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Korean Implementation of the OECD Bribery Convention: Implications for Global Efforts to Fight Corruption

Jong Bum Kim

KOREA INSTITUTE FOR
INTERNATIONAL ECONOMIC POLICY

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KOREA INSTITUTE FOR INTERNATIONAL ECONOMIC POLICY
300-4 Yomgok-Dong, Seocho-Gu, Seoul 137-747, Korea
Tel :02)3460-1045 / FAX: 02)3460-1144,1199
URL: http//www.kiep.go.kr

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KOREA INSTITUTE FOR
INTERNATIONAL ECONOMIC POLICY (KIEP)
300-4 Yomgok-Dong, Seocho-Gu, Seoul 137-747, Korea
Tel: (822) 3460-1045 Fax: (822) 3460-1144
URL: http://www.kiep.go.kr

Kyung Tae Lee, *President*

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Executive Summary

The OECD Bribery Convention is an important milestone in the global efforts to combat bribery and corruption. The convention, which entered into effect on February 15, 1999, effectively criminalizes the bribery of a foreign public official. However, it is limited in that it deals with the bribery of a foreign public official by developing measures against bribe-giving activity only. The convention does not deal with the problem of the bribe receiving foreign public officials. In addition, the convention does not deal with the bribery and corruption that do not involve transnational business.

Although the OECD Bribery Convention tackles only with the supply side of bribery in transnational business, it sets an important standard for combating bribery in both domestic as well as transnational business. Specifically, the OECD Bribery Convention establishes the criminal liability of a legal person. In addition, it imposes sanctions against the proceeds obtained from bribery. For some countries, these instruments against bribery are not established for domestic bribery offense. In the case of Korea, the implementing legislation of the OECD Bribery Convention establishes the criminal liability of a legal person. Also, it establishes monetary sanctions against the proceeds obtained from the bribery. In contrast, the Korean Criminal Codes punishing the offense of the bribery of a domestic public official do not establish similar measures against domestic bribery.

This paper compares the legal purposes behind the OECD Bribery Convention and those behind the Korean Criminal Codes on bribery

offenses. The legal purpose behind the OECD Bribery Convention is primarily the protection of fair competitive condition in the international business transactions, while the legal purpose behind the Korean Criminal Codes is the protection of "incorruptibility" of a public official's duty. This paper argues that the Korean Criminal Codes should also be reinterpreted to protect the fair competitive conditions in the domestic market. It is recommended that the Korean Criminal Codes on domestic bribery should be amended to incorporate the new instruments introduced in the OECD Bribery Convention.

In today's rapidly globalizing world, bribery and corruption has no national boundaries. In a global effort to combat corruption, all the trading nations in the world should adopt the OECD Bribery Convention so that the existing criminal measures to fight domestic corruption would be strengthened in line with the measures introduced to fight transnational bribery in the OECD Bribery Convention.

Dr. Jong Bum Kim is currently working as a Specialist, Trade Affairs for the Ministry of Foreign Affairs and Trade of the Republic of Korea. He earned his Ph.D. in Economics from University of California, Riverside. He is currently on leave as a Research Fellow from Korea Institute for International Economic Policy. Corresponding Address: 77 Sejongro Jongro-Ku, Seoul 110-760, S. Korea. E-mail: jbkim98@mofat.go.kr

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I. Introduction

Corruption and bribery has no national boundaries. As the rapid growth of international trade and investment and multi-national corporations deepens global economic integration, corruption and bribery have taken international dimensions. Nearly all nations already have domestic criminal laws prosecuting bribery of domestic public officials. However, it was only until recently that nations have started to fight corruption in cross-border commerce. Led principally by the organization of Economic Cooperation and Development (OECD), the OECD member countries have now joined efforts to combat corruption by criminalizing bribery of a foreign public official.

The efforts by the OECD member countries have culminated in the signing of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions("OECD Bribery Convention") on December 17, 1997.[1] In the countries ratifying the

* Specialist, Trade Affairs, The Ministry of Foreign Affairs and Trade of the Republic of Korea; Research Fellow (On Leave), Korea Institute for International Economic Policy (KIEP); Lead Examiner, OECD Working Group on Bribery in International Business Transactions.

1) Convention on Combating Bribery of Foreign Public Officials in Interna-

OECD Bribery Convention, which entered into force on February 15, 1999, bribery of a foreign public official would be made a criminal offense.[2] Although the OECD Bribery Convention is an important milestone in the efforts to combat corruption, its scope is limited to the bribery of a foreign public official. Moreover, the OECD Bribery Convention is limited in that it primarily deals with the supply side of the bribery but leaves the demand side to existing domestic criminal laws in individual countries. In other words, it punishes a briber giver for the "active bribery" of a foreign public official but not a bribe receiving foreign public official for the "passive bribery".[3]

As the eighth largest exporting country in the OECD,[4] in the course of implementing the OECD Bribery Convention, Korea has enacted the Foreign Bribery Prevention Act ("FBPA") on December 28, 1998.[5] The

tional Business Transactions and related Documents, OECD Document, DAFFE/IME/BR(97)20.

2) Twenty-eight OECD member countries and five non-member countries including Argentina, Brazil, Bulgaria, Chile, and Slovak Republic signed the convention on December 17, 1997. Australia signed the convention later on December 7, 1998. Twelve member countries of the OECD have ratified the convention as of February 26, 1999. *See* Inside US Trade, Dec. 25, 1998

3) In general "active bribery" refers to the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery" which refers to the offence committed by the official who receives the bribe.

4) See *Supra* note 1 at 11, Annex to the OECD Convention.

5) Korea ratified the OECD Bribery Convention on January 4, 1999, and the domestic implementing legislation, FBPA, entered into force with the entry into force of the OECD Bribery Convention on February 15, 1999. *See* Steps Taken and Planned Future Actions by Each Participating Country

introduction of the OECD Bribery Convention in Korea, however, has resulted in an anomalous situation in which the sanction against the bribery of a domestic public official according to the Korean Criminal Codes is less severe than that of bribery of a foreign public official according to the FBPA. This anomaly stems from the fact that the legal purpose of the FBPA is quite distinct from the usual interpretation of the legal purpose behind the Korean Criminal Codes against bribery of a domestic public official.[6] Specifically, a problem arises because the legal purpose of the FBPA supports fair and competitive condition in the international market while the Korean Criminal Codes fail to support the same principle in the domestic market.

As the global economic integration progresses, the distinction between domestic and international markets is becoming increasingly blurred. Today, multinational companies operate in many countries, and bribery takes place across national borders involving various nationalities. In a globalized market, the distortion resulting from bribery and corruption will have global repercussions. Therefore, in order to combat bribery and corruption effectively, a government must combat bribery of both foreign as well as national public officials with equal intensity. It would not be sustainable for governments to support a global standard in the international market without supporting an equivalent standard in the national market.

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to Ratify and Implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD Document, DAFFE/IME/BR(99)22.

6) The legal purpose of the OECD Bribery Convention is broadly stated in the preamble of the OECD Bribery Convention. In the OECD Bribery Convention, it is explicitly stated that among other things bribery distorts competitive conditions in the international market.

In Korea, protection of competition in the domestic market has become increasingly important especially since one of the causes of Korea's economic and financial crisis in 1997 has been attributed to the lack of competitiveness in the Korean economy. The entrenched corruption of public officials at all levels, which undermined fair competition in the economy, has contributed significantly to the economic crisis. Therefore, bribery and corruption in the national market has to be combated in order to promote fair competition in the national market. However, in addition to combating transnational corruption with the adoption of the OECD Bribery Convention, Korea needs to strengthen the measures to fight domestic corruption. Specifically, as an indirect result of its participation in the global efforts to fight transnational bribery,[7] the Korean Criminal Codes need to be amended so that sanctions against the bribery of a domestic public official would be strengthened to meet the global standard set in the OECD Bribery Convention. This would be an indirect result of Korea's participation in the global efforts to fight national corruption.

In this paper, I analyze the process of international convergence of norms through the examples of the OECD Bribery Convention and Korea's FBPA. The first section of this paper will introduce the increased multilateral efforts to fight corruption. This section will, in particular, describe how the awareness of the various harms of corruption generated the multilateral momentum to fight bribery and corruption. The second section of this paper will discuss the

7) Philip M. Nichols analyzes transnational bribery in the context of the anomaly arising from globalization and the remaining fragmentation in decision-making at local levels. Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 The Yale Journal of International Law, 257, 260 (1997).

significance of the OECD Bribery Convention, especially by focusing on its various instruments available to fight transnational bribery. The third section discusses Korea's implementation of the OECD Bribery Convention. This section analyzes how the FBPA and the Korean Criminal Codes differ in their purposes and in some of their elements. The final section suggests that the differences between the two laws with regard to the sanctions against the profits obtained from bribery and with regard to the liability of a legal person may eventually have to be reconciled. In conclusion, this article draws a few lessons from Korea's implementation of the OECD Bribery Convention for our global efforts to combat corruption.

II. Multilateral Efforts to Combat Corruption

A. Overview of the Consequences of Corruption

Corruption benefits the few at the expense of many by distorting public policy decision-making. Particularly in developing countries, it undermines efficient allocation of badly needed financial resources for economic development. Moreover, corruption also undermines the legitimacy of the political process resulting in the breakdown of public trust in the government. Thus, combating corruption as an effort to promote good governance is necessarily becoming a key element of economic development.[8]

An important lesson we can learn from the Asian financial crisis of 1997 is that countries that are riddled with graft and corruption are subject to risks of the volatile international financial market. As a result of the financial crisis, it has become more evident that national governments need to provide a sound environment for foreign investors so that the economy will be less subject to the volatility of international financial capital. Corruption was also blamed for slowing the implementation of the necessary response to the crisis and posing as a major obstacle to restoring confidence that is critical to the

8) *See* Robert Rubin, *Statement of Treasury Secretary Robert Rubin*, A Global Forum on Fighting Corruption: Safeguarding Integrity Among Justice and Security Officials, speech delivered at the Global Forum on Fighting Corruption, Wednesday, February 24, 1999 〈http://www.insidetrade.com〉. Robert Rubin refers to good governance as an important dimension to an environment conducive to attracting private capital.

country's recovery and stability.[9] The global investors could not find confidence in an economy unless they saw the government's clear commitment to fight corruption.

In a recent study, it has been shown that countries suffering from pervasive corruption invest less and achieve lower economic growth.[10] Another study linking corruption and foreign direct investment has shown that "an increase in corruption level from that of Singapore to that of Mexico is equivalent to raising the tax rate by over 20 percentage points."[11] A high degree of corruption in an economy such as Mexico effectively works as taxes on foreign direct investments. From these studies, we learn that corruption clearly poses as an investment barrier, which stunts economic growth.

In another dimension, corruption in developing countries not only stunts economic growth but also alters the composition of public expenditure. Specifically corrupt governments spend less on public expenditure and health care.[12] Thus, corruption inflicts heavy costs to the most disadvantaged population in the country. Specifically, corruption is most detrimental to ordinary citizens in developing countries because corruption of low ranking officials handling administrative services makes the daily life of ordinary citizens very

9) *See id.*

10) Paolo Mauro, *The Effects of Corruption on Growth, Investment, and Government Expenditure: A Cross-Country Analysis, Corruption and the Global Economy*, 83-107, (Kimberly Ann Elliott, eds., Institute for International Economics, Washington DC) (1997).

11) Shang-jin Wei, *How Taxing is Corruption on International Investors?* (NBER Working Paper 6030) (1997).

12) Paolo Mauro, *Corruption: Causes, Consequences, and Agenda for Further Research*, 1998, Finance and Development, IMF, at 12.

difficult. As an example of corruption in a developing country, in Nigeria, wealth from oil export since 1974 has failed to contribute to economic growth because of corruption and the private enrichment of the ruling elite.[13] The deeply entrenched corruption stunted economic growth, which resulted in the national income of Nigeria in 1984 amounting to less than that of 1974.[14] The Nigerian economy diminished by annually by 0.4% during the 1980s.[15]

In addition to the negative consequence of corruption on economic development, with the growth of world trade and investment, the international dimension of corruption has been recognized as a serious problem. This is because corruption increasingly involves multinational companies operating both in developing as well as developed countries. Thus, bribery and corruption, which distort the competitive conditions in international business, has become a concern of major trading nations. To protect the competitive condition in the international business transactions, governments can no longer ignore the bribery of foreign public officials by their firms that conduct business overseas. It is not an exaggeration to state that "today's decisive battles for free trade, development, and democracy may well be fought in the campaign against corrupt practices."[16] Concerted multilateral efforts are required to combat corruption to assure the continued growth of world trade and investment.

13) Susan Rose Ackerman, *The Political Economy of Corruption*, 44, (Kimberly Ann Elliott, eds., *Corruption and the Global Economy*, Institute for International Economics, Washington DC) (1997).

14) *See id.*

15) *See id.*

16) *See* Robert S. Leiken, *Controlling the Global Corruption Epidemic*, Foreign Policy, Winter 1996, at 55–73.

B. Corruption as Trade and Investment Barrier

The scope of bribery involved in international transactions has increased as world trade and investment expanded. If only 5% of the 28 billion dollars of FDI inflows to developing countries is used for bribing, the total bribe amounts to 6.4 billion dollars.[17] More importantly, if a similar method of calculation is used for world trade in goods and services, the amount of bribe involved in world trade would be estimated to be more than 652 billion dollars.[18] It will be primarily the consumers of the country receiving foreign direct investments or participating in international trade who will have to shoulder the enormous cost of corruption.

If bribery and corruption are engaged as a second-best response to existing trade barriers, then they will arguably expand trade and investment which otherwise would have been suppressed. For instance, bribes may be given to reduce tariffs, lower government revenue while perhaps increasing trade. Also, bribes might be given to bypass inefficient regulations that might discriminate against foreign investors. Moreover, small-scale bribes, which for example, facilitate the passage of imports through customs, may arguably promote trade and investment. However, bribery and corruption in reality is not limited to greasing the system to facilitate trade and investment. Officials who are unscrupulous enough to take small-scale bribes to facilitate trade will undoubtedly also take a large-scale sums of bribes to influence

17) *See* Ackerman, *Supra* note 13 at 32.

18) *See The World Trade Organization Annual Report*, International Trade Statistics, 1998. The calculation is based on 1996 total world trade in goods and services. *Id.*

decisions in obtaining and retaining businesses or to gain other important advantages. In return for the bribe, the corrupt official might, for example, allow the company to violate important environmental and safety standards. Small-scale, facilitating bribes are just another aspect of overall phenomenon of corruption.

For companies that refuse to engage in the practice of bribing foreign public officials, the pervasive practice of bribery and corruption in international business would pose as non-tariff barriers to trade and investment. First, a corrupt environment inherently favors domestic firms over foreign firms because foreign firms may be less skilled in local practices of bribery. Second, foreign firms are may be prohibited from giving bribes by their national legislation, which would place them at a disadvantage compared to firms from countries that have not yet ratified the OECD Bribery Convention.

In a recent survey in Korea, high level executives of multinational companies found it difficult to do business in Korea because Korean public officials solicited bribes in the form of pecuniary payments as well as other services. Among the executives surveyed, 73% of the respondents said that they had been asked to pay bribes of some form, either directly or indirectly, and 50% of those surveyed complied to the solicitation of bribes by paying some sort of bribe.[19] As many as 30% also said that because of the pervasive corruption, they are seriously considering the option of moving their business to another country.[20] If Korea does not vigorously enforce bribery laws against bribery of national public officials, it is likely that the competition will

19) Young-soo Kim, *Foreign Companies Victims of Extortion*, Digital Chosun-ilbo, June 27, 1999, 〈http://www.chosun.com〉.

20) *See id.*

be tilted in favor of domestic firms, which are well versed in the corrupt local practices. Moreover, it is also possible that domestic firms may be are subject to the Korean Criminal Laws on bribery which impose weaker sanctions than the implementing laws of the OECD Bribery Convention in the home country of a multinational. This would further tilt the playing field in favor of domestic firms.

In view of the fact that the magnitude of bribery and corruption involved in international business transactions depends on the size of the international trade and investment, the primary responsibility of fighting corruption to uphold the international trading system would fall naturally on the shoulders of those countries that are major trading nations. Those companies giving bribes to foreign public officials are engaging in the degradation of competitive market system in the foreign country. In addition, since the international trade and investment involve competition among companies of domestic as well as foreign origin, corruption will undermine the international trading system by distorting import and investment decisions.

In recent years, member countries of the OECD who are major trading nations in the world have been building a consensus that each country must be responsible for the conduct of its own companies regardless of where they operate in order to support the international trading system. On the basis of this consensus, the OECD member nations have agreed on the OECD Bribery Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. By successfully binding national governments to criminalize the bribery of a foreign public official, the OECD Bribery Convention has built the most significant multilateral instrument in the fight against bribery and corruption. As an international treaty, it would require those governments that have ratified the treaty to criminalize the

bribery of foreign public officials.

C. Multilateral Efforts to Fight Transnational Corruption

World-wide initiatives against corruption employ many different tools. Some tools deal with transnational bribery alone while others deal with transnational bribery in conjunction with domestic bribery. The prime example of a multinational effort to deal with transnational bribery is the OECD Bribery Convention that criminalizes the bribery of foreign public officials. Other multinational efforts combat the bribery and corruption of both domestic and foreign public officials.

Corruption is fought at the supply side as well as the demand side. Supply side measures focus on prevention and punishment of offering of bribes, while demand side measures counter a public official's incentives to receive bribes. Earlier efforts to combat corruption go back to the 1970s when the U.S. pushed hard in the Economic and Social Council (ECOSOC) for an international agreement on illicit payments. The draft of the international agreement was modeled after the U.S. FCPA ("Foreign Corrupt Practices Act") which prohibited U.S. companies from giving bribes to foreign public officials. However, the effort failed because of the division between developed and developing countries over the definition of illicit payment.[21] The UN ("United Nations") efforts were later rekindled in the 1990s with the adoption of the UN declaration against Corruption and Bribery in International Commercial Transactions on February 21, 1997. The

21) *See* Mark Pieth, *The Political Economy of Corruption*, 122, (Kimberly Ann Elliott, eds., *Corruption and the Global Economy*, Institute for International Economics, Washington DC) (1997).

declaration urged countries to make commitments to take effective actions to combat all forms of corruption and bribery and related illicit practices in international commercial transactions.[22] In addition, the declaration urged countries to commit themselves to criminalize bribery of a foreign public official in an effective and coordinated manner.[23] The declaration is limited, however, in that it's not binding, and an escape clause allows the implementation of the declaration to be subject to each state's own constitution and fundamental legal principles. On the demand side of the fight against bribery and corruption, the UN adopted, on December 12, 1996, the International Code of Conduct for Public Officials. This code of conduct sets out principles that public officials of all nations should uphold to preserve the integrity of public offices.

In contrast to the UN declaration and the International Code of Conduct for Public Officials, the OECD has worked towards adopting a more concrete and binding anti-corruption program although limited to OECD members who are mostly developed countries. In 1994, the OECD member countries agreed on a formal recommendation calling on member countries to take "effective measures to deter, prevent, combat the bribery of a foreign public official." This recommendation was followed by another measure in 1996, which called for the elimination of the practice of allowing tax deductibility of bribes paid to foreign public officials. In 1996, at least 14 OECD countries allowed tax deduction in various forms, but this has been reduced to eight countries as of February, 1999.[24]

22) *See* The United Nations Declaration against Corruption and Bribery in International Commercial Transactions at art. 1.

23) *See id*, art. 2.

24) *See* Stuart E. Eizenstat, *An anti-corruption and Good Governance Strategy*

In addition to the set of recommendations, the OECD took a bold step in 1997 to negotiate an international treaty to criminalize the bribery of a foreign public official. In mid 1997, negotiation was launched and 29 member countries of the OECD and five non-member countries signed the OECD Bribery Convention on December 17, 1997.[25]

The OECD Bribery Convention is a historic achievement in that it has attacked the supply side of corruption by agreeing on the criminalization of the bribery of foreign public officials through a binding international treaty. Moreover, the OECD Bribery Convention has ensured an effective implementation by providing follow-up monitoring mechanisms.

In the western hemisphere, the member states of the OAS adopted the Inter American Convention against Corruption ("OAS Convention") on March 1996. The OAS Convention has made a successful attempt to fight the supply side of corruption by harmonizing rules against both national as well as transnational bribery. In criminalizing both national and transnational bribery, the Bribery Convention has employed a broader definition of bribery. The Convention attacks illicit enrichment and other corrupt conduct which goes beyond offering, promising or giving payments "in order to obtain or retain business or other improper advantage in the conduct of international business."[26]

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for the 21st century, speech delivered at the Global Forum on Fighting Corruption, Wednesday, February 24, 1999.

25) The OECD Bribery Convention went into effect on February 15, 1999 after five of the top 10 OECD exporters which account for 60 percent of the group's exports ratified the OECD Convention. See *Global Anti-Bribery Convention Set To Go Into Effect*, Inside US Trade, Dec. 25, 1998, Vol. 6, No. 51.

26) *See* Rex J. Zedalis, *Internationalizing Prohibitions on Foreign Corrupt Practices: The OAS Convention and the OECD Revised Recommendation*, Journal of

Despite its broad scope, the Convention includes an escape clause that allows each country to adopt its own measures to punish the bribery of foreign public officials subject to its constitution and the fundamental principles of its legal system.[27]

In Europe, efforts to fight corruption have also made significant progress. However, the coverage of this effort has been limited to EU community officials and officials of member states. The first major effort is the First Protocol to the Convention on the Protection of the Financial Interests of Community adopted on September 27, 1996.[28] It asks member states to criminalize active and passive bribery committed by or against Community officials and public officials of member States that affect the financial interests of the Community. However, in the following year, the Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (EU Bribery Convention), adopted by the Council on May 26, 1997 expanded the scope of the criminalization of bribery by dropping the reference to the financial interests of community officials.[29] Still, in contrast to the OECD Bribery Convention, the EU Bribery Convention does not cover the bribery of public officials of non-EU member countries. In this regard, the EU

World Trade, 31 J.W.T. 6, December 1997 at 51.

27) See Art. VIII of Inter-American Convention against Corruption ("OAS Convention"). The OAS Convention entered into force on March 6, 1997, thirtieth date following the date of deposit of the second instrument of ratification.

28) U.N. Economic and Social Council, Promotion and Maintenance of the Rule of Law: Action Against Corruption and Bribery, at 10, E/CN. 15/1998/3 (1998).

29) *See id.*

Bribery Convention is not intended to protect international trade and commerce from corruption but instead is intended to protect the internal trade and economic interests of member states in the European Union. The EU's efforts to fight corruption within the European Union is part of a larger arrangement according to the Maastricht Treaty to foster coordination on the basis of unanimity among EU member states.[30]

In another front, the Council of Europe has drafted Criminal Law Convention on Corruption, which was signed on January 27, 1999.[31] The draft Convention fights corruption both on the demand side as well as on the supply side. Unlike the approach taken in the European Union, the Council of Europe is seeking a comprehensive fight against corruption by addressing national and transnational bribery. The current draft includes both active and passive bribery of national as well as foreign public officials. In addition, it is also noteworthy that the draft Convention expands the notion of bribery to trading of influence involving public officials.[32]

Behind the multilateral governmental efforts, which leaped forward during the 90s, non-governmental organizations such as Transparency International (TI), at grass-root levels, mobilized world-wide public opinions against corruption. The TI has successfully stimulated public discussion of corruption with its publication of the Corruption

30) *See* Mark Pieth, *World Wide Initiatives Against Transnational Corruption*, (Aug. 1998), (Paper presented at the 12th ICC Congress in Seoul).

31) The Criminal Law Convention on Corruption, 〈http://www.coe.fr/eng/legaltxt〉.

32) *See* Promotion and Maintenance of the Rule of Law: Action against Corruption and Bribery, Economic and Social Council, United Nations, E/CN.15/1998/3, 23 March 1998.

Perception Index (CPI) since 1995. The index ranked countries according to the degree of corruption. As a result of the publication of the index, in some countries, substantive anti-corruption reforms have been launched.[33] The CPI has revealed the correlation between corruption and the level of living standard. As a result, international lending institutes are now making use of the CPI as a valuable tool for fighting corruption in developing countries.[34]

Lastly, the World Bank and the IMF, as international lending institutes, are using its lending power to induce loan-receiving countries to clean up corruption in their countries.[35] This is a concrete effort to fight corruption on the demand side. In the past, corruption has been considered as a political factor, which was not taken into account in lending decisions. Today, corruption is explicitly taken into account in country risk analysis, lending decisions, and portfolio supervisions. The World Bank now considers whether bank projects are likely to be affected by corruption and the extent to which development objectives are likely to be compromised by corruption in all its lending decisions.[36] For instance, the World Bank recently reduced its lending to Kenya and Nigeria in a recent case because of the pervasive corruption which had posed substantial risks to loans in those countries.[37]

33) *See 1998 Corruption Perception Index*, TI Press Release 〈http://www.transparency.de〉.

34) *See id.*

35) *See* The World Bank, *Helping Countries Combat Corruption: The Role of the World Bank*, September, 51 (1997).

36) *See id.*

37) *See* The Economist, *Honest Trade: A global war against bribery*, , Jan. 16, 1999. at 23.

III. OECD Bribery Convention

A. Overview of the Convention

The OECD Bribery Convention came into effect on Februrary 15, 1999, on the sixtieth day following the day it reached the critical mass of implementation. The convention focuses on solving the supply side of bribery by criminalizing the active bribery of a foreign public official. In addition, the accounting provision of the convention requires countries to take measures against false accounting practices such as establishing off-the-books accounts. Another instrument adopted in the convention is the money laundering clause which makes bribery of foreign public officials a predicate offence for the purpose of money laundering legislation.[38] Despite the convention's narrow focus on dealing with only active bribery" of foreign public officials, the measures adopted in the convention are powerful tools in the fight against bribery and corruption.

The OECD Bribery Convention is noteworthy in that it is the first successful effort to establish a binding international obligation among major trading and investing nations of the world to fight entrenched practices of bribing foreign public officials in international business transactions. Most significantly, the Convention employs monitoring

38) Money laundering requirement applies to only those countries, which has made bribery of its own public officials a predicate offense for the purpose of the application of its money laundering legislation. *See* the OECD Bribery Convention at art. 7, 〈http://www.oecd.org/daf/nocorr-uption〉.

and follow-up measures to promote the full implementation of the OECD Bribery Convention.[39] The OECD Working Group on Bribery in International Business Transactions is entrusted with the job of monitoring. This process will include two phases: the first phase will evaluate whether the domestic implementing legislation meet the standards set by the convention, and the second phase will study and assess the institutional structures to enforce the laws and the application of the laws and rules in practice.[40]

The OECD Bribery Convention is a significant achievement in the fight against bribery and corruption because it seeks harmonization of domestic policy with regard to bribery and corruption but achieves this without compromising the fundamental principles of each country's legal system. This harmonization is achieved by pursuing functional equivalence among the measures taken by each country to punish the bribery of a foreign public official.[41] This approach was put to test especially in the context of corporate liability and sanctions clauses. If establishing liability of legal persons conflicted with the legal principles of some OECD member countries, such a country can substitute criminal sanctions of legal persons for the bribery of a foreign public official by non-criminal sanctions that are effective, proportionate and dissuasive.[42] With regard to seizure and confiscation

39) *See id*, at art. 12.

40) *See* The Procedure of Self and Mutual Evaluation of Implementation of the OECD Bribery Convention and the Revised Recommendation 〈http://www.oecd.org/daf/nocorruption/selfe.htm〉.

41) *See* the Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Commentaries"), at para. 1, 〈http://www.oecd.org/daf/nocorruption/instruments.htm〉.

42) *See* OECD Bribery Convention, *supra* note 1, art. 3.2.

of a bribe and proceeds of the bribery, the convention allows for a substitute monetary sanction for those countries where the legal tradition is inconsistent with such sanctions.[43]

B. Purpose of the Convention

The objective of the convention, as stated in the preamble, is to combat bribery in international business transactions. Three major harms of bribery and corruption are mentioned in the convention. First, bribery and corruption raises serious moral and political concerns.[44] Second, they undermine good governance and economic development.[45] Third, it distorts international competitive conditions.[46] In addition to these objectives, the convention aims to achieve functional equivalence among the measures adopted by each party in combating bribery and corruption in international business transactions.

C. Elements of Bribery

The OECD Bribery Convention defines the offence of bribery of foreign public officials in Article 1. The undue pecuniary or other advantage offered, promised or given to a foreign public official will constitute a bribe if it is intended to obtain or retain business or other improper advantage in the conduct of international business. Small facilitation payments, however, is not included in the definition of the

43) *See* OECD Bribery Convention, *supra,* note 1, art. 4.3.

44) *See* OECD Bribery Convention, *supra* note 1, preamble, para. 1.

45) *See id.*

46) *See id.*

payments to "to obtain and retain business," because it is thought that criminalization would not be a practical or effective measure to fight this type of payment.[47]

The convention adopts a definition of "foreign public officials", which is both a mixture of an autonomous definition independent of the local law and a definition implicitly dependent on the national law of the bribe receiving public official's country. First, "foreign public official" is defined as any person holding a legislative, administrative or judicial office in a foreign country.[48] Since the respective laws of a foreign country will have varying definitions of legislative, administrative or judicial offices, this definition is complemented by a functional definition of foreign public official which is any person exercising a public function for a foreign country, including for a public agency or public enterprise.[49] This functional definition is further elaborated additionally by providing definitions of public function, public enterprise, and public agency in the Commentaries.[50] In accordance with the functional definition of foreign public official, if a private person by the victim country's law engages in public function, such as participation in a committee with the authority to decide on a public procurement, then the person will be considered a public official. Lastly, the definition of public official also includes any official or agent of a public international organization.[51] According to this definition, for example, an official of a regional integration organization such as European Communities will be considered a public official.

47) *See* Commentaries, note 41, above, at para 9.

48) *See* OECD Bribery Convention, *supra* note 1, art. 1.4.a.

49) See Commentaries, *supra* note 47.

50) *See* Commentaries, *supra* note 41, para. 12, 13, 14.

51) *See* OECD Bribery Convention, *supra* note 48.

D. Corporate Liability and Sanctions

The OECD Bribery Convention establishes the liability of a legal persons for the bribery of a foreign public official, and a criminal sanction is applicable to the legal person for the offense if the legal system of the country allows it. In countries where criminal responsibility of a legal person is not applicable, the countries shall not be required to establish such criminal responsibility.[52] In the case of Korea, although the criminal responsibility of a legal persons is generally not established for other domestic crimes, the domestic implementing legislation of the OECD Bribery Convention explicitly adopts criminal liability of legal persons.[53]

E. Jurisdiction

The OECD Bribery Convention establishes jurisdiction based on either territoriality or nationality principle.[54] Territorial jurisdiction can be found if the offence is committed in whole or in part in one's territory. The interpretation of "in whole or in part" is broad enough such that an extensive physical connection to the act of bribery is not required.[55] According to the same principle, if a country has jurisdiction to prosecute its national for offences committed abroad, it

52) *See* Commentaries, *supra* note 41, above, at para. 20.

53) *See* the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions ("FBPA") at para. 4. Unofficial translation available on request from 4th Prosecution Division, Prosecution Bureau, Ministry of Justice, Republic of Korea.

54) *See* OECD Bribery Convention, *supra* note 1, above, art. 4.1 and 4.2.

55) *See* Commentaries, *supra* note 41, at para. 25.

shall also establish the same jurisdiction with respect to the bribery of a foreign public official.[56] Following the above jurisdictional principle, non-nationals who bribe a foreign public official would be subject to prosecution if the crime is committed in part in the territory regardless of whether the public official is a national of the bribe giver's country or a national of a third country. This case raises the possibility of overlapping jurisdictions when the authority from the bribe giver's country asserts jurisdiction on the basis of the nationality principle. The jurisdictional conflict will be resolved through a consultation process initiated at the request of one of the countries involved.[57]

F. Entry into Force

Since bribery in international business transactions involves major trading nations, those nations should shoulder the primary responsibility of fighting this phenomenon. The responsibility of major trading nations is reflected in the ratification condition which stipulates that the convention would go into effect on the sixtieth day following the day after five of the top 10 OECD exporters, which accounts for 60 per cent of the total combined exports of those ten countries, have deposited their instruments of ratification.

56) *See* OECD Bribery Convention, *supra* note 1, art. 4.2.

57) *See* OECD Bribery Convention, *supra* note 1, art. 4.3.

IV. Korean Implementation of the OECD Bribery Convention

A. Enactment of the Foreign Bribery Prevention Act

Korea enacted a special law, the Foreign Bribery Prevention Act ("FBPA") as the implementing legislation of the OECD Bribery Convention with the purpose of fully incorporating the OECD Bribery Convention to its national law. The FBPA follows to a large extent the text of the Convention. In areas where direct transposing of the text of the Convention results in conflicts with the current legal tradition of Korean laws, the FBPA attempted to achieve a functional equivalence to the OECD Bribery Convention.[58]

The FBPA explicitly states that it aims to establish a sound practice in international business transactions.[59] It also states that the law is intended to provide the details necessary to implement the OECD Bribery Convention. Korea considered the possibility of implementing the OECD Bribery Convention by amending the Korean Criminal Codes on national bribery. However, unlike the FBPA, the Korean Criminal Codes (*Hyongpop*) is not intended to protect the establishment of a sound practice in international business transactions.[60] Moreover, it would have taken too much time to amend the Korean Criminal

58) Korea ratified the OECD Bribery Convention on January 4, 1999. The implementing legislation was enacted on 28, December 1998.

59) See the FBPA, note 53, above at art. 1.

60) The Korean Criminal Codes (*Hyongpop*) criminalize both active and passive bribery under article 129 through Article 133.

Codes because the codes contain basic principles of the Korean Criminal law system. Another option was to amend the Monopoly Regulation and Fair Trade Act which aims to protect fair competition in the national market. However, this option was not chosen because the Monopoly Regulation and Fair Trade Act does not extend its coverage to international business transactions.[61] Therefore, a special law has been enacted to deal with the offense of the bribery of foreign public officials. Yet, the provisions of the Korean Criminal Codes will generally apply to the offences prescribed by special laws, unless provided otherwise in the special law.[62]

B. Definition of Bribery

In the FBPA, any person who promises, gives or offers a bribe to a foreign public official in relation to his or her official duties in order to obtain improper advantage in the conduct of international business transactions shall be subject to prosecution.[63] This language closely follows the language in the Article 1.1 of the OECD Bribery Convention. The act of offering, promising or giving any undue pecuniary or other advantage constitute bribery when the following

61) The purpose of the Korea's Monopoly Regulation and Fair Trade Act as stated in Article 1, Chapter 1 of the Act is "to encourage fair and free economic competition by prohibiting the abuse of market-dominant positions and the excessive concentration of economic power and by regulating improper concerted acts and unfair business practices, thereby stimulating creative business activities, protecting consumers, and promoting the balanced development of the national economy."

62) *See* Hyongpop, *supra* note 60, art. 8.

63) *See* FBPA, *supra* note 53, art. 3.1.

two elements are met. The first element is that the payment has to be made "in order that the official act or refrain from acting in relation to the performance of official duties."[64] The second element is that the payment has to be made "in order to obtain or retain business or other improper advantage in the conduct of international business."[65] In other words, the payment is made to receive a specific favor or as a quid pro quo.

With regard to the bribery of a domestic public official, the Korean Criminal Codes provide that any public official who "receives, demands or promises a bribe in relation to his official duties" will be guilty of bribery.[66] The key element constituting bribery in this codes are that the payment to the official has to be made specifically in relation to his official duties.[67] This is analogous to the first element of bribery to foreign public official as defined in the FBPA. However, the second "quid pro quo" element of bribery is not explicitly written in the Korean Criminal Codes. Thus, the quid pro quo element was left to the interpretation of the courts. The Korean Supreme Court has acknowledged that though a payment was made as a gift or as a social courtesy, if it can be shown as well that the payment was made a "quid pro quo in relation to the official's duty", then the payment will be considered as an illicit bribe.[68]

64) *See* OECD Bribery Convention, *supra* note 1, art. 1.1.

65) *See id.*

66) *See* Hyongpop, *supra* note 60, art. 129.

67) See for more details, Joongi Kim and Jong Bum Kim, *Cultural Differences in the Crusade against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act, 6, Pacific Rim Law & Policy Journal,* 549, 562-564 (1997).

68) Judgment of June 14, 1996, Taepopwon [Supreme Court], 96 Do 865.

The Supreme Court broadly interpreted the nature of the relationship to a public official's duty so that when establishing the offence of bribery, it does not matter whether the public official's duty is violated, whether favors have been requested, or whether the public official's act or omission is within his authorized duty or competence.[69] The public official's duty includes those duties which the public official was responsible for in the past as well as duties the public official is responsible for in the future.[70] In addition, the Supreme Court ruled that the timing of the payment to the public official in relation to the act or omission of official duty is not relevant to establishing the offence of bribery.[71] The above definition of the bribery of a national public official contrasts with the definition of the bribery of a foreign public official in the FBPA. The Korean courts have to ascertain a more explicit requirement that the payment is made "in order to obtain or retain business or other improper advantage in the conduct of business."[72]

C. Definition of a Foreign Public Official

With regard to the definition of "foreign public official," the FBPA closely follows the text of the OECD Bribery Convention and its Commentaries. A "foreign public official is broadly defined in three ways. First, any person holding a legislative, administrative or judicial office of a foreign government, whether elected or appointed, would

69) Judgement of Sept. 25, 1984, Taepopwon [Supreme Court], 84 Do 1568.

70) *Supra* note 69.

71) *Supra* note 69.

72) *See* the FBPA, *supra* note 53, art. 3.1.

be a foreign public official.[73] Second, any person who exercises "public function" for a foreign government and works in the following three specific capacities is defined as a foreign public official.[74] In the first capacity, the person conducts a business for the public interest, delegated by a foreign government. In the second capacity, the person works for a public organization or agency established by law to carry out a specific business for the public interest.[75] In the third capacity, the person works as an executive or employee of any enterprise over which a foreign government exercises controlling power.[76] In the FBPA, "public function" is not explicitly defined, but the definition of "public function" provided in the Commentaries of the OECD Bribery Convention would hold true as the interpretation of the "public function" in the FBPA. Finally, as any person who works for a public international organization is defined as a "public official".[77]

Because the FBPA defines a foreign public official functionally, the scope of public officials covered under the FBPA in a foreign country may possibly be wider than the scope of public officials covered under the Korean Criminal Codes criminalizing receiving or giving of bribes to domestic public officials. This could raise the possibility in which a Korean who bribes a person exercising a public function for the national government would not be prosecuted while another Korean who bribes a person exercising an identical public function for a foreign government would be prosecuted. In Article 2.2 of the FBPA, any person conducting a business, for the public interest, delegated

73) *See* the FBPA, *supra* note 53, art. 2.1.

74) *See* the FBPA, *supra* note 53, art. 2.2.

75) *See id.*

76) *See id.*

77) *See* FBPA, *supra* note 53, art. 2.3.

by a foreign government and exercising public function would be considered a foreign public official, but for the purpose of the Korean Criminal Codes the person exercising identical function and conducting a business, in the public interest for the Korean government may not be considered a public official. The anomaly arises from the fact that the Korean Criminal Codes do not provide a definition of a public official. Instead, various laws such as National Civil Service Law[78] and the Act on Special Sanctions on Certain Criminal Behaviors define a person who will be subject to bribery statutes in the Korean Criminal Codes.

D. Permissible Payments

The FBPA adopts two classes of permissible payments that appear in the Commentaries of the OECD Bribery Convention. First, "if the payment is permitted or required by the law of the foreign public official's country", any person promising, giving or offering a "bribe" will not be subject to prosecution.[79] The "law" in this clause implies regulations and case laws in addition to written laws.[80] Second, if small pecuniary or other advantage is promised, given or offered to a foreign public official in order to facilitate the legitimate performance

78) kuga gongmuwon bop [National Civil Service Law] defines various types of public officials according to their functions.

79) *See* the FBPA, *supra* note 53, art. 3.1

80) The Commentaries make it explicit that in addition to the written law, if regulations and case law permit the payment, then the payment, otherwise illegal, will not be deemed an offence. *See supra* note 41, para 8. Both the exceptions have their origin in the U.S. Foreign Corrupt Practices Act ("FCPA"). *See supra* note 67, at 574–577.

of the official's business, such payment will not be considered an offence.[81] In order for the payment to be considered harmless, the payment should be made to an official who is engaged in ordinary and routine works.[82]

E. Sanctions

The bribery of a foreign public official under the FBPA is punished by a maximum of 5 years' imprisonment or an imposition of fine up to 20 million Won on the briber.[83] If the "gains" obtained from bribery exceeds above 10 million Won, a maximum of 5 years' imprisonment and a fine up to twice the amount of the gains will be imposed on the briber.[84] When an imprisonment sentence is imposed, a criminal fine must be imposed as well. Unlike the Korean Criminal Codes punishing the bribery of a national public official, the court can Impose monetary sanctions against the profits obtained from the bribery of a foreign public official. However, since the OECD Bribery Convention requires that the bribes and the proceeds of the bribe of a foreign public official are subject to monetary sanctions,[85] whenever the proceeds obtained from the bribe are identifiable, the court will have to resort to imposing fines as a monetary sanction. While bribery of a national public official shall be punishable by maximum of five years of imprisonment or fines less than 20 million Won,[86] bribery of

81) *See* FBPA, *supra* note 53, art.3.2.b.

82) *See id.*

83) *See* FBPA *supra* note 53, art. 3.1.

84) *See supra* note 83. The Korean word used for "gains" is "leeyik" which includes both profits and earnings other than the profits.

85) *See* OECD Bribery Convention, note 38, art. 3.3.

a foreign public official is punishable by fines and imprisonment if the profits from the fine are identifiable.

F. Responsibility of Legal Persons

The OECD Bribery Convention establishes the liability of legal persons for bribing a foreign public official.[87] However, this would be done in accordance with the legal principles of individual countries.[88] Following the OECD Bribery Convention, the Korean FBPA established the criminal responsibility of a legal person with the proviso that "if the legal person has paid due attention or exercised proper supervision to prevent the offense," it would not be liable under the FBPA.[89] In order to prove the liability of the legal person, it has to be shown that the legal person has been negligent in paying due attention or exercising proper supervision to prevent the offense. In the case in which the legal person is found liable, fines up to 1 billion Won will be imposed, and when the profit obtained from the bribery exceeds 500 million Won, the legal person will be subject to a fine up to twice the amount of the profit.

In 1992, the Supreme Court found that a general and abstract supervision by the legal person to prevent an offense by its employee was not a sufficient defense against the liability of legal person.[90] In the above case, employees of a company were violating Public Health Law for mediating prostitution. The company, however, objected to its

86) *See* Hyongpop, *supra* note 60, art. 133.

87) *See* OECD Bribery Convention, *supra* note 1, art. 2.

88) *See supra* note 87.

89) *See* FBPA, *supra* note 53, art. 4.

90) Judgement of Aug. 18, 1992, Taepopwon [Supreme Court], 92 Do 1359.

criminal liability on the ground that employees were instructed not to engage in the mediation of prostitution and that they were required to submit written promises not to engage in such business.[91] The Supreme Court found that these supervisory activities by the legal person were an inadequate ground for defense. The Court held that a legal person's criminal responsibility provisions containing the defense clause is intended to strongly presume the legal person's negligence.[92] Moreover, "the burden of proof is on the part of the legal person so that the purpose of having the dual liability of a legal person and its employees is achieved."[93]

G. Jurisdictions

Korea established jurisdiction over the bribery of a foreign public official when the offense has occurred in whole or in part in its territory. Article 2 of the Korean Criminal Codes stipulate that "the Korean Criminal Codes apply to offenses committed by nationals as well as foreigners in the territory of the Republic of Korea."[94] The jurisdiction clause of the Korean Criminal Codes will apply to the FBPA when the offense of the bribery of a foreign public official has occurred in whole in the territory. Even when the offense has occurred only "in part" in the territory, Korea can exercise its jurisdiction on the basis of the OECD Bribery Convention which will have the same legal effects as other domestic laws. In addition to the territorial

91) *See id.*

92) *See id.*

93) *See id.*

94) *See* Hyongpop, supra note 60 art. 2.

jurisdiction, Korea establishes jurisdiction for offenses committed abroad by its nationals.[95] Therefore, when the offense of the bribery of a foreign public official is committed abroad, Korean authorities can exercise its jurisdiction.

In a very plausible case in which a bribe is paid to a foreign public official by a foreign employee of a Korean company, the Korean authority will not have jurisdiction over the offense by the employee because it is committed by a foreign national. However, the Korean authority may exercise jurisdiction over the offense by the legal person whose employee has committed the offense of the bribery of a foreign public official. The responsibility of a legal person under the FBPA is strictly conditional on the fact that a representative, agent, employee or other individual working for the legal person has committed the offense as set out in Article 3.1 of the FBPA. Since the non-Korean national who has bribed a foreign public official outside of the territory of Korea has committed the offence under the Article 3.1 of the FBPA, the Korean company will be liable for the bribery of a foreign public official, unless the company has paid due attention or exercised proper supervision to prevent the offense."[96]

However, a reservation should be made to the above conclusion because the jurisdiction over the offense of a legal person is yet unclear in the Korean Criminal Codes. The Korean authority has jurisdiction over the Korean "person" committing an offense outside the territory of Korea according to Article 3 of the Korean Criminal Codes. However, the Korean Criminal Codes do not provide a separate clause on jurisdictional reaches with regard to an offense of a legal person.

95) *See* Hyongpop, *supra* note 60 art. 3.

96) *See* FBPA, *supra* note 53, art. 4.

Since the responsibility of a legal person is established with regard to the offense of the bribery of a foreign public official, the "person" in Article 3 of the Korean Criminal Codes would be interpreted as including a legal person as well. Therefore, it would be reasonable to conclude that the Korean authority has jurisdiction with regard to a legal person over the offense of the bribery of a foreign public official.

V. Comparison of the FBPA and the Korean Criminal Codes on Bribery

A. Legal Purposes

The Korean Criminal Codes on bribe essentially differs from the FBPA in the purposes underlying the laws. The leading Supreme Court case on bribery decided in 1984 lays out the principles involved in the prosecution of the bribery offense. The Court first described that the purpose of criminalizing bribery is to maintain the "fairness of official decisions and society's trust in these decisions, such that the "incorruptibility" of official actions as a central protective interest will be guarded."[97] A more recent Supreme Court case in 1994 outlines identical principles.[98] The key protective interest is "incorruptibilty" of a public official in the sense that the public duty of the official cannot be bought off by a bribe.

In contrast to the Korean Criminal Codes, the FBPA in Article 1 explicitly states two purposes. The law first aims to establish a sound practice in international business transactions.[99] Second, it aims to provide the details necessary for the implementation of the OECD Bribery Convention.[100] The second aim would imply that the purposes of the OECD Bribery Convention would be adopted in the FBPA as well. Therefore, like the OECD Bribery Convention, the FBPA aims to

97) Judgment of Sept. 25, 1984, Taepopwon [Supreme Court], 84 Do 1568.

98) Judgment of Jan. 23, 1996, Taepopwon [Supreme Court] 94 Do 3022.

99) *See* FBPA, *supra* note 53, above, art. 1.

100) *See id.*

combat bribery which "raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions,"[101] as stated in the preamble of the OECD Bribery Convention. These aims of the OECD Bribery Convention are much wider in scope than the aims of the Korean Criminal Codes on national bribery which tries to protect a public official' duty from corruption.

B. Liability of Legal Persons

Some elements of the FBPA cannot be found in the Korean Criminal Codes. First, the Korean Criminal Codes do not establish the liability of a legal person for the bribery of a domestic public official. As a result, if a legal person's employee bribes a foreign public official in relation to the business of the firm, the legal person will face sanctions if the legal person was negligent in providing an adequate supervision. In contrast, the liability of a legal person is not established at all for the bribery of a domestic public official. Therefore, if a legal person's employee bribes a domestic public official, the legal person will not face any sanctions.

C. Sanctions Against Proceeds of Bribery

Another element which is not found in the Korean Criminal Codes is the fine imposed as a monetary sanction against the "gains" obtained from the bribery of a foreign public officials. In addition to the imprisonment, the fines will be imposed as a monetary sanction against

101) *See* the OECD Bribery Convention, *supra* note 1, preamble.

the gains from the bribery of a foreign public official so that it is assured that the bribery would be an unprofitable act. Any profits or proceeds arising from the bribery of a foreign public official will be subject to fines. The Korean legal system has yet to provide guidelines on what "gains" from bribery means, and the lack of guidelines makes it uncertain as to how the sanctions will be calculated in reality.

Since the FBPA imposes additional sanctions for the bribery of a foreign public official, the Korean legal system possibly provides more deterrence in practice against the bribery of a foreign public official than against the bribery of national public officials.

VI. Implication for Combating Corruption in Korea

With the enactment of the FBPA, the set the legal instruments for combating the bribery of a foreign public official is more comprehensively established than those for combating the bribery of a national public official. This asymmetry cannot be defended on the ground that the FBPA is intended to protect international competitive conditions and to promote economic development unlike the domestic bribery laws.

In line with the FBPA, the Korean Criminal Codes should also be employed as an instrument to maintain competitive conditions in the national economy, because the bribery of a national public official also distorts the competitive conditions for domestic business and harms the economic development in the country. Therefore, the Korean Criminal Codes punishing the bribery of a national public official should be amended so that new instrument would be available to combat the bribery of national public officials. In particular, the liability of a legal person for the bribery of a domestic public official would have to be established in the Korean Criminal Codes. In addition, fines against profits obtained from the bribery should be included in the sanctions against the bribery of domestic public officials.

VII. Conclusion

Bribery and corruption no longer remain a domestic concern. Since "no country can seal itself off from the impact of corruption beyond its borders", every nation must cooperate with each other to fight corruption wherever it is in the world.[102] The OECD Bribery Convention, though a most significant instrument developed so far in the fight against corruption, deals only with the active bribery or the supply side of the corruption involved in international business transactions. As a result, the convention only establishes instruments against transnational corruption in the home country of the bribery. This approach, however, overlooks the fact the host country of the bribe needs to further strengthen its existing instruments to fight national corruption. This is especially the case for developing countries where existing national instruments to fight corruption are at best weak or not effectively enforced. Given the inherent limitation of anti-corruption tools which deal with the problem from the supply side only, the international effort must also focus on how the domestic criminal laws of the foreign public official's country could be strengthened from the demand side.

Countries that fight corruption to protect the fair competitive condition in international business transactions must also fight national corruption to protect the same condition in the national economy. Nations must fight corruption everywhere, not least in their own nation. In this respect, the OECD Bribery Convention can serve a useful

102) A keynote address by U.S. President Al Gore given at the Global Forum on Fighting Corruption held in the U.S. in February 24, 1999.

purpose in exerting indirect pressure on strengthening national instruments against the bribery and corruption of domestic public officials in countries ratifying the Convention. The instruments available in the OECD Bribery Convention set an important standard for fighting bribery and corruption of both national and foreign public officials.

國文要約

경제협력개발기구(OECD)가 국제상거래에서 뇌물수수 및 부패 관행을 척결하기 위하여 OECD 뇌물방지협정을 마련함으로써 뇌물수수 및 부패를 척결하기 위한 국제적인 노력이 진일보하게 되었다. 동 협약이 1999년 2월 15일 발효됨으로써, 외국공무원에 대한 뇌물증뢰 범죄는 형사 처벌의 대상이 되었다. 그러나 동 협약은 국제상거래에서의 뇌물수수 행위를 척결하는 방법으로 뇌물 증뢰행위에 대한 처벌에만 초점을 맞추고 있다. 뇌물을 수뢰한 외국공무원에 대한 처벌은 각국의 현행 뇌물죄로 효과적으로 처벌되고 있다고 가정하고 있는 것이다.

OECD 뇌물방지협정은 뇌물의 공급 측면에서의 여러가지 대응 규정을 마련하고 있으며, 이와 같은 규정들은 국제 상거래와 관련없는 국내부패 척결을 위한 국내 규정을 보강하는 데 필요한 기준을 제시하고 있다고 볼 수 있다. 특히 외국공무원에 대한 뇌물증뢰죄에서의 법인에 대한 형사처벌, 뇌물로부터 얻은 이익을 박탈하기 위한 처벌 규정 등은 뇌물죄의 처벌 수위 및 범위를 확대시키고 있다. 우리나라는 1998년 12월 28일 동 협약의 이행입법인 국제상거래뇌물방지법을 제정 및 공포하였으며, 동 이행입법에서 법인의 형사처벌과 뇌물을 주고 얻은 이익의 두배에 상당하는 벌금형을 규정하고 있다. 그러나 외국공무원에 대한 뇌물증뢰 행위의 처벌과는 달리 형법의 뇌물죄는 국내 공무원에 대한 뇌물증뢰죄의 처벌로써 법인에 대한 형사처벌 및 뇌물을 주고 얻은 이익에 대한 벌금형을 규정하고 있지 않다.

본 논문은 OECD 뇌물방지협정에서의 保護法益과 형법 뇌물죄의 보호법익을 비교한다. OECD 뇌물방지협정의 보호법익은 국제상거래에서의 공정한 경쟁환경의 보호라고 볼 수 있으며, 국내 뇌물죄의 보호법익은 공무원의 직무의 공정성 또는 매수불가성 등으로 볼 수 있다. 본 논문은 형법의 뇌물죄의 새로운 보호법익으로 국내시장에서의 공정한 경쟁환경의 보호를 받아들여야 한다고 주장한다. 따라서 형법의 뇌물죄는 OECD 뇌물방지협정의 국내이행입법과 같이 뇌물증뢰자를 고용한 법인에 대한 형사처벌 및 뇌물증뢰로부터 얻은 이익을 박탈하기 위한 벌금형을 규정해야 할 것이다.

뇌물수수 및 부패는 국경의 제한을 받지 않는 현상이다. OECD 뇌물방지협정은 뇌물수수 및 부패를 척결하기 위한 규범으로써 강도 높은 처벌규정을 두고 있다. 따라서 동 협정의 국내 이행입법은 국내 뇌물수수 및 부패를 방지하기 위한 규범을 강화하는 데 기준이 될 수 있을 것이다. 국제상거래에서의 부패 문제는 뇌물

의 수요 측면에서도 해결되어야 하며, 이를 위하여 각국의 국내 뇌물죄 규범의 강화 및 이의 철저한 이행이 이루어져야 할 것이다. 또한, 뇌물수수 및 부패를 척결하기 위한 노력의 일환으로 OECD 뇌물방지협정이 OECD 비회원국들에게 확산되어가야 할 것이다.

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對外經濟政策研究院
발 행 처 137-747 서울특별시 서초구 염곡동 300-4
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