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Unkept Promises: On the Implementation of the OECD Anti-Bribery Convention in Korea

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Abstract: While the Organization for Economic Cooperation and Development (OECD)'s Anti-Bribery Convention is often considered a success in the fight against global corruption, ensuring its implementation remains challenging. As evidenced by the sustained decline in Transparency International's ratings, the Korean government does not actively enforce anti-bribery legislation against companies and individuals engaged in business activities abroad. To support this argument, this article reviews the Korean legal apparatus designed to control foreign bribery and examines why the relevant authorities have insufficiently enforced them. Specifically, this paper discusses the Foreign Bribery Prevention Act, its legislative history, how the Korean legislature has failed to implement the OECD Working Group's recommendations in a timely manner, and the consequences of this failure. Through a case study, this paper compares the practices of Korean law enforcement authorities with those of their counterparts abroad, particularly in the United States. This paper also illustrates how the traditional leniency of Korean prosecutors and judges toward bribe giving, especially by large conglomerates, has affected the enforcement of the relatively new legal apparatus designed to combat bribery of foreign public officials. Furthermore, a cultural leniency toward bribery, coupled with the Korean government's unwillingness to raise public awareness of foreign bribery crimes and their punishments, poses a significant challenge to combating foreign bribery.

Keywords: OECD; anti-bribery convention; foreign bribery; bribe giving; bribe receiving; Korea

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1. Introduction

Since the 2000s, the Korean[1] government has taken Transparency International's Corruption Perception Index seriously, at least officially. In 2004, the Korean government aimed to rank tenth in the index (OECD 2007, p. 10), and this goal is still in place (Lee 2023). Although this ambitious dream has not yet been realized, and Korea's ranking remains outside of 30th in the world, Korea has made notable strides in recent years—both in absolute (score) and relative (rank) terms—in the fight against corruption, as shown in Table 1.

Foreign bribery, however, is a different story. Anti-corruption initiatives targeted at foreign bribery, including the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD 1997), have failed or had limited effectiveness in Korea. As illustrated in Table 2, Transparency International previously rated Korea as implementing "moderate enforcement" up until 2012. Nevertheless, Korea's rating declined

[1] In this paper, "Korea" refers to South Korea.

considerably in 2013, reaching the level of "little or no enforcement", and it has not yet recovered its previous rating.

Table 1. Korea's ranking in Transparency International's Corruption Perception Index.

Year	Rank	Total Countries	Rank Among OECD Countries	Total OECD Countries
1999	50	99	27	29
2000	48	90	27	30
2001	42	91	24	30
2002	40	102	24	30
2003	50	133	24	30
2004	47	146	24	30
2005	40	159	22	30
2006	42	163	23	30
2007	43	180	25	30
2008	40	180	22	30
2009	39	180	22	30
2010	41	178	26	34
2011	43	183	27	34
2012	45	176	27	34
2013	46	177	27	34
2014	44	175	27	34
2015	43	168	28	34
2016	52	176	29	35
2017	51	180	29	35
2018	45	180	30	36
2019	39	180	27	36
2020	33	180	23	37
2021	32	180	22	38
2022	31	180	22	38
2023	32	180	22	38

Source: Transparency International. Available at: https://www.transparency.org/en/cpi (accessed on 1 December 2024).

According to Transparency International, there has been a discernible decline in the enforcement of anti-bribery legislation in many countries over the past few decades. In particular, this decline has been observed in several prominent exporters that were previously active in this domain (Transparency International 2022, p. 3). Korea, a major exporter, is noteworthy for having been rated as implementing "moderate enforcement" until 2012 but then subsequently having been rated as "little or no enforcement" in almost all instances since 2013.

The existing literature has examined the motivations of states and non-state actors in complying with the OECD Convention (Jensen and Malesky 2018; Jongen 2021). While this literature provides a valuable analytical framework for understanding a broad range of countries, country-level analysis remains essential to gain a more nuanced understanding of local contexts and to verify or supplement the existing literature. The legal traditions and

economies of the countries party to the OECD Convention exhibit considerable diversity, presenting significant challenges to monitoring and evaluating its implementation across countries. It is, therefore, essential to facilitate the exchange of local experiences and perspectives to enhance the efficacy of existing measures, such as peer reviews, and to enable concerted efforts to combat corruption. While country-level analyses are relatively more readily available for European or English-speaking countries such as the United Kingdom (Rose 2012), assessing the Convention's implementation in non-European, non-English-speaking countries remains challenging.

Table 2. Transparency International's Classification of Foreign Bribery Enforcement in OECD Convention Countries.

Year	2009	2010	2011	2012	2013	2014	2015	2018	2020	2022
Active Enforcement	4	7	7	7	4	4	4	7	4	2
Moderate Enforcement	11	9	9	12	4	5	6	4	9	7
Limited Enforcement[2]	-	-	-	10	10	8	9	11	15	18
Little or No Enforcement	21	20	21	8	20	22	20	18	15	16
Total Countries	36	36	37	37	38	39	39	40	43	43

Number shows countries in each rating; gray indicates which category Korea belongs to. Source: Transparency International. Available online: https://www.transparency.org/en/search/filter?project=strengthening-enforcement-of-the-oecd-anti-bribery-convention-1&type=publication (accessed on 1 December 2024).

In this respect, this paper focuses on Korea, given its significant role in the global economy. Transparency International's reports on the OECD Convention's implementation utilize export volume as a metric to assess the size of international economic activities, and Korea has consistently ranked sixth or seventh among OECD countries since the 2010s. Furthermore, while Korea is often viewed as a model for economic development, having progressed from an aid recipient to a donor country (Ferro and Nishio 2021), its performance in terms of the rule of law is comparatively lackluster (International IDEA 2023). In light of this, Korea's experiences and challenges in combating foreign corruption offer valuable insights, particularly for non-Western and developing countries. However, language barriers and its status as a legal periphery (Kim 2024, p. 154) make Korea a challenging case for foreign researchers.

The existing literature demonstrates that political will is a crucial factor in implementing the OECD DAC principles in Korea (Lim 2014). Furthermore, the legal issues pertaining to Korea's OECD Convention implementation and potential solutions have been extensively discussed (Jin 2019). This paper contributes to the literature on the OECD Convention's implementation in Korea in two ways. First, it reflects on recent legal developments related to the Convention and major foreign bribery scandals that emerged recently in Korea. Second, it extends beyond purely legal discussions to cover the cultural and societal obstacles to the Convention's implementation. The study thus focuses on the question of informal or de facto compliance—whether the formal legislation leads to changes in the behavior of the target group—in addition to formal or de jure compliance, which focuses on the operation of the formal legal devices (Jensen and Malesky 2018, p. 37).

[2] This category was first introduced in the 2012 report.

Both the OECD Working Group on Bribery ("OECD Working Group") and Transparency International have identified numerous issues regarding the inadequate enforcement of the OECD Convention in Korea (e.g., OECD 2011, pp. 12–40; 2018, pp. 11–75; Transparency International 2022, pp. 77–79). To examine Korea's inactivity, the article first examines the Korean legal apparatus designed to deter the bribery of foreign officials. The third section addresses the following key issues: the legislators' passivity in enacting or revising foreign bribery-related laws; the lack of prosecutorial initiatives and the failure to enforce existing legal measures against large Korean conglomerates; Korean courts' overly restrictive interpretation of the relevant laws in foreign bribery cases; societal attitudes that are more tolerant of giving bribes than of taking bribes; and the government's failure to raise awareness of foreign bribery as a crime.

2. A Brief Introduction to the Korean Legal System Aimed at Preventing Bribery of Foreign Officials

Shortly after joining the OECD in 1996, Korea signed the OECD Convention on 17 December 1997, and it enacted the Foreign Bribery Prevention Act (FBPA) on 28 December 1998 to stipulate matters necessary for implementation of the Convention. The OECD Convention contains many provisions that could not be implemented under Korea's criminal law at the time, such as the requirement to punish legal persons in addition to those who bribe foreign public officials, making the enactment of a new law to enable the implementation of the Convention inevitable. Prior to the FBPA's enactment, if a bribe was given to a foreign public official, the person giving the bribe could not be punished for bribery because foreign public officials were not included in the term "public official" under Korean criminal law.

Since the enactment of the FBPA, however, a number of laws have been enacted or revised to regulate foreign bribery: the crime of bribing a foreign public official is not only a predicate crime under the Act on Regulation and Punishment of Criminal Proceeds Concealment (ACPC; enacted in 2001) (Article 2 of the ACPC) but is also included in the crime of corruption under the Act on Special Cases Concerning the Confiscation and Return of Property Acquired Through Corrupt Practices (ACPCP; enacted in 2008) (Article 2 of the ACPCP). Based on these laws, (1) the act of concealing, disguising, or receiving the proceeds of foreign-bribe-related crimes is punishable as a money laundering crime (Articles 3 and 4 of the ACPC); (2) the said proceeds, a property acquired through bribery, or the equivalent value of the property may be confiscated (Article 8 of the ACPC; Article 3 of the ACPCP); and (3) if necessary, the court may issue a preservation order for forfeiture and prohibit the disposition of a property at the request of a public prosecutor or by its official authority (Article 12 of the ACPC, Articles 33 to 66 of the Act on Special Cases concerning the Prevention of Illegal Trafficking in Narcotics). In addition, the Public Interest Whistleblower Protection Act was amended in 2015 to protect any person who makes a whistleblowing disclosure regarding foreign bribery (Article 2 of the Public Interest Whistleblower Protection Act).

3. Discussion

3.1. The Reluctance, Indifference, or Lassitude of Legislators in Penalizing Foreign Bribery

Because Korea follows the civil law tradition and case law is not recognized as a source of law as is the case in a typical civil law country (Haro 2023, pp. 4, 6), the FBPA must be a comprehensive and detailed codified law to ensure legal certainty in accordance with the legal concept of *nulla poena sine lege*.

However, the FBPA was not a matter of interest to Korean legislators: Only five days after the executive branch proposed a bill for the FBPA, the bill passed the National

Assembly on 7 December 1998. There was no discussion about the bill by the members of the National Assembly.[3]

The FBPA is a simple law by Korean standards: it consists of only 6 articles and 814 words (English translation, excluding addenda). Even by simple comparison, the FBPA insufficiently captures the content of the OECD Convention, which consists of 17 articles and 2028 words (excluding the preamble). This sharply contrasts with the FBPA's U.S. counterpart, the Foreign Corrupt Practices Act (FCPA), which contains 6452 words (excluding the Attorney General's guidance and opinions).

As a result, there are many ambiguities and potential loopholes in the law. The OECD Working Group has repeatedly determined in its monitoring reports that many parts of the FBPA remain unclear and has recommended that they be revised for clarification (e.g., OECD 2021a, pp. 5–10).

However, the Korean government has been reluctant to enact legislation to improve the FBPA. To date, there have been only four revisions, and all of them have begrudgingly reflected points raised by external organizations such as the OECD (see Table 3 below). In short, the Korean government has never been proactive or active in revising it.

A notable example of such inactivity is bribing through an intermediary. Although the practice of bribing through an intermediary, such as a local agent or foreign subsidiary, is a common occurrence, it was not explicitly covered by the FBPA. Then, in 2007, the OECD Working Group identified the loophole and recommended that the Korean government revise the FBPA to encompass instances where a bribe is offered, promised, or given through an intermediary (OECD 2011, p. 36). In 2011, the OECD Working Group repeated the recommendation (OECD 2011, p. 13). Nevertheless, as illustrated in the case below, it was not until the United States government formally requested the extradition of an individual accused of contravening the FCPA that the Korean government took concrete steps to address the issue.

Table 3. FBPA revisions.

Date of Revision	Revised Provision	External Pressure
October 2014	Abolition of Small Facilitation Payments: (Article 3 paragraph 2) Eliminated a defense where a "small pecuniary or other benefit is promised, given or offered to a foreign official engaged in ordinary and routine work to facilitate the legitimate conduct of the official's business."	OECD Recommendations (OECD 1999, p. 3; 2007, p. 58; 2011, pp. 16–17); Transparency International (2010, 2011)
December 2018	Bribing through an Intermediary Added: (Article 3 paragraph 2) Amended to explicitly state that the offence of bribing a foreign public official is applicable in instances where the bribe is made through an intermediary.	OECD Recommendations (OECD 1999, p. 3; 2007, p. 36; 2011, p. 13); an extradition request of the U.S. government (Raymond and Park 2017); Transparency International (2011)

[3] The National Assembly. Bill Information. Available online: https://likms.assembly.go.kr/bill/billDetail.do?billId=015074 (accessed on 1 August 2024). In Korea, a bill is introduced in the National Assembly by a legislator (with more than 10 legislators consenting thereto) or initiated by the executive branch.

Table 3. *Cont.*

Date of Revision	Revised Provision	External Pressure
May 2020	Increase in the Level of Sanctions: (Article 3 paragraph 1) The maximum amount of fines applicable to natural persons for foreign bribery increased from "KRW 20 million (USD 15,000), or up to twice the profit obtained if such profit exceeds KRW 10 million (USD 7500)" to (1) KRW 50 million (USD 37,500) if the pecuniary advantage obtained or the amount of the bribe is below KRW 10 million (USD 7500), or (2) At least twice and up to five times the amount of the pecuniary advantage obtained (or the amount of the bribe in cases where the pecuniary advantage is less than the amount of the bribe or the nature of the pecuniary advantage cannot be quantified) if the pecuniary advantage exceeds KRW 10 million (USD 7500).	OECD Recommendations (OECD 2007, pp. 43–45; 2011, p. 14), Transparency International (2010, 2011, 2013, 2018, 2020)
October 2021	Extension of the Statute of Limitations: (Article 6) The statute of limitations applicable to legal persons was extended from 5 years to 7 years so that it is consistent with that applicable to natural persons.	OECD Recommendations (OECD 2007, p. 39; 2018, p. 42), Transparency International (2020, 2022)

3.1.1. Ban Ki Sang Case

Mr. Ban Ki Sang, a brother of former U.N. Secretary-General Ban Ki-moon and an executive at the Korean construction company Keangnam Enterprises, and his son, Mr. Joo Hyun Bahn, who worked in commercial real estate in New York, were involved in an illicit scheme involving the offering and acceptance of bribes (U.S. Department of Justice 2017). In 2012, Keangnam completed a significant construction project in Hanoi, Vietnam, with a total cost exceeding USD 1 billion. Facing financial difficulties, Keangnam sought to refinance or sell the property. Bahn was hired to provide assistance and was introduced to Malcolm Harris, who asserted that he could facilitate the sale through connections with a member of a Middle Eastern royal family. From September 2013 onward, Ban and Bahn attempted to bribe officials in the Middle Eastern country via Harris, agreeing to pay USD 2.5 million. Harris misappropriated USD 500,000 of the initial payment, and the remaining USD 2 million was not remitted. In December 2016, the U.S. Department of Justice (DOJ) filed charges against Ban, Bahn, and Harris for various offenses, including violations of the FCPA, wire fraud, money laundering, and identity theft. Moreover, the DOJ requested that the Korean government extradite Ban, a Korean national who was residing in Korea (Raymond and Park 2017).

3.1.2. Consequences

Following the Ban Ki Sang case, the requisite revisions were finally made to the FBPA in late 2018. Nonetheless, Ban was still able to evade extradition to the United States because (1) his conduct did not constitute a crime according to Korean law at the time

of the payment to an agent, (2) Korean criminal law bars retrospective effect (Article 1 paragraph 1 of the Criminal Act), and (3) the Korean Extradition Act limits extraditable offenses to offenses that are punishable under the laws of both Korea and the requesting state by at least imprisonment without prison labor for not less than one year (Article 6 of the Extradition Act). In summary, a briber was able to evade punishment from both the United States and the Korean authorities as a result of the extended delays in the revision of the FBPA.

3.2. The Prosecution's Lack of Initiative in Both Investigation and Indictment

3.2.1. Failure to Take Proactive Steps to Gather Information from Multiple Sources

Investigative personnel, including prosecutors and police officers, frequently gather evidence for criminal investigations from a range of sources, including their own observations and/or those of an informant (Dressler et al. 2021, p. 8). In the context of non-foreign bribery, as illustrated in Table 4, Korean investigative agencies tend to rely more on their own observations than on external reporting and complaints including accusation and delation.

Table 4. Detection sources for non-foreign bribe-giving cases (2001–2022).

Source	Cases
Detected based on a report or complaint	1018 (15.9%)
Detected directly by law enforcement without a report or complaint	4600 (71.9%)
Others	779 (12.2%)
Total	6397

Source: Supreme Prosecutors' Office. Available online: https://www.spo.go.kr/site/spo/crimeAnalysis.do (accessed on 1 December 2024).

To illustrate, of the 6397 bribe-giving cases investigated from 2001 to 2022 in Korea, only 1018 (15.9%) were initiated based on an informant complaint; the remaining 4600 cases (71.9%) were initiated without a complaint. The clues to these cases were identified through various means, including media reports and evidence gathered while investigating related cases.

In contrast, a similar level of proactive engagement from investigative agencies has not been observed in cases of foreign bribery. Most foreign bribery cases in Korea have been brought to the attention of law enforcement authorities by foreign authorities or through reports or complaints from business partners or competitors (OECD 2018, p. 13). A more detailed analysis of the 13 foreign bribery investigations conducted since 2013 (including those that resulted in non-prosecutions or acquittals) indicates that 5 cases were initially brought to the attention of Korea by foreign authorities, 5 by reports (2) or complaints (3) from business partners or competitors of the individuals or companies allegedly involved, and 3 by whistleblowers.

Moreover, the OECD Working Group has repeatedly noted Korea's lack of proactive use of mutual legal assistance (MLA) in its foreign bribery investigations (OECD 2011, p. 31; 2018, pp. 50–51). This is due in part to limited resources, as evidenced by the case of some countries (Jongen 2021, p. 349). The insufficient number of personnel and lack of foreign intelligence capabilities among Korean prosecutors and police impede their ability to effectively address transnational crime (Ahn 2019, p. 73). To illustrate, as of 1 December 2024, there are only four lawyers in charge of international criminal affairs in the International Criminal Affairs Division of the Korean Ministry of Justice, which serves as the primary regulatory authority for the FBPA. Two of the aforementioned individuals are prosecutors, while the remaining two are junior attorneys. Most prosecutors assigned

to the Ministry of Justice are replaced every two years due to an internal regulation that typically prevents them from holding the same position for a period exceeding two years. The aforementioned junior attorneys are often assigned to this position for military service, which is obligatory for most Korean men, immediately after graduating from law school. They subsequently retire upon completion of their military service, following a two- to three-year tenure. The composition of the International Criminal Division presents a challenge to the accumulation of expertise in international bribery cases. Additionally, the language barrier presents a significant challenge (Hwang 2023), yet there is currently only one individual responsible for translation within the aforementioned division.

Nevertheless, this issue can be attributed to a deficiency in volition rather than an absence of capability. While some foreign bribery cases were extensively covered in the Korean media, Korean law enforcement authorities did not initiate investigations or prosecutions in these cases. The following cases illustrate instances where Korean prosecutors did not pursue investigations or indictments despite the existence of substantial evidence corroborating criminal charges initially established by foreign investigative agencies or courts.

Samsung Heavy Industries Case

Samsung Heavy Industries ("Samsung") is a Korean engineering company that maintains offices in several countries around the world, including a branch office in Houston, Texas. From 2007 to 2013, Samsung paid around USD 20 million to a Brazilian intermediary, knowing that part of this money would be used for bribes. This bribery scheme aimed to influence Petrobras, Brazil's national oil company, to award a contract for a drill ship (U.S. Department of Justice 2019).

In November 2019, the DOJ filed a single-count information in the Eastern District of Virginia against Samsung, charging the company with conspiracy to violate the anti-bribery provisions of the FCPA. At that time, a deferred prosecution agreement (DPA) was entered into between Samsung and the DOJ with a term of three years. In accordance with the terms of the DPA, Samsung agreed to pay a criminal penalty of USD 75,481,600.

The Korean Criminal Act does not bar the prosecution of an individual or a legal person for an offense that has already been adjudicated in a different jurisdiction (Article 7 of the Criminal Act). Furthermore, a DPA is not a court judgment; thus, the Korean authorities were not obligated to take into account the fact that Samsung had entered into a DPA with the DOJ (Hong 2022, p. 65). Given the extensive coverage of the Samsung case in the Korean press, it seems probable that the relevant authorities in Korea were aware of the case but chose not to indict Samsung.

KT Case

KT, previously known as Korea Telecom, is a prominent telecommunications company in Korea. KT was previously a fully state-owned entity, and its operations continue to be significantly influenced by the Korean government. This is largely because the government's National Pension Service holds the largest stake in the company. As a result, KT's governance is vulnerable to political influence, which has prompted its management to seek engagement with politicians.

According to the U.S. Securities and Exchange Commission (SEC), KT engaged in illicit payments to government officials in Korea and Vietnam between 2009 and 2018. In Korea, the illicit payments included the generation and maintenance of a slush fund (U.S. Securities and Exchange Commission 2022). This fund was used to evade Korea's Political Funds Act, which prohibits corporations from making political contributions (Article 45 paragraph 2(5) and Article 31 paragraph 2 of the Political Funds Act). Most of the funds went to lawmakers in the National Assembly who sat on committees with the ability to impact the

telecommunications industry and KT's business. The political contributions amounted to approximately USD 393,574 and were given to 99 Korean lawmakers and candidates. In Vietnam, KT provided financial contributions to third parties with connections to officials to secure contracts for a solar power project and a vocational colleges project. The bribes for the two projects totaled approximately USD 650,000.

The SEC had jurisdiction over this case because KT's American Depositary Shares are traded on the New York Stock Exchange. In February 2022, the SEC settled with KT, requiring the company to cease further violations of the FCPA. KT consented to pay a total of USD 6,800,378, comprising USD 2,263,821 in disgorgement and a USD 3,500,000 civil penalty.

In November 2021, Korean authorities indicted KT executives for criminal violations related to illegal political contributions from the slush funds. The prosecutor chose a summary indictment that was limited to allegations of raising illegal funds for Korean politicians and resulted in only modest monetary penalties of USD 2300 to 5500 (Seoul Central District Court Decision 2022GoJung129, decided 5 July 2023). Nevertheless, the issue of foreign bribery did not appear to constitute a significant concern for Korean authorities. The indictment of the KT executives did not extend to the bribery cases in Vietnam, despite the fact that KT's conduct in Vietnam was no less culpable than its conduct in Korea, at least in terms of the amounts of the illicit payments. Furthermore, there was no rationale for the prosecution to be concerned about the possibility of multiple convictions for identical facts, given that KT was subjected to a mere civil penalty by the SEC.

Although both Samsung and KT were subjected to heavy punishment by the U.S. authorities and the facts of both cases were reported by Korean media, neither Samsung nor KT (nor their executives) have been charged with foreign bribery by Korean law enforcement authorities. Furthermore, the rationale behind the disparate treatment of domestic and foreign illicit payments to public officials in the KT case remains opaque.

3.3. The Courts' Overly Restrictive Interpretation of the FBPA

The OECD Working Group has expressed concerns regarding the interpretation of the FBPA by Korean courts. These interpretations have been deemed overly restrictive and contrary to the objective of the OECD Convention. Two court judgments, which are discussed in further detail below, provide illustrative examples of Korean courts' narrow interpretation of Article 1 of the OECD Convention.

3.3.1. Parent–Subsidiary Liability

The territorial principle represents the most traditional and widely accepted basis for criminal jurisdiction in the context of cross-border offenses (Liivoja 2010, pp. 25, 39; Payer 2023, p. 176). In accordance with this principle, a state is entitled to enact legislation governing activities or omissions within its jurisdiction. However, this principle does not adequately address conflicts of jurisdiction arising from the relationships between a parent and its subsidiary, which are essentially separate entities (Law and Contemporary Problems 1987, p. 72; Schaefer 2019, p. 1662).

Although neither the OECD Convention nor the FBPA provides a definitive answer to the question of whether enterprises headquartered in a Convention country should be held liable for bribery perpetrated by a foreign subsidiary, it has become the prevailing norm to establish such liability (Pieth et al. 2014, p. 159). The 2009 Recommendation of the OECD Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions recognized the liability of a company "using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf" (Annex I C. Responsibility for Bribery through Intermediaries). This section

was subsequently elucidated through its amendment in 2021, which states, "a legal person cannot avoid responsibility by using intermediaries, including related legal persons and other third parties, irrespective of their nationality, to offer, promise, or give a bribe to a foreign public official on its behalf". Nevertheless, in a recent decision, a Korean court ruled that a parent company could not be held liable for foreign bribery committed by its foreign subsidiary. This ruling is at odds with the aforementioned new standard.

DGB Financial Group Case

Kim Tae-oh, Chairman of DGB Financial Group, and three other senior executives of the financial group were charged in December 2021 with the alleged provision of USD 3.5 million in illicit payments to Cambodian brokers between April and October 2020. These funds were purportedly intended to facilitate the bribery of Cambodian government officials in exchange for the issuance of a commercial banking license to DGB SB, a Cambodian subsidiary of Daegu Bank, which is a DGB subsidiary.

In January 2024, the court of first instance acquitted Chairman Kim and others (Daegu District Court Decision 2021GoHap497, decided 10 January 2024). However, while the court acknowledged that the accused had passed money to local brokers to bribe foreign public officials, it ruled that DGB SB, a Cambodian local bank, is a separate legal entity from Daegu Bank, which is merely an investor in DGB SB. Additionally, although the court recognized that the defendants held pivotal roles at DGB SB or were in a position to exert direct influence on the company, it did not acknowledge the defendants' nor the parent company's accountability for DGB SB's conduct.

3.3.2. The Concept of International Business Transactions

A substantial proportion of instances of foreign bribery are connected to the awarding of contracts, the acquisition of business permits and licenses from foreign governments, and so forth. However, as shown in the two court judgments below, Korean courts have excluded the act of obtaining business licenses or permits from the concept of international commerce, which is contrary to the OECD Convention's objective to comprehensively and effectively eradicate bribery in international commerce.

Filipino Casino License Case

In this case, the defendants had formulated a plan to establish an online casino enterprise in the Philippines in collaboration. Following the establishment of their company, they awaited the requisite approval from the relevant authority, the Philippine Amusement and Gaming Corporation (PAGCOR), for their business license application.

PAGCOR is a public corporation wholly funded by the Government of the Philippines that is responsible for authorizing and regulating all entertainment, gambling, and gaming facilities within the Philippines and establishing and managing the businesses operating therein. Philip, an ex-aide to the President of the Philippines, oversaw business licensing and authorization. From 2007 to 2008, the defendants provided a total of USD 350,000 to Philip's private enterprise in exchange for their business license.

The defendants were prosecuted in 2010 but were ultimately found not guilty (Seoul Central District Court Decision 2010GoHap443, decided 4 May 2012). The court found it difficult to determine that the defendants had the intention to provide the bribes and that obtaining a business license for an online casino in the Philippines constituted an international business transaction.

In its assessment of this ruling, the OECD Working Group emphasized that legal authorities should not construe the term "international commerce" in a narrow manner, but rather adopt a more expansive interpretation consistent with the stipulations set forth in Article 1 of the OECD Convention (OECD 2018, pp. 29–30).

DGB Financial Group Case

In addition to the aforementioned parent–subsidiary liability, the court identified another rationale for the acquittal based on the premise that obtaining a commercial banking license is not a business transaction. The court ruled as follows:

> “The ‘Commentaries on Convention on Combating Bribery of Foreign Public Officials in International Business Transactions’ adopted by the Negotiating Conference on 21 November 1997 includes the following paragraph (OECD 2021b):
>
> “Small ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage’ within the meaning of paragraph 1 and, accordingly, are also not an offense. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programs of good governance. However, criminalization by other countries does not seem a practical or effective complementary action.
>
> “The commentary above does not directly explain the meaning of ‘international business transaction’. However, it does recommend that member states establish a program to prevent payments (of a bribe) to public officials to perform duties such as issuing licenses or permits. It is clear that the act is not a criminal act as defined in the OECD Convention, given that the above act is a mere recommendation.”

This is a complete misunderstanding of the commentary, in that the paragraph of the commentary does not mention that payments to obtain a license or a permit are not illegal, but rather discusses the nature of “facilitation” payments and practical difficulties in detecting all criminal activities.

In any case, the court’s overly narrow interpretation of the term “international business transaction” has adversely affected the investigative activities of the Korean authorities: in 2014 and 2015, the prosecution observed a lack of clarity regarding whether political donations made by a Korean national to a Regent in Indonesia to acquire a mining license constituted a bribe to secure an “international business transaction” and decided not to indict the suspect (OECD 2018, pp. 85–86).

3.4. Less Punishment for Bribe Giving than for Bribe Taking

Like the OECD Convention, the FBPA punishes only the “supply side”, the individual who offers, promises, or gives a bribe. Accordingly, the distinction between giving and receiving bribes appears to influence prosecutorial decisions in Korea.

The practice of offering gifts and bribes appears to be pervasive in East Asian cultures, particularly in Korean culture (Chang et al. 2001, p. 125). It is not uncommon for Koreans to blur the lines between gifts and bribes in their everyday interactions. In fact, in the not-so-distant past, the Korean Supreme Court recognized the existence of a “social courtesy exception”, which exempts certain payments or gifts made to officials from being prosecuted as bribes. In accordance with this exception, payments or gifts presented as mere social courtesies were regarded as not being offered in exchange for an official’s actions and, thus, were not deemed to constitute an illicit bribe (Kim and Kim 1997, p. 564). Furthermore, prosecutors were disinclined to pursue cases based solely on such payments or gifts.

The ambiguity between offering gifts and offering bribes within the context of Korean culture may have resulted in bribe giving being regarded as a lesser offense in Korea than bribe receiving. This perception may have contributed to the disparate treatment of the two crimes in Korean law. Whereas the recipient of a bribe may be punished with up

to life imprisonment depending on the amount of the bribe (Article 129 paragraph 1 of the Criminal Act; Article 2 paragraph 1 of the Act on Aggravated Punishment of Specific Crimes), the maximum penalty for the person giving the bribe is five years' imprisonment (Article 133 paragraph 1 of the Criminal Act). Such a difference is also found with regard to the confiscation of a bribe or the proceeds of the bribery: while Korean law requires mandatory forfeiture of a bribe or the value thereof (Article 134 of the Criminal Act) and the proceeds of receiving a bribe (Article 3 paragraph 1 of the Act on Special Cases Concerning Confiscation on Offenses of Public Officials), the proceeds of giving a bribe "may" be forfeited at the discretion of the judge (Article 8 paragraph 1 of the ACPC).[4]

This generous attitude toward a briber may, in addition to the cultural factors mentioned above, be attributed to the understanding that in contrast to the individual who receives the bribe, the briber is merely a de facto accomplice of a non-public official aiding or abetting the crime committed by a public official. In other words, in the case of bribery, Korean legislators have long regarded the public official who receives the bribe as being the primary perpetrator of the criminal act. In contrast, the individual who offers the bribe is regarded as merely complicit in the crime of the public official, and the role of the individual offering the bribe in inducing or causing the bribery is not taken into consideration (Chung and Kang 2006, pp. 311–12).

Previously, the policy of the Korean prosecution service was to investigate bribers without detention, in contrast to the practice of detaining the recipients of the bribe (The Law Times 2003). This practice has remained relatively static until recently, as evidenced by the frequency of summary indictments for bribery. This can be observed in Table 5.

Table 5. Type of indictment for non-foreign bribery in Korea (2001–2022).

	Indictment with Detention[5]	Indictment Without Detention	Summary Indictment[6]	Total
Bribe Giving	1184 (16.2%)	3743 (51.1%)	2404 (32.8%)	7331
Bribe Receiving	4120 (45.8%)	4270 (47.5%)	598 (6.7%)	8988

Source: Supreme Prosecutors' Office. Available online: https://www.spo.go.kr/site/spo/crimeAnalysis.do (accessed on 1 December 2024).

In the context of Korean criminal proceedings, the decision-making processes of prosecutors and judges regarding the application and issuance of detention warrants are informed by a range of considerations, including the potential for evidence destruction and the likelihood of flight (Article 201 and Article 70 paragraph 1 of the Criminal Procedure Act). However, the gravity of the crime in question is a particularly pivotal criterion (Article 201 and Article 70 paragraph 2 of the Criminal Procedure Act). In other words, in practice, detention and indictment are usually limited to serious crimes and are considered an indicator of the prosecutor's willingness to investigate and punish the crime in question. Conversely, the prosecution's failure to apply for a detention warrant or its reliance on summary orders that do not involve detention in many instances of bribery indicate that

[4] Before the revision of the Act on Regulation and Punishment of Criminal Proceeds Concealment in 2005, it was not possible to confiscate the proceeds of giving a bribe.

[5] In Korea, criminal cases are filed by public prosecutors in a system of public prosecution (Article 246 of the Criminal Procedure Act). In legal parlance, a prosecutor's referral of a suspect to the criminal justice system is referred to as an "indictment". The individual thus indicted is designated as a defendant.

[6] In contrast to the standard indictment process, the law allows for a streamlined procedure whereby a summary order is issued without a public trial of the accused. The accused may be sentenced to a fine or forfeiture. This is also referred to as a "summary indictment" (Article 448 of the Criminal Procedure Act). Once the relevant indictment has been filed, the prosecutor will then request a summary order for the fine or forfeiture.

it perceives the crime of bribe giving as minor and is inclined to impose only minimal penalties for it.

This generally lenient standard for bribe giving in the Korean legal system appears to be consistent with Korean prosecutorial decisions not to prosecute foreign bribery: the OECD Working Group noted that several non-prosecution decisions were made by taking into account factors that contradict Article 1 of the OECD Convention, including decisions not to prosecute bribe payers on the basis that the bribe receivers had been prosecuted and sanctioned (OECD 2021a, p. 7).

3.5. Hesitation to Raise Public Awareness of the FBPA

A fundamental preventive measure against foreign bribery crimes is to increase public awareness of the FBPA. However, as discussed above, this is not currently the case. Although the OECD Working Group has repeatedly recommended enhancing government-led awareness-raising activities, these recommendations have been only partially implemented (OECD 2018, pp. 61–62, 78; 2021a, p. 9).

In Korea, in contrast to many other countries such as Germany and France, the criminal code does not address foreign bribery offenses. Instead, these crimes are addressed in a separate law, the FBPA. As a result, not even legal professionals with formal legal training, let alone the general public, usually have the opportunity to learn about the crime of foreign bribery or the FBPA without special education. To illustrate, a survey was conducted of 300 Korean law students at Dongguk and Hanyang Universities, which revealed that none of the future legal professionals had been made aware of this legislation.

The Korean government's adoption of a more rigorous approach to enforcing the FBPA with a greater focus on prosecuting and punishing prominent companies and business leaders could prove an effective strategy for promoting the FBPA. In the event of a significant foreign bribery scandal, experts agree that governments may be compelled to implement changes (Jongen 2021, p. 348). However, the Samsung incident mentioned above was given minimal coverage in the media due to the considerable influence that major corporations like Samsung exert over the media landscape (Kim 2017).

Furthermore, even though the OECD Working Group makes its peer review reports accessible to the public, often in the form of translations into the local language of the reviewed state (Jongen 2021, p. 343), the Korean government has misrepresented the OECD Working Group's direct and clear comments and criticisms using a significantly different tone and has promoted them domestically. A case in point is the commentaries provided by the OECD Working Group in the Phase 4 report published in 2018. In particular, the OECD Working Group has identified the need for more robust enforcement of the OECD Convention in Korea. The term "concerned" was used in 15 of the 32 commentaries to indicate a lack of compliance, while diplomatic and euphemistic language was also employed to maintain a generally positive tone, a common practice in peer review reports (Jensen and Malesky 2018, p. 41). In the report, the OECD Working Group repeatedly used direct and strong expressions such as "seriously concerned" and "(we) reiterate the previous (Phase 3) recommendation", which conveyed a sense of frustration among the members of the OECD Working Group. The Korean government also received a caution in seven of the remaining commentaries by the OECD Working Group. Nevertheless, the press release from the Korean government was entitled "Korea is moving closer to a more ethical and transparent society", which gave its Korean readers the impression that Korea is an exemplary case and that the OECD Phase 4 report was full of positive evaluations (Korean Ministry of Justice 2018). Such an attitude raises doubt about the sincerity of the Korean government's commitment to eradicating foreign bribery crimes. Crucially, this contradicts the Korean government's statement that it publishes and makes easily

accessible press releases to ensure press freedom and equal access to information with regard to foreign bribery reporting (OECD 2021a, pp. 5–6).

4. Conclusions

The OECD Convention is the product of many years of negotiations between countries. To reach an agreement, many parts of the Convention were left to each country's legislation. As previously stated, Korean legislators have, at the very least, demonstrated a lack of enthusiasm for the implementation of the OECD Convention. The enacted legislation notably lacked detail, and any subsequent revisions were made only in response to mounting pressure from the OECD to address legal loopholes. In fact, the Korean government has never independently proposed amendments to the law that were not prompted by the OECD. Moreover, there was an occasion when a revision was delayed despite repeated recommendations from the OECD, and it was only after pressure from a prominent foreign government that the revision was finally implemented. As evidenced by the case of Ban Ki Sang, it is uncertain when the relevant provision of the FBPA would have been revised had there been no pressure from the United States for criminal extradition.

While it is acknowledged that numerous elements of the FBPA are open to interpretation, Korean prosecutors have generally been passive in responding to cases that are clearly punishable under existing laws and regulations. While factors such as a lack of investigative capacity and language barriers may have played a role, the primary reason appears to be a lack of willingness to enforce the law. Moreover, even in instances where foreign bribery cases have been brought to trial, courts tend to interpret the FBPA in a highly constrained manner, failing to conduct a sufficiently comprehensive analysis of the intent and principles set forth in the OECD Convention.

These issues can be partially addressed by strengthening formal (de jure) compliance, such as introducing debarment (a ban on receiving public contracts), given that fines may be seen as no more than a "cost of doing business" in the corporate context (Jin 2019, p. 409). Sustained external pressure, including the "naming and shaming" tactics employed by the OECD Working Group, is imperative to maintain the compliance momentum. However, improving informal (de facto) compliance requires addressing intrinsic factors of Korean culture, where the line between bribes and gifts is often blurred. There is also a discernible bias among prosecutors and courts to show leniency toward crimes perpetrated by large corporations, underscoring the need for a change in perception among legislators, prosecutors, judges, and, most importantly, businesses and the general public. Integrating the FBPA into mandatory formal legal education can significantly raise awareness among legal professionals of the distinctive characteristics of foreign bribery offenses, thereby promoting long-term enhancements in compliance. However, the Korean government has not yet made adequate efforts to raise awareness of this law, which could be a more fundamental solution. Despite the government's repeated assurances, it is evident that achieving enhanced compliance with the OECD Convention in Korea remains a considerable challenge, especially given the difficulty of overcoming the aforementioned cultural and social impediments within a relatively short timeframe.

It should be noted that Korea's reluctance to enforce the Convention is not an isolated issue (Jongen 2021, p. 350). As the number of country case studies, such as those discussed in this article, continues to grow, devising more effective strategies to pressure countries to strengthen their implementation of OECD conventions will become increasingly feasible.

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