



# **PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN KOREA**

**October 2011**

This Phase 3 Report on Korea by the OECD Working Group on Bribery evaluates and makes recommendations on Korea's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 14 October 2011.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

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## EXECUTIVE SUMMARY

The Phase 3 Report on Korea by the OECD Working Group on Bribery evaluates and makes recommendations on Korea's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and related instruments. The Report focuses on developments since Korea's Phase 2 evaluation in November 2004, taking into account progress observed in Korea's written follow-up report in March 2007. It also addresses cross-cutting horizontal issues that are routinely covered in each country's Phase 3 evaluation. The Working Group recognises that Korea has obtained convictions in nine separate cases of the bribery of foreign public officials under Korea's Act on Preventing Bribery of Foreign Public Officials in International Business Transactions (FBPA), including three convictions of legal persons, since 1999; although the majority of these cases involved the bribery of foreign military staff on Korean soil. The Working Group considers it a positive sign that currently one case is under prosecution, and three cases are in the pre-investigation stage – all which appear to have taken place abroad. However, Korea needs to use more proactive steps to gather information from diverse sources at the pre-investigation stage both to increase sources of allegations and enhance investigations. In addition, Korea must preserve transnational bribery case records for a reasonable period to allow for full reporting on those cases to the Working Group.

Important developments since Phase 2 that should bolster enforcement of the FBPA include concrete efforts to improve information gathering and coordination between the various relevant agencies. A new information and intelligence gathering capacity coordinated by the Ministry of Justice and involving the Ministry of Foreign Affairs and Trade and the Supreme Prosecutor's Office was launched in May 2011, to support investigations of crimes with international elements, including foreign bribery and tax evasion. A consultative group for sharing information on foreign bribery enforcement was also recently established by the Ministry of Justice, National Tax Service, and Anti-Corruption and Civil Rights Commission. Korea's agencies responsible for public procurement contracting, including procurement financed by official development assistance funds, and its official export credit support agency, are now empowered to debar companies convicted of foreign bribery. Korea has also made notable efforts to improve the prevention and detection of foreign bribery, including through awareness-raising of the FBPA in the private sector. Moreover, the Commercial Act has been amended to require listed companies to establish compliance guidelines and appoint a compliance officer to implement the guidelines. Reporting suspicions of foreign bribery should increase, due to a new whistleblower law that applies to both public and private sector employees and now extends to reports on foreign bribery.

The Working Group also identified further measures that need to be taken by Korea to further strengthen the implementation of the Convention. These include ensuring that criminal sanctions imposed in practice for foreign bribery are effective, proportionate and dissuasive, and that Korea confiscates the proceeds of foreign bribery where possible. To enhance prevention and detection, the Working Group recommends that Korea encourage all companies, including SMEs, to adopt adequate internal controls, ethics and compliance programmes and measures. In addition, Korea is recommended to find ways to facilitate reporting by the tax authorities of suspicions of foreign bribery that they uncover in their tax audits.

The Report and the recommendations, which reflect findings of experts from Finland and Israel, were adopted by the OECD Working Group. Korea will submit an oral report on its implementation of

recommendations 7 and 11 within one year, and a written report on its progress implementing all recommendations within two years. The Report is based on the laws, regulations and other materials supplied by Korea, and information obtained by the lead examiners during its three-day on-site visit to Seoul from 31 May to 2 June 2011, during which the examiners met with representatives of Korea's public administration, private sector and civil society.

## A. INTRODUCTION

### 1. The on-site visit

1. From 31 May to 2 June 2011, a team from the OECD Working Group on Bribery in International Business Transactions (the Working Group, made up of the 38 State Parties to the OECD Anti-Bribery Convention) visited Seoul as part of the Phase 3 peer evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention), the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (the 2009 Anti-Bribery Recommendation) and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (the 2009 Tax Recommendation). The purpose of the visit was to evaluate the implementation and enforcement by Korea of the Anti-Bribery Convention and the 2009 Recommendations.

2. The evaluation team was composed of lead examiners from Finland and Israel as well as members of the OECD Secretariat.<sup>1</sup> Prior to the visit, Korea responded to the Phase 3 general questionnaire and supplementary questions. Korea also provided translations of relevant legislation, documents and case law. During the visit, the evaluation team met with representatives of the Korean public and private sectors and civil society.<sup>2</sup> Due to the use of consecutive interpretation, the Korean participants and the evaluation team had to be well-organized and concise. The on-site visit was well attended by Korean officials, and the evaluation team was particularly grateful for the efforts made by Korea to secure an excellent level of participation from the private sector, including SMEs. The evaluation team expresses its appreciation of Korea's high level of cooperation throughout the evaluation process, illustrated in part by the presence of the Deputy Minister of Foreign Affairs and Trade, who stated in his opening speech that "Korea looks forward to a fair evaluation that will help make Korea a more transparent society." The evaluation team is also grateful to all the participants at the on-site visit for their open and frank discussions. The evaluation team notes that the Korean government was not present during the panel discussions with the private sector and civil society.

### 2. Outline of the report

3. This report is structured in two parts. This part (Part A) summarises background information about the on-site visit, the Korean economy and foreign bribery cases that have been prosecuted or are ongoing in Korea. Part B examines Korea's efforts to implement and enforce the Anti-Bribery Convention and the 2009 Recommendations, having regard to Working Group-wide issues for evaluation in Phase 3. It

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1 Finland was represented by Ms. Niina Hannonen, Special Advisor, Ministry of Employment and Economy and; Ms. Ritva Sahavirta, State Prosecutor, Office of the Prosecutor General and National Member for Finland at Eurojust. Israel was represented by Ms. Amit Merari, Legislation and Legal Counsel Department (Criminal Law), Ministry of Justice and; Mr. Aryeh Peter, Deputy Director, Criminal Division, State Attorney's Office, Ministry of Justice. The OECD Secretariat was represented by Ms. Christine Uriarte, Co-ordinator of the Phase 3 Evaluation of Korea, Counsellor, Anti-Corruption Division; and Ms. Melissa Khemani, Anti-Corruption Analyst/Legal Expert, Anti-Corruption Division.

2 See Annex 3 for a list of participants.

pays particular attention to enforcement efforts and results, as well as country specific issues arising from progress made by Korea on areas for improvement identified in Phase 2, or issues raised by changes in the domestic legislation or institutional framework of Korea. Part C sets out the Working Group's recommendations and issues for follow-up.

### **3. Economic Background**

4. The economic development of Korea over the past fifty years has been among the most rapid and sustained ever seen. Since 1960, Korea has been transformed from one of the poorest countries on earth to a leading industrial nation. Rapid output growth boosted Korea's per capita income from less than 15% of the OECD average in 1970 to 70% of the OECD average by the 2008 global financial crisis. Korea is a trade-oriented economy with a population of about 48 million<sup>3</sup> and a high GDP per head of USD 28 000. About 30% of the GDP is from industry, 60% from services and the remaining 10% from agriculture, forestry, fishing and construction. The Korean economy was severely affected by the 2008 recession and the associated collapse of world trade. However, Korea has achieved one of the fastest and strongest recoveries among OECD countries, led by expansionary fiscal stimulus (the largest among OECD countries) and buoyant exports, resulting in 6.2% growth in 2010. Korean exports expanded at a double-digit rate during 2009-2010, due to the Won's steep depreciation and strong demand from China. As a result of the buoyant export growth, Korea became the world's 9th largest exporter in 2009 from the 12th largest exporter in 2008.<sup>4</sup>

5. Korea's commodity exports, heavily oriented towards industrial goods, accounted for 44% of GDP in 2009. High tech and heavy industry products comprised 90% of exports, including about 26% in electronic products and 7% in automobiles. Commodity imports were about 39% of GDP and about 58% of the imports were in raw materials and fuel imports.<sup>5</sup> In 2009, a little more than half of the exports (52%) were to Asian countries, with China as the main destination country, while Europe and North America accounted for 15% and 11% respectively. Korean trade was underpinned by Korea's foreign direct investment which was largely in Asia and North America, which jointly amounted to about 63% of foreign direct investment in 2009. China is Korea's largest Asian regional recipient of FDI, amounting to 34.8% in 2010.<sup>6</sup> About half of the foreign direct investment abroad was in the mining and manufacturing sectors in 2009, relatively unchanged from the previous year.<sup>7</sup>

6. Large enterprise groups comprised of diversified family-owned conglomerates –referred to as “chaebols” – have played an important role in the Korean economy. However, during the 1997 Asian financial crisis they were the source of excessive leveraging and other problems which led up to, and intensified, the crisis in Korea. As a result, many went bankrupt; others were the focal point of government-led corporate reform programmes and were forced to adopt commercially viable governance structures.<sup>8</sup> These measures included the reduction of debt, increasing transparency and greater managerial accountability to shareholders.

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3 2009 figures.

4 Basic Statistics of Korea, OECD Economic Survey of Korea (2010).

5 Ibid.

6 Source: Korea International Trade Association.

7 FDI data provided by the Korean authorities.

8 OECD Economic Survey of Korea (2010).

7. One aspect of the Korean economy that the evaluation team addressed in further depth is the Kaesong Industrial Zone (KIZ)<sup>9</sup>. The KIZ, which was established in 2002, is a South Korean industrial park located in North Korea. There are a number of incentives for Korean companies to establish operations in KIZ; it is a duty-free zone, there are no restrictions on the use of foreign currency, and companies can benefit from the lower-waged employment of the North Korean labour force. In addition, the corporate tax rate is 10-14% with an exemption for the first 5 years after generating profits, and a 50% reduction for the next 3 years. Companies that established their operations in KIZ, at least during the first phase, obtained low interest rates. South Korea also provides political risk insurance, which will cover financial losses up to 90% of a company's investment in KIZ up to USD 5.4 million. South Korean SMEs operating in KIZ are also eligible for state subsidies and other benefits.<sup>10</sup> As of the end of 2010, over 120 medium-sized South Korean companies were employing over 47,000 North Korean workers to manufacture products in KIZ. In 2010, it produced over USD 323 million in output; products vary and include clothing and textiles, kitchen utensils, auto parts, and semiconductor parts.<sup>11</sup> The Korean authorities consider KIZ to have long term strategic and economic importance, due to its value as an instrument to induce change within North Korea through direct investment and engagement with South Korea.

#### 4. Cases involving the bribery of foreign public officials

##### a) Summary of completed cases

8. Since the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions (FBPA) came into force in February 1999, Korea has prosecuted and obtained convictions in nine separate cases. Korea provided court judgements for all of these cases. However, due to rules in Korea for the destruction of case records, which is discussed further in this section of the Report (see discussion in "Destruction of case records", below), such records no longer exist for the first five cases prosecuted by the Korean authorities (Cases 1 to 6 in the table in Annex 3). As a result, limited information is available about the facts of these five cases, including how they were detected and investigated. A table summarizing each of the nine completed cases to date, including the sanctions imposed, amount of the bribe, nature of the *quid pro quo*, and other essential available facts, are compiled in Annex 3.

9. Of the nine cases, convictions were obtained in one in 2002, five in 2004, one in 2007, and two in 2008. In one case, one of the defendants who acted as an intermediary was acquitted (*Security Service Company Case*) All nine cases, except one, involved the bribery of procurement authorities in the United States army base in Korea. All of the US army procurement cases took place in Korea. The case that did not involve the bribery of US procurement authorities took place in China.

10. Of the three cases in which investigation records are still available, detection occurred through a variety of ways. The *Telecommunications Services Company Case* was detected by the US Air Force Office of Special Investigation (OSI). The *Security Service Company Case* was detected by a third person who was an employee of the company. The *Merchant Association Case* was detected by a Chinese petitioner.

11. In the following three cases, the company involved in the foreign bribery transaction was convicted and fined: *Construction Company Case*, *Furniture Supply Company Case*, and

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9 The KIZ is also frequently referred to as the "Gaesong Industrial Complex" (GIC). Also see discussion under section 1. below on foreign bribery implications.

10 Congressional Research Service, *The Kaesong North-South Korean Industrial Complex*, (April 2011).

11 Ibid.

*Telecommunications Services Company Case*. The fines in these cases were USD 100 000, 5000 and 20 000, respectively.<sup>12</sup> In the *Telecommunications Services Company Case* the prosecution appealed the sanction on grounds that it was too low, but the appeal was dismissed.<sup>13</sup>

12. Three natural persons have been sentenced to imprisonment, with the longest sentence at four years and the shortest at 8 months. Two of these sentences have been suspended -- one on appeal. Thirteen natural persons (including those sentenced to imprisonment) have been subject to fines. The highest fines imposed were USD 10 000, and the lowest were USD 1000.<sup>14</sup>

**b) Case under prosecution**

13. During the on-site visit, the Korean authorities reported that one case was under prosecution at that time. Representatives of a Korean logistics company and a travel agency were indicted by the Incheon District Prosecutor's Office in May 2011 for violating the FBPA by bribing the President of a Korean subsidiary of a Chinese airline company ('*Chinese Airline case*'). The bribe allegedly amounted to around KRW 6.7 billion (USD 6.3 million), and was allegedly given to the President of the Chinese company to obtain a decrease in freight fees from freight forwarding companies, and the right to sell tickets for the Chinese airline company. The President of the Chinese airline company was considered a "foreign public official" under the FBPA, because the company is state-controlled by the Chinese government. The Korean authorities explained that the case was detected and investigated through leads and information generated by the Korean authorities. At the time of writing this report, the case was still pending before the Incheon District Court.

**c) Cases in pre-investigation stage**

14. At the on-site visit, the Korean authorities very openly discussed with the lead examiners pre-investigation measures that had been taken, or were being taken at the time of the on-site visit, in relation to nine allegations of FBPA violations. In order to respect the confidential nature of these pre-investigations, this report does not provide potentially identifying information about the alleged parties.

15. Virtually all of these cases had been the subject of media reports, and in response to those reports, the Korean authorities have been using their embassies in the relevant countries to obtain further information. At the time of the on-site visit, six of these pre-investigations have not been closed, and the Korean authorities were waiting for further information from the relevant Korean embassies about those cases. Three pre-investigations had been closed due to information obtained through the relevant Korean embassies indicating that "there is no reason for investigations".<sup>15</sup> Following the on-site visit, three more of these pre-investigations were closed. In two of those cases, the decision to close the pre-investigation arose due to information from the relevant Korean embassies, including that the courts in the foreign jurisdictions had not taken any action and that no further leads were available. In the third case in which the pre-investigation was closed, Korea received information about the court proceedings in the foreign jurisdiction, in which it appeared that the case did not concern Korea. During the evaluation of Korea in the Plenary, the Korean authorities explained that these cases could be re-opened if new information were

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12 The US Dollar (USD) conversion from South Korean Won (KRW) is based on the exchange rate on 6 July 2011.

13 The level of sanctions is discussed more fully under section 3 below, and corporate liability is discussed more fully under section 2 below.

14 Ibid.

15 These allegations and the process involved for obtaining information through Korean embassies at the pre-investigation stage are discussed under section 5 below.

to be detected. In the three continuing pre-investigations, the Korean authorities were still waiting for information from the relevant Korean embassies in two of the cases, and had signed an MOU on information exchange with the foreign authorities in the third case.

*d) Destruction of case records*

16. As mentioned earlier in this section, the case records<sup>16</sup> in the first six cases prosecuted by Korea have been destroyed. The destruction of records containing confidential information is mandated by statute in Korea after the expiration of certain time limits. Although the principle of destroying such documents is contained in the Act on Management of Public Documents, specific rules for specific types of documents are regulated by ministerial regulations. In relation to case records, Article 30 of the Ministry of Justice Regulations on Archiving Documents requires the destruction of case records after a specified period, which depends on the type and the severity of the sanction imposed for the offence. The Korean authorities explain that when the penalty imposed is imprisonment for less than three years or a fine, the case records are required to be destroyed after three years (i.e., the scope of the penalties imposed in the FBPA cases prosecuted so far). Once these records are destroyed, important information about, for instance, the way an offence was detected and investigated is lost, because in Korea, the court judgment does not normally go into these kinds of details. In addition, information is lost on why certain individuals may have not been indicted, or why the prosecution authorities decided to not indict the company that benefited from the bribery offence.

17. As a result, although the Korean authorities provided as much information as possible according to the court judgements, and even postulated why certain investigative steps may have not been taken, or certain companies were not charged, the lead examiners would have been able to obtain a much more complete picture of Korea's enforcement of the FBPA if the information in the case records of the first six prosecutions were still available. The lead examiners are also concerned that in the future, it might not be possible for Korea to provide sufficient information about new prosecutions in the context of the Working Group's procedures for Phase 3 follow-up reporting because of this practice. Moreover, the preservation of case records would facilitate Korea's ability to effectively respond to MLA requests from other Parties to the Convention regarding transnational bribery cases that they are pursuing in their own jurisdictions.

18. The Korean authorities explained that there are three exceptions to the rule on destroying documents contained in the Ministry of Justice Regulations on Archiving Documents, including situations where the "record of a case is of special importance either domestically or internationally". They also explained that ministerial regulations can be amended by a formal resolution by Cabinet. During the evaluation of Korea in the Plenary, the Korean authorities explained that they are actively seeking ways to ensure that case records on for transnational bribery cases are not destroyed before they have provided a full report to the Working Group on those cases.

*Commentary*

*The lead examiners believe that the ability to fully discuss cases that have been prosecuted under the FBPA is an essential aspect of the peer-review process for monitoring implementation of the Anti-Bribery Convention, and thus maintaining these records is needed for Korea to effectively carry out its obligation under the Anti-Bribery Convention to "cooperate in carrying out a programme of systematic follow-up to monitor and promote the*

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16 For the purpose of the Korean rules on the destruction of records, a "case record" consists of all materials produced or collected in the course of an investigation and trial.

*full implementation of this Convention”. The lead examiners therefore recommend that Korea find as soon as possible an appropriate way within its legal and regulatory framework to ensure that in the future investigation records on transnational bribery cases are not destroyed before Korea has had an opportunity to provide a full report to the Working Group on Bribery on those cases. The lead examiners also recommend that Korea ensure that the solution to this issue also address the requirement under the Convention to provide prompt and effective mutual legal assistance to another Party for proceedings brought under the scope of the Anti-Bribery Convention.*

## **B. IMPLEMENTATION AND APPLICATION BY KOREA OF THE CONVENTION AND THE 2009 RECOMMENDATIONS**

### **1. Foreign Bribery Offence**

#### **a) Bribe that benefits third party**

19. In Phase 2 the Working Group recommended that Korea clarify that the offence of bribing a foreign public official in Article 3.1 of the FBPA covers the situation where a bribe is transmitted directly to a third party, such as a family member, business partner, charity, or political party. The recommendation stemmed from several factors, including the absence of express language covering this situation in Article 3.1, in contrast with the domestic bribery offence in the Criminal Act. In addition, in Phase 2, Korea did not provide jurisprudence supporting its position that this situation is covered by the FBPA.

20. The Korean authorities have not taken steps to clarify the FBPA in this regard. They explain that Article 3.1 covers the situation where a bribe is transferred directly to a third party as long as there has been contact or communication with a foreign public official to the effect that such a transfer would take place. During the on-site visit, an academic agreed with this analysis, and added that it is not necessary that the third party knows that the advantage is a bribe. The academic also explained that there has been a domestic bribery conviction in which, upon agreement between the briber and the public official, a donation was made directly to a temple without knowledge by the temple that the donation constituted a bribe.

#### *Commentary*

*The lead examiners recommend following-up application of the FBPA to cases where the bribe is transmitted directly to a third party. They are somewhat reassured by practice in this respect concerning the bribery of domestic public officials, but deem follow-up prudent given that the domestic bribery offence covers this case explicitly; whereas the FBPA does not.*

#### **b) Bribery through an intermediary**

21. Article 3.1 of the FBPA does not expressly cover the case when a bribe is transferred through an intermediary. Given that bribes are frequently offered, promised or given through, for instance, a local agent or foreign subsidiary, the lead examiners wanted to reassure themselves that the absence of express language would not be a loophole. The lead examiners were also conscious that the large enterprise group

structure that predominates in Korea provides opportunities for dissimulating bribes by transferring them through sister companies.

22. The lead examiners have determined that practice under the FBPA demonstrates that bribery through intermediaries is clearly covered. So far, four cases have been prosecuted successfully in which the bribe or bribes were conveyed through an intermediary. In the *Construction Company Case*, the bribe payment was conveyed through the foreign public official's wife. In the *Cleaning Service Company Case* the CEO directed an employee to give bribes to the foreign public official. In the *Samsung Rental* case an executive of the company was directed by the defendant CEO to bribe the foreign public official. In the *Security Service Company Case* the bribery transactions were executed through the brother of the foreign public official.

c) *Liability of intermediaries*

23. During the on-site visit, the lead examiners raised questions about the liability of intermediaries that participate knowingly in the bribery of a foreign public official. This issue was raised because in the *Security Service Company Case*, the intermediary was acquitted. In this case, the intermediary appeared to have played quite a substantial role. He introduced the defendants to the foreign public official, who is his brother-in-law. He also conveyed the bribe payment to the foreign public official, and permitted one of the defendants to use his bank account in the bribery transaction. The Court acquitted the intermediary because he was the brother-in-law of the foreign public official and according to the Court had quite a "limited role" in the bribery transaction. The Court viewed him as a co-conspirator with the foreign public official rather than the briber. In addition, the Court stated that he was not in a position to gain any benefit from the contract that the defendants sought to secure. .

24. The Korean authorities provided a great deal of information on the law of co-principals and accomplices in Korea, in response to the lead examiners' concerns about the acquittal of the intermediary in the *Security Service Company Case*. The law in this respect is clear and straightforward, and does not appear to be an obstacle to the conviction of an intermediary playing the same role as the intermediary in the *Security Service Company Case*. In summary, to be convicted as a co-principal under article 30 of the Criminal Act, there must be proof of joint intention as well as actual acts in furtherance of the crime. The Korean authorities add that any acts that assist the principal's commission of a crime or strengthen the consequences of the crime can qualify as aiding and abetting by an accessory under Article 32 of the Criminal Act, and an act of implementation by a co-principal under Article 30. However, an accessory does not have "functional control over the offence".

*Commentary*

*The lead examiners consider that the law on co-principals and accessories is clear and straightforward in Korea. However, the acquittal of the defendant in the Security Company Case who acted as an intermediary raises concerns about how the relevant provisions in the Criminal Act are applied in practice to bribery involving intermediaries. They therefore recommend following-up the application of the law on co-principals and accessories to intermediaries for violations of the FBPA.*

d) *Definition of foreign public official*

i. *Bribery of person exercising public function for foreign public enterprise*

25. During the on-site visit the Korean authorities reported an ongoing FBPA prosecution, which involved the alleged bribery of the President of a Korean subsidiary of a Chinese airline company. The case was being prosecuted as the bribery of a foreign public official because the company is state-

controlled by the Chinese government. The Korean authorities explained that they determined the person allegedly bribed was a “foreign public official”, in accordance with the FBPA, by looking at Chinese and Korean legal provisions.

*ii. Bribery of person exercising public function for foreign country*

26. During the on-site visit the Korean authorities also discussed a case prosecuted in 2010 by the Daegu District Prosecutors’ Office involving the bribery of Korean individuals who were contracted by the US military to recruit and organise the labour force for the US military based in Korea. The purpose of the bribe was to obtain a position in the labour force at the US military base. The case was prosecuted under Article 357 of the Criminal Act as the bribery of a person who is “administering another’s business”.

27. The lead examiners consider that this case could have been prosecuted under the FBPA, since the person who was bribed appears to fall within the definition of a “foreign public official” in Article 2.2.a. as follows: “any person conducting a business, in the public interest, delegated by a foreign government”. This provision in the FBPA is very close to the language in the Anti-Bribery Convention, which under Article 1.4.a) requires that a “foreign public official” include “any person exercising a public function for a foreign country, including for a public agency or public enterprise”.

28. The lead examiners consider that pursuant to the principle of “functional equivalence” enshrined in the Anti-Bribery Convention, it does not matter if Korea uses a different offence to prosecute the bribery of foreign public officials where it sees fit, as long as it complies with the standards under the Anti-Bribery Convention. However, the use of Article 357 to prosecute foreign bribery does not appear as rigorous as the FBPA, given the following differences: 1. The penalty of imprisonment under Article 357 of the Criminal Act is a maximum of 2 years; whereas under the FBPA it is a maximum of 5 years; 2. The maximum fine under Article 357 is KRW 5 million (USD 5000)<sup>17</sup>; whereas under the FBPA it is 20 million (USD 20 000) or a fine up to twice the amount of the profit if it exceeds KRW 10 million (USD 10 000); and 3. Legal persons are not liable for violations under Article 357; whereas they are under the FBPA. In addition, since legal persons are not liable for violations under Article 357, its use for the bribery of foreign public officials does not comply with Article 2 of the Anti-Bribery Convention, which requires that Parties establish such liability for the bribery of a foreign public official.

29. In response to the concerns of the lead examiners, the Korean authorities state that Article 357 of the Criminal Code is very useful in the foreign bribery context, because it enables them to investigate and prosecute private sector representatives who receive bribes in connection with the discharge of their duties, as well as those who give them bribes. They add that in the case prosecuted by the Daegu District Prosecutors’ Office, the local prosecutors may not have been convinced that the bribe was given “in order to obtain or retain business or other improper advantage in the conduct of international business”, and that therefore Article 357 was the appropriate provision under which to bring the case.

***Commentary***

***The lead examiners recommend that the Working Group follow up future prosecutions to determine how “international business” is interpreted in practice, including whether it covers employment with a foreign government. They also recommend following-up whether natural and legal persons are subject to effective, proportionate and dissuasive penalties when cases of foreign bribery are prosecuted under penal provisions other than the FBPA.***

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17 See footnote 12 regarding currency conversion.

iii. *Scope of “foreign government”*

30. Due to the presence of “cooperative projects” between South and North Korea, which are essentially special economic zones established in North Korea for South-North economic cooperation, the lead examiners reviewed whether persons performing public functions in relation to these projects in North Korea would be considered “foreign public officials” for the purpose of the FBPA. The lead examiners focussed on this issue in relation to the Kaesong Industrial Zone (KIZ),<sup>18</sup> located about 60 kilometres from Seoul in North Korea, due to its size and long-term economic importance. The lead examiners reviewed the application of the FBPA to bribery of the following two kinds of officials in this respect: 1. North Korean officials; and 2. Persons performing public functions for the KIZ.

31. The Korean authorities explained that it would be very difficult for a South Korean national operating a business in KIZ to come into contact with a North Korean official. All business arrangements are made between the South Korean Ministry of Unification and the North Korean authorities. In addition, contacts and communications between South Korean nationals and North Korean residents are closely regulated by the Ministry of Unification through rigorous approval and reporting requirements in the Inter-Korean Exchange and Cooperation Act. However, since South Korea does not recognise North Korea, officials from the North Korean regime are not considered “foreign public officials” under the FBPA. However, the Korean authorities point out that any business activities in the KIZ are subject to the Inter-Korea Exchange and Cooperation Act, and pursuant to Article 29 of the Act, any person who carries out any cooperative project undermining national security, the maintenance of order, or public welfare shall be subject to imprisonment for not more than three years or a fine not exceeding KRW 10 million (USD 10 000). The Korean authorities also point out that Article 26-2 of the same Act states that a person performing a public function shall be deemed a public official, but they do not confirm that bribery of such a person would be considered bribery of a domestic public official under the Korean Criminal Act.

32. Pursuant to the Kaesong Industrial Zone Act and Regulations, the KIZ management organ and other KIZ offices have the authority to perform many public functions, including those that put them into direct contact with the private sector, such as the following: 1. Approval and registration of the establishment of enterprises in KIZ; 2. Tax audits and granting reductions or exemptions from enterprise income tax; 3. Recruitment and supply of labour required by enterprises; 4. Affairs related to the entry and exit, stay and residence in KIZ; 5. Customs inspection and supervision; and 6. Supervision and control of accounting matters, and the monitoring and regulation of accounting audits. Prior to Korea’s Phase 3 evaluation in the Working Group, the Korean authorities brought to the attention of the lead examiners certain provisions in the Inter-Korean Exchange and Cooperation Act that shed further light on the status of officials of KIZ, and which in the opinion of the Korean officials indicate that bribery of such officials would be treated as bribery of domestic public officials under Korea’s Penal Code.<sup>19</sup>

33. The lead examiners note that according to the Anti-Bribery Convention, a “foreign public official” includes a person performing a public function for “any organised foreign area or entity, such as

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18 See section 3. of the Introduction to this Report for a discussion on the Kaesong Industrial Zone.

19 Article 12 of the Inter-Korea Exchange and Cooperation Act states: “Transactions between South Korea and North Korea shall be deemed internal transactions between the same people, not those between nations”. Article 26-2 states: “Members of the Council who are not public officials, and the executives and employees of the juristic persons or organization engaging in the business entrusted shall be deemed public officials in applying the penal provisions under the Criminal Act and other Acts related to their duties”. Article 30 states: “In the application of this Act (excluding Article 9(1) and (11), any member of an organization overseas which takes an active part in the policy line of North Korea shall be deemed a resident of North Korea”.

an autonomous territory or a separate customs territory”.<sup>20</sup> Thus a person performing a public function for the North Korean regime constitutes a “foreign public official” under the Anti-Bribery Convention.

### *Commentary*

***The lead examiners recommend that Korea take appropriate steps within its legal framework to ensure that the bribery of persons performing public functions for the North Korean Regime, and the Kaesong Industrial Zone, are covered by the FBPA as the bribery of a foreign public official or the Korean Penal Code as the bribery of a domestic public official.***

#### ***e) Defence of small facilitation payments***

34. Article 3.2 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”. During the on-site visit, the lead examiners reviewed application of this defence in Korea, as well as Korea’s implementation of paragraph VI. i) of the 2009 Anti-Bribery Recommendation to periodically review the policies and approach on small facilitation payments.<sup>21</sup>

35. The Korean authorities explained that the Ministry of Justice regularly reviews the outcome of investigations and prosecutions of foreign bribery for policy purposes, including consideration for amendments to the FBPA. They state that so far, these cases show clearly that the defence for small facilitation payments is very narrow, and there is no confusion regarding its application. As long as the bribery is for the purpose of obtaining or retaining business or other improper advantage in the conduct of international business, the advantage given constitutes a bribe in Korea. However, at the on-site visit, the Korean authorities frankly discussed the history behind the inclusion of the defence for facilitation payments in the FBPA. They explained that they did not intend to limit the scope of the foreign bribery offence; rather, the defence was included because of its presence in Commentary 9 to the Anti-Bribery Convention.

36. Information provided by the various participants in the on-site visit demonstrated that application of the small facilitation payments defence in Korea is not well understood. A representative of the Supreme Court of Korea said that since there is no jurisprudence on the scope of the defence, it is very difficult to know what it covers; nevertheless if it were raised as a defence, the Court would have to look at it. He added that the Court would be more “generous” in applying defences in the FBPA in favour of a defendant, than it would for general defences in the Criminal Act. He also said that the Court would take into account government guidelines in its interpretation of the defence.

37. In discussions with representatives of various business associations, one association thought that small facilitation payments were prohibited, another had surveyed its members on this issue, and discovered that the majority understood them to be prohibited, a third believed that they were not prohibited, and a fourth was confused about what would be considered a “small” payment. A major enterprise group believed such payments were prohibited, and a SME with significant foreign business operations asked the lead examiners to explain what is a small facilitation payment. KOTRA, Korea’s Trade Investment Promotion Agency, tells companies they are prohibited from making such payments.

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20 See Article 1.4.a) of the Anti-Bribery Convention, and Commentary 18 on the Convention.

21 Paragraph VI. ii), which recommends that Parties to the Anti-Bribery Convention encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures.

## *Commentary*

*The lead examiners recommend that in compliance with paragraph VI. i) of the 2009 Anti-Bribery Recommendation, Korea continue to periodically review its policies and approach on small facilitation payments, and that this review include consideration of 1) whether guidelines on the defence would be beneficial, and 2) the practical value of maintaining the defence in the FBPA, given that it is not being applied in practice by the law enforcement authorities, and the reason for including it was mainly to reflect Commentary 9 to the Anti-Bribery Convention. The lead examiners also recommend that Korea encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures.*

## **2. Responsibility of Legal Persons**

### *a) Infrequent use of liability of legal persons*

38. Out of the nine cases under the FBPA prosecuted so far, convictions were sought and obtained against legal persons in only the following three cases: 1. *Construction Company Case*, 2. *Furniture Supply Company Case*, and 3. *Telecommunications Service Company Case*. However, in all nine cases it appears to the lead examiners that the bribery transactions were made for the benefit of legal persons. Regarding the six other cases, the Korean authorities explain that in Cases 2, 3 and 9 in Annex 3, legal persons were not involved. The defendants in Cases 2 and 3 each ran a company, but they were not considered legal persons under Korean commercial law, which the Korean authorities state recognise all major forms of legal persons. In Case 9, the defendants represented a “merchant organisation”, which also is not considered a legal person under Korean commercial law. Regarding the other three cases, since the relevant “case records” have been destroyed, the Korean authorities surmise that in two of the cases the companies were not prosecuted because they were very small and had “no capacity for self-sufficiency”. They had concrete information that one company had gone bankrupt and another was a “paper company” that was put together for the sole purpose of bidding on the foreign public procurement contract at the centre of the relevant case. Regarding the third case for which the “case record” had been destroyed, the Korean authorities believe it is likely that it involved a legal person, but without the case record they cannot state with certainty the reasons for non-prosecution.

39. The majority of the business associations that participated in the on-site visit were not aware that companies in Korea are liable for the bribery of foreign public officials; although two commented on a growing trend to prosecute the employee responsible for the bribery transaction and the CEO of the company. The representative of one civil society organisation commented that there is unwillingness in Korea to pursue corporations for FBPA violations. An academic stated that corporate liability is a “very difficult theoretical issue in Korea”.

40. The Korean authorities explained that the low number of corporate prosecutions under the FBPA is not due to a low level of awareness that legal persons are liable for FBPA violations. They stated that even though legal persons are not liable for domestic bribery under the Criminal Act, there are many other statutes that provide such liability, including the Securities and Exchange Act, Monopoly Regulation and Fair Trade Act, and Labor Standards Act, and that therefore the law enforcement authorities are well-acquainted with the use of legal person liability. The Korean authorities also provided information about courses on the FBPA that were introduced in 2005 for law enforcement authorities, including the Korea Police Investigation Academy in the National Police Agency. These courses are held four times a year for

80 investigative officials each time. The curriculum covers various aspects of the FBPA, but does not appear to specifically target the liability of legal persons for FBPA violations.<sup>22</sup>

### *Commentary*

*The lead examiners recommend that the Korean authorities take appropriate steps to raise the awareness of police and prosecutors of the importance of prosecuting legal persons for violations of the FBPA. In respect of the police, this could be done in the context of the academic courses specifically on the FBPA that are held quarterly.*

#### **b) No punishment for “due attention” or “proper supervision”**

41. Article 4 of the FBPA, which establishes the responsibility of legal persons for FBPA violations, states that a legal person shall not be subject to the sanctions in Article 4 if it “has paid due attention or exercised proper supervision to prevent the offence against this Act”. To date, there is no jurisprudence on what constitutes “due attention” or “proper supervision” to prevent an offence against the FBPA. However, the liability of legal persons for other offences in Korea commonly uses the same formulation.

42. According to the Korean authorities and two other participants in the on-site visit – a Supreme Court judge and a business association -- there is a general understanding in Korea about the meaning of “due attention” and “proper supervision”. The representative of a business association stated that it is something that has to be determined on a case-by-case basis. He also stated that government guidelines on the scope of these terms would help the private sector understand what they need to do to avoid liability.

43. The Supreme Court judge stated that the terms have been interpreted by the courts for other kinds of offences, and provided the lead examiners with an example – a case decided in 2008 regarding a violation of the Occupational Safety and Health Act,<sup>23</sup> which involved involuntary manslaughter by a company. The Court held that “due attention” and “proper supervision” must be determined taking into account all the circumstances, including the purpose of the statute, the legal interest infringed by the violation, the form of the violation, the extent of damages caused by the violation, the size of the legal person and its ability to supervise the individual perpetrator, the structure of command in the legal person, and the actual actions taken by it to prevent the violation.

### *Commentary*

*The lead examiners recommend following-up the application in practice of the provision in Article 4 of the FBPA, which results in no sanctions for a legal person that “has paid due attention or exercised proper supervision to prevent” the bribery of foreign public officials. The lead examiners also recommend that Korea raise awareness among law enforcement authorities and the private sector regarding the liability of legal persons for violations of the FBPA.*

### **3. Sanctions**

44. In Phase 2, the Working Group issued a number of recommendations to Korea on its sanctions and confiscation regime for foreign bribery. In Korea’s Phase 2 Follow-up Report, the Working Group found that Recommendation 6(a)<sup>24</sup>, which called for Korea to take steps to ensure that the actual fines for

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22 See also section 10 below on awareness-raising.

23 Decision date: September 9, 2008, Case number: 2008 Do 7834

24 For full text of Recommendation, see [Korea Phase 2 Report](#), Recommendation 6(a).

foreign bribery are effective, proportionate and dissuasive, was found to have been not implemented. The Working Group further found that Recommendation 6(c)<sup>25</sup>, which called for Korea to ensure that certain public agencies take appropriate actions, including, *inter alia*, the possible addition of non-criminal sanctions where persons and companies are found to have committed foreign bribery, to have been only partially implemented. Since Phase 2, Korea has taken some steps to address the Working Group’s recommendations; however, the lead examiners remain concerned about the low level of sanctions, as well as the absence of confiscation, that have been applied in Korea’s foreign bribery cases to date.

**a) Criminal sanctions**

45. There have been no changes affecting the sanctions applicable to the foreign bribery offence since Phase 2. For natural persons, Article 3 of the FBPA provides for imprisonment of up to five years or a fine of KRW 20 million (approx. USD 20 000). The maximum fine increases to twice the profit earned from the offence if the profit exceeds KRW 10 million (approx. USD 10 000). For legal persons, Article 4 of the FBPA provides for a maximum fine of KRW 1 billion (approx. USD 1 million). The maximum fine increases to twice the profit earned from the offence if the profit exceeds KRW 500 million (approx. USD 500 000).

46. Sanctions have been imposed in Korean foreign bribery cases as follows:

Case	Court Imposed Sanction on Natural Person	Court Imposed Sanction on Legal Person
<b>Construction Company Case [2002]</b>	- CEO sentenced to 18 months imprisonment and fine of KRW 10 million (approx. USD 10 000).  - On appeal, prison sentence for CEO suspended for 3 years.	- Fined KRW 100 million (approx. USD 100 000). On appeal sentence of company confirmed.
<b>Seo Case [2004]</b>	- CEO sentenced to 10 months imprisonment and fine of KRW 10 million (approx. USD 10 000).	
<b>Ji Case</b>	- CEO of supplier company fined KRW 7 million (approx. USD 7000).	
<b>Ahn Case [2004]</b>	- CEO of another supplier company fined KRW 1.5 million (approx. USD 1500).	
<b>Cleaning Service Company Case [2004]</b>	- President of company fined KRW 7 million (USD 7000).  - Employee fined KRW 3 million (approx. USD 3000).	

25 For full text of Recommendation, see [Korea Phase 2 Report](#), Recommendation 6(c).

<b>No Case and Furniture Supply Company Case. [2004]</b>	- CEO sentenced to fine of KRW 5 million (approx. USD 5000).	- Company sentenced to fine of 5 million (approx. USD 5000).
<b>Security Service Company Case [2007]</b>	- One co-CEO sentenced to imprisonment for 4 years, and fined KRW 7 million (USD 7000).  - Other co-CEO sentenced to 8 months imprisonment, and fined KRW 5 million (approx. USD 5000).	
<b>Telecommunications Service Company Case [2008]</b>	- CEO fined KRW 10 million (approx. USD 10 000).  - Court gave CEO credit for 58 days of pre-trial incarceration and ordered no further imprisonment.  - Conviction and sentence affirmed on appeal.	- Company fined KRW 20 million (approx. USD 20 000).  - Prosecution appealed low sentence; appeal was dismissed.
<b>Merchant Association Case [2008]</b>	- Company president fined KRW 2 million (approx. USD 2000).  - Company vice-president fined KRW 1 million (approx. USD 1000).  - Manager in charge of general affairs fined KRW 1 million (approx. USD 1000).	

47. The lead examiners note with concern the continued low level of sanctions imposed in Korea's foreign bribery cases. Most prison sentences to date fall far below the maximum imprisonment term under the law, and in half of the cases where imprisonment was ordered, the sentences were suspended. With regard to monetary sanctions, the lead examiners note that the maximum fine in foreign bribery cases varies depending on the profits derived from the offence, and question the ease with which such profits can be quantified. This concern was also raised by the Working Group in Phase 2, who further noted that linking the fine with 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 small profit or loss from the transaction.<sup>26</sup> Regardless of these potential difficulties, Korea does not appear to be taking into account the profits gained in calculating a fine, given the low level of sanctions that have been applied in practice. Korea noted in its responses to the Phase 3 Questionnaire that the *Construction Company Case* [2002] case has been the only case thus far where it was deemed that the amount of the profit exceeded the prescribed threshold. However, because the case record has been destroyed, Korean authorities were unable to re-confirm this or provide information on how the profits

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26 [Korea Phase 2 Report](#), at para. 128, p. 40.

were calculated by the court. During the on-site visit, Korean officials confirmed that the practice of destroying case records further prevented them from verifying this information.<sup>27</sup> Korean officials were unable to explain more generally the precise system, including what factors are systematically taken into account, in calculating the profits derived from the offence.

48. Civil society representatives participating in the on-site visit also voiced their concern over the low level of sanctions imposed for corruption offences in Korea. Criticism has also been expressed by Korean legislators, including on the general leniency in imposing sanctions for white collar crime on major business figures. In a 2010 Parliamentary Inspection of the Supreme Court, Korean Congressman, Lee Ju Young, criticised the courts for imposing a low level of sanctions for bribery offences generally.<sup>28</sup> During the on-site visit, Korean officials indicated that the Supreme Court's Sentencing Committee has recently established new sentencing guidelines with harsher fines for white collar crime, including bribery. At present, these guidelines only apply to domestic bribery; however, a judge from the Supreme Court believes that the courts would probably refer to them in the absence of specific guidelines on foreign bribery. He also explained that there is a "potential" to add guidelines specifically on foreign bribery once there has been more experience. In this regard, the lead examiners are confident that Korea will guide itself in accordance with the provisions in Article 3.1 of the Anti-Bribery Convention, which state that the range of penalties applicable for foreign bribery "shall be comparable to that applicable to bribery of the Party's own public officials..."<sup>29</sup>

**b) Additional forms of civil and administrative sanctions**

49. Since Phase 2, Korea has taken steps to establish additional forms of civil and administrative sanctions for foreign bribery. The Korean International Cooperation Agency's (KOICA) regulations and implementing rules<sup>30</sup> on procurement and contracting provide that sanctions should be imposed on any procurement-related business that is in violation of the FBPA. KOICA can exclude a company from participating in a KOICA-funded project for a period ranging from six months to two years. KOICA can also cancel a decision to award a contract, or cancel or close a partial or full contract, if a contractor has been found guilty of foreign bribery. Korean authorities also impose mandatory debarment on companies found to have committed foreign bribery, for a period ranging from six months to two years (based on the amount of the bribe paid), from bidding on public procurement contracts. The Economic Development Cooperation Fund (EDCF) Regulations on Anti-Corruption also impose mandatory debarment of contractors found to have committed foreign bribery from obtaining officially-supported export credit for a period of three years.<sup>31</sup>

**Commentary**

***The lead examiners commend Korea for the steps taken to establish additional forms of civil and administrative sanctions for foreign bribery. However, the lead examiners continue to have concerns over the sufficiency of criminal sanctions applied to both natural and legal persons for foreign bribery, taking into account the overall effect of suspended prison sentences, and fines imposed in all cases that were less than the amount of the bribe. The lead***

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27 See also section A.1. above on the destruction of case records.

28 Parliamentary Inspection of the Supreme Court, Press Release (19 October 2010), available on the homepage of Congressman Lee Ju Young.

29 OECD Anti-Bribery Convention, Article 3.1.

30 Amended 6 January 2011.

31 See also section 11 below on Public Advantages.

*examiners therefore recommend that Korea take appropriate steps according to its legal system to ensure that sanctions imposed in practice are effective, proportionate and dissuasive in all foreign bribery cases. In this regard, the establishment and application in practice of the revised sentencing guidelines for bribery should be followed-up by the Working Group. The determination of the profit in calculating the fine should also be followed-up as practice develops.*

#### **4. Confiscation of the bribe and the proceeds of bribery**

50. Korean law provides for the confiscation of the bribe and the proceeds of bribery. The FBPA deals with the confiscation of bribes (but not the proceeds of foreign bribery), though the precise scope of this power is unclear. Article 5 provides for confiscation of a bribe if “the offender under this Act [...] is in possession of the bribe given in the commission of an 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.” In previous analyses of these provisions, Korean authorities have confirmed that Article 5 would be used to confiscate a bribe that has been returned by the foreign public official to the briber, or has been offered or promised but not yet given to the foreign public official.<sup>32</sup> Confiscation of the bribe is also possible under Article 5 if it is in the possession of a third party who has knowingly obtained it.

51. Two other statutes address the confiscation of the proceeds of bribing, and should apply to bribery in violation of the FBPA. Article 8 of the Proceeds of Crime Act (POCA) allows for confiscation of criminal proceeds and properties derived from criminal proceeds. For foreign bribery, a court may confiscate “funds or properties relating to” the offence. Since Phase 2, Korea has also enacted the Act on Special Cases Concerning Confiscation and Recovery of Stolen Assets (ASCCC), which entered into force in March 2008. Under Article 3 of the ASCCC, a court may confiscate “proceeds of corruption” which includes criminal proceeds and properties derived from proceeds. However, the provision only applies to certain listed offences; while FBPA Article 3.1 (active foreign bribery by natural person) is listed, FBPA Article 4, which covers active foreign bribery by a legal person, is excluded. The lead examiners question whether the exclusion of legal persons from application of the ASCCC may undermine the effectiveness of Korea’s confiscation regime for foreign bribery.

52. Korea has not to date used Article 5 of the FBPA to confiscate any bribes to foreign public officials, or the POCA or the ASCCC to confiscate the proceeds of bribing a foreign public official. While the lack of practice to date renders the lead examiners unable to draw any definitive conclusions, they question whether the complex legislative regime governing confiscation may hamper such efforts in practice. Korean authorities indicated that recent steps have been taken to strengthen confiscation efforts. In September 2010, the Supreme Prosecutor’s Office established a specialised Confiscation of Criminal Proceeds Unit within each of the fifty-seven prosecutors’ offices across the country. During the on-site visit, Korean authorities also stated that confiscation efforts are also being applied in the current *Chinese Airline* case. The experience and outcome of these efforts should therefore be followed up by the Working Group.

#### ***Commentary***

*As consistently noted by the Working Group on Bribery in previous country evaluations, confiscation is an important element of an effective sanctions regime. The lead examiners welcome Korea’s recent efforts to strengthen its confiscation abilities by establishing*

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32 See also: [ADB/OECD Thematic Review on the Criminalisation of Bribery in Asia and the Pacific](#) (2010), Korea country chapter, at p. 284.

*specialised confiscation units across the country's prosecutors' offices. The lead examiners recommend that the Working Group follow-up the work of these units as practice develops.*

*The lead examiners nevertheless note with concern that confiscation has not been applied as yet in Korea's cases of foreign bribery. The lead examiners recommend that law enforcement authorities make full use of the provisions available to confiscate the bribe and proceeds of foreign bribery, where appropriate. The lead examiners also recommend that Korea consider whether the complicated nature of its legislative confiscation scheme has been a hindrance to the effective imposition of confiscation as a sanction in foreign bribery cases.*

## **5. Investigation and Prosecution of the Foreign Bribery Offence**

### **a) New information and intelligence gathering capacity**

53. In May 2011 Korea launched a new information and intelligence gathering capacity to support investigations of crimes with international elements, including the bribery of foreign public officials, tax evasion and international organised crime. The Ministry of Justice, Ministry of Foreign Affairs and Trade, and the Supreme Prosecutor's Office have joined forces to strengthen their capacity to gather information and intelligence on such crimes through the following measures: 1. Regular updates by the Ministry of Justice to the Supreme Prosecutor's Office on allegations in the international media; 2. A new special team within the Office of Criminal Intelligence Planning, Supreme Prosecutor's Office, which focuses on criminal information gathering and enforcement; and 3. A new task of foreign information gathering at the International Criminal Affairs Division, Ministry of Justice, to support the active enforcement of the FBPA. The new system also involves closer cooperation with the Board of Audit and Inspection of Korea. The MOJ plays a coordinating role in the new system.

54. The special team within the Office of Criminal Intelligence Planning at the SPO includes public certified accountants, and many team members have foreign language abilities and overseas training. One of the team's main functions is to closely monitor media coverage of allegations involving Koreans living or doing business abroad. The MOJ, MOFAT and SPO work together to verify leads found mainly in media sources. This is done by actively using Korean embassies and consular offices to collect information that might support the media allegations. The Korean authorities state that since the new system is in its inception stage, they would welcome input on its operation from the Working Group on Bribery.

55. At the time of the on-site visit, the new system had been used to follow-up nine media allegations.<sup>33</sup> Three of these cases had been closed by the time of the on-site visit, and the Korean embassies were still waiting for information in the six other cases. The Korean authorities explained that the three cases had been closed because information obtained through the relevant Korean embassies indicated "there is no reason for investigations". In at least two of these cases, this conclusion was based on reports from the embassies that related charges had not been laid in the foreign countries. No preliminary investigative steps were taken in Korea to identify possible leads, such as inquiring whether the companies in question were conducting internal investigations. Following the on-site visit three more pre-investigations were closed based on information received through the relevant Korean embassies. Again, there is no indication that preliminary investigative steps were taken in Korea in these cases. In the remaining three cases, the Korean authorities were still waiting for information from the relevant Korean embassies in two, and had signed an MOU on information exchange with the foreign authorities in the third case. The Korean authorities also did not indicate that preliminary investigate steps were being taken in the remaining open cases.

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33 See further discussion in section on "Cases in pre-investigation stage" in Introduction to this Report.

56. The Korean authorities explain that if an embassy provided information that substantiated an allegation, confirmatory steps would then be taken in Korea, such as email tracking, asset tracking and background checks. They would also use officers in the field to obtain financial information about the relevant companies and perform an accounting analysis, under the supervision of the SPO.

57. The impression of the lead examiners is that the new system still needs time to be strengthened and tested. It has some very positive features, and the fact that already nine pre-investigations have been opened in such a short time shows that it could result in substantially increased enforcement of the FBPA. The Korean authorities stress that the main party responsible for generating leads and information on foreign bribery is the SPO. The lead examiners note, however, that the system of evidence gathering appears to over-rely on Korean embassies and consular offices to collect information to support media allegations, specifically information on related legal proceedings in the foreign country, especially since the lack of legal proceedings in a foreign jurisdiction does not necessarily mean that an FBPA violation did not take place. Making inquiries about such information is an important and necessary step, but at the same time proactive steps could be taken in Korea during and after the embassies try to acquire information. For instance, the Korean authorities could conduct public record checks, including of company records kept by the Korean Financial Supervisory Commission. In addition, the Korean authorities could usefully inquire whether the Korean Financial Supervisory Commission and National Tax Service are conducting investigations of related books and records violations and tax evasion respectively. By making the KFSC and NTS part of the new system for information and intelligence gathering, this kind of information is more likely to be sought systematically.

#### *Commentary*

*The lead examiners believe that the new information and intelligence gathering capacity coordinated by the Ministry of Justice and also involving the Ministry of Foreign Affairs and Trade and the Supreme Prosecutor's Office could help Korea substantially increase enforcement of the FBPA. In order to strengthen this potential, they recommend using proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations, in addition to having Korean embassies and consular offices acquire information about related legal proceedings in the foreign jurisdiction. The lead examiners consider the recent MOU on information exchange with foreign authorities regarding one of the pre-investigations an important step in this direction. They also recommend making the Korean Financial Supervisory Commission and National Tax Service part of the new system.*

#### **b) Role of Anti-Corruption and Civil Rights Commission in receiving and processing allegations**

58. In February 2008 the Korea Independent Commission against Corruption (KICAC)<sup>34</sup> merged with the Ombudsman of Korea and the Administrative Appeals Commission to become the Anti-Corruption and Civil Rights Commission (ACRC)<sup>35</sup>. According to article 12 of the Act on the Anti-Corruption and the Establishment and Operation of the ACRC (ACA), the functions of the ACRC include: 1) investigating and handling complaints and grievances of the people, and recommending related

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34 Information about KICAC is provided on pp. 13-15 of the [Phase 2 Report on Korea](#)

35 The ACRC is headed by 15 commissioners (Committee), including the Chairman (ministerial level), and the Vice-Chairman (vice-minister level). The Act on Anti-Corruption and the Establishment and Operation of the ACRC provides legal protections for the commissioners' independence, including on their appointment and conflicts of interest. The Chairman and Vice-Chairman are appointed by the President on the recommendation of the Prime Minister, and "serve political service". The role of the ACRC in raising awareness of the FBPA and Anti-Bribery Convention is discussed in section 10 below.

rectification or submitting opinions related to those complaints; 2) investigating actual conditions and evaluating the results of complaints and improvements of administrative systems handled by the ACRC; 3) protecting and rewarding those who have reported suspected corruption<sup>36</sup>; and 4) investigating and handling complaints of businesses to resolve their difficulties. The Korean authorities explained that on 30 September 2011, statutory protections for whistleblowers in Korea will be extended to include private sector whistleblowers.<sup>37</sup> Thus, the ACRC will potentially soon begin to receive reports of the bribery of foreign public officials from the private sector, which could make it an important source of allegations. At the on-site visit, the representative of a large enterprise group stated that if an FBPA violation were reported on the company's hotline; the company would then transmit the report to the ACRC.

59. Although the ACRC has the capacity to receive allegations of FBPA violations, it does not have the legal authority to conduct coercive investigative measures. When it receives a credible report, it normally conducts voluntary interviews of the informant and potential witnesses. The ACRC explains that if conducting such an interview risks tipping off the alleged perpetrator and the consequent destruction of evidence, it will verify the information provided by the informant, and immediately refer the case to the investigative authorities. In this respect, the Korean authorities refer to item 2 of Article 29(1) of the ACA, which authorises the ACRC to request a potential witness (i.e., "an interested person, reference persons or a public organization employee") to make statements or submit necessary materials, and Article 59(1), which authorises the ACRC to ask an informant for permission to include his or her identity in a referral of a case to the relevant public organisation. The Korean authorities add that it is necessary to conduct a "minimal factual confirmation" of the informant's report, in order to avoid slander and defamation cases being brought by the subject of the report. They also explain that they "follow due process" to prevent the destruction of evidence and obstacles to investigations by the law enforcement authorities.

60. According to Article 59 of the ACA, "if the need arises for investigating" a corruption case that has been reported to the ACRC, it shall be referred to the Board of Audit and Inspection (BAI), an investigative agency, or an agency in charge of supervising the relevant public organisation<sup>38</sup>. Pursuant to Article 59(4), the ACRC is only required to file an accusation with the prosecution if it receives a report about corruption by a senior public official, and details of the report are needed for a criminal investigation. The Korean authorities explained that investigations are conducted by the "concerned division" of the ACRC, and involve a legal review. If the legal review indicates that a case should be transferred as provided in Article 59, it is brought to the commissioners, who transfer the case if they reach a unanimous decision in favour of such a transfer. Following the on-site visit, the Korean authorities identified provisions in the "Enforcement Decree" of the ACA, which in their opinion provide adequate criteria for determining when it is appropriate to transfer a case to the authorities identified in Article 59 of the ACA. Article 57 (1) of the "Enforcement Decree" states that a referral should be made to the BAI under Article 59 of the ACA when "deemed necessary" by the Board of Audit and Inspection Act. A referral should be made to "investigative agencies" when "a suspicion of a crime or necessity of investigation is deemed to exist".

61. The Korean authorities have not identified any further guidance or criteria for deciding when a case should be transferred for investigation, or whether it should be transferred to the BAI, investigative agency, or supervisory agency. In the absence of such criteria, the lead examiners are concerned that there is a real risk that the ACRC could fail to transfer credible reports of FBPA violations to the prosecution authorities. However, following the on-site visit, the Korean authorities informed that the Ministry of

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36 Further discussion on whistleblower protections is provided in section 10 below.

37 Ibid.

38 If there is not a relevant supervisory agency, the case shall be referred to the relevant public organisation itself.

Justice, National Tax Service and the ACRC have launched a consultative group that will meet regularly to share information regarding foreign bribery enforcement. Korea expects that these meetings will facilitate the development of concrete criteria for transferring reports of foreign bribery from the ACRC to the SPO.

### *Commentary*

*The lead examiners welcome that the ACRC, Ministry of Justice and National Tax Service have launched a consultative group for sharing information about foreign bribery enforcement, and recommend that Korea establish clear criteria for requiring the ACRC to transfer reports of FBPA violations to law enforcement authorities, and that such criteria are established as a matter of priority given that a statutory amendment extending whistleblower protections to persons who report FBPA violations is due to come into force on 30 September 2011.*

## **6. Money Laundering**

62. From 2004 to the end of 2010, the Korea Financial Intelligence Unit (KoFIU) received 2279 STRs related to bribery offences, and of these 434 were analysed in-depth. None of the analysed information involved foreign bribery offences, and therefore was not disseminated to the law enforcement authorities. Information from the FATF indicates that between 2002 and June 2008, the Korea Financial Intelligence Unit (KoFIU) received overall 140 793 STRs, and of these 30 582 were analysed in depth, and 10 209 were disseminated to law enforcement agencies.

63. The lead examiners note that in the *Security Service Company Case*, the defendant, who acted as an intermediary and was acquitted of the FBPA charge, was not charged with money laundering, even though he admitted to lending his bank accounts to one of the parties involved in the offence.

64. A representative of the SPO explained that local prosecutors' offices have teams dedicated to detecting and investigating the proceeds from criminal activities. He also explained that public awareness is only starting to develop on the risk of money laundering in relation to the proceeds of bribery. A representative of KoFIU stated that, while KoFIU still has room to improve in terms of experience and manpower "compared to the United States and other advanced economies", Korea's anti-money laundering system has made significant progress since the establishment of KoFIU in 2001. He stated further that KoFIU is currently in the process of expanding. It is also compiling money laundering case studies.

65. Due to the large enterprise structure that predominates in Korea, with its complicated system of interlocking shareholdings, it could be challenging for Korean financial institutions to verify the identity of beneficial owners of accounts. FATF Recommendation 5 recommends that financial institutions identify the beneficial owner and take reasonable measures to make such verifications and to understand the ownership and control structure of the customer. KoFIU explained at the on-site visit that Korea has not established rules and policies that specifically take into account the challenges of identifying the beneficial owners in large enterprise groups. But information from the FATF indicates that Korea has taken limited steps to implement the relevant part of FATF Recommendation 5. Korea does not consider that the FATF recommendations obligate countries to take stronger anti-money laundering measures based on the scope or size of legal persons or trusts, and points out that large enterprise groups have not been shown to be at higher risk for money laundering. Nevertheless, Korea plans to do further work on implementing FATF Recommendation 33 on the transparency of legal persons and arrangements. The representative of KoFIU said that this issue will be discussed in the context of a review of FATF Recommendation 33, which the FATF informs is currently being conducted.

66. Another issue that came up at the on-site visit is how Korea addresses the potential for conflicts of interest between financial institutions regarding their STR obligations, and their loyalty to customer corporations that are part of the same enterprise group. The Korean authorities explain that due to a regulation prohibiting commercial entities from holding ownership over financial institutions, it is structurally impossible for an affiliate of a large enterprise group to be involved in money laundering offences perpetrated by its parent company or proprietor. However, it is very common for financial service providers, such as insurance, credit card, and asset and investment management companies to be affiliated with large enterprise groups. In order to ensure effective STR reporting, this could be an area for further attention in Korea.

### *Commentary*

*The lead examiners recommend that Korea take steps to raise awareness of the risk of money laundering in relation to the proceeds of bribery amongst institutions and individuals responsible for making STRs, including the publication of relevant case studies. The lead examiners also recommend that Korea take appropriate steps according to its legal system to ensure that financial institutions responsible for making STRs understand the total ownership structure of their corporate customers, and to address the potential for conflicts of interest between financial institutions regarding their STR obligations, and their customer corporations that are part of the same enterprise group.*

## **7. Accounting Requirements, External Audit, and Company Compliance and Ethics Programmes**

### **a) Reporting by external auditors**

67. In Phase 2 the Working Group recommended that Korea require the reporting of indications of bribery to the law enforcement authorities by external auditors or management committees. In Korea's Phase 2 written follow-up report, the Working Group noted that the situation had not changed since Phase 2, and external auditors were still obliged to only report wrongdoing by a company's director to the statutory auditor, an audit committee and the general meeting of shareholders. Korea indicates in its responses to the Phase 3 supplementary questionnaire that external auditors are required to report unlawful acts relating to bribery to company management without regard to the impact on financial statements, and if necessary, the illegal acts are reported to internal auditing bodies. Thus, Korea does not appear to have addressed the Phase 2 recommendation. In addition, to date, no cases of the bribery of foreign public officials have been detected by the accounting and auditing profession.

68. Article 27 of the Board of Audit and Inspection Act prohibits the disclosure of information or materials obtained in the course of an audit to another person. It also prohibits the disclosure of information about the personal affairs or private life of the individual submitted for an audit inspection, for purpose other than that of the relevant inspection. Thus, currently in Korea, external auditors have no choice but to report suspicions of the bribery of foreign public officials internally. According to a representative of a major accounting and auditing group, the auditing profession has had discussions with the Korea Financial Supervisory Commission on a possible amendment to the Board of Audit and Inspection Act regarding auditors' reporting obligations. Concerns about such an amendment were raised by the profession, and therefore this issue will require careful review. The accounting and auditing representative did not indicate whether discussions on a possible amendment addressed the issue of providing a "safe harbour" to auditors who report wrongdoing (i.e., protection from legal action for auditors who make such reports reasonably and in good faith).

69. According to a major accounting and auditing group, external auditors are obliged to detect wrongdoings that have a “significant influence on financial statements”. The notion of “materiality”, which is the most important auditing principle, refers to information that could result in a “wrong decision based on financial information”.

#### *Commentary*

*In Korea the detection of FBPA violations by the accounting and auditing profession is constrained by confidentiality requirements in the law, and a strict interpretation of the notion of “materiality”. In addition, training has not been undertaken by the profession on the FBPA. The lead examiners therefore recommend that Korea consider amending the Board of Audit and Inspection Act, to require the external auditor to report suspected acts of bribery of foreign public officials to competent authorities independent of the company, such as law enforcement or regulatory authorities, and also take appropriate steps to ensure that auditors making such reports reasonably and in good faith are protected from legal action.*

#### *b) Internal controls, ethics and compliance*

70. In March 2010, the Commercial Act was amended to require listed companies to establish “compliance guidelines” that shall be complied with when its executives and employees perform their duties, to ensure their compliance with the law and that they appropriately manage their companies. Listed companies shall appoint one or more persons in the capacity of a “compliance officer” with the responsibility of compliance duties set out in the “compliance guidelines”, monitoring compliance with the guidelines and reporting the results to the board of directors. The Commercial Act also provides requirements on the appointment of a compliance officer, including on qualifications and for preventing conflicts of interest. According to the Commercial Act, the “compliance guidelines” shall take into account *inter alia* the size of a company’s assets. The amendment is due to come into force on 15 April 2012. The Ministry of Justice explains that it has provided extensive awareness to the business community regarding the upcoming amendments to the Commercial Act.

71. Representatives of two major accounting and auditing groups in Korea said that they do not run training programmes that target FBPA violations; one provides training courses that mention bribery charges in general, and the other provides regular programmes on ethical behaviour. In addition, no professional organisation providing guidance and support to the profession appears to be holding training that targets the FBPA.

#### *Commentary*

*The lead examiners recommend following up implementation of the amendment to the Commercial Act requiring listed companies to establish “compliance guidelines” and appoint a “compliance officer” to carry out relevant compliance duties in the guidelines, monitor compliance with them and report the results to the board of directors, once the amendment comes into force in April 2012. The lead examiners also recommend that Korea encourage all companies, including SMEs, to develop and adopt adequate internal controls, ethics and compliance programmes or measures, taking into account the Good Practice Guidance on Internal Controls, Ethics and Compliance in Annex II of the 2009 Anti-Bribery Recommendation. Part of the Korean government’s encouragement to companies to act in this regard could include awareness-raising about the importance of running specific training programmes in the accounting and auditing profession that target the FBPA.*

## 8. Tax Measures for Combating Bribery of Foreign Public Officials

### a) *Sharing tax information*

#### i. *Sharing information by National Tax Service*

72. In Phase 2 the Working Group recommended that Korea amend the prohibition against sharing evidence of FBPA violations contained in information submitted by tax payers. This recommendation has still not been addressed by the Korean authorities. In addition, it appears that none of the cases of the bribery of foreign public officials prosecuted so far in Korea were detected through tax payer information.

73. Article 81-13 of the Framework Act on National Taxes authorises the release of tax information that does not relate to tax crimes in only two special circumstances – pursuant to a court order or a warrant issued by a judge. Korea explains that when a warrant is issued, the NTS does not refuse to provide tax information. The Korean authorities have not considered amending the statute to allow the tax authorities to report suspicions of foreign bribery arising out of the performance of their duties.

74. On the other hand, if the NTS uncovers evidence of a tax crime, all related documents are voluntarily provided and reported to the law enforcement agencies. The NTS pointed out that evidence of a tax crime could relate to an FBPA violation.

#### ii. *Sharing information by SPO*

75. The National Tax Service has not received reports directly from the SPO on any of the nine FBPA convictions. The NTS stated that if such reports were received, they would review the relevant tax payer information for evidence of tax crimes. The Korean authorities explain that six FBPA cases in which convictions were obtained are described in the ACRC's handbook.

76. Following the on-site visit, the Korean authorities informed that the NTS, Ministry of Justice and ACRC and other relevant authorities established a consultative group that will meet regularly and share information related to the enforcement of the FBPA. They expect that this forum will facilitate information-sharing between the NTS and the SPO on foreign bribery. In addition, the Ministry of Justice will send prosecutors to OECD meetings that will discuss tax measures for detecting and reporting foreign bribery, to strengthen its capacity to generate leads on FBPA violations through tax investigations.

#### iii. *Sharing information through bilateral tax treaties*

77. The Korean authorities stated that they have not been including in their bilateral tax treaties the optional language of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention, which allows the sharing of tax information received by foreign tax authorities with other law enforcement and judicial authorities on certain high priority matters, including corruption, money laundering and terrorism, provided certain conditions are met. However, Korea has signed the Convention on Mutual Administrative Assistance in Tax Matters<sup>39</sup> and its amending Protocol on 27 May 2010 and the process of ratification should be completed before the end of 2011. Article 22.4 of the Convention, which is now open to all countries, allows the use of information received from a Party to the Convention to be shared with other law enforcement agencies and judicial authorities on certain high priority matters, including to

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39 See: <http://www.oecd.org/dataoecd/8/62/48308691.pdf>

combat corruption, provided this is allowed under the laws of the supplying state and that the supplying state agrees to this use.<sup>40</sup>

### *Commentary*

*The lead examiners believe that one of the most effective ways to disclose foreign bribery is through tax inspections, and thus emphasise the importance of reporting of foreign bribery by tax authorities. They welcome the establishment of the new consultative group that includes the NTS, SPO and ACRC, and the potential for this group to facilitate information-sharing on foreign bribery. Nevertheless, given legal obstacles to the spontaneous sharing of tax information on foreign bribery offences that does not relate to evidence of a tax crime, the lead examiners recommend that Korea, in accordance with its legal system, take appropriate steps to establish an effective legal and administrative framework to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties. In order to support the effectiveness of Korea's fight against foreign bribery, they also encourage the SPO to systematically share information with the NTS about convictions under the FBPA, so that the NTS can review the relevant tax payer information for evidence of related tax crimes.*

#### **b) Tax treatment of small facilitation payments**

78. The NTS stated that even though the FBPA provides a defence for small facilitation payments, they are not deductible under the Corporate Tax Act and Income Tax Act Taxes because such a payment does not satisfy the test under the Act of “social acceptability”.

#### **c) Training and awareness of tax authorities**

79. The NTS has published the OECD Bribery Awareness Handbook for Tax Examiners on its website. In addition it provides guidelines on determining whether a payment is “socially acceptable”, which refer to the Anti-Bribery Convention. However, tax examiners have not been specifically trained to detect bribery. The lead examiners believe that adding corruption to the risk assessment and audit process would focus tax examiners on identifying bribes during the examination of tax returns and encourage them to carry out relevant compliance checks.

### *Commentary*

*The lead examiners recommend that Korea provide tax examiners with training specifically on detecting FBPA violations. They also recommend that the NTS include bribery in its risk assessment and audit processes.*

## **9. International cooperation**

### **a) Mutual Legal Assistance**

80. Korea provides mutual legal assistance (MLA) under bilateral and multilateral treaties and under the Act on International Judicial Mutual Assistance in Criminal Matters.<sup>41</sup> Individual statutes may also provide for tailored MLA in respect of their provisions. For example, the Proceeds of Crime Act (POCA)

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40 There are currently 21 signatories to the amended Convention. More countries are expected to follow shortly.

41 Enacted 8 March 1991.

sets out special MLA provisions relating to the confiscation of criminal proceeds. Since Phase 2, Korea has also enacted the Act on Confiscation and Recovery of the Proceeds of Corruption<sup>42</sup>, which provides for international mutual assistance relating to ‘corrupt assets’ from corruption offences. In March 2011, the Korean National Assembly approved accession to the Council of Europe Convention on Mutual Legal Assistance in Criminal Matters and the Council of Europe Convention on Extradition; the formal accession process is expected to take place within the year.

81. The Ministry of Justice is the central authority for both incoming and outgoing MLA requests in Korea. Incoming requests are transmitted to the Supreme Prosecutor’s Office (SPO), which then decides how to proceed. Korea has concluded MLA agreements with 28 countries, of which 20 are currently in force. Dual criminality is required in the Korean MLA system. However, few requests have been refused by Korea on the sole basis that the lack of dual criminality prevents assistance. Further, Korea’s MLA treaties often include provisions which dispense entirely with the dual criminality requirement.<sup>43</sup> Korea provides extradition to a foreign country if the conduct underlying the extradition request, had it occurred in Korea, is punishable in Korea by death or imprisonment of at least one year; foreign bribery offences would thus meet this threshold.<sup>44</sup>

82. Korea maintains a system that provides information on both incoming and outgoing MLA and extradition requests, which includes the retention of all relevant case files. Based on this system, the Korean authorities stated that they would be able to determine the average amount of time taken to respond, or obtain a response, to requests, but they did not provide further details in this regard. Korea’s responses to the Phase 3 Questionnaire record that since Phase 2, the Ministry of Justice has received one MLA request in relation to a foreign bribery case.<sup>45</sup> Korea has also received a request for preliminary information on a legal person in relation to a possible foreign bribery case, which is currently under review. A discussion on the potential impact of the destruction of case records on the effective provision of MLA to Parties to the Anti-Bribery Convention is provided in a preceding section of this report.<sup>46</sup>

83. Korea has not sent MLA requests in connection with a foreign bribery case. During the on-site visit, Korean officials explained that since most bribery cases to date have involved the bribery of procurement authorities in the United States Army base located in Korea, the Status of Forces Agreement (SOFA)<sup>47</sup> was relied upon instead of an MLA treaty. Article 22(6)(a) of SOFA states that “authorities of the Republic of Korea and the military authorities of the United States shall assist each other in the carrying out of all necessary investigations into offenses, and in the collection and production of evidence...”<sup>48</sup>

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42 Entered into force in 2008.

43 FATF/APGML Mutual Evaluation Report on Korea (26 June 2009), p. 188, available at: <http://www.fatf-gafi.org/dataoecd/22/54/43439553.pdf>

44 Act on International Judicial Mutual Legal Assistance in Criminal Matters, Articles 29 and 33; Extradition Act, Article 6 and 42. Applicable treaties and foreign legislation may impose additional conditions for extradition and MLA.

45 The request was received in September 2008. The response procedure was discontinued because the suspect was subsequently arrested in the requesting state.

46 See the following section of this report: A. 4. d) “Destruction of case records”.

47 Agreement Under Article 4 of the Mutual Defense Treaty Between the Republic of Korea and the United States of America Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, (1966, amended 2001).

48 Ibid., Article 22 (Criminal Jurisdiction), subsection 6(a).

**b) *Informal Cooperation and Memoranda of Understanding***

84. The SPO has recently undertaken efforts to establish informal contacts with law enforcement counterparts in foreign jurisdictions. Korean authorities state that by enhancing credible cooperation, the SPO aims to expedite MLA while facilitating informal information-sharing among cooperating foreign jurisdictions and international organisations. According to Korea, these contacts have been useful in assessing whether evidence or other matters were located in the other jurisdictions and thus could later be formally obtained through an MLA request. The SPO has entered into several Memoranda of Understanding (MOU) with law enforcement authorities in foreign jurisdictions, including China, the Russian Federation and the United States. During the on-site visit, Korean officials highlighted the particularly close cooperation with China, which includes regular law enforcement meetings with China's Ministry of Public Security. In January 2010, the SPO also established the International Money Laundering Investigation Team within its International Cooperation Center, which can respond to informal requests from foreign law enforcement authorities outside of formal MLA channels. Korean authorities state that this is expected to enhance the detection of foreign bribery as well as information-sharing with foreign authorities. In February 2011, the SPO also signed an MOU with the World Bank on mutual cooperation to prevent fraud and corruption to enable future cooperation and the referral of foreign bribery cases.

***Commentary***

*The lead examiners are unable to assess in detail Korea's practice of providing MLA in foreign bribery cases due to (i) the limited number of requests made to Korea and the lack of information on the duration of time taken to respond to requests made or received, and (ii) more generally, the lack of a mechanism by which the evaluation team could obtain information from other Parties to the Anti-Bribery Convention on how effectively Korea has responded to MLA requests. The lead examiners further consider that the question of how to assess the practice of Parties in responding to MLA requests is a cross-cutting issue that should be examined by the Working Group.*

*The lead examiners commend Korea on its bilateral informal cooperation efforts with foreign law enforcement authorities and the World Bank.*

**10. Public awareness and the reporting of foreign bribery**

85. The Working Group issued a number of Recommendations to Korea in its Phase 2 evaluation on awareness-raising and the reporting of foreign bribery, some of which were found to have been only partially implemented in Korea's Phase 2 Follow-up Report. These included Recommendation 1, which addressed awareness-raising needs within the investigative, prosecutorial and judicial authorities, agencies involved in directly implementing the Anti-Bribery Convention, and among SMEs, and; Recommendation 3(a), which addressed the need to consider extending whistleblower protection to those who report foreign bribery.

**a) *Awareness of the Anti-Bribery Convention and the offence of foreign bribery***

86. Since Phase 2, Korea has taken steps to raise awareness of the Anti-Bribery Convention and the FBPA, particularly among the private sector. In 2011, the Ministry of Justice (MOJ) launched an awareness-raising campaign for businesses, including the publication of an Anti-Bribery Convention casebook and a compliance handbook. Discussions and seminars with compliance officers from Korean companies also form part of the MOJ's campaign. The Anti-Corruption and Civil Rights Commission (ACRC) has also raised awareness of foreign bribery among the business community. The ACRC has publicized the Anti-Bribery Convention and more recently, Annex 2 of the 2009 Recommendation, to over

1100 subscribers of its on-line newsletter, “Business Ethics Briefs”, which expressly encourages companies to adopt internal controls, ethics and compliance measures in accordance with the principles of Annex 2. The ACRC has also spoken specifically on the Anti-Bribery Convention and the FBPA at private sector events and symposia. It has also been active in raising awareness of the new Act on the Protection of Whistleblowers<sup>49</sup> (‘WPA’) through various public and inter-agency consultations, as well as media campaigns. (See section c) below for further discussion on the WPA).

87. Awareness-raising efforts within the public sector have varied. The ACRC published an OECD Anti-Bribery Guidebook that is distributed among public organisations, organisations related to the public service and business councils. The Guidebook has also been distributed among foreign diplomatic representations in conjunction with the Ministry of Foreign Affairs and Trade (MOFAT). MOFAT also distributes information and guidelines to its embassies on the Anti-bribery Convention and the FBPA, in which companies are advised to contact the economic counsellor at the relevant Korean embassy when faced with bribe solicitation. Despite these efforts, however, representatives from the private sector participating in the on-site visit stated that when such reports have been made to Korean embassies, the level of support provided has been limited.

88. With regard to the judiciary and legal profession, the MOJ further indicated that they regularly give lectures on the Convention to judicial trainees, who include prospective judges, prosecutors or private attorneys. The MOJ also indicated that the new systematic procedure it has implemented with MOFAT and the Supreme Prosecutor’s Office (SPO) to more actively pursue foreign bribery allegations is also intended to increase awareness of the offence among prosecutors.<sup>50</sup> With regard to the investigative authorities, academic courses on the FBPA have been set up by the Korea Police Investigation Academy within the National Police Agency (NPA). These courses are held four times a year for 80 investigative officials at a time. Korean authorities stated that the NPA will continue to strengthen such efforts by making the course more specialised and focused.<sup>51</sup> Korea did not indicate that any specific awareness-raising efforts have been undertaken by the Board of Audit and Inspection (BAI), as per Phase 2 Recommendation 1 (which was found to not have been implemented in Korea’s Phase 2 Follow-up Report). It therefore appears that Korea has not addressed this Recommendation.

89. Korean business and industry associations participating in the on-site visit demonstrated knowledge on the Anti-bribery Convention and FBPA; some have been active in specifically raising such awareness among their members, particularly with SMEs. The Korean government’s efforts to engage more closely with the private sector on international anti-corruption laws, including the Anti-bribery Convention, were positively highlighted during the discussions. Many panellists were, however, unaware that there had been FBPA convictions in Korea. Panellists further mentioned that more specific guidance from the Government on certain aspects of the FBPA and the liability of legal persons would be useful, particularly on the small facilitation payments defence and the ‘due attention’ and ‘proper supervision’ exemption to corporate liability, which are widely viewed as being unclear in the law.<sup>52</sup>

90. Companies – both large enterprises and SMEs – participating in the on-site visit also demonstrated knowledge on the Anti-bribery Convention and the FBPA, although, again, there was little awareness that there had been FBPA convictions in Korea. One company mentioned that the *Siemens* case triggered wider awareness of foreign bribery laws within its company and led to the launching of its compliance programme. Panellists from SMEs noted that they receive most of their information and

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49 Enacted 29 March 2011 and entered into force on 30 September 2011.

50 See section 5 above for more information on this procedure.

51 See also section 2 with regard to awareness-raising and training on the responsibility of legal persons.

52 See section 1 above for further discussion of these provisions.

training from the awareness-raising activities of Korean business and industry associations, and that more proactive direct engagement by the Government would be useful. The SMEs participating in the on-site visit also mentioned that rather than seeking assistance from MOFAT on corruption concerns, or when faced with bribe solicitations abroad, they often approach the Korean Trade-Investment Promotion Agency (KOTRA), which is charged with, *inter alia*, gathering information about overseas markets to promote national trade and foreign investment, promoting overseas public relations on behalf of domestic industry and intermediation in trade transactions. KOTRA also has overseas offices in over one hundred countries that provide support and advice to Korean companies operating in those markets.

**b) Reporting suspected acts of foreign bribery<sup>53</sup>**

91. Article 25 of the ACA states that any person who becomes aware of an act of corruption may report such an act to the ACRC. Article 26 of the ACA imposes an obligation upon public officials to report to law enforcement or the Board of Audit and Inspection (BAI) an act of corruption committed by another public official or instances where the official is forced or proposed by another public official to commit an act of corruption. The ACA does not expressly impose an obligation on public officials to report acts of corruption or foreign bribery more generally, i.e. acts not committed by other public officials but private individuals or companies. Korea, however, confirms in its responses to the Phase 3 Questionnaire that public officials are required to alert investigative authorities in the event that they come across acts of foreign bribery.<sup>54</sup>

92. Companies participating in the on-site visit also described internal reporting mechanisms that they have established as means of detecting and reporting acts of corruption. Many were aware of the new whistleblower protection legislation that now applies to private sector employees, and have in turn established or strengthened internal hotlines and other forms of anonymous reporting within the company. One company noted that while they welcome the new legislation, they would prefer that such reports be made internally and addressed accordingly, rather than having “their dirty laundry aired” externally. Business and industry associations participating in the panel discussions also welcomed the new legislation, and have incorporated it into their training programmes.

**c) Whistleblower protection**

93. Since Phase 2, Korea has introduced new measures on the protection of whistleblowers. The Act on the Protection of Public Interest Whistleblowers (‘WPA’) was enacted on 29 March 2011 and entered into force on 30 September 2011. Korean authorities confirmed that the new WPA now covers both public and private sector whistleblowers who report in good faith and on reasonable grounds “public interest violations”.

94. In Korea’s Phase 2 Follow-up, the Working Group found that Korea had not implemented Recommendation 3(a), which called for consideration to extend whistleblower protection to those who report on foreign bribery. This now appears to have been rectified; Article 2 of the WPA defines a “violation of the public interest” as an act that “infringes on the health and safety of the public, the environment, consumer interests and fair competition.” It also covers acts that are subject to penal provisions defined in a number of Acts annexed to the WPA, which, in turn, cover “other laws defined by Presidential Decree regarding health, safety, environmental protection, protection of consumer interest, promotion of fair competition, etc.” Korean authorities clarified that by means of the “Enforcement

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53 Sections 7 and 8 of this Report respectively provide information on reporting obligations for tax officials and auditors, and section 11 provides further details on the reporting obligations of officials responsible for the disbursement of public advantages.

54 Articles 2,3,4(2) of the Criminal Procedure Act.

Decree” of the Act on the Protection of Public Interest Whistleblowers, the FBPA is now expressly provided for in the Annex of the WPA as an act related to the violation of the public interest. During the on-site visit, representatives of civil society voiced concern that the new WPA does not adequately address the reporting of acts of corruption, and that the definition of “public interest violation” is too narrow in scope, rendering it unclear as to whether foreign bribery reports would be covered. The ACRC stated that they will soon be publishing and distributing guidance on the WPA. Following the on-site visit, the ACRC further indicated that awareness-raising efforts have been initiated within both the public and private sectors. Since the Act entered into force, a number of reports have already been received, including from the private sector, although it is not yet clear how many of these concern foreign bribery.

### *Commentary*

*The lead examiners commend the efforts Korea has undertaken to raise public awareness of the Anti-Bribery Convention and the FBPA among the private sector. Engaging with SMEs is a horizontal issue faced by all Parties to the Anti-Bribery Convention, and Korea should pursue additional opportunities to raise awareness among SMEs for the purpose of preventing and detecting foreign bribery.*

*With regard to whistleblower protection, the lead examiners commend Korea on enacting a new law that applies to both public and private sector employees, as well as the reporting of foreign bribery. To ensure a wide level of awareness that the law now affords protection to those who report on foreign bribery, the lead examiners encourage Korea to consider further clarifying that foreign bribery reports are covered by the WPA in any official guidance on the law, and to continue its awareness-raising activities on the WPA.*

## **11. Public advantages<sup>55</sup>**

### **a) Official development assistance**

95. Official development assistance (ODA) is mainly administered by the Korean International Cooperation Agency (KOICA). In Phase 2, the Working Group issued a recommendation to Korea with regard to disclosure policies and reporting obligations of KOICA on suspicions of FBPA violations.<sup>56</sup> In the Phase 2 Follow-up, the Working Group concluded that this Recommendation had not been implemented. Since the Phase 2 Follow-up Report, KOICA has undertaken procedural steps to report to competent authorities suspected violations of the FBPA. KOICA has developed a “Memorandum of Anti-Bribery and Integrity” (“Memorandum”) as a part of its internal regulations of operation that provide guidance for disclosing suspected acts of bribery, which KOICA would then report to law enforcement authorities. However, no such reports have been made to date.

96. With regard to prevention and detection efforts more generally, all companies contracting with KOICA must adopt the Memorandum, which requires companies to establish rules to prevent the bribery of foreign public officials, as well as establish whistleblower channels and protection mechanisms. The Memorandum also makes explicit reference to the Anti-Bribery Convention, and recommends that companies awarded ODA-funded contracts establish internal controls, ethics and compliance systems or measures. KOICA indicated that since the requirement to adopt the Memorandum came into effect in March 2010, they have received an increasing number of inquiries on the FBPA and the Anti-Bribery Convention from Korean companies and institutions, which has in turn contributed to awareness-raising

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55 See also section 3 for related discussion on civil and administrative sanctions.

56 Phase 2, Recommendation 3(b).

efforts. If a contractor is found to have engaged in bribery, KOICA can impose a number of sanctions, including cancellation of the contract and exclusions from future tenders.

97. KOICA has also engaged in information-dissemination and training programmes on the Anti-Bribery Convention to companies that have contracted, or have the potential to contract, with KOICA. Korean authorities further indicated that if Korean companies confront difficulties concerning bribe solicitations abroad while implementing a KOICA-funded project, they may report to KOICA's overseas offices or headquarters for assistance. However, no such instances have been recorded to date.

**b) Officially supported export credits**

98. Korea's export credit agencies (ECAs), the Export-Import Bank of Korea (Korea Eximbank) and the Korea Trade Insurance Corporation (K-Sure), are both members of the OECD Working Party on Export Credit and Credit Guarantees, and frequently work together in the granting of officially supported export credit. Representatives from both ECAs who participated in the on-site visit demonstrated strong knowledge and awareness of the Anti-Bribery Convention and the FBPA. The Korea Eximbank officials further indicated that a copy of the FBPA is attached to all contracts. Both ECA officials were also aware of Annex 2 of the 2009 Recommendation; an OECD-specific unit has been established within K-Sure which keeps abreast of OECD-related documentation and guidance, and in turn, adapts these to their internal rules and procedures. While explicit reference to Annex 2 is not provided for in either of the ECAs' contracting documentation, both agencies indicated that they take such principles into account, particularly when engaging in due diligence of exporters or applicants. Both ECAs impose mandatory debarment of contractors found to have committed foreign bribery for a period of three years.

99. Since Phase 2, both ECAs have revised their guidelines to address the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits (2006 Council Recommendation). The revised Anti-Bribery Guidelines of Korea Eximbank impose new obligations for reporting to law enforcement authorities if there is credible evidence of bribery in relation to the award of an export contract. However, Korea Eximbank officials confirmed during the on-site visit that to date no such reports have been made. An anti-bribery declaration is also required of exporters and applicants requesting official export credit support, stating that neither they nor anyone acting on their behalf have engaged or will engage in bribery in the transaction. The revised Guidelines also make provision for enhanced due diligence of exporters who are included on debarment lists of the international financial institutions, being investigated for violations of the FBPA, convicted by a national court, or subject to any equivalent national administrative measures for a violation of foreign bribery laws of any country within a five-year period. Enhanced due diligence is also undertaken where Korea Eximbank has reason to believe that bribery may be involved in a transaction after credit, cover or other support has been approved.

100. K-Sure has adopted similar provisions to prevent bribery in officially supported export credits in its "Business Practices for Preventing Bribery" ('Business Practices') to comply with the 2006 Council Recommendation. The Business Practices provide for anti-bribery declarations, sanctions and reporting obligations to law enforcement authorities. K-Sure officials also confirmed during the on-site visit that no such reports have yet been made to law enforcement authorities. K-Sure's Business Practices also make provision for undertaking enhanced due diligence if there is reason to believe that bribery may have been involved in the transaction either before or after the cover has been approved.<sup>57</sup>

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57 K-Sure Business Practice for Preventing Bribery, Article 5: Undertaking Enhanced Due Diligence.

c) **Public procurement**

101. Korea has undertaken efforts to promote transparency in public procurement, including by ratifying the WTO Agreement on Government Procurement. Since Phase 2, the Public Procurement Service of Korea (PPS) implemented the Korea ON-line E-Procurement System (KONEPS) and “Fingerprint Recognition e-Bidding”, which is applied by local governments and other public organisations in carrying out procurement for goods, services and construction projects. Korea states that one of the objectives in establishing such e-mechanisms was to reduce opportunities for corruption and collusion. PPS officials indicated that since the off-line procurement system was replaced by KONEPS, corruption risks, including those linked to discretionary and arbitrary decision-making of public officials has dramatically decreased. Greater transparency has also been promoted by the requirement that transaction results, including bidding and payments, are publicly disclosed on-line. The PPS also provides integrity training and an incentives programme for its employees; credit, termed “integrity mileage”, is reflected in employees’ performance evaluations for, *inter alia*, reporting wrongful conduct, completing integrity education curricula, and making proposals for integrity policy improvements. There is also annual mandatory integrity and anti-corruption training for all employees.

102. The PPS has established due diligence measures that includes requiring all bidders to sign a “Pledge of Ethical Practice and Integrity” (‘Pledge of Integrity’) in submitting their bids, which makes express reference to the Anti-Bribery Convention. The Pledge of Integrity also requires bidders to endeavour to establish codes of ethics and whistleblower protection mechanisms, and sets out administrative sanctions for bidders and contractors who have violated its provisions. Compliance checks with the Pledge of Integrity are carried out through a random survey of companies. The PPS also runs an Integrity Ombudsman Programme, whereby an external person of reputable integrity monitors the contracting process for goods and public works in order to ensure compliance with the PPS’s integrity rules. The KONEPS system maintains a database of information on contractors, including on previous sanctions imposed on a company, which can be accessed by governmental bodies. Mandatory debarment is imposed for bribery; the time period of debarment is based on the amount of the bribe. The PPS confirmed during the on-site visit that there is no obligation to consult the debarment lists maintained by the international financial institutions.

**Commentary**

*The lead examiners commend Korea on the various measures undertaken to prevent, detect and report foreign bribery by Korean agencies involved in the disbursement of official development assistance and officially-supported export credit, including the considerations given to internal controls, ethics and compliance measures. In view of the close working relationship between Korea Eximbank and K-Sure, the lead examiners further recommend that Korea consider applying a more harmonized approach to their anti-bribery guidelines, in order to more effectively implement the 2006 Recommendation.*

*With regard to public procurement, the lead examiners note that transparency has increased with the introduction of the KONEPS system, and commend Korea on efforts undertaken to strengthen prevention, detection and reporting measures within its public procurement system.*

*The lead examiners further note that these public agencies can debar companies convicted of corruption offences, which can be a significant deterrent for companies to engage in bribery. The lead examiners recommend that Korea consider adopting a systemic approach to allow all these agencies to easily access information on companies sanctioned for corruption, such as through the establishment of a national debarment register. This could allow these agencies to more effectively and efficiently apply their debarment rules.*

## RECOMMENDATIONS AND FOLLOW-UP

103. The Working Group on Bribery recognises that the Korean Government has prosecuted and convicted nine separate cases of foreign bribery since the FBPA came into force in 1999, including three legal persons. However, the majority of these cases involved the bribery of foreign military staff on Korean soil. In addition, three allegations of foreign bribery violations are currently at the pre-investigation stage and one case is under prosecution. The Working Group commends Korea for its high level of cooperation throughout the evaluation process, and the stated commitment of the political level of government to the enforcement of the FBPA.

104. Regarding outstanding recommendations since Korea's written follow-up report in March 2007, the Working Group notes that the following recommendations from Phase 2 that were not considered fully implemented are now fully implemented: Recommendation 1 on awareness-raising in the public and private sectors; 3(a) on whistleblower protection; 3(b) on the disclosure policies of the Korean International Cooperation Agency (KOICA); and 6(c) on additional non-criminal sanctions. The following recommendations remain not fully implemented: Recommendation 2(a) on reporting by external auditors; 5(a) on the transmission of a bribe directly to a third party beneficiary; and 6(a) on the level of fines applied in practice.

105. In conclusion, based on the findings in this report on implementation by Korea of the Anti-Bribery Convention and the 2009 Anti-Bribery Recommendation, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues indentified in Part 2. The Working Group invites Korea to report orally on the implementation of Recommendations 4 and 8 within one year of this report (i.e. October 2012). It further invites Korea to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e. October 2013).

### 1. Recommendations of the Working Group

#### *Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery*

1. Concerning the offence of bribing a foreign public official in the FBPA, the Working Group recommends that Korea:
  - a. Take appropriate steps within its legal framework to ensure that the bribery of persons performing public functions for the North Korean Regime, or the Kaesong Industrial Zone, are covered by the FBPA as the bribery of a foreign public official, or by the Korean Penal Code as the bribery of a domestic public official (Convention, Article 1, Commentary 18);
  - b. Continue to periodically review its policies and approach on facilitation payments pursuant to the 2009 Anti-Bribery Recommendation, and consider in its review: i) whether guidelines on the defence would be beneficial, and ii) the practical value of maintaining the defence in Korea (2009 Recommendation VI i)); and
  - c. Encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures (2009 Recommendations, para. VI ii)).

2. Regarding the liability of legal persons for the bribery of foreign public officials, the Working Group recommends that Korea raise awareness among law enforcement authorities and the private sector on the liability of legal persons for violations of the FBPA (Convention, Article 2).
3. Regarding sanctions for the offence of bribing a foreign public official, the Working Group recommends that Korea: i) take appropriate steps according to its legal system to ensure that sanctions imposed in practice on natural and legal persons are effective, proportionate and dissuasive; and ii) make full use of the authority to confiscate the bribe and proceeds where appropriate, and consider whether the complicated nature of the legislation on confiscation has been a hindrance to the effective imposition of confiscation as a sanction (Convention, Article 3.1, 3.3).
4. Regarding the investigation and prosecution of cases of foreign bribery, the Working Group recommends that Korea:
  - a. Ensure that the investigation records on transnational bribery cases are not destroyed before Korea has had an opportunity to provide a full report on those cases to the Working Group, and that case records are kept for a reasonable period to provide prompt and effective mutual legal assistance to other Parties for proceedings under the scope of the Anti-Bribery Convention (Convention, Articles 9.1, 12);
  - b. Strengthen the new information and intelligence gathering capacity coordinated by the Ministry of Justice, which involves the Ministry of Foreign Affairs and Trade and the Supreme Prosecutor's Office (SPO), by making the Korean Financial Supervisory Commission and the National Tax Service (NTS) part of the new system (Convention, Article 5, Commentary 27, 2009 Recommendation Annex I, para. D);
  - c. Increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations (Convention, Article 5, Commentary 27, 2009 Recommendation, IX. i), Annex I, para. D); and
  - d. Establish clear criteria for requiring the Anti-Corruption and Civil Rights Commission (ACRC) to transfer reports of FBPA violations to the law enforcement authorities, and that such criteria are established as a matter of priority given that a statutory amendment extending whistleblower protections to persons who report FBPA violations came into force on 30 September 2011 (Convention, Article 5, Commentary 27, 2009 Recommendation Annex I, para. D).

***Recommendations for ensuring effective prevention and detection of foreign bribery***

5. The Working Group recommends that Korea take the following steps to improve the prevention and detection of the foreign bribery offence through its anti-money laundering system: i) increase awareness amongst institutions and individuals responsible for making Suspicious Transaction Reports (STRs) of the risk of laundering the proceeds of foreign bribery, including by publishing relevant case studies; ii) take appropriate steps according to its legal system to ensure that financial institutions responsible for making STRs understand the total ownership structure of their corporate customers; and iii) address the potential for conflicts of interest between financial institutions regarding their STR obligations, and their customer corporations that belong to the same enterprise groups as themselves (Convention, Article 7).
6. The Working Group recommends that Korea take the following steps to improve the prevention and detection of foreign bribery through its accounting and auditing framework: i) consider amending the Board of Audit and Inspection Act to require external auditors to report suspected acts of foreign

bribery to competent and independent authorities, such as law enforcement or regulatory authorities; ii) ensure that auditors making such reports reasonably and in good faith are protected from legal action; and iii) encourage awareness-raising and training on the FBPA in the accounting and auditing profession (2009 Recommendation X.B.).

7. Regarding measures in the private sector for preventing and detecting foreign bribery in the private sector, the Working Group recommends that Korea: i) encourage all companies, including SMEs, to adopt adequate internal controls, ethics and compliance programmes and measures, taking into account the Good Practice Guidance in Annex II of the 2009 Anti-Bribery Recommendations; and iii) pursue additional opportunities to raise awareness of the FBPA among SMEs (2009 Recommendation X.C., and Annex II).
8. Concerning tax measures for preventing and detecting foreign bribery, the Working Group recommends that Korea: i) take appropriate steps to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties; ii) encourage the SPO to systematically share information with the NTS about convictions under the FBPA, so that the NTS can review the information for evidence of related tax crimes; iii) provide tax examiners with specific training on detecting FBPA violations; and iv) include bribery in the risk assessment and audit processes of the NTS (2009 Recommendation VIII (i); and 2009 Tax Recommendation).
9. Regarding the prevention, detection and reporting of suspicions of foreign bribery by Korea's two public agencies that provide contracting opportunities, the Working Group recommends that Korea:
  - a. Consider applying a more harmonised approach to the anti-bribery guidelines of Korea's officially supported export credit agencies -- Korea Eximbank and K-Sure -- to more effectively implement the 2006 Recommendation on Bribery and Officially Supported Export Credits (2009 Recommendation XI (i) and XII); and
  - b. Consider adopting a systematic approach to providing access to information on companies convicted of corruption, such as through a national debarment register, to facilitate debarment by public contracting agencies of companies convicted of foreign bribery (Convention, Article 3.4, Commentary 24, 2009 Recommendation XI (i)).
10. Regarding the protection of whistleblowers, the Working Group encourages Korea to consider further clarifying that the Act on Protection of Public Interest Whistleblowers now provides protections for those who report suspicions of foreign bribery in any official guidance on the Act, and continue its awareness-raising activities on the Act (2009 Recommendation IX (iii)).

## **2. Follow-up by the Working Group**

11. The Working Group will follow-up the issues below as FBPA case law and practice develop:
  - a. Application of the FBPA to cases where the bribe is transmitted directly to a third party, and the application of the law on co-principals and accessories to intermediaries (Convention, Article 1);
  - b. How "international business" is interpreted in practice, including whether it covers employment with a foreign government (Convention, Article 1);

- c. Regarding sanctions i) application of the provision in the FBPA that results in no sanctions for a legal person that “has paid due attention or exercised proper supervision to prevent” foreign bribery; ii) application of the revised sentencing guidelines for bribery, including how the profit is determined when calculating fines to be imposed for foreign bribery; and iii) impact on confiscation in foreign bribery cases of the newly established specialised confiscation units in prosecutors’ offices (Convention, Articles 1, 2, 3.1, 3.3);
- d. Whether natural and legal persons are subject to effective, proportionate and dissuasive penalties when cases of foreign bribery are prosecuted under other penal provisions (Convention, Article 3.1);
- e. Provision of MLA by Korea to other Parties to the Anti-Bribery Convention (Convention, Article 9.1); and
- f. Implementation of an amendment to the Commercial Act, due to come into force in April 2012, requiring listed companies to establish “compliance guidelines”, and appoint a “compliance officer” to carry out compliance duties in the guidelines, monitor compliance with the guidelines, and report the results to the board of directors (2009 Recommendation C, and Annex II).

**ANNEX 1: PHASE 2 RECOMMENDATIONS TO KOREA AND ASSESSMENT OF IMPLEMENTATION BY THE WORKING GROUP ON BRIBERY IN 2007**

<i>Phase 2 Recommendations – 2004</i> <sup>58</sup>	<i>Written Follow-Up – 2007</i> <sup>59</sup>
<b>1) Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery</b>	
<p><b>Text of Recommendation 1:</b></p> <p>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).</p>	<i>Partially implemented</i>
<p><b>Text of Recommendation 2(a):</b></p> <p>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:</p> <p>(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).</p>	<i>Not implemented</i>
<p><b>Text of Recommendation 2(b):</b></p> <p>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:</p> <p>(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).</p>	<i>Satisfactorily implemented</i>
<p><b>Text of Recommendation 3(a):</b></p> <p>With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Korea:</p>	<i>Partially implemented</i>

<sup>58</sup> This column sets out the recommendations of the Working Group on Bribery to Korea in its Phase 2 Report, as adopted in June 2004.

<sup>59</sup> This column sets out the findings of the Working Group on Bribery on Korea's Phase 2 Follow-Up Report, as adopted by the Working Group in March 2007.

<p>(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).</p>	
<p><b>Text of Recommendation 3(b):</b></p> <p>With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Korea:</p> <p>(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).</p>	<p><i>Not implemented</i></p>
<p><b>Text of Recommendation 3(c):</b></p> <p>With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Korea:</p> <p>(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).</p>	<p><i>Satisfactorily implemented</i></p>
<p><b>Text of Recommendation 3(d):</b></p> <p>With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Korea:</p> <p>(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)</p>	<p><i>Satisfactorily implemented</i></p>
<p><b>Text of Recommendation 4(a):</b></p> <p>With respect to measures to disallow the deductibility of bribe payments to foreign public officials, the Working Group recommends that Korea:</p> <p>(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).</p>	<p><i>Satisfactorily implemented</i></p>
<p><b>Text of Recommendation 4(b):</b></p> <p>With respect to measures to disallow the deductibility of bribe payments to foreign public officials, the Working Group recommends that Korea:</p> <p>(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).</p>	<p><i>Satisfactorily implemented</i></p>
<p><b>2) Recommendations for Ensuring Effective Prosecution and Sanctioning of Bribery of Foreign Public Officials</b></p>	

<p><b>Text of Recommendation 5(a):</b></p> <p>With respect to measures for ensuring the effective prosecution of foreign bribery offences, the Working Group recommends that Korea:</p> <p>(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).</p>	<p><i>Not implemented</i></p>
<p><b>Text of Recommendation 5(b):</b></p> <p>With respect to measures for ensuring the effective prosecution of foreign bribery offences, the Working Group recommends that Korea:</p> <p>(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).</p>	<p><i>Satisfactorily implemented</i></p>
<p><b>Text of Recommendation 6(a):</b></p> <p>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:</p> <p>(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).</p>	<p><i>Not implemented</i></p>
<p><b>Text of Recommendation 6(b):</b></p> <p>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:</p> <p>(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).</p>	<p><i>Satisfactorily implemented</i></p>
<p><b>Text of Recommendation 6(c):</b></p> <p>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:</p> <p>(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).</p>	<p><i>Partially implemented</i></p>

**3) 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);
  - (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);
  - (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 nonfinancial 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);
- (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).

## ANNEX 2: LIST OF PARTICIPANTS IN THE ON-SITE VISIT

### **Government Ministries and Bodies**

- Anti-Corruption and Civil Rights Commission
- Board of Audit and Inspection
- Korea Eximbank
- Korea Financial Intelligence Unit
- Korean International Cooperation Agency
- Korea Public Procurement Service
- Korea Trade Insurance Corporation
- Korea Trade Investment Promotion Agency
- Ministry of Foreign Affairs and Trade
- Ministry of Justice
- Ministry of Strategy and Finance
- Ministry of Unification
- National Police Agency
- National Tax Service
- Supreme Prosecutors Office

### **Judiciary**

- Supreme Court

### **Private Sector**

#### *Private enterprises*

- Representatives from six large enterprise groups
- Representatives from two SMEs

#### *Business associations*

- Federation of Korean Industries
- Korean Chamber of Commerce and Industry
- Korea Employers Federation
- Korea Federation of Small and Medium-sized Enterprises
- Korea International Trade Association

#### *Legal profession and academics*

- Representative from Korean Association for Corruption Studies, Baekseok University
- Representative from Yonsei Law School

#### *Accounting and auditing profession*

- Korea Accounting Institute
- Korean Institute of Certified Public Accountants

### **Civil Society**

- Transparency International Korea

**ANNEX 3: TABLE OF FBPA CASES PROSECUTED IN KOREA (FEBRUARY 1999-OCTOBER 2011)**

<b>Name of Case</b>	<b>Year of Conviction</b>	<b>Court Imposed Sanctions (Natural Persons)</b>	<b>Court Imposed Sanctions (Legal Persons)</b>	<b>Amount of Bribe</b>	<b><i>Quid pro quo</i></b>	<b>Summary of facts</b>
<b>1. Construction Company Case</b>	2002 - 2003: sentence appealed	- CEO sentenced to 18 months imprisonment and fine of KRW 10 million (USD 10 000).  - On appeal, prison sentence for CEO suspended for 3 years.	- Company fined KRW 100 million (USD 100 000). On appeal sentence of company confirmed.	- Promised bribe of about USD 600 000 (converted from KRW).  - Delivered bribe of about USD 400 000 (converted from KRW).	Construction contracts worth about USD 21.3 million (converted from KRW).	- Bribery of US army procurement official.  - Bribery took place in Korea.  - Foreign public official's wife acted as intermediary.
<b>2. Seo Case</b>	2004	- CEO sentenced to 10 months imprisonment and fine of KRW 10 million (USD 10 000).		- Bribes given totalled about USD 50 000 (converted from KRW) to obtain procurement contract.  - Bribes totalling USD 20 000 offered to stop investigation process by	- Bribes were for purpose of obtaining contracts to supply goods to army.  - No information on value of contracts.	- Bribery of US army procurement official.  - Bribery of US army inspector.  - Bribery took place in Korea.

				US army inspector.		
<b>3. Ji Case</b>	2004	- CEO of supplier company fined KRW 7 million (USD 7000).		- Bribes totalling KRW 11.5 million (USD 11 000) given by one CEO.	- Bribes were given to obtain contracts to deliver deficient goods to US army.	- Bribery of US army procurement official.
<b>4. Ahn Case</b>		- CEO of another supplier company fined KRW 1.5 million (USD 1500).		- Bribes totalling KRW 3.7 million given by other CEO.	- No information on value of contacts.	- No information on value of contacts.
<b>5. Cleaning Service Company Case</b>	2004	- President of company fined KRW 7 million (USD 7000).  - Employee fined KRW 3 million (USD 3000)		- Bribes totalling KRW 36 million given (USD 34 000).	- Bribes were given to obtain renewal of cleaning service contracts with US army.  - No information on value of contracts.	- Bribery of US army procurement official.  - Bribery took place in Korea.  - CEO directed employee to give bribes.
<b>6. No Case and Furniture Supply Company Case</b>	2004	- CEO sentenced to fine of KRW 5 million (USD 5000)	- Company fined 5 million (USD 5000).	- CEO offered bribes totalling KRW 16.3 million (USD 16 000).	- Bribes were given to obtain furniture supply contracts with US army.  - No information on value of	- Bribery of US army procurement official.  - Bribery took place in Korea.

					contracts.	
<b>7. Security Service Company Case</b>	2007	<ul style="list-style-type: none"> <li>- One co-CEO sentenced to imprisonment for 4 years, and fined KRW 7 million (USD 7000).</li> <li>- Other co-CEO sentenced to 8 months imprisonment, and fined KRW 5 million (USD 5000).</li> <li>- Intermediary acquitted.</li> </ul>		<ul style="list-style-type: none"> <li>- Bribes totalling around KRW 305.5 million (USD 290 000) given.</li> </ul>	<ul style="list-style-type: none"> <li>- Bribes given to obtain confidential procurement information regarding contract for security services at US army.</li> </ul>	<ul style="list-style-type: none"> <li>- Bribery of US procurement official.</li> <li>- Bribery took place in Korea.</li> <li>- Bribes given by intermediary, who was brother of the US official.</li> <li>- Intermediary also communicated confidential procurement information back to CEOs.</li> <li>- Bribery detected by third person who was employee of company.</li> </ul>
<b>8. Telecoms Services Company Case</b>	2008	<ul style="list-style-type: none"> <li>- CEO fined KRW 10 million (USD 10 000).</li> <li>- Court gave CEO credit for 58 days of pre-trial incarceration and ordered no further</li> </ul>	<ul style="list-style-type: none"> <li>-Company fined KRW 20 million (USD 20 000).</li> <li>- Prosecution appealed low sentence,</li> </ul>	<ul style="list-style-type: none"> <li>Bribes given as follows: (1) USD 130 000 worth of entertainment (including cash payment of USD 20 000), (2) Promise of 10 000 common</li> </ul>	<ul style="list-style-type: none"> <li>Bribes to US army procurement official and for the purpose of obtaining the following: (1) confidential bid proposal information, which enabled Company to win contract as Internet and phone service provider to</li> </ul>	<ul style="list-style-type: none"> <li>- Bribery of US procurement officials.</li> <li>- Bribery took place in Korea.</li> <li>- Defendant CEO directed</li> </ul>

		<p>imprisonment.</p> <p>- Conviction and sentence affirmed on appeal.</p>	<p>but the appeal was dismissed.</p>	<p>shares of Company, (3) Promise of USD 65 000, the cost of renting a BMW 7 Series car, and (4) payments totalling USD 68 000.</p>	<p>customers on US military installations in Korea, (2) Help handling complaints at the US Army about the poor quality of the services provided by Company, (3) favoured treatment in obtaining contracts, and (4) help handling complaints, maintaining contract, and obtaining new telecommunications contract.</p>	<p>an executive of the company to bribe the foreign public official.</p> <p>- Case detected by US Air Force Office of Special Investigations (OSI).</p> <p>- Joint investigation conducted by Gyeonggi Provincial Police Authority and OSI.</p>
<p><b>9. Merchant Association Case</b></p>	<p>2008</p>	<p>- Company president fined KRW 2 million (USD 2000).</p> <p>- Company vice-president fined KRW 1 million (USD 1000).</p> <p>- Manager in charge of general affairs fined KRW 1 million (USD 1000).</p>		<p>- Bribes offered in form of toiletry and make-up sets, worth around KRW 5.2 million (USD 5000).</p> <p>- Bribes were also offered totalling KRW 21.5 million (USD 20 000).</p>	<p>Purpose of bribes to ease entry procedures into China, and special consideration when clearing through customs in China.</p>	<p>- Bribery of unidentified public officials of Chinese Immigration Office.</p> <p>- Bribery of unidentified officials of Chinese Port Office and China Customs.</p> <p>- Bribery took place in China.</p> <p>- Allegation brought to attention of</p>

						Incheon Metropolitan Police Agency by Chinese petitioner.
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#### **ANNEX 4: LIST OF ABBREVIATIONS, TERMS AND ACRONYMS**

ACA	Act on Anti-Corruption and the Establishment and Operation of the Anti-Corruption And Civil Rights Commission
ACRC	Anti-Corruption and Civil Rights Commission
AML	Anti-Money Laundering
ASCCC	Act on Special Cases Concerning Confiscation and Recovery of Stolen Assets
BAI	Board of Audit and Inspection
CA	Criminal Act
ECA	Export Credit Agencies
EDCF	Economic Development Cooperation Fund
FBPA	Foreign Bribery Prevention Act
KIZ	Kaesong Industrial Zone
KICAC	Korea Independent Commission Against Corruption
KFSC	Korean Financial Supervisory Commission
KOICA	Korea International Cooperation Agency
KoFIU	Korea Financial Intelligence Unit
KONEPS	Korea On-line E-Procurement Service
K-Sure	Korea Trade Insurance Corporation
KOTRA	Korea Trade Investment Promotion Agency
MLA	Mutual Legal Assistance
MOFAT	Ministry of Foreign Affairs and Trade
MOJ	Ministry of Justice
MOU	Ministry of Unification

MOU	Memorandum of Understanding
NTS	National Tax Service
ODA	Official Development Assistance
OECD	Organisation for Economic Cooperation and Development
POCA	Proceeds of Crime Act
PPS	Public Procurement Service
SMEs	Small and Medium Sized Enterprises
SOFA	Status of Forces Agreement
SPO	Supreme Prosecutors Office
STR	Suspicious Transaction Report
WPA	Act on the Protection of Public Interest Whistleblowers