

## KOREA

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

#### A. IMPLEMENTATION OF THE CONVENTION

##### Formal Issues

Korea signed the Convention on December 17, 1997, and deposited the instrument of ratification with the OECD on January 4, 1999. On December 28, 1998, it enacted implementing legislation in the form of *The Act on Preventing Bribery of Foreign Public Officials in International Business Transactions* (“FBPA”)<sup>1</sup>, which entered into force on February 15, 1999.

##### Convention as a Whole

As a major exporter, Korea fully supports the Convention. It states that it has done its best to address the requirements of the Convention through the implementation of the FBPA, which criminalises the bribery of a foreign public official in international business transactions, and contains provisions on the responsibility of legal persons and confiscation.

Korea explains that the foreign bribery offence was drafted in accordance with the language in the Convention, as well as the provisions in the *Criminal Code* on the bribery of a domestic public official.

In addition, since the Convention has the same legal effect as any legislation passed by the National Assembly, the Korean authorities will interpret the provisions of the FBPA strictly in accordance with the Convention. The Commentaries on the Convention do not have binding legal force in Korea, but will function as formal guidelines for the interpretation of the Convention.

The courts have given the domestic bribery offence a broad and flexible interpretation. Korea, therefore, contends that the language of the FBPA would be interpreted to fully cover the requirements of Article 1 of the Convention.

#### 1. ARTICLE 1. THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

Article 3.1 of the FBPA sets out, as follows, the offence of bribery of a foreign public official:

*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 profit.*

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## **1.1 The Elements of the Offence**

### **1.1.1 any person**

The FBPA does not contain a definition of “person”, and there is no legal authority for a definition. Korea states that article 3.1 applies to “any person” (i.e. natural person) regardless of his/her nationality, and that no person is excluded.

### **1.1.2 intentionally**

According to the Korean authorities, the requirement of intent in the offence is satisfied if the offender acted in order to obtain an improper advantage.

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

Article 3.1 of the FBPA expressly prohibits the “offering”, “promising” or “giving” of a bribe to a foreign public official.

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

Article 3.1 of the FBPA refers to the offering, etc., of a “bribe to a public foreign official in relation to his/her official business”, not “any undue pecuniary or other advantage” as required by the Convention. Korea states that there is no direct definition of the term “bribe” in criminal statutes or in the case law, but there are decisions of the courts that imply that a “bribe” is “any undue advantage given, etc. in return for an act (this term includes an omission) in relation to a public official’s duty or business”. Furthermore, “acts in relation to a public official’s duty or business” include any activity within the public official’s competency and also such activity that is closely related to the official’s competency or dealt with *de facto* by him/her in relation to his/her competency. (Supreme Court Decision 1982. 11.23, 82 Do 1549) Whether or not the violation of the duty has occurred is irrelevant (Supreme Court Decision 1995. 9. 25, 95 Do 1269).

Korea further provides that the case law confirms that the advantage, which is the substance of the bribe, includes money, goods and other pecuniary advantages, as well as intangible benefits (such as the opportunity of having a sexual relationship) that satisfy the demand or desire of a person. For instance, lucrative business opportunities are included (Supreme Court Decision 1995. 9. 25, 95 Do 1269).

### ***The Exceptions Generally***

Article 3.2 contains the following two exceptions to the offence in article 3.1:

- a. such payment is permitted 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.*

In contrast to article 3.1, which criminalises the promising, giving and offering of a “bribe”, the terminology for the subject of the bribe under the exceptions in article 3.2 is “payment” under article 3.2.a. and “small pecuniary or other advantage” under article 3.2.b. The Korean authorities explain that a more correct translation from the Korean language would be “corrupt thing”, and that more neutral terms were

chosen for the exceptions to clarify that they do not constitute bribes under article 3.1. Moreover, the Korean authorities do not believe that the mixture of terms could present problems in application.

***First Exception: Law of Foreign Public Official's Country permits Such Payment***

The first exception is similar to Commentary 8 on the Convention, except that Commentary 8 refers to the “written” laws and “regulations” of a foreign state. Korea explains that the Korean statute uses the word “bup-ryung” (law-regulation), and as there is no notion of unwritten law in the Korean legal system, the language of article 3.2.a. is not different from that of Commentary 8, and therefore does not encompass customary law.

***Second Exception: Small Payments in Relation to Ordinary or Routine Work***

The second exception is a codification of the notion of “small facilitation payments” contained in Commentary 9 on the Convention. However, contrary to Commentary 9, article 3.2.b. is not restricted to “payments”. Korea explains that other types of advantages that could be included pursuant to this exception include the providing of useful information, the introduction of a person, etc. And the types of acts that Korea intends to capture include the issuance of licenses for importing goods, the certification of documents and the installation of telephone lines, etc.

At this time case law does not exist to provide guidance on the scope of this exception. However, with respect to its procedural application, the Korean 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.

**1.1.5 whether directly or through intermediaries**

Article 3.1 of the FBPA does not expressly apply to persons who give bribes to foreign public officials through intermediaries. However, the Korean authorities state that these cases are covered.

There are examples in the case law of decisions where convictions have been obtained for bribery through intermediaries. Korea cites as an example a Supreme Court decision (1996. 12. 6, 96 Do 144, etc.) where a person was successfully convicted of giving a bribe through his wife to the chief of a branch bank owned by the government.<sup>2</sup>

**1.1.6 to a foreign public official**

Article 2 of the FBPA states that a “foreign public official” is any person who falls within one of the following descriptions:

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 following 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;*

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2. Both the briber and the person who received the bribe were convicted in this case.

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 subparagraph 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.*

The description of foreign public official in article 2.1 of the FBPA is almost identical to the first part of the definition of foreign public official in Article 1.4.a. of the Convention, except that it does not include a reference to subdivisions of government. However, Korea confirms that this provision does apply to all subdivisions of government.

The descriptions in article 2.2.a, b and c of the FBPA are intended to capture the part of the definition in relation to “any person exercising a public function for a foreign country” contained in the second part of Article 1.4.a of the Convention.

Korea indicates that the definition also includes military officials of foreign countries and international organisations.

Commentaries 12 and 13 on the Convention define “public function” and “public agency” in terms of tasks, not “business”. Article 2.2.a and b of the FBPA contain descriptions that relate to the carrying out of business in paragraph a, and specific business in paragraph b. The Korean authorities explain that in the Korean language, it is very difficult to distinguish between the terms “activity”, “task” and “business”. Thus in the Korean version of the FBPA the term “business” in article 2.2.a. could be replaced with “activity” or “task”, and “specific business” in article 2.2.b. could be replaced with “specific activity” or “specific task”.

Article 2.2.c of the FBPA defines foreign public officials in relation to “public enterprises”. It applies to “any enterprise over which a foreign government holds over 50 percent of its subscribed capital or exercises substantial controlling power over its overall management”, etc. Thus, in contrast to Commentary 14, the FBPA does not specify that either direct or indirect control is a sufficient trigger, or that it applies to the case where more than one foreign government has control. Additionally, by using the term “substantial controlling power” it could appear that the FBPA requires more than *de facto* control where it is not the case that the foreign government holds over 50 per cent of the shares. Korea submits that consistent with Commentary 14 on the Convention, article 2.2.c. of the FBPA will be interpreted to include direct and indirect control. It will also apply to the case where more than one foreign government has control. Moreover, the term “substantial controlling power” was drafted to correspond to the term “dominant influence” in the Commentaries. Thus, Korea states that the FBPA does not require more than *de facto* control where it is not the case that the foreign government holds over 50 per cent of the shares.

The latter part of subparagraph c, which deals with the non-applicability of the subparagraph to the case where an enterprise operates on a competitive basis “equivalent to entities of ordinary private economy, without preferential subsidies or other privileges”, follows the language of Commentary 15 on the Convention.

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

The FBPA does not expressly cover the case where a third party receives the benefit. However, Korea states 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. In support of this assertion, Korea provides an example in its case law (Supreme Court Decision 1955.10.18, 55 Do 235). In this case a military officer received money in return for an act in relation to his duty for the benefit of the military unit to which he was attached (i.e. the money was spent on the unit, not on himself). The Court held that the officer was liable for the bribery offence because the fact that the money benefited a third party did not alter the fact that the money represented a bribe. It is assumed that Korean courts would apply the same reasoning in relation to the person who gives a bribe that benefits a third party.

The Korean authorities further provide 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 express doubts as to whether this case is covered by the Convention.

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

The FBPA does not contain a specific reference with respect to acts “in relation to the performance of official duties”. However, Korea states that under Korean criminal law the term “bribe” implies that an undue advantage is promised, offered or given in order that the official act or refrain from acting in relation to the performance of his official duty or competence. Korea further states that in practice this is interpreted very broadly, and that it does not matter whether the public official’s act or omission is within his authorised duty or competence, or whether it is lawful or unlawful.

Korea provides that, as stated earlier in the discussion under 1.1.4, although there is no direct definition of the term “bribe” in criminal statutes or in the case law, the case law implies that “bribe” means “any undue advantage given, etc. for an action in relation to a public official’s duty or business”. Korea offers the following examples in the case law of what is encompassed by this term:

- The duty need not be that which is specified by law but may include the entire scope of the official’s duties for which he/she is responsible. It includes activities within his/her competence and also such activities that are closely related to his competence or are dealt with de facto by him/her in relation to his/her competence. (Supreme Court Decision 1982. 11. 23, 82 Do 1549)
- The scope of the duties includes those that are specifically stipulated by statutes as well as those which are based upon directions, orders, internal guidelines or administrative measures. (Supreme Court Decision 1984. 9. 25, 84 Do 1568)
- The duty need not be of an independent nature--it includes the exercise of one’s duty that influences the performance of the duty of someone in a more senior position. (Supreme Court Decision 1987. 9. 22, 67 Do 1472)
- It is irrelevant whether the violation of the duty has occurred or not. (Supreme Court Decision 1995. 9. 25, 95 Do 1269)

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

Article 3.1 of the FBPA applies in relation to a bribe that is given to a foreign public official “in order to obtain improper advantage in the conduct of international business transactions”. This wording differs somewhat from Article 1 of the Convention.

Article 3.1 of the FBPA does not explicitly refer to “business” or to “retain”. However, Korea explains that “improper advantage” implies “business”, among other things, and that in the Korean language the word that corresponds to “obtain” also means “retain”. Thus, article 3.1 applies to the case where the purpose of a bribe is to preserve business that has already been obtained.

### **1.2/1.3 Complicity/Conspiracy and Attempt**

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”. Article 1.2 further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

Korea explains that there are general principles in the Korean *Criminal Code* governing complicity, including complicity with respect to the offence of bribing a foreign public official. The *Criminal Code* provides for three categories in relation to complicity: co-authorship, abetting and aiding. These provisions are linked to the offence of bribing a foreign public official in the FBPA through article 8 of the *Criminal Code*, which stipulates that the general provisions in the *Criminal Code* shall apply to offences prescribed in other criminal statutes.

Article 30 of the *Criminal Code* deals with co-authorship. It states that where two or more persons jointly commit an offence, each person shall be separately responsible, as an author, for the commission of the whole offence.

Additionally, it is well established in the case law in relation to domestic bribery that where two or more persons conspire to commit an offence, any conspirator who does not participate in the actual commission of the offence is also liable to a criminal penalty as an author of the whole offence (e.g. Supreme Court Decision 1985. 3. 12, Do 2197). Korea gives as an example the case where some directors of a company conspire to offer a considerable amount of money in order to obtain a new business from a foreign government, without taking any further action. The bribe is then offered to a foreign public official by one of the employees. In this case each of the directors involved in the conspiracy is separately responsible under the FBPA as an author of the whole bribery offence. However, if no bribe had been offered after the directors had conspired to make the offer, there would have been no criminal liability under the FBPA because under Korean criminal law, mere conspiracy (i.e. no further action is taken after the conspiracy to offer, etc. the bribe has been made) is not punishable unless provided for in relation to the offence in question. And under Korean law, there is no special provision that criminalises a mere conspiracy in relation to bribery (domestic or foreign).

Article 31.1 of the *Criminal Code* states that any person who abets another person to commit an offence shall be subject to the same criminal liability as the actual perpetrator of the offence.

Under article 32 of the *Criminal Code*, a person who aids another person in the commission of an offence shall be liable to a penalty, although it shall be less severe than the one to which the perpetrator is liable. Korea explains that aiding differs from abetting in that aiding just reinforces another person’s will to commit an offence or helps another person to commit an offence. On the other hand, abetting involves making another person have the will to commit an offence.

Korea states that its criminal law does not deal directly with the issues of incitement and authorisation, but that these could be fully covered by the above three categories of complicity. Korea explains that in the Korean language it is impossible to distinguish between the terms “incitement” and “abetting”, therefore there is no legal authority to support its contention that “incitement” is covered. Moreover, Korea believes that an authorisation can be dealt with under the notion of co-authorship, abetting or aiding, depending upon the circumstances.

Korea provides that according to article 29 of the *Criminal Code*, an attempt is not punishable unless there is a special provision in relation to the offence in question (as in relation to mere conspiracy). And in relation to the bribery offences (domestic and foreign), there is no special provision that *criminalises* an attempt.

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

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

### **2.1.1 Legal Entities**

Article 4 of the FBPA establishes the criminal responsibility of a legal person for the bribery of a foreign public official. This provision, which follows, was established specifically to address the requirements of the Convention, and an equivalent provision does not exist in relation to the domestic bribery offences:

*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. (The emphasis is added by Korea in its Response to the Phase I Questionnaire.)*

Korea explains that under Korean law, legal persons can take various forms, including associations, foundations, joint-stock corporations, limited liability companies, unlimited or limited partnerships, etc. Although there is no legal authority for the definition of a legal person, for the purpose of article 4 of the FBPA, Korea considers a legal person to be any legal entity other than a natural person whose legal personality is given or acknowledged by law. There are many laws governing the various forms of legal person, such as the *Civil Code*, administrative law and other special statutes.

Korea further explains that there is no legal barrier to prosecuting and criminally sanctioning legal entities that are state-owned or state-controlled. In fact, there have been many decisions of the courts where a criminal fine has been imposed on a legal person that was owned or controlled by the State. For example, in one case a state-owned university hospital that had violated the *Anti-Air Pollution Act* was prosecuted and convicted (Supreme Court Decision 1991. 2. 26, 90 Do 2597). Korea states that the principle of criminal liability of state-owned or state-controlled companies applies to article 4 of the FBPA, and that these companies will routinely be subjected to criminal prosecutions for offences under the FBPA.

### **3.1.2 Standard of Liability**

Korea explains that the only important requirement for imposing criminal liability on a legal person is that a representative, agent, employee or other individual working for that legal person has committed the

foreign bribery offence “in relation to its business”. Korea states that this means the criminal responsibility of a legal person under the FBPA is based on strict liability, and there is no need to prove the legal person’s negligence, etc. However, it is a defence under article 4 if the legal person has “paid due attention or exercised proper supervision to prevent the offence”.

In determining whether the violation of the law by a legal person’s employee, etc. was done “in relation to its business”, the Supreme Court, in a customs law violation case (1991. 2. 26, 90 Do 25897), held that:

1. Objectively, it should appear that the act was done for the business of the legal person; and  
2. Subjectively, the employee, etc. should have intended to do the act for the legal person. The Court stated that in determining whether the employee, etc. had the requisite intent the following elements should be considered altogether:

- The legal scope of the business of the legal person.
- The rank or position of the employee, etc.
- The relationship between the act that violated the law and the legal scope of the legal person’s business.
- The employee’s motive for, and circumstances after, the commission of the offence.
- Whether the legal person knew about the commission of the offence or the degree to which the legal person was involved in the commission of the offence.
- The origin of the fund used for the violation of the law.
- The final possession of the resulted profit and other related circumstances.

The Korean authorities provide that it is not necessary that the employee, etc. be found guilty of bribing a foreign public official under article 3.1 of the FBPA for proceedings to be taken under article 4 in relation to the legal person. (Korea states that there may be case law in support of this.)

Korea provides that with respect to the defence under article 4 of the FBPA, the person who must have “paid due attention or exercised proper supervision to prevent the offence” is the person who has the responsibility to supervise in order to prevent the offence. According to a decision of the Supreme Court (1992. 8. 18, 92 Do 1395) the supervision must be concrete and specific—general and abstract supervision is not sufficient. The Supreme Court also held that there is a strong presumption under the defence clause that the legal person has been negligent, and that, therefore, there is a reverse onus of proof. (Korea points out that in this context, the criminal responsibility of a legal person under the FBPA is not based on strict liability.) In addition, Korea indicates that where a person with the supervisory responsibility commits the bribery offence, it would treat the legal person as if it committed the offence intentionally itself. In such cases, there is little room to trigger the exemption clause.

Korea explains that the legal person is responsible for the act of any employee that constitutes a bribery offence under the FBPA, regardless of the employee’s rank or position within the organisation.

### **3. ARTICLE 3. SANCTIONS**

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

monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

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

With respect to criminal penalties for domestic bribery, natural persons are liable to a maximum term of imprisonment of 5 years, or a maximum fine of 20 million won.<sup>3</sup> Legal persons are not liable to criminal penalties for domestic bribery.

With respect to criminal penalties for foreign bribery in relation to natural persons, article 3.1 of the FBPA states as follows:

*Any person...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 profit.*

Korea explains that the amount of a fine in relation to the foreign bribery offence shall be based upon the “Lee-ik” (gains) which is close in meaning to “proceeds” in the Convention. The “profit” (or gains) shall be calculated under article 3.1 and 4 of the FBPA in accordance with the definition of “proceeds” in Commentary 21 on the Convention. Thus “profit” shall be interpreted as “the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through the bribery”. There does not exist any further legal authority for calculating the “profit” in relation to the foreign bribery offence.

Additionally, article 3.3 of the FBPA states as follows:

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

This provision is intended to ensure that in all cases a fine should be imposed where a term of imprisonment is imposed. It is also possible for the courts to provide for a fine penalty without imprisonment.

With respect to legal persons, article 4 of the FBPA states that:

*...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.*

Korea confirms that this provision is not meant to indicate that sanctions on the actual perpetrator are a prerequisite for imposing a penalty on the legal person.

In conclusion, Korea states that the penalty provisions under the FBPA are “much stricter” than those under the *Criminal Code* for domestic bribery. Indeed, legal persons are not liable for domestic bribery, and with respect to natural persons, the FBPA (in certain cases, which must be clarified) permits the imposition of fines that exceed the amounts under the *Criminal Code*.

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<sup>3</sup> Art. 132 of *Criminal Code*.

### 3.3 Penalties and Mutual Legal Assistance

Korea states that pursuant to the *Act of International Mutual Legal Assistance in Criminal Matters* and treaties on mutual legal assistance in criminal matters, the gravity of penalties is not a relevant factor in determining whether to provide mutual legal assistance. Thus, Korea states, there is no legal barrier in providing legal assistance with respect to offences under the FBPA, provided that other general requirements such as the principles of dual criminality and reciprocity, etc. are satisfied.

### 3.4 Penalties and Extradition

Korea states that pursuant to the Extradition Act and Korea's extradition treaties, an extraditable offence is an offence that is punishable under the laws of Korea and the requesting country by a deprivation of liberty for a period of one year or more.<sup>4</sup> Thus, Korea states, the bribery offence under the FBPA, providing for a maximum term of imprisonment of 5 years, is an extraditable offence in Korea.

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

The Korean reply to the questionnaire states that article 5 of the FBPA provides, with respect to confiscation of the bribe, that:

*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.*

The Korean authorities point out that the words "after the offence has been committed" have been inserted by mistake, and should be deleted. They also indicate that the word "used" should replace "given".

Korea confirms that the bribe could be confiscated from a legal person.

Korea further confirms that "knowledge" means that the person who obtained the bribe should have known, at the time of obtaining the bribe, that the bribe was something proscribed by the FBPA. It is not sufficient for the purpose of article 5 that he/she acquires such knowledge afterwards.

The Korean authorities explain 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.

Under the FBPA, the proceeds are not directly subject to confiscation.

### 3.7 Monetary Sanctions in Place of Confiscation of the Proceeds

Although the FBPA does not provide for the confiscation of the proceeds, in some cases the fine provisions are calculated taking into account the "profit" obtained through the offence.<sup>5</sup> Where the profit obtained through the foreign bribery offence exceeds a total of 10,000,000 in the case of a natural person, and 500,000,000 won in the case of a legal person, the FBPA mandates the imposition of a fine that amounts to up to twice the amount of the profit.

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<sup>4</sup> Art. 6 of Extradition Act

<sup>5</sup> See art. 3.1 on natural persons, and art. 4 on legal persons.

### 3.8 Civil Penalties and Administrative Sanctions

The Korean legal system does not presently provide for the imposition of additional civil or administrative sanctions upon a person or a legal person already subject to a criminal sanction for bribing a foreign public official. Korea states, however, that it will seek ways of imposing non-criminal sanctions on “enterprises” by looking at the methods and experiences of other OECD member countries.<sup>6</sup>

## 4. ARTICLE 4. JURISDICTION

### 4.1 Territorial Jurisdiction

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

Article 2 of the *Criminal Code* establishes jurisdiction over any offence that has been committed in the territory<sup>7</sup> of the Republic of Korea. And article 2 of the *Criminal Code* shall be interpreted broadly in accordance with Article 4.1 of the Convention as establishing jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in Korea, because Article 4 became a part of Korean law on ratification. In practice, this means that Korea has jurisdiction over any part of an act constituting the offence under the FBPA of bribing a foreign public official. Korea provides as an example the case where the director of a company in Seoul abets a person to give some money to a foreign public official in order to obtain a new business in a foreign country. If the person who has been abetted actually commits the bribery, Korea will have jurisdiction over the acts of both persons.

### 4.2 Nationality Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirement of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

Under article 3 of the *Criminal Code*, Korea has jurisdiction to prosecute its nationals for offences committed abroad, and there is no additional requirement such as dual criminality. Korea states that this principle applies to any criminal offence, including the bribery of a foreign public official. However, exercising its jurisdiction may be another matter. For instance, where there is no reliable evidence or there is any other legal reason such as the lapse of time, etc., Korea may decline to exercise its jurisdiction. Korea adds that in any case, it will exercise its jurisdiction in accordance with the Convention.

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<sup>6</sup> Korea makes this comment in relation to question 5.1 of the Questions Concerning Implementation of the Convention and the 1997 Recommendation, which concerns laws and regulations permitting authorities to suspend enterprises from competition for public contracts.

<sup>7</sup> Under art. 3 of the Constitution, territory includes the actual territorial boundaries of the Korean peninsula and its subordinating lands. Under art. 4 of the *Criminal Code* it also includes areas within its territorial waters, and aboard ships and airplanes flying under its flag.

### **4.3 Consultation Procedures**

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

Korea states that the notion of consulting with another country with a view to an eventual transfer of jurisdiction is foreign to Korea. It states further that the Ministry of Justice (4<sup>th</sup> Prosecution Division of Prosecution Bureau) is the central authority for the purpose of mutual legal assistance in criminal matters, and, thus, is expected to be in charge of such consultations and related matters. It further indicates that under Korean law, the related communication should be made through diplomatic channels unless relevant treaties provide otherwise.

Korea confirms that it is prepared to handle requests from other Parties in relation to the consultation and eventual transfer of jurisdiction, where appropriate.

### **4.4 Review of Current Basis for Jurisdiction**

Korea states that its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials. Additionally, pending before the National Assembly is a bill to amend the *Criminal Code* so that Korea will have additional jurisdiction over an offence where it has an obligation to establish jurisdiction by reason of a multilateral international agreement to which it is a party. However, this amendment will have no effect on Korea's jurisdiction as far as the offence of bribing a foreign public official is concerned.

More specifically, the issue of jurisdiction over Korean companies for the acts of non-Korean agents abroad is something that Korea intends to study as it is controversial whether Korea has jurisdiction over Korean companies in such cases.

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

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

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

Korea explains that there is no difference between the way that foreign bribery cases and other criminal cases are investigated and prosecuted.

#### *Investigations*

Korea states that criminal investigations are conducted by, or under the supervision of, public prosecutors. Public prosecutors do not face any barriers to initiating investigations. Moreover, their political independence is guaranteed under article 8 of the *Public Prosecutors Office Act*.

Article 195 of the *Criminal Procedure Code* provides that the prosecutor should investigate an offence when he/she considers that there is a suspicion of an offence. In practice, however, if the alleged offence is very petty or there appears to be little possibility of a successful prosecution, the prosecutor would not initiate the investigation. An investigation may be suspended when the alleged offender or an important witness cannot be found. When there is insufficient evidence or the case has been prosecuted, the

investigation is terminated. These principles apply when the prosecutors conduct the investigations as well as when they have a supervisory role.

According to article 196 of the *Criminal Procedure Code* the police can investigate criminal cases only under the supervision of prosecutors. The relevant policing authorities may be involved at any stage of the investigative process. In practice, however, investigations by the police are usually conducted at an early stage. And in minor cases the prosecutors do not interfere much in the police investigation. All criminal cases investigated by the police should be referred to the prosecutors immediately after the investigation.

### *Prosecutions*

Pursuant to article 246 of the *Criminal Procedures Code*, decisions concerning whether to prosecute are within the sole discretion of public prosecutors. And even where there is sufficient evidence to prosecute a case, the public prosecutor may decline to initiate court proceedings.<sup>8</sup> In determining whether to prosecute a case, the factors to be considered include but are not limited to the following:

1. The age, character, intelligence and circumstances of the alleged offender;
2. The relationship between the victim and the alleged offender;
3. The motivation, methods and result of the alleged offence; and
4. The circumstances after the commission of the alleged offence.<sup>9</sup>

In addition, pursuant to a decision of the Constitution Court (1995. 1. 20, 94 Human 246), the following relevant factors shall also be considered in deciding whether to prosecute:

1. Previous convictions and the criminal history of the accused;
2. The gravity of the penalty prescribed by the relevant law;
3. The social impact of the alleged offence;
4. The change in the condition of public life and in the evaluation of the criminality of certain acts;
5. The development of the law;
6. Whether or not any accomplices have been pardoned; and
7. The period of time that has lapsed since the commission of the offence.

All the above factors also apply in deciding whether to suspend or terminate prosecutions and they are normally considered again during the sentencing stage.

Furthermore, pursuant to article 10 of the *Prosecutors Offices Act*, injured parties have the right to appeal a decision to not prosecute. An appeal against a district prosecutor's decision may be made to the Higher Prosecutor's Office and then to the Supreme Prosecutor's Office. Finally, if the injured party is not satisfied with the decision of the Supreme Prosecutor's Office, pursuant to article 68.1 of the *Constitution Court Act*, he/she may appeal to the Constitution Court.

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

Korea confirms that as prescribed by Article 5 of the Convention, the investigation and prosecution of the bribery of a foreign public official shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

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<sup>8</sup> Art. 246 of *Criminal Procedures Act*.

<sup>9</sup> Art. 247.1 of *Criminal Procedures Act*, Art. 51 of *Criminal Code*.

## 6. ARTICLE 6. STATUTE OF LIMITATIONS

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

Pursuant to article 249 of the *Criminal Procedures Act*, the statute of limitations for the foreign bribery offence under the FBPA is 5 years. The period begins to run when the offence in question is completed, and is suspended where a prosecution is initiated against one of the offender’s accomplices or where the accused stays outside of Korea’s jurisdiction for the purpose of avoiding prosecution.<sup>10</sup> In the latter case the return of the accused to Korea sets in motion the running of the limitations period.

## 7. ARTICLE 7. MONEY LAUNDERING

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

### 7.1 Domestic Bribery

In Korea, bribery of a domestic public official is not a predicate offence for the purpose of the application of money laundering legislation.<sup>11</sup> Currently a bill introduced in July 1997 entitled *The Act on the Money Laundering Prevention* is pending before a subcommittee.

The bill criminalises money laundering of the criminal proceeds derived from the offences of domestic passive bribery, organised crime, illegal political fund raising, etc. It also imposes various obligations on financial institutions in order to prevent and trace money laundering activities, such as obligations to report illegal funds to investigation authorities, keep related records and verify the identification of the performer of financial transactions.

### 7.2 Foreign Bribery

Similarly, bribery of a foreign public official is presently not a predicate offence for the purpose of money laundering legislation. However, once the domestic bribery bill is prepared, corresponding legislative measures will be taken in relation to foreign bribery.

## 8. ARTICLE 8. ACCOUNTING

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

Korea explains that accounting requirements are organised under the *External Audit Law*, which imposes accounting standards, requires external audits, and stipulates penalties for violations of its rules.

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<sup>10</sup> Art. 253 of *Criminal Procedures Act*.

<sup>11</sup> The only predicate offences for the purpose of the application of money laundering legislation are drug related offences, pursuant to *The Special Act on Preventing Illegal Drug Trafficking*.

## **8.1 Accounting and Auditing Requirements**

### **8.1.1 Accounting**

The accounting standards require that all economic transactions be appropriately recognized in financial statements. Korea states that this implies that off-the-books accounts or transactions are not permitted.

Korea states that its accounting standards employ the accrual basis to recognize revenues and expenses, and that, therefore, revenues and expenses are recognized as they occur. Korea explains that this prohibits the recognition of non-existent expenses.

The use of false documents is deterred by the requirement that the records of all economic transactions be based on objective documents and evidence.

No liabilities with incorrect identification of their object should be entered into the accounting system because Korean accounting standards specify accounting treatments for contingent liabilities consistent with international best practices.

Additionally, the auditing standards charge management with establishing and maintaining an adequate internal control system.

### **8.1.2 Auditing**

A statutory auditor is an internal employee but is elected at the general shareholder's meeting, and thus is considered to be independent of management. It is his/her to examine directors' proposals and other relevant documents and report any violations of laws, decrees, articles of incorporation and other significant improprieties at the general shareholder's meeting. He/she may report such violations to the prosecutorial authorities, but is under no obligation to do so.

External auditors must obtain objective, reliable evidence on accounting records and the internal control system. If an external auditor becomes aware of any significant illegal acts or matters contravening laws or decrees or the articles of incorporation and such acts or matters have been committed by an officer in connection with conducting corporate business, he/she shall notify the statutory auditor and report such findings at the general shareholder's meeting. In addition, an external auditor must report any accounting omissions, falsifications, or fraud to a statutory auditor. He/she may report such violations to the prosecutor's office, but as in the case of the statutory auditor, is under no obligation to do so.

The accounting and auditing standards are separate but complimentary regulations established by the Financial Supervisory Commission. The application of these standards is compulsory for companies that fall under the *External Audit Law*.

The Securities and Futures Commission (the financial accounting regulatory authority) is required by the *External Audit Law* to review audit reports to ensure the compliance of auditors with the auditing standards and the compliance of firms with the accounting standards, including whether accounting records and financial statements faithfully represent the substance of transactions without any omissions or falsifications. It is also required by the *Securities Exchange Act* to investigate disclosed documents by publicly traded companies. The Securities and Futures Commission may report violations of the law to the prosecutor's office but is under no obligation to do so.

## **8.2 Companies Subject to Laws and Regulations**

All joint stock companies are required by the *Commercial Code* to appoint an internal auditor who is independent from the management of the company. This internal auditor is referred to as a “statutory auditor”.

In addition, joint stock companies with total assets worth over 7 billion won or more are subject to the accounting standards and auditing standards regardless of whether their stocks are publicly traded. They are required to hire an external auditor (CPA or CPA firm) pursuant to the *External Audit Law*. Therefore, joint stock companies with total assets worth 7 billion or more won are required to have both statutory auditors and external auditors. Audit reports of these companies are reviewed by the Securities Exchange Commission according to the *External Audit Law*. Korea indicates that more than 8 thousand firms are currently subject to an external audit.

Nevertheless, regardless of size or type, all companies are generally expected to observe accounting standards as the *Corporate Taxation Law* prescribes bookkeeping guidelines.

## **8.3 Penalties**

The Securities and Futures Commission is empowered to take administrative measures against firms and auditors who commit material accounting omissions, falsifications and fraud. Such measures include warnings and suspensions of licences or the issuance of securities, etc.

Korea states that firms and auditors are liable to criminal sanctions pursuant to the *External Audit Law* if their violations of the rules and regulations involve an intentional omission or fraud, and the resulting damage is significant, material or important. The penalty for a CPA or an employee of a firm shall be imprisonment for a maximum term of 3 years or a fine. In the case of a fine penalty, the ceiling is 30 million won, but if 5 times the personal gains exceed the ceiling (regardless if the gains are already realized or expected), the amount can be increased to that level.

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

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

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

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

#### **9.1.1 Criminal Matters**

Korea has concluded bilateral treaties on mutual legal assistance in criminal matters with some of the signatories to the Convention.<sup>12</sup>

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<sup>12</sup> Australia, U.S.A., Canada and France.

Korea also states that the *International Mutual Legal Assistance in Criminal Matters Act* allows the providing of mutual legal assistance in criminal matters to those countries with which Korea has no relevant treaties or arrangements, provided that reciprocity is guaranteed. Korea confirms that reciprocity is required where a request for mutual legal assistance is received from a Party to the Convention with which Korea does not have a relevant treaty.

The Act does not provide any specific process for guaranteeing reciprocity, but in practice it is done on a case-by-case basis through means of a diplomatic note issued by the embassy of the requesting country or by a statement included in the request to the effect that reciprocity is guaranteed. Under the Act, providing mutual legal assistance in these cases is discretionary, but Korea states that pursuant to Article 9 of the Convention, it will fully respect the requests from non-treaty Parties in relation to requests respecting the foreign bribery offence.

Further requirements under the *International Mutual Legal Assistance in Criminal Matters Act* that must be satisfied in order to provide MLA to a requesting country (unless a related treaty or arrangement provides otherwise) include the following:

1. Dual criminality (see discussion below under 9.2).
2. The offence for which MLA is requested should not be of a political nature.
3. There should not be a risk of violating the sovereignty, national security, peace and order, or established customs of Korea.

In addition, Korea states that its law enforcement agencies have a close relationship with their foreign counterparts, enabling prompt informal consultations and the exchange of information.

The measures that exist under the relevant bilateral treaties and the *Mutual Legal Assistance in Criminal Matters Act* to enable Korea to comply with a request for mutual legal assistance include: serving documents; taking evidence including statements from persons; providing information, documents, records and articles of evidence; locating or identifying persons or items; obtaining and providing expert evaluations; executing requests for search and seizure; making detained persons and others available to give evidence or assist in an investigation; measures to assist in relation to proceeds of crime; and other forms of assistance not prohibited by law.

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

The *International Mutual Legal Assistance in Civil Matters Act* allows Korea to provide mutual legal assistance in civil matters. Under this Act, the serving of documents and taking of evidence in civil cases is available regardless of whether the related proceedings in the requesting country are in relation to a natural or a legal person. Providing legal assistance in civil cases to non-treaty countries is discretionary, but Korea will respect requests from non-treaty countries that are Parties to the Convention.

In addition, in order to facilitate mutual legal assistance in non-criminal matters, Korea will join the *Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters* this year.

## **9.2 Dual Criminality**

Article 6.4 of the *International Mutual Legal Assistance in Criminal Matters Act* states that dual criminality is one of the compulsory requirements for providing legal assistance in criminal matters to another country, unless related treaties or arrangements provide otherwise. However, Korea states that

dual criminality will be deemed to exist if the offence for which the assistance is sought is within the scope of the Convention.

### **9.3 Bank Secrecy**

Pursuant to article 4 of the *Act on Real Name Financial Transaction and Protection of Confidentiality*, the production of banking records may be obtained by a search and seizure warrant issued by a judge. In addition, under article 17.2 of the *International Mutual Legal Assistance in Criminal Matters Act*, the production of banking records may be obtained by a search and seizure warrant if necessary for executing a request from another country for legal assistance. In making a request for assistance under this Act that includes the production of banking records, the requesting country is required to provide relevant information showing the necessity for such bank records.

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

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

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

Korea explains that it has concluded bilateral extradition treaties with a number of the signatories to the Convention.<sup>13</sup> In addition, as was stated earlier, pursuant to article 6 of the *Extradition Act* and Korea's extradition treaties, an extraditable offence is an offence that is punishable under the laws of Korea and the requesting country by a deprivation of liberty for a period of one year or more.<sup>14</sup> Thus, Korea states, the bribery offence under the FBPA, providing for a maximum term of imprisonment of 5 years, is an extraditable offence in Korea.

### **10.2 Legal Basis for Extradition**

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

Korea states that Article 4 of the *Extradition Act* allows extradition to a country with which Korea has not concluded a bilateral extradition treaty provided that reciprocity is guaranteed by the requesting country. Korea also states that reciprocity is guaranteed under the *Extradition Act* in the same way and according to the same principles as is MLA pursuant to the *International Mutual Legal Assistance in Criminal Matters Act* (see discussion under 9.1).

Korea adds that it does not consider the Convention as a legal basis for extradition because it cannot be considered as a guarantee of reciprocity pursuant to article 4 of the *Extradition Act*. Korea explains that this is because some Parties do not consider the Convention as a legal basis for extradition.

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<sup>13</sup> Bilateral extradition treaties have been concluded with the following (in order according to date signed): Australia, Spain, Canada, Chile\*, Argentina\*, Brazil, Mexico, and the U.S.\* (\* indicates that treaty is not yet in force).

<sup>14</sup> Art. 6 of Extradition Act

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

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

Pursuant to article 9.1 of the *Extradition Act*, decisions concerning whether or not to extradite Korean nationals are discretionary<sup>15</sup>. There has not yet been a case where a request has been made for the extradition of a Korean national, therefore there is no clear legal authority on the exercise of discretion in this respect.

Furthermore, article 4 of the *Extradition Act* states that nationals should not be extradited to those countries that have not guaranteed reciprocity. Pursuant to article 4 of the *Extradition Act*, the Convention cannot be considered as a guarantee of reciprocity.

Korea states that where nationality is the sole reason for declining a request to extradite a person for the bribery of a foreign public official, there are no explicit rules and procedures to govern the situation. Again, as there is no case where a Korean national has been requested for extradition, a standard practice has not been established. Pursuant to the Convention, however, if Korea declines a request to extradite a person for the bribery of a foreign public official solely on the ground that the person is its national, the case will be submitted to a competent authority. It is expected that the practice will be for the Ministry of Justice to transfer the case to the Supreme Prosecutor's Office.

### **10.5 Dual Criminality**

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

Korea explains that pursuant to the *Extradition Act* and bilateral extradition treaties that it has concluded with other countries, the existence of dual criminality is a mandatory condition for extradition. It explains further that the condition of dual criminality will be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of the Convention. In other words, states Korea, Article 10.4 of the Convention is given the same legal effect as domestic law under the Korean legal system.

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

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

Korea has notified the OECD Secretary-General of the relevant authorities. The Ministry of Foreign Affairs and Trade and the Ministry of Justice have been designated as the authorities responsible for making and receiving requests in relation to matters of consultation, mutual legal assistance and extradition.

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<sup>15</sup> The Ministry of Justice has the authority to determine whether to extradite a Korean national.

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

### **3. TAX DEDUCTIBILITY**

#### *Generally*

Korea does not expressly deny the tax deductibility of bribes generally or of bribes made specifically to foreign public officials. Korea explains that the tax deductibility of bribes made to foreign public officials is denied because, pursuant to article 19.2 of the *Corporate Tax Law* (CTL) and the *Income Tax Law* (with respect to individual taxpayers), they do not constitute “expenses or losses that are related to business and commonly recognized as ordinary and normal”.

Further relevant provisions are contained in article 24.1 of the CTL and article 35.1 of the Enforcement Decree on the CTL, which state that offers made by a company to a person who has no special relationship to the company are not deductible if they are made without any direct connection to the business of the company. Moreover, article 55 of the Enforcement Decree on the *Income Tax Law* contains a complete list of tax deductible expense related items--bribes to foreign public officials are not listed, and are, therefore, not eligible for deduction.

#### *Non-Tax Deductibility where there is a Criminal Conviction*

If a conviction has been obtained pursuant to the FBPA for the bribery of a foreign public official, then the payment is not eligible for deduction because it is clear that it is not “commonly recognized as an ordinary and normal” business expense.

#### *Non-Tax Deductibility where there is no Criminal Conviction*

In the case where there has not been a criminal conviction, the tax administration authority can still deny tax deductibility of a payment to a foreign public official if it finds that the business accounting records of the claimant are clearly false or the relevant expenditure cannot be justified as a normal business transaction. In such a case, the tax authority bears the burden of proving that the expense is not deductible.

## EVALUATION OF KOREA

### 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

#### 1. 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 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.

#### 2. 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.

### **3. 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.

### **4. 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.

### **5. 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.