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Law
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Research

Cultivating Entrenched Integrity and the Role of Judicial Corruption Akere Muna, Vice chair, <i>Transparency International</i>	3
Global Overview Homer E Moyer Jr <i>Miller & Chevalier Chartered</i>	7
Australia Jane Ellis and Elizabeth Johnstone <i>Blake Dawson</i>	11
Belgium Christiaan Barbier <i>Monard – D’Hulst</i>	17
Brazil Jorge Nemr <i>Leite, Tosto e Barros Advogados Associados</i>	23
Cambodia Vicheka Lay	30
Canada Milos Barutciski <i>Bennett Jones LLP</i>	33
China Samuel Porteous and Winston Wan <i>Navigant Consulting Ltd</i>	38
Colombia Patricia Mantilla Neissa <i>Legal & Business Consulting</i>	44
Costa Rica Gabriela Goebel Prestinary <i>Feinzaig Scharf & van der Putten</i>	48
Ecuador Bruce Horowitz <i>Paz Horowitz, Abogados</i>	53
France Stéphane Bonifassi <i>Lebray & Associés</i>	57
Germany Kai Hart-Hoenig <i>Dr Kai Hart-Hönig Rechtsanwälte</i>	62
Greece Ioanna Anastassopoulou and Apostolos Giannakoulis <i>V&P Law Firm</i>	67
Hong Kong Angus Hamish Forsyth <i>Stevenson, Wong & Co</i>	73
India Vineetha M G <i>AZB & Partners</i>	77
Indonesia Richard Cornwallis and Benny Bernarto <i>Makarim & Taira S</i>	84
Italy Astolfo Di Amato <i>Astolfo Di Amato & Associati – Avvocati</i>	89
Japan Kenichi Sadaka, Koya Uemura and Emi Sakai <i>Anderson Mōri & Tomotsune</i>	95
Kenya Sonal Sejpal <i>Anjarwalla & Khanna Advocates</i>	101
Korea Kyungsun Kyle Choi and Kyo-Hwa Liz Chung <i>Kim & Chang</i>	107
Lebanon Jihad Rizkallah, Karen Malek and Marie-Anne Jabbour <i>Badri and Salim El Meouchi Law Firm</i>	112
Liechtenstein Siegbert Lampert <i>Lampert & Schächle Attorneys at Law</i>	119
Luxembourg Rosario Grasso <i>Kleyr Grasso Associes</i>	124
Mexico Luis Rubio Barnetche <i>Rubio Villegas y Asociados, SC</i>	130
Namibia P F Koep and H M van den Berg <i>Koep & Partners</i>	134
Netherlands Bert Fibbe <i>NautaDutilh NV</i>	138
Nigeria Babajide O Ogundipe and Chukwuma Ezediaro <i>Sofunde Osakwe Ogundipe & Belgore</i>	143
Paraguay M Yolanda Pereira <i>Z Berkemeyer Attorneys & Counselors</i>	147
Peru José Ugaz Sánchez-Moreno <i>Benites, Forno & Ugaz Abogados</i>	151
Poland Janusz Tomczak <i>Wardyrński & Partners</i>	155
Portugal Antonio Mendonça Raimundo and Petra Fernandes <i>Albuquerque & Associados</i>	160
Russia Vasily Torkanovskiy and Khristofor Ivanyan <i>Ivanyan & Partners</i>	165
Saudi Arabia Robert Thoms <i>The Law Firm of Salah Al-Hejailan</i>	171
Suriname Hans Lim A Po Jr <i>Lim A Po Law Firm</i>	175
Sweden Harald Nordenson and Caroline Falconer <i>Setterwalls</i>	179
Switzerland Paul Gully-Hart and Peter Burckhardt <i>Schellenberg Wittmer</i>	184
Taiwan Daniel Y M Song <i>Lee and Li, Attorneys-at-Law</i>	190
United Arab Emirates Kavitha S Panicker <i>ACE Consulta Juris</i>	194
United Kingdom Monty Raphael <i>Peters & Peters</i>	200
United States Homer E Moyer Jr, James G Tillen, Jeffrey Hahn and Marc Alain Bohn <i>Miller & Chevalier Chartered</i>	210
Zambia Mutembo Nchito <i>MNB Legal Practitioners</i>	217

Korea

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Korea has signed and ratified the OECD Convention on Bribery and the UN Convention against Corruption.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The rules governing bribery of domestic government officials are stipulated in the following laws and regulations: the Korean Criminal Code; the Act Concerning Aggravated Punishment of Specific Crimes (Specific Crimes Act); the Act Concerning Aggravated Punishment of Specific Economic Crimes (Specific Economic Crimes Act); the Act on the Creation and Operation of the Anti-Corruption and Civil Rights Commission and the Prevention of Corruption; the Public Officials' Code of Conduct for Maintenance of Integrity (Code of Conduct); and other administrative laws and regulations. As for bribery of foreign public officials, Korea has enacted the Foreign Bribery Prevention in International Business Transactions Act (FBPA) pursuant to the OECD Convention on Bribery, which has similarities to the Foreign Corrupt Practices Act in the United States.

Foreign bribery

3 Legal framework

Describe the individual elements of the law prohibiting bribery of a foreign public official.

In Korea, the main law governing bribery of foreign public officials is the FBPA which entered into force in 1999. Under the FBPA, any Korean national who intentionally engages in the bribery of a foreign public official in order to obtain improper advantages will be subject to criminal punishment. Moreover, any foreign nationals engaged in the bribery of a foreign public official within Korea are also subject to punishment under the FBPA under territoriality principles.

Under article 3.1 of the FBPA, a violation of the FBPA will be found if the following elements are satisfied: any person intentionally promising, giving or offering a bribe (money, goods and other pecuniary advantages as well as intangible benefits that satisfy the demand or the wishes of a person) to a foreign public official in connection with the performance of his or her official duties (any activity within the public official's capacities and any activity closely related to the official's capacities or dealt effectively by him or her in connection to his or her capacities (Supreme Court Decision, 82 Do 1549. 23 November 1982)) in order to obtain an improper advantage in an international business transaction.

However, even if the elements above are satisfied, article 3.2 of the FBPA provides exceptions in the following circumstances:

- the law of the foreign public official's country permits such payment; or
- small payments made to a public official in order to facilitate his or her official function involving a routine and repetitive function not subject to discretion.

4 Definition of a foreign public official

How does your law define a foreign public official?

Article 2 of the FBPA defines a foreign public official in a way that is similar to the OECD Convention on Bribery, encompassing not only government officials but also individuals performing a public function (eg, employees in public agencies, international organisations and government controlled companies).

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The FBPA prohibits providing a bribe to a foreign official when the elements of article 3.1 are satisfied. A 'bribe' under the FBPA includes 'any undue advantage' which refers to money, goods and includes almost everything that the official demands or desires. As there is no specific exception regarding gifts or entertainment under the FBPA, whether a gift is criminally punishable will depend on the amount of the gift or entertainment and the specific facts of each case.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Under article 3.2(2), small payments made to a public official in order to facilitate his or her official function involving a routine and repetitive function not subject to discretion would not be found to be a violation of the FBPA.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

The FBPA itself does not contain specific regulations concerning payments through intermediaries but the Criminal Code does prohibit aiding or abetting and regards it as a criminal offence. Thus, payment through intermediaries or third parties to foreign public officials, albeit indirectly, is prohibited under the same circumstances as outlined in question 3. Also, as explained in response to question 8 below, a legal entity may be held liable for bribery of a foreign official when a representative, agent, employee or other individual working for such legal entity has committed the offence in connection to its business.

8 Liability

Can both individuals and companies be held liable for bribery of a foreign official?

Yes. Individuals as well as legal entities can be held liable under the FBPA. A legal entity may be held liable for bribery of a foreign official when a representative, agent, employee or other individual working for such legal entity has committed the foreign bribery offence in connection to its business.

Article 4 of the FBPA, however, does not enforce strict liability if the legal entity has 'afforded due attention or exercised proper supervision to prevent the offence'. The corporation or other legal entity may be exempt from punishment if it proves that it has taken measures to prevent such FBPA violations by its representatives, agents or employees.

9 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

The FBPA only contains criminal penalties but a convicted party may be held liable additionally for civil damages under a lawsuit initiated by a party whose rights were infringed (ie, competitors, customers, business partners, etc) pursuant to tort law.

10 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The FBPA is enforced by the police and the prosecutor's office. A Korean court has final authority in determining the amount of fine or the length of imprisonment.

11 Self-disclosure of violations

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

There is no explicit mechanism for companies to disclose violations in exchange for reduced penalties. As noted in question 8, however, the corporation or other legal entity may be fully or partially exempt from punishment if it proves that it has taken measures to prevent such FBPA violations by its representatives, agents or employees.

12 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

FBPA enforcement matters are not resolved through plea agreements or settlement agreements. However, as in any other case, the public prosecutor possesses a certain amount of discretionary powers to decide whether to proceed with prosecution depending on the specific circumstances of the case.

13 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery laws and regulations.

Since the enactment of the FBPA, there have only been eight convictions for foreign bribery in Korea. Therefore, it is not yet possible to determine any clear patterns of enforcement.

14 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery under your legal system?

Foreign companies can be held liable for the behaviour of their employees, agents and representatives. There are no thresholds as to size or legal form of the entity so that any legal person acknowledged under the law including associations, foundations, joint-stock corporations, limited liability companies, unlimited or limited partnerships, etc may potentially come under the reach of the FBPA.

15 Sanctions

What are the sanctions (including collateral sanctions, such as loss of export privileges) for individuals and companies violating the foreign bribery laws and regulations?

Individuals may be subject to imprisonment for up to five years or a fine of up to 20 million won (US\$30,000). If the profit obtained through the offence exceeds a total of 10 million won, the individual can be subject to imprisonment of up to five years or a fine of up to twice the amount of the profit. Whenever an individual becomes subject to imprisonment, a fine will be imposed as well.

Legal entities are liable to pay a fine of up to 1 billion won in addition to the imposition of penalties on the actual offender. In case the profits that were obtained through the offence exceeds a total of 500 million won, the legal entity can be subject to a fine of up to twice the amount of the total profit. Please note that the imposition of penalties on the actual offender is not a prerequisite for imposing a fine on the company.

The amount of fine is calculated in proportion to the profit (or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through the bribery) obtained by committing the prohibited act.

16 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving violations of your laws prohibiting bribery of foreign officials.

All of the cases where the FBPA has been implicated concerned construction or service companies in relation to US Army projects in Korea.

As an example, on 17 April 2006, a representative of a security service company and two other individuals were detained and indicted for violating the FBPA by paying officials of the US Army approximately 200 million won in connection to a bidding process. The representative of the security service company obtained classified information such as bidding strategies, price information and the individual estimate drawn up by the US government and subsequently established a paper company to participate in the bid to procure a contract for security services worth 87 billion won. The court subsequently confirmed the FBPA charges and subjected the defendants to criminal penalties of both a criminal fine and imprisonment.

Financial record keeping**17 Laws and regulations**

What laws and regulations require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Pursuant to the External Audit of Joint-Stock Company Law, a company is required to be audited by an external auditor on an annual basis and required to prepare and keep corporate books with effective internal controls in accordance with Korean GAAP. Additionally, the Korean Commercial Code requires a company to prepare

an account book and a balance sheet on an annual basis and keep corporate books including important documents related to the business for 10 years. Lastly, the Securities and Exchange Law requires a listed company to prepare and report its financial statements on a regular basis to the Financial Supervisory Commission and the Korea Stock Exchange.

18 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

There is no obligation in the Korean anti-bribery laws to report violations of anti-bribery laws. A company with 7 billion won or more in assets at the end of the latest fiscal year, however, is subject to the requirement that an audit report prepared by an external auditor be submitted to the Financial Supervisory Commission. The audit report should disclose information on any events that may have a significant impact on the company. These events would be disclosed in the financial statements (ie, balance sheet and profit and loss statement) as a loss or gain (or a liability or asset, or both) or in the footnote thereof as a 'contingent' liability or asset. The loss of a company that may result from being found guilty of bribery, if significant, is likely to be recognised as a contingent liability provided that the amount of such liability cannot be measured with sufficient reliability. The audit report must be submitted once per year after the annual financial statements have been prepared. This audit requirement does not require the company to disclose any such event as and when they occur.

An event or omission may be considered to have a 'significant impact' or be considered 'material' from an auditing point of view if such event could influence the economic decisions of those that make such decisions relying on the financial statements of the company.

19 Prosecution under financial record-keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

The afore-mentioned laws are not used to prosecute domestic or foreign bribery.

20 Sanctions for accounting violations

What are the sanctions for violations of the accounting laws and regulations associated with the payment of bribes?

Both the External Audit of Joint-Stock Company Law and the Securities and Exchange Law state that violations of several of the provisions may subject a violator to up to five years of imprisonment or a fine of up to 30 million won. According to the Korean Commercial Code, a violation can result in a fine of up to 5 million won.

21 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

In Korea, the Corporate Income Tax Law and the Individual Income Tax Law prohibit the deductibility of domestic and foreign bribes.

Domestic bribery

22 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Pursuant to articles 129 and 133 of the Criminal Code, the Specific Crimes Act and court precedent, to establish a charge of bribery of a public official ('official bribery'), prosecutors need to show that

an economic benefit has been given to a public official in connection with his or her official duties and the benefits go beyond the boundaries of what is usually given as a matter of custom or social courtesy.

'Economic benefit' is broadly interpreted to encompass anything of value including entertainment, a gift of cash or goods or even an invitation to a round of golf. A 'public official' includes a 'deemed public official' who is a senior staff employee of a government corporation meeting the requirements provided in article 4 of the Specific Crimes Act (see question 24).

23 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes. Articles 129 and 133 of the Criminal Code prohibit both the offering of bribes to public officials and taking of bribes by public officials in connection with the public officials' duties and impose punishment on the giver as well as the taker of such bribes.

24 Public officials

Are any public officials not covered or accorded different treatment under these laws?

The term 'public official' is broadly defined as being any employee of a government entity such as a government agency, ministry or the military including legislators and judges. Hence, all public officials are subject to the anti-bribery laws.

25 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

According to the State Public Officials Act, public officials of the state shall not engage in profit-making activities other than public affairs and shall not hold any other jobs without approval by the head of the institution to which he belongs. Meanwhile, the Official Duties of Public Officials of the National Assembly forbids officials from engaging in activities that may obstruct the efficiency of their services, wrongfully influence public affairs, give such officials benefits contrary to the interest of the state or affect the government in a dishonourable manner. Lastly, the Code of Conduct as well as the Code of Conduct for Judges and Court Officials, the Code of Conduct for Constitutional Court Officials and the Code of Conduct for Election Committee Officials require that public officials report to the head of the institution to which they belong regarding any lecture stipends, expositions, presentations or discussions they conduct outside the institution if the frequency of the activity exceeds three times a month or six hours a month.

26 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

According to the Criminal Code and the Specific Crimes Act, any type of economic benefit that is provided to or received by a domestic official in connection with his or her duties is prohibited. In such case, both the giver and the taker are punished.

In addition, the Code of Conduct was enacted and took effect on 19 May 2003 in the form of a Presidential Decree to the Anti-Corruption Act to provide general guidelines with respect to, among other things, giving gifts to and entertaining public officials. The Code of Conduct prohibits a public official from receiving any cash, gifts or other entertainment from anyone who has an interest in the performance of the official duties of the official with a few exceptions that

Update and trends

On 29 February 2008, the Anti-Corruption Act was abolished with the enactment of a new law creating the Anti-Corruption and Civil Rights Commission (the ACRC) and The Act on the Creation and Operation of the Anti-Corruption and Civil Rights Commission and the Prevention of Corruption (the New Act), but the main provisions of the former Anti-Corruption Act have been incorporated into the New Act without significant modification. The ACRC was launched on 29 February 2008 by the integration of the Ombudsman of Korea, the Korea Independent Commission against Corruption (KICAC)

and the Administrative Appeals Commission. The purpose of such consolidation was to provide citizens with a one-stop service of addressing public complaints, filing administrative appeals and fighting corruption by a single organisation in a speedier and more convenient manner. Although the ACRC, similar to the KICAC, does not have independent investigative power, it is expected that the agency will vigorously encourage whistle blowing activities on a broader level, which will in turn heighten enforcement actions against corrupt activities.

are briefly explained in question 27. Unless gifts or entertainment are determined to constitute bribery in violation of the Criminal Code or the Specific Crimes Act, only the public official at the receiving end is subject to disciplinary measures under the Code of Conduct.

27 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

It cannot be said that certain types of gifts and gratuities are permissible under Korean law because any gift, no matter how small, could constitute a bribe depending upon the context in which it is given. With respect to government officials, however, the Code of Conduct sets forth certain exceptions that would allow government officials to receive certain gifts and gratuities in certain circumstances and under certain conditions. These exceptions include, for example, 'food or conveniences provided within the extent of normal practices.'

28 Private commercial bribery

Does your country also prohibit private commercial bribery?

Article 357 of the Criminal Code prohibits giving economic benefits to a person who is entrusted with conducting the business of another person if such benefits are related to an improper request made in connection with the duties of the person in question. This essentially concerns the bribery of private sector employees.

The difference between the elements of commercial bribery and those of official bribery is that, in principle, commercial bribery requires that an improper request be made (eg, a request to award a bid in exchange for cash) whereas an improper request is not a necessary element of official bribery. For official bribery, as long as

the economic benefits are connected to the public official's duties, providing benefits to an official could be considered bribery even if no improper request is made. In practice, however, prosecutors have tended to gloss over the requirement that an improper request be made in commercial bribery cases, and the courts have not been vigilant in requiring that the element be satisfied.

29 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery laws and regulations?

A giver of a bribe to a government official in violation of the Criminal Code can face up to five years of imprisonment or a fine of up to 20 million won. The penalty that would apply to the giver of a bribe to a private sector employee would be either a fine of up to 5 million won or imprisonment of up to two years.

Under the Criminal Code, a public official who receives, solicits or agrees to a bribe can face imprisonment of up to five years or be disqualified for up to 10 years. In case of violations under the Specific Crimes Act and the Specific Economic Crimes Act, the penalties may be higher since the maximum penalties are set higher than those under the Criminal Code in correlation with the bribery amount.

30 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

The laws regarding bribery of public officials have been enforced with respect to relatively small amounts of money because a violation can be found simply if the payment is made 'in connection with the duties' of the public official.

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31 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving violations of domestic bribery laws, including any investigations or decisions involving foreign companies.

The Supreme Court ruled on 21 January 2000 (Case No. 99 Do 4940) that payments of 1 million won by a medical supplies wholesaler to a public official of the Korea Veterans Hospital on each of the three major Korean holidays over the course of four years (for a total of 13 million won) was punishable as a bribe. In return, the wholesaler received certain benefits in the delivery of medicine as well as notification of bidding rates and information related thereto. Even though the wholesaler did not ask for any explicit or specific favours each time, the money was meant to ensure that the wholesaler was given preferential treatment in delivery transactions. This case is significant because it shows that the Korean courts will aggregate gifts given over a long period of time in determining if bribery was committed.

The Supreme Court also ruled on 29 September 2005 (Case No. 2005 Do 44411) that a benefit given by a foreign bank to an official of a public corporation in small amounts to cover golf expenses such as 325,000 won and 267,000 won throughout a period of one year amounting to 1.916 million won in total, in return for favours related to financial derivative transactions, constitutes a bribe. The decision required that various factors be considered including the nature of the public official's work, the relationship between the work and the benefit-giver, the existence of a private relationship between the parties, the size of the benefits and the context and timing of the benefits in determining whether a bribe had occurred. This case is significant because it demonstrates that although the overall amount is not large, as long as it was provided 'in connection with' the duties of a public official, then bribery can be found to exist.

In one of the more recent cases reported through the local media (decision rendered in December 2008 but remains unpublished to date), the Supreme Court held that two meals provided by a construction company employee to a local district government official on two different occasions, each amounting to 18,000 won and 12,000 won for a total of 30,000 won, constituted bribery, since these meals were provided clearly in connection with the duties of the public official in question as partly shown by the bribe giver's failed attempt to also provide cash payment of 5 million won.

The Code of Conduct for public officials discussed earlier is a model code that every government agency has adopted as its own. Many individual codes of conduct provide a monetary threshold, such that meals, transportation and telecommunication services provided by an interested party are specifically limited to 30,000 won whereas gifts for commemorative occasions such as weddings and funerals are limited to 50,000 won. If the value of the gifts given are within these limits, one can significantly reduce the risk of a charge of bribery. However, as the recent Supreme Court case illustrates, in addition to the amount of the gift or meals, the context in which the gift is given is also a decisive factor.

