in Spring 1998, to report to the Council after the first regular review and as appropriate there after, and to review this Revised Recommendation within three years after its adoption.

Co-operation with Non-members

XI) **APPEALS** to non-member countries to adhere to the Recommendation and participate in any institutional follow-up or implementation mechanism.

XII) **INSTRUCTS** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the Recommendation and its follow-up.

Relations with International Governmental and Non-governmental Organisations

XIII) **INVITES** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to consult and co-operate with the international organisations and international financial institutions active in the combat against bribery in international business transactions and consult regularly with the non-governmental organisations and representatives of the business community active in this field.

ANNEX

Agreed Common Elements of Criminal Legislation and Related Action

1) Elements of the Offence of Active Bribery

i) *Bribery* is understood as the promise or giving of any undue payment or other advantages, whether directly or through intermediaries to a public official, for himself or for a third party, to influence the official to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business.

ii) *Foreign public official* means any person holding a legislative, administrative or judicial office of a foreign country or in an international organisation, whether appointed or elected or, any person exercising a public function or task in a foreign country.

iii) *The offeror* is any person, on his own behalf or on the behalf of any other natural person or legal entity.

2) Ancillary Elements or Offences

The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting state are recognised as applicable to the offence of bribery of a foreign public official.

3) Excuses and Defences

Bribery of foreign public officials in order to obtain or retain business is an offence irrespective of the value or the outcome of the bribe, of perceptions of local custom or of the tolerance of bribery by local authorities.

4) Jurisdiction

Jurisdiction over the offence of bribery of foreign public officials should in any case be established when the offence is committed in whole or in part in the prosecuting State's territory. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

States which prosecute their nationals for offences committed abroad should do so in respect of the bribery of foreign public officials according to the same principles.

States which do not prosecute on the basis of the nationality principle should be prepared to extradite their nationals in respect of the bribery of foreign public officials.

All countries should review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if not, should take appropriate remedial steps.

5) Sanctions

The offence of bribery of foreign public officials should be sanctioned/punishable by effective, proportionate and dissuasive criminal penalties, sufficient to secure effective mutual legal assistance and extradition, comparable to those applicable to the bribers in cases of corruption of domestic public officials.

Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe.

Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.

6) Enforcement

In view of the seriousness of the offence of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim.

Complaints of victims should be seriously investigated by the competent authorities.

The statute of limitations should allow adequate time to address this complex offence.

National governments should provide adequate resources to prosecuting authorities so as to permit effective prosecution of bribery of foreign public officials.

7) Connected Provisions (Criminal and Non-criminal)

Accounting, recordkeeping and disclosure requirements

In order to combat bribery of foreign public officials effectively, states should also adequately sanction accounting omissions, falsifications and fraud.

Money laundering

The bribery of foreign public officials should be made a predicate offence for purposes of money laundering legislation where bribery of a domestic public official is a money laundering predicate offence, without regard to the place where the bribery occurs.

8) International Co-operation

Effective mutual legal assistance is critical to be able to investigate and obtain evidence in order to prosecute cases of bribery of foreign public officials.

Adoption of laws criminalising the bribery of foreign public officials would remove obstacles to mutual legal assistance created by dual criminality requirements.

Countries should tailor their laws on mutual legal assistance to permit co-operation with countries investigating cases of bribery of foreign public officials even including third countries (country of the offer or; country where the act occurred) and countries applying different types of criminalisation legislation to reach such cases.

Means should be explored and undertaken to improve the efficiency of mutual legal assistance.

(iii) RECOMMENDATION OF THE COUNCIL ON THE TAX DEDUCTIBILITY OF BRIBES TO FOREIGN PUBLIC OFFICIALS

adopted by the Council on 11 April 1996

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the OECD Council Recommendation on Bribery in International Business Transactions [C(94)75/FINAL];

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that the Council Recommendation on Bribery called on Member countries to take concrete and meaningful steps to combat bribery in international business transactions, including examining tax measures which may indirectly favour bribery;

On the proposal of the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises:

I. RECOMMENDS that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal.

II. INSTRUCTS the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-Member countries and to report to the Council as appropriate.

(iv) PARTIES TO THE CONVENTION

Countries Having Ratified/Acceded to the Convention*

	Country	Date of Ratification
1.	Iceland	17 August 1998
2.	Japan	13 October 1998
3.	Germany	10 November 1998
4.	Hungary	4 December 1998
5.	United States	8 December 1998
6.	Finland	10 December 1998
7.	United Kingdom	14 December 1998
8.	Canada	17 December 1998
9.	Norway	18 December 1998
10.	Bulgaria	22 December 1998
11.	Korea	4 January 1999
12.	Greece	5 February 1999
13.	Austria	20 May 1999
14.	Mexico	27 May 1999
15.	Sweden	8 June 1999
16.	Belgium	27 July 1999
17.	Slovak Republic	24 September 1999
18.	Australia	18 October 1999
19.	Spain	14 January 2000
20.	Czech Republic	21 January 2000
21	Switzerland	31 May 2000
22.	Turkey	26 July 2000
23.	France	31 July 2000
24.	Brazil	24 August 2000
25.	Denmark	5 September 2000
26.	Poland	8 September 2000
27.	Portugal	23 November 2000
28.	Italy	15 December 2000
29.	Netherlands	12 January 2001
30.	Argentina	8 February 2001
31.	Luxembourg	21 March 2001
32.	Chile	18 April 2001
33.	New Zealand	25 June 2001
34.	Slovenia[1]	6 September 2001
35.	Ireland	22 September 2003

* In order of ratification/accession received by the Secretary General.

1. Slovenia, as a new member in the OECD Working Group on Bribery, deposited it's accession instrument