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Public Administration and Anti-corruption
A Series of Policy Discussion Papers

[Translated Version]

LAWS AND LAW ENFORCEMENT ON BRIBERY OF FOREIGN PUBLIC OFFICIALS: A COMPARATIVE STUDY OF INTERNATIONAL PRACTICES AND APPLICATION FOR VIET NAM

February 2018

The series of *Policy Discussion Papers* on *Public Administration Reform and Anti-Corruption* is commissioned by the Policy Advisory Team (2007-2016) and the Governance and Participation Team (from 2017) at UNDP Viet Nam.

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Abbreviations

AC	Anti-Corruption
ACRC	Anti-Corruption and Civil Rights Commission
CPC	Criminal Procedure Code
FBPA	Foreign Bribery Prevention Act
FCPA	Foreign Corrupt Practices Act
FPOs	Foreign Public Officials
HCMC	Ho Chi Minh City
MLA	Mutual Legal Assistance
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
PC	Penal Code
PCI	Pacific Consultants International
PRC	People Republic of China
UCPL	Unfair Competition Prevention Law
UK	United Kingdoms
US	United States
UNCAC	United Nations Convention against Corruption
UNTOC	United Nations Convention against Transactional Organized Crime

Executive Summary

Viet Nam has increasingly been taking part in economic integration and globalization. In such a context, there is an emerging trend of investment by domestic investors in other countries, which may create risks of bribery of foreign public officials or internatinal organizations in order to obtain commercial advantages in international investments. In 2015, Viet Nam criminalized bribery of foreign public officials (hereinafter FPOs) based on the current need to prevent such practices and its obligations under the UN Convention Against Corruption (UNCAC). The Penal Code of Viet Nam 2015 officially recognizes bribery of FPOs by adding under Sub-section 6 to Article 364 of the Penal Code 'giving bribe to FPOs, officials of international public organizations'. The criminalization of bribery of FPOs resulted from the assessment of the compliance of Vietnamese criminal law with the UNCAC. Before the amendment of the 1999 Penal Code, Viet Nam underwent the process of national self-assessment of UNCAC implementation in 2011 and 2012, which found some important gaps, including bribery of FPOs, also suggesting areas that need further compliance with UNCAC's provisions. By the additional criminalization of corruption under the 2015 Penal Code, these suggestions seem to have been recognized to some extent. This shows Viet Nam's concern about maintaining fair competition in business, ensuring good governance, and promoting international co-operation in fighting against corruption.

The new provisions entered into force on 1 January 2018 despite a low level of knowledge as well as awareness of law practitioners and businesses on bribery of FPOs. In order to ensure that the new provisions are enforced, it is useful to provide recommendations and advice on mechanisms and solutions for the comprehensive and effective law enforcement of bribery of FPOs. It is the first time that the 2015 Penal Code imposes criminal liability on giving bribe to FPOs; therefore, it is essential to conduct a comparative study on international practices to identify solutions for effective law enforcement, including guidelines on law application and settlement of other related matters. Difficulties and challenges in law development and enforcement in terms of bribery of FPOs from other countries should be examined comprehensively for lessons learnt for Viet Nam.

This policy research paper offers recommendations by reviewing the current legal framework on bribery of FPOs of some selected countries; and, reviewing and analyzing their law enforcement regarding how anti-foreign bribery law works and/or does not work and what the reasons are. The study acknowledges that criminalization of bribery of FPOs is not only an issue of criminal law but is also related to the problem of legal mechanisms to prevent and detect this offense in businesses. Therefore, to detect and handle bribery of FPOs, there is a need for comprehensive mechanisms and solutions, including international co-operation in the fight against bribery of FPOs. This study also contributes to enhancing the effectiveness of the legal framework on anti-corruption in general, and to reforming the Law on Anti-corruption in particular.

The study started by selecting legal systems of different countries for comparative analysis. Five country cases are selected as they have criminalized bribery of FPOs. These include the United States ("the US" with the Foreign Corrupt Practices Act ("FCPA") that addresses the problem of international corruption by criminalizing bribing foreign government officials very early since 1977); the United Kingdom ("the UK", ratifying the OECD

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") in 1998 and reforming its anti-corruption law by the enactment of the 2010 Bribery Act); Japan (which criminalized bribery of foreign public officials since 1998); South Korea (with the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions ("FBPA"), taking effect on February 15, 1999); and, China (criminalizing bribery of FPOs through amending the PRC Criminal Law, which came into force on May 2011).

Anti-bribery of FPOs with relevant considerations including the legal framework, elements of the offence, criminal liability of legal persons, jurisdiction of the law, the law enforcement has been analyzed and discussed from comparative perspectives with practices of the US, the UK, South Korea, Japan and China. Experiences from the five country cases with different levels of legal framework development and law enforcement on bribery of FPOs, however, show that strong institutional will to improve legal frameworks is key to combating bribery of FPOs.

From the experiences of the US and the UK, tools and practices such as a comprehensive legal framework, detailed guidances, case law, specialized units, detecting allegations through foreign requests for legal assistance, availability of concerned information, etc., are all important elements in determining the success of national efforts to prevent, detect and sanction bribery of FPOs. The lessons learnt from the US and the UK are to encourage whistleblowers to come forward, with good protections provided both under the law and in practice. Reporting channels are also made available and improved.

The cases of South Korea and Japan show efforts in improving their systems to fight bribery of FPOs, although they still have some weaknesses such as unclear definition of foreign public officials, a lack of relavant case studies focusing on bribery of FPOs, a lack of effective mechanisms for self-reporting and whistleblowing. For China, the additional provision on foreign bribery seems to be have been added merely for compliance with UNCAC.

The 2015 Penal Code does reflect the special feature of foreign bribery through the element of "FPOs" or "officials of international public organization". However, it does not define the concept of bribery of FPOs. In addition, through comparative analysis as well as opinions received from interviews, it can be concluded that the way of criminalizing giving bribes to FPOs under the Penal Code of Viet Nam neither reflects all UNCAC's special features nor fully complies with requirements of it. In particular, the combination of bribery of FPOs with domestic bribery in legislation is inappropriate to correctly determine what bribery of FPOs compromises. Further, such a combination does not show other differences between foreign bribery and domestic bribery, including the briber (often legal persons under the laws of other countries), some requirements of the intent and purpose (the scope as well) of the offence.

Regarding the mechanism of detectingbribery of FPOs, it should be noted that although the Law on Anti-corruption recognizes awarding whistleblowers, giving bribe is not classified as corruption crimes as provided in the Penal Code, so whistleblowing of foreign bribery has not fallen under the scope of this law. In addition, the Law on Anti-corruption has a provision on encouraging self-detection of corrupt acts in businesses, but it is not clear enough and it excludes the act of giving bribes. Unlike the other five countries' legislations, the Law on Anti-corruption lacks provisions on self-reporting and detecting bribery of FPOs within businesses. These are key obstacles for Viet Nam in the detection of bribery of FPOs.

Reviewing the current legal framework on mutual legal assistance (MLA) in criminal matters, extradition, joint investigation, transfer of criminal proceedings shows that the framework still has loopholes that may negatively affect the effectiveness of international cooperation in investigation, prosecution, adjudication and execution of judgment on bribery of FPOs. Current laws do not cover the competence and procedures for dealing with issues raised by the requests of MLA from other countries like, for example, urgent arrest of persons before receiving official requests of extradition; freezing assets or limitation of asset transfers, or seizing assets in Viet Nam based on the orders of a foreign court. The Law on Mutual Legal Assistance and the treaties on MLA in criminal matters between Viet Nam and other countries only mention transferring criminal proceedings but have not yet stipulated for general principles. The 2015 Criminal Procedural Code also does not define this matter. Although Viet Nam has taken part in some bilateral, multilateral and regional cooperation, its actions are not adequate. Moreover, the fact that Viet Nam does not directly apply international treaties, makes international cooperation even more difficult.

In summary, Viet Nam still lacks necessary mechanisms to enforce provisions on bribery of FPOs and officials of international public organizations under the 2015 Penal Code. The capacity of law enforcement officials in criminal cases of transnational crimes is still limited. Mechanisms for cooperation in criminal proceedings, especially international cooperation in investigation, prosecution, and adjudication of criminal cases are also unclear and difficult to implement.

Based on lessons learnt from the comparative analysis and the analysis of the shortcomings of Viet Nam's laws regarding anti-bribery of FPOs, the following recommendations are put forward:

On amendment of the 2005 AC Law

It is strongly advised that the AC Law include new provisions on business integrity and hold businesses accountable for developing and implementing codes of conduct and internal control mechanisms. The experiences of the US, the UK, South Korea and Japan indicate that the prosecution of bribery of FPOs should not be the first and sole solution. Mechanisms for early prevention and detection act are essential. These countries criminalize bribery of FPOs not only to punish it but also to promote the use of preventive and self-detection mechanisms by businesses to avoid criminal liability. Requiring businesses to establish their codes of conduct and internal control mechanisms will be a starting point for imposing criminal liability of commercial organs for bribery of FPOs in the future.

As discussed in this paper, the Law on Anti-corruption still contains loopholes in the scope of corrupt acts. Excluding 'giving bribes to FPOs' from the list of corrupt acts in the law prevents the detection and handling of such acts. In order to ensure the consistency of the legal framework on anti-bribery, the law should be revised by expanding the scope of acts under its jurisdiction to giving bribes, including bribery of FPOs. By introducing provisions on prevention and detection of giving bribes to FPOs into the law, the basis to fight corruption will be improved.

On guidelines on handling the offense of bribery of FPOs under the 2015 Penal Code

The following elements should be included and clarified in the guidelines:

- The concept of 'foreign public officials' and 'officials of international public organizations'
- The scope of benefits or areas of transactions for which bribery of FPOs is committed: Should it include all kinds of benefits and advantages that the briber wants to gain through the performance of FPOs' duties, or only advantages obtained

through international commercial transactions?
- The purpose of bribery of FPOs
- Bribes in the form of intangible advantages

On reforming the relevant provisions in the 2015 Penal Code

It is essential to establish bribery of FPOs as a seperate crime under the Penal Code. With a thorough analysis on the interests harmed by the crime, the international feature of the bribee, the purpose and area of business deals or advantages that the briber wants to gain, there are clear differences in the elements and the levels of seriousness between bribery of FPOs and that of domestic officials. It is therefore crucial to set up a separate crime of bribery of FPOs, clarify the elements of the crime and differentiate the severity of criminal penalties.

Reforming the 2015 Penal Code should include definitions of FPOs and officials of international public organizations in order to ensure the consistent understandings of such concepts to facilitate and enable investigation, prosecution and adjudication of criminal cases. Legal definitions of these concepts need to include the fundamental elements defined by Article 2 of the UNCAC. In addition, the definition of FPOs should be more specific to include, for example, officials of state owned enterprises as defined under the UK or South Korea's laws.

Furthermore, in the context where Viet Nam has criminalized giving and taking bribes in the private sector and giving bribes to FPOs, it is essential to consider imposing criminal liability on legal entities for the crime of giving bribes to FPOs. The study observes that defining criminal liability of legal persons for active bribery is common in international practices, because many countries see the need of preventing businesses from corrupt practices and punishing them for damaging fair competition and business integrity. In addition, corrupt practices by enterprises are now pervasive. A study on business integrity conducted in 2016 by the Government Inspectorate and other business surveys conducted by the Vietnam Chamber of Commerce and Industry have pointed out that giving bribes is often conducted through businesses' representatives for obtaining commercial advantages. Defining criminal liability for individuals is neither fair nor sufficient enough in cases where bribery is committed with the agreement by and on behalf of the legal entities, especially in the context where some legal entities are established to commit organized crimes.

On improving the mechanisms for international cooperation in detecting and prosecuting bribery of FPOs

- It is essential to revise the Law on Mutual Legal Assistance by defining clearly its scope in the relationship with the Criminal Procedural Code. The revision of the law needs to be done in the way that it ensures coherence while avoiding overlaps with the Criminal Procedural Code.
- It is important to provide competence and procedures for dealing with requests of MLA from other countries and to fill the gaps in the legislation for extraditions, transfer of criminal cases as presented and analyzed in this report.
- It is also recommended that Viet Nam facilitate negotiations for and expand MLA in criminal matters, extradition, and transfer of sentenced persons by signing MLA treaties with more countries, especially where there are high risks of bribery of FPOs by Vietnamese businesses. Increased bilateral cooperation in the judicial sector will also help avoid the transfer of assets gained through corruption crimes.

On raising awareness of law enforcement officials and businesses on bribery of FPOs

- It is necessary to introduce provisions on bribery of FPOs to training materials when disseminating the 2015 Penal Code.
- Providing traning courses on bribery of FPOs for law enforcement officials is essential.
- Making businesses aware of the criminalization of foreign bribery under the 2015 Penal Code and training them how to prevent and combat bribery of FPOs is integral.

Introduction

Viet Nam has increasingly been taking part in economic integration and globalization. In such a context, there is an emerging trend of investment by domestic investors in other countries, which may create risks of bribery of foreign public officials or internatinal organizations in order to obtain commercial advantadges in international investments. In 2015, Viet Nam criminalized bribery of foreign public official (hereinafter FPOs) based on the current need to prevent such practices and its obligations to the UN Convention Against Corruption (UNCAC). The Penal Code of Viet Nam 2015 officially recognizes bribery of FPOs by adding Sub-section 6 to Article 364 of the PC, called 'giving bribe to FPOs, official of international public organization'. The criminalization of FPO resulted from the assessment of the compliance of Vietnamese criminal law with the UNCAC. Before the amendment of the Penal Code 1999, Viet Nam underwent the process of national self-assessment of UNCAC implementation in 2011 and 2012, finding some important gaps, including bribery of FPOs, also suggesting areas that need further compliance with UNCAC's provisions. By the additional criminalization of corruption under the 2015 Penal Code, suggestions seem to be recognized to a certain extent. This shows Viet Nam government's concern about maintaining fair competition in business and good governance, promoting international co-operation in fighting against corruption.

New provisions have entered into force from the 1st January 2018 despite of a low level of knowledge as well as awareness of law practitioners and businesses on bribery of FPOs. The new law should not be of a symbol and its enforcement should be paid atttention thereon. Now it is high time to provide recommendations and advice on mechanisms and solutions for the comprehensive and effective law enforcement of bribery of FPOs. It is the first time the 2015 Penal Code imposes criminal liability on giving a bribe to FPOs; therefore, it is essential to conduct a comparative study on international practices to identify solutions for effective law enforcement, including guidelines on law application and settlement of other related matters. Difficulties and challenges in law and law enforcement of other countries in terms of bribery of FPOs should be examined comprehensively for learning lessons for Viet Nam, particularly those influencing law enforcement.

This policy research paper provides recommendations by reviewing current legal framework on bribery of FPOs of some selected countries; reviewing and analyzing its law enforcement, how anti-foreign bribery law works and/or does not work and what the reasons are for it. The study realizes that criminalization of bribery of FPOs is not only the issue of criminal law but also the problem of legal mechanisms on enterprises to prevent and detect such offenses. To detect and handle bribery of FPOs, there is a need of comprehensive mechanisms and solutions, including international co-operation in fighting against bribery of FPOs. This study also contributes to enhancing effectiveness of legal framework on anti-corruption in general, especially in progress of reforming the Law on anti-corruption.

This study only focuses on the legal framework on bribery of FPOs and its enforcement. The report was conducted through mainly desk-review and interview experts who have major in anti-corruption and public officials of law enforcement agencies.[1] The legal comparative method is used as the main research methodology.

[1] While carrying out this policy advocacy research, research team has conducted interviews and discussions with experts and law enforcement officials those specilized in anti -corruption law, including: Comparative Law Institute – Hanoi Law University, Criminal and Administrative Law Department of Ministry of Justice, Legal Department of Governmental Inspectorate, Legal and Research Management of Supreme People's Procuracy, Legal and Research

The study started by selecting legal systems of different countries for comparative analysis. At first, it found that among countries which have criminalized bribery of FPOs, the United States ("the US") should be the best case for comparison as it has adopted the Foreign Corrupt Practices Act ("FCPA") that addresses the problem of international corruption by criminalizing bribing foreign government officials very early since 1977. The FCPA was highly appreciated that it encougaged American companies engaged in international business to develop comprehensive corporate compliance programs, in which corporations establish procedures to prevent the payment of bribes, conduct internal investigations when the management finds out allegations of bribery, and voluntarily disclose any uncovered bribery to the government as a result of their investigations.[2] The US's determination to fight foreign corrupt practices has been shown by its increasing number of investigated and convicted cases.[3]

The United Kingdom ("the UK") ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") in 1998. Since then, the UK had recognized bribery of FPOs as an offence by refering to the Prevention of Corruption Act 1906, the Public Bodies Corrupt Practices Act 1889 and case law on bribery offences. It was found that none of these offences expressly referred to bribery of FPOs until the Anti-terrorism, Crime and Security Act 2001 (Part 12) and corporate liability imposed on foreign bribery cases under case law.[4] In April 2010, the UK enacted the Bribery Act 2010 which reformed its legislative scheme of bribery offences, especially creating a seperate offence of bribery of FPOs (Sec.6). "The policy that founds the offence at Section 6 is the need to prohibit the influencing of decision making in the context of publicly funded business opportunities by the inducement of personal enrichment of foreign public officials".[5] It is worth getting lessons from the UK in reforming law against corruption in terms of foreign bribery.

Japan criminal law is also a good choice for comparison because it criminalized bribery of foreign public officials since 1998, showing Japan's willingness to prevent this type of corruption. The case of the Pacific Consultants International (PCI), the consultant for the Saigon East-West Highway and Water Environment project in HCMC,[6] where Japan criminally punished some Japanese businessmen for bribing Vietnamese public officials, is an example of criminal law enforcement in this regard. As a member of the OECD Convention in 1998, Japan amended the

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Management Department of Supreme People's Court, Legal Department of Central Internal Affairs. We also conducted interview with Mr. Gerry McGowam, Investigator from National Crime Agency of the UK, International Liaison Officer (Viet Nam/Malaysia/Laos) at the UK Embassy to Viet Nam and Mr. Carlos J. Costa-Rodrigues, Attorney Adviser, International Enforcement for the Office of International Affairs – U.S Securities and Exchange Commission.

[2] See: Phase 1 Report on United State Review of Implementation of the Convention and 1997 Recommendation, p.1, accessed at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2390377.pdf on 6 November 2017.

[3] See: United States: Follow-up to the Phase 3 Report and Recommendations, December 2012, accessed at http://www.oecd.org/daf/anti-bribery/UnitedStatesphase3writtenfollowupreportEN.pdf on 6 November 2017. See more: Richard L. Cassin, *2017 FCPA Index*, accessed at http://www.fcpablog.com/blog/2018/1/2/2017-fcpa-enforcement-index.html on 1st Feb 2018.

[4] See: United Kingdom: Phase 1 ter Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions, accessed at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/46883138.pdf on 8 November 2017.

[5] See: Ministry of Justice, Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing, paragraph 23.
Accessed at http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf on 8 November 2017.

[6] See http://english.thesaigontimes.vn/2337/Japan-suspends-ODA-for-Viet Nam-over-corruption-case-ambassador.html for further information.

Unfair-Competition Prevention Law ("UCPL") which contains Article 18 for criminalizing bribery of FPOs. Japan also enacted additional regulations in 2004 for broadening the jurisdiction of Article 18 to cover conducts by Japanese nationals in foreign countries. In addition, the Penal Code of Japan, Article 22.1 imposes criminal liability on legal persons including firms and organizations.[7] This means to support the enforcement of the UCPL in cases where foreign bribery is committed on behalf of legal persons.

South Korea is one of the strategic partners of Viet Nam, notable in Asia by the development of the economy and the protection of a fair and transparent competitive environment. In 1998, one year after its signing the OECD Convention, South Korea enacted the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions ("FBPA") which entered into force on February 15, 1999. The early enactment of the FBPA makes South Korean anti-bribery of FPO enforcement more experienced than other countries in Asia. South Korea has taken steps to improve enforcement of the foreign bribery offence,[8] being a good example of preventing and combating bribery of FPOs.

The People Republic of China ("PRC") shares a similar context of combating corruption with Viet Nam, but has shown to be more determined to tackle corruption. In terms of dealing with bribery of FPOs, the PRC National People's Congress passed an amendment of the PRC Criminal Law setting out a prohibition on the payment of bribes to "*foreign officials*" and "*officials of international public organizations*" ("Amendment") on 25 February 2011. This amendment firstly evidences that China follows the international treaties, in particular UNCAC, which China ratified in 2006. In addition, China also became a member of ADB/OECD Anti – Corruption Initiative for Asia – Pacific since 2005, therefore, this amendment shows its strong commitment to be member of OECD and its effort in fighting against corruption in collaboration with international community.[9] Moreover, criminalization of bribery of FPOs by amending the Criminal Law of China shows its concern in the increasing number of Chinese companies having business activities in foreign countries and provides a legal ground for competent agencies to investigate activities of Chinese companies doing business overseas when needed.

It can be seen that bribery of FPOs has been increasingly criminalized over the world and the criminalization of foreign bribery is among the most important trends.[10] The notion for such criminalization is to prevent not only domestic corruption but also corrupt practices by officials of other countries and international public organizations. Such criminalization also satisfies the need of a coordinated and multifaced attack against bribery. The above five countries' experiences in legislating and enforcing bribery of FPOs will be reviewed and compared in this analysis that hopefully will give lessons to Viet Nam. The cases of US and UK are also sources of criminal law that Viet Nam can learn from to deal with bribery of FPOs, especially in the context where the Supreme Court of Viet Nam is making its efforts to set up precedents as other sources for adjudication.

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[7] See https://www.globallegalinsights.com/practice-areas/bribery-and-corruption/global-legal-insights---bribery-and-corruption/japan, accessed 5 November 2017.

[8] See: Korea: Follow-up to the Phase 3 Report and Recommendations, May 2014, accessed at http://www.oecd.org/daf/anti-bribery/KoreaP3WrittenFollowUpReportEN.pdf on 10 November 2017.

[9] See: *PRC criminal law to tackle bribery of foreign public officials* at http://www.nortonrosefulbright.com/knowledge/publications/35820/prc-criminal-law-to-tackle-bribery-of-foreign-officials accessed 27 November 2017.

[10] The information on the trends of criminalization of foreign bribery can be seen for example in the Note "The impact of the OECD Anti-Bribery Convention" by Nicola Ehlermann-Cache (Policy Analyst of the OECD Anti-Corruption Division), at https://www.oecd.org/mena/competitiveness/41054440.pdf; more information can be obtained at https://www.transparency.org/files/content/corruptionqas/24_Trends_in_Anti-Bribery_laws.pdf, accessed on 28 November 2017.

1. Comparative Analysis on International Practices in Anti-Bribery of Foreign Public Officials

1.1. Legal Framework on Bribery of Foreign Public Officials

Of the five selected countries under study, UK, USA, Japan and South Korea have a comprehensive legal framework on bribery of FPOs. They have foreign bribery criminalized in a special act and also deal with such corruption by case law. China however creates the offence under the penal code, having a vague and poor legal framework on foreign bribery.

The first and most important law dealing with bribery of FPOs is the legislation criminalizing such an act. Among these countries, the US, the UK and South Korea have their special acts on bribery of FPOs (the FCPA of the US, the Bribery Act of the UK, the FBPA of South Korea). Japan added one article to criminalize bribery of FPOs to the UCPL. Only China establishes bribery of FPOs in its penal code (the PRC Criminal Law).

The FCPA (15 U.S.C. §§ 78dd-1, et seq.) of the US deals with the problem of international bribery in a very comprehensive and systemic manner. First, the provisions on anti-bribery of FPOs prohibit individuals and businesses from bribing foreign government officials to obtain or retain business by criminalizing such acts. Second, the provisions on accounting impose certain record keeping and internal control requirements on issuers, and prohibit individuals and companies from knowingly falsifying an issuer's books and records or circumventing or failling to implement an issuer's system of internal controls. Third, it confirms that violations of the FCPA can lead to civil and criminal penalties, sanctions and remedies, including fines and/or imprisonment. The FCPA can be considered a comprehensive legislation on bribery of FPOs because of its adequacy of necessary provisions on setting up the offence and imposing penalties and remedies thereon. It also makes a good reference by showing relavant laws for easier application. The guiding principles of enforcement are also established under the FCPA. It further provides for meaningful measures for preventing foreign bribery. Notably, the Act clearly sets out whistleblower provisions and protections which are essential for detecting foreign bribery.

The Bribery Act of the UK also criminalizes bribery of a FPO by creating a standalone offence under Section 6. The Act recognizes the offence where a person offers, promises or gives a financial or any advantage to a FPO with the intention of influencing the official. The penalties can be imprisonment for a term not exceeding 10 years or a fine or both (Section 11). Foreign bribery offence under the Bribery Act is much similar to that of the FCPA. However, the Bribery Act represents a broader international trend and has an even wider application. Because the Bribery Act requires more comprehensive procedures for organizations to set up and maintain anti-bribery programmes than the FCPA,[11] anti-corruption procedures by organizations may be sufficiently robust for the purposes of the FCPA but may not be adequate where the Bribery Act is concerned. In addition, the Bribery Act sets out both domestic (including private to private) and foreign bribery while the FCPA only provides for bribery of FPOs. Furthermore, the Bribery Act criminalizes any failure to prevent bribery and impose criminal liability for legal entities thereon.

Similar to the US and the UK, South Korea implements the OECD Convention through the enactment of the FBPA which criminalizes the birbery of a FPO in international business

[11] See analysis on the Guidance of the Bribery Act and the Resource Guide of the FCPA below for detail.

transactions. The FBPA has similarities to the FCPA of the US as it only focuses on foreign bribery. Article 3.1 of the FBPA sets out the offence of bribery of a foreign public official as follows: "*Any person, promising, giving or offering bribe to a foreign public official in relation to his/her official business in order to obtain improper advantage in the conduct of international business transactions, shall be subject to a maximum of 5 years' imprisonment or a fine up to 20,000,000 won. In the event that the profit obtained through the offence exceeds a total of 10,000,000 won, the person shall be subject to a maximum of 5 years' imprisonment or a fine up to twice the amount of profit*."[12] The country means to fully support the OECD Convention by containing also provisions on the responsibility of legal persons and confiscation. [13] Similar to the US and the UK law, Article 3.2 of the FBPA provides an exception (defence) if the law of the FPO's country permits or requests such payment.

Different from the above countries, Japan criminalizes bribery of FPOs under the UCPL, not in anti-bribery law. Article 18 provides that: "*No person shall give, or offer or promise to give, any money or other benefit to a Foreign Public Official, etc. to have the Foreign Public Official, etc. act or refrain from acting in relation to the performance of official duties, or in order to have the Foreign Public Official, etc., use his/her position to influence another Foreign Public Official, etc. to act or refrain from acting in relation to the performance of official duties, in order to obtain a wrongful gain in business with regard to international commercial transactions."* In addition, UCPL also defines the penalty for bribery of a FPO including imprisonment up to three years or fine up to ¥3 millions. To respond to the OECD recommendation, Article 21.2 of UCPL (amended in 1998) increases seriousness of imprisonment penalty up to five years and a fire up to ¥5 millions. However, confiscation proceeding of bribery of FPO is not yet regulated under Japanese law. Therefore the OECD Working Group on Bribery in International Transactions ("Working Group") suggested that Japan should consider revising the Anti-Organized Crime Law in order to confiscate illegal assets gained by bribery and laundering.[14]

For China, the PRC Criminal Law generally prohibits an individual or entity from giving "money or property" to a state functionary, a non-state functionary or any entity for the purpose of obtaining "improper benefits" (Article 164). The Criminal Law prohibits both state functionaries and non-state functionaries and entities from accepting money or property or making use of their position to provide improper benefits to a person who seeks for improper benefits. Particularly, the Amendment to Article 164 of the Criminal Law clearly sets the prohibition on the payment of bribes to "foreign officials" and "officials of international public organizations" as follows: "*Whoever provides property to a foreign official or an official of an international public organization for the purpose of seeking an improper commercial benefit, will be punished [in accordance with the provisions applicable to commercial bribery*." Regarding criminal penalties, the Criminal Law defines the penalties imposed on individuals and legal entities as follows: penalty imposes to individual is from three to ten years of imprisonment depending on the seriousness of offence and penalty of the legal entities is fine and the person who has direct responsiblity for an offence may be imposed a penalty of imprisonment up to ten years (Article 164). The Amendment is however criticized that it is intentionally designed to be narrowly interpreted and weakly enforced as well

[12] The English version of the FBPA is accessed at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2378002.pdf on 21 November 2017.

[13] See: Phase 1 Report on Korea Review of the Implementation of the Convention and 1997 Recommendation, accessed at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2388296.pdf on 20 November 2017.

[14] OECD, "Japan must make fighting international bribery a priority", June 30, 2016, http://www.oecd.org/daf/anti-bribery/japan-must-make-fighting-international-bribery-a-priority.htm, accessed 27 November 2017.

as failing to encompass the full range of conduct intended to trigger criminal liability under Article 16 of the UNCAC.[15]

In addition to such criminal acts and laws, most of these countries have *the guidance for the application of the law on bribery of FPOs*. Japan, for instance, has the Guidance for the Prevention of Bribery to Foreign Officials ("Guidance") set by the Ministry of Economy, Trade and Industry ("METI").[16] With the aims at supporting Japanese company to develop their business in foreign countries, METI amended the Guidance in 2015 to interpret clearly that Japanese companies must reject request of bribery of foreign public officials even if the bribes are conducted to gain fair and reasonable treatment. In addition, the Guidance also determines that small gifts for congratulations and expenses for travel and entertainment may not be considered bribery if it is only for building a general social relationship or gaining the official acquaintance with the products and services of companies. Guidance gives example of acceptable gifts and hospitality including gifts for distribution, refreshments at business meeting, for promotion or commemoration, and for seasoning with low value in compliance with local culture and law.

More specifically, the UK's Ministry of Justice issues the Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing. The Guidance interpretes the jurisdiction of the Bribery Act, explaining the elements of bribery offences under the Act, including bribery of a foreign public official. It clarifies for instance the term a 'foreign public official', the difference in the requirement of intent between bribery of a FPO (Sec.6) and offences of bribing another person (Sec.1). It further explains some defences for exemption of criminal liability such as *bona fide* hospitality and promotional or other business expenditure which seeks to improve the image of a commercial organisation. Especially, it sets out six principles requiring commercial organisations to prevent bribery, including proportionate procedures, top-level commitment, risk assessment, due diligence, communication (including training), monitoring and review. Each principle is characterized by clear and specific requirements, illustrated by specific case studies in Appendix A.

Similar to the UK's Guidance, the US's Resource Guide to the U.S. Foreign Corrupt Practices Act ("Resource Guide") by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission[17] consists of specific explanations of the elements of the offence, interpreting accounting provisions, refering to other related laws, explaining the guiding principles of enforcement (e.g. self-reporting, cooperation, remedial efforts, corporate compliance programs, etc.), guiding the use of resolutions to foreign bribery (for example, through criminal complaints, plea agreements, non-prosecution agreements, etc.). The Resource Guide is very practical because it also gives examples, facts and real cases which clearly illustrate the FCPA's provisions. This Guide therefore is a comprehensive instrument for the enforcement of the FCPA (see Appendix 1 for details). However, the Guide shows general requirements than the Guidance of the Bribery Act in terms of corporate compliance programs (for instance, it does not clearly require specific procedures as the Guidance does).

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[15] See: Samuel R. Gintel, "Fighting Transnational Bribery: China's Gradual Approach", *Wisconsin International Law Journal*, Vol. p.1.

[16] The Guidance is accessed at http://www.meti.go.jp/policy/external_economy/zouwai/pdf/GuidelinesforthePreventionofBriberyofForeignPublicOfficials.pdf on 18 October, 2017.

[17] Accessed at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf, on 22 December 2017.

Sharing such efforts of supporting the fundamental laws on foreign bribery, the Anti-Corruption and Civil Rights Commission ("ACRC") of South Korea adopted a Guideline for Referral of Reported Cases in 2012 which requires it to transfer reports of the FBPA violations to law enforcement authorities.[18] South Korea however has no guidance explaining elements of the offence. That is also the case of China where such elements as foreign public officials, foreign countries and international organizations with regard to foreign bribery have not been interpreted by any guideline.

Moreover, all five countries under study have made other laws that mean to support the implementation and enforcement of foreign bribery law. The US has, for instance, Travel Act which prohibits travel in interstate or foreign commerce or using the mail or any facility in interstate or foreign commerce with the intent to proceed of any unlawful activity or to promote, manage, establish, or carry on any unlawful activity;[19] the anti-money laundering statutes; the mail and wire fraud statutes; the statutes on tax violations, etc.[20] The UK's related laws include, for example, the Proceeds of Crime Act 2002[21] which allows seizure of property subject to a restrain order by the Crown Court in a criminal investigation into foreign bribery to prevent its removal; the Public Interest Disclosure Act 1998 (PIDA)[22] that is to ensure protection of whistleblowers by protecting employees from detrimental treatment for disclosing misconduct, including foreign bribery. This is also the purpose of the Japan's Whistleblower Protection Act 2004.[23] The South Korea's International Mutual Legal Assistance in Criminal Matters Act allows providing of mutual legal assistance in criminal matters;[24] the Act on Regulation and Punishment of Concealment of Crime Proceeds;[25] the Corporate Income Tax Law and the Individual Income Tax Law prohibit the deductibility of domestic and foreign bribes.[26] For China, the PRC's Anti-Unfair Competition Law ("AUCL") also prohibits improper commercial benefits through bribes to FPO, providing for administrative sanctions on bribery cases.[27]

By comparing the legal framework of the five countries, it is noted that anti-corruption legislations do not limit to establishing the offence of FPOs but extend its scope to responsibility of legal persons, confiscation of proceeds from bribery of FPOs, and preventive measures as well. In this regard, a comprehensive act or law specialized in criminalization of FPOs and other related

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[18] See: Korea: Follow-up to the Phase 3 Report and Recommendations, May 2014, accessed at http://www.oecd.org/daf/anti-bribery/KoreaP3WrittenFollowUpReportEN.pdf on 10 November 2017.

[19] 22 U.S.C.§ 2778(g)(1)(A)(vi), (g)(3)(B).

[20] See more detail in the Resource Guide by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.

[21] Accessed at https://www.legislation.gov.uk/ukpga/2002/29/contents on 26 November 2017.

[22] Accessed at https://www.legislation.gov.uk/ukpga/1998/23/contents on 26 November 2017.

[23] Accessed at http://www.cas.go.jp/jp/seisaku/hourei/data/WPA.pdf on 28 November 2017.

[24] For more information of the Act, see: Phase 1 Report on Korea Review of the Implementation of the Convention and 1997 Recommendation, accessed at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2388296.pdf on 20 November 2017, p.17.

[25] See the information at https://uk.practicallaw.thomsonreuters.com/Document/I9ee3e018642411e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1

[26] See: Korea Anti-Corruption Regulation – Getting The Deal Through – GTDT, accessed on 15 November 2017 at https://gettingthedealthrough.com/area/2/jurisdiction/35/anti-corruption-regulation-korea/

[27] Accessed at http://www.lawinfochina.com/Display.aspx?lib=law&Cgid=6359 on 20 November 2017; more information on the latest amendment of the AUCL can be obtained at https://globalcompliancenews.com/china-anti-unfair-competition-bribery-20171121/

matters, as seen in the cases of the US and the UK, seems more systematic and convenient. Moreover, these countries see that the law it self cannot lead to the effective enforcement so it needs support by other instruments such as a detailed guidance and other related laws.

1.2. Elements of the Offence

The first element to be compared is ***the bribe giver***. The five countries recognize this element in a broad scope. They all acknowledge that any person including a commercial entity can be the bribe giver to the FPOs. The nationality of such a person does not matter. For China, the bribe giver is not clearly defined under Article 164 of the Criminal Law but that person can be determined by the provisions on jurisdiction as mentioned at 2.4 below. Jurisdiction of law on bribery of FPOs is not only applied for Chinese nationality but also for foreigners under the Penal Code of China. Other four countries set out a clear scope of the bribe giver under the provisions on foreign bribery offence. In this respect, the FCPA of the US shows its exclusive way of legislation by clearly defining the bribe givers in foreign bribery offence (see Box 1). This type of legislative technique seems so meaningful for the application of foreign bribery law.

Box 1: Bribe giver under the FCPA of the US

The FCPA, after the 1998 amendments, extends its coverage to other persons, natural or legal, who take any act within the US in furtherance of a bribe. The Act now has jurisdiction over:

- "Issuers" who are essentially publicly-traded companies - any corporation (domestic or foreign) that has registered a class of securities with the Securities and Exchange Commission ("SEC") (Section 12, Exchange Act) or is required to file periodic or other reports with the SEC (Section 15(d), Exchange Act).
- "Domestic concerns other than issuers" are any US citizen, national or resident, as well as any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the US or its states, territories, possessions, or commonwealths or that has its principle place of business in the US.
- "Persons other than issuers or domestic concerns" are any foreign persons or foreign non-issuer entities that, either directly or through an agent, engaged in any act in furtherance of a corrupt payment while in the territory of the US. Officers, directors, employees, agents, or stockholders acting on behelf of such persons or entities may also be subject to the FCPA.

(*15 U.S.C. §§ 78dd-2 and 15 U.S.C. §§ 78dd-3 and the FCPA's Resource Guide*)

Under anti-foreign bribery law of the comparative countries, ***the core element of the offence is a FPO***. The concept FPO is defined in different ways.

South Korea simply lists such persons based on their functions as the way that the OECD Convention does.[28] Article 2 of the FBPA of South Korea provides that "*A foreign public official is any person who: (1) is engaged in a legislative, adminislative, or judicial work for a foreign government (including local government); (2) falls within one of the followings and exercises public function for a foreign government: conducting official business on authority delegated by*

[28] Article 1(4)(a) of the OECD Convention defines "foreign public official" as "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization".

a foreign government; working for a public organization or agency established by law to carry out specific business in the public interest; is an executive or employee of any enterprise over which a foreign government holds over 50 percent of its subscribed capital or exercises substantial controlling power over its overall management including the decision of major business and the appointment or dismissal of its executives (except an executive or employee of those enterprises operating on a competitive basis equivalent to entities of ordinary private economy, without preferential subsidies or other privileges); or (3) works for a public international organization." According to a report on South Korea's implementation of the OECD Convention, in order to make that definition more clear, "[South] Korea confirms that this provision does apply to all subdivisions of government" and it "also includes military official of foreign countries and international organizations."[29] The definition appears clear enough and compliant with the requirement of the OECD Convention.

Under the FCPA of the US, definition of "foreign official" includes "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." (15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2). In a report reviewing the US's implementation of the OECD Convention, the US authorities confirm that the definition of "foreign official" is independent on the foreign government's classification of who is an official. The definition of "foreign official" set by US authorities would, for example, cover judges, even though they are not expressly included, and even though in a particular country the judiciary might be independent to a degree, which could call into question whether judges are foreign public officials.[30] In addition, the US case law has shown the coverage of individuals whose official status may not be clearly apparent.[31] Broader than the scope set out under other countries' law, the FCPA specifically prohibits payments to "any candidate for foreign political office" and "any foreign political party or official thereof" to influence that party's or individual's decision-making or to induce that party or individual to take any act or to use its or his influence in connection with obtaining or retaining business. Although the term "foreign country" is not defined in the FCPA, other legislation of the US Code provides support for its application, such as the Foreign Agent Registration Act. As regards public enterprises, different from the FBPA of South Korea, the FCPA does not contain an explicit reference to "public enterprises" or any definition thereof. In addition, the Act applies to payments to foreign officials who are employees of "instrumentalities" of foreign governments. They may be officers, directors and employees of state enterprises.

Under the FCPA, the term "foreign official" also includes any officer or employee of a public international organization or any person acting in an official capacity for or on behalf of any public international organization (15 U.S.C. § 78dd-1(f)(1). "Public international organization" is defined in the FCPA[32] as: "(i) an organization that is designated by Executive Order pursuant to Section 1 of the International Organizations Immunities Act; or (ii) any other international organization that is designated by the President by Executive order for the purposes of this section" (15 U.S.C. §

[29] See: Phase 1 Report on Korea Review of the Implementation of the Convention and 1997 Recommendation, accessed at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2388296.pdf, p.4.
[30] See: Phase 1 Report on United State Review of Implementation of the Convention and 1997 Recommendation, accessed at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2390377.pdf, p.5.
[31] Ibid.
[32] 15 U.S.C. §§ 78dd-1(f)(1)(B); 78dd-2(h)(2)(B); 78dd-3(f)(2)(B).

78dd-1(f)(2). Such provisions were lightly criticized by the OECD Working Group due to the fact that it does not reach to all international public organizations that are covered under Article 19 of the International Organizations and Immunities Act.[33]

Under Japanese law, Article 18.2 of the UCPL of Japan clearly defines the terms of foreign public officials and officials of international organization as follows:

- a person who engages in public service for a foreign state, or local authority;
- a person who engages in service for an entity established under a special foreign law to carry out special affairs in the public interest (i.e, a person engaging in service for a public entity);
- a person who engages in the affairs of an enterprise;
- a person who engages in public services for an international organization constituted by governments or inter-governmental international organizations; or,
- a person who engages in affairs under the authority of a foreign state or local government or an international organization"

In addition, Cabinet Order No. 388 of 2001 of Japan also clarifies the term 'international organization' to include both governmental and intergovernmental organizations, such as UN, ILO, or WTO (etc).[34] Therefore, private international organizations are not under jurisdiction of the UCPL. For example, accoding to the Guidelines by the METI, an illicit payment to an officer of the International Olympic Committee cannot be prosecuted because it is given to private international organizations. In addition, bribery of foreign public officials can be prosecuted only if it is related to "international commercial transaction" including any activities of international trade and cross-border investment.[35]

Different from the legislation of the above countries, the Amendment of the PRC Criminal Law simply confirms bribery of foreign officials or the officials of international public organizations is a type of giving a bribe offence. It is an offence for a Chinese company or individual to give such a bribe to a FPO or an official of an international public organization seeking an improper commercial benefit. The PRC Criminal Law does not include definition of a "FPO" or "international public organization". Even in 2016, the Supreme People's Court issued *Judicial Interpretation: Opinion on Issues concerning the Application of Law in the Handling of Criminal Cases of Commercial Bribery*[36] but such interpretation has unluckily no guidelines on handling of foreign bribery cases. Such terms as a FPO, foreign country, official of international public organization under the Amendment of the Criminal Law have not been interpreted so far.

All these five countries agree on such elements as 'any person', including natural and legal ones; intent to offer, promise or give advantage to FPOs; whether directly or through intermediaries; for that official or for a third party. However, in terms of the bribe, the PRC Criminal Law just recognizes material advantage while other four jurisdictions find it in form of any undue pecuniary or other advantage, including intangible benefits.

Another important element is the purposes of foreign bribery. Most of countries provide that such bribery is committed in order to obtain or retain business or other improper advantage in

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[33] See: Phase 1 Report on United State Review of Implementation of the Convention and 1997 Recommendation, accessed at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2390377.pdf, p.6.

[34] See more information at https://gettingthedealthrough.com/area/2/jurisdiction/36/anti-corruption-regulation-2017-japan/

[35] Ibid.

[36] Global Legal Insights, Bribery and Corruption, at https://m.lw.com/thoughtLeadership/bribery-and-corruption-second-edition-china, accessed 28 November 2017.

the conduct of international business. Such purposes under the US FCPA are clearly illustrated in the Resource Guide to the Act (see Box 2 below). This element determines the scope of foreign bribery (only in international business transactions), also reflecting a difference between foreign bribery and a domestic one. The element is set out under domestic laws as this is the requirement under the OECD Convention and the UNCAC. By such a requirement, both international organizations and state parties see the high-risk connection between bribery of FPO and international bussiness transactions.

Box 2: Examples of Actions Taken to Obtain or Retain Business under the FCPA of the US

- Winning a contract
- Influencing the procurement process
- Circumventing the rules for importation of products
- Gaining access to non-public bid tender information
- Evading taxes or penalties
- Influencing the adjudication of lawsuits or enforcement actions
- Obtaining exceptions to regulations
- Avoiding contract termination

(Source: Resource Guide to the US FCPA – p.13)

1.3. Criminal Liability of Legal Persons

Regarding liability of legal persons, these five countries all establish legal mechanisms for imposing criminal liability on legal entities, and while some legislate criminal corporate liability by their penal codes or other special acts, others determine such liability under common law.

The US FCPA clearly sets out criminal liability for legal entities under its provisions.[37] The Resource Guide interpretes such provisions to include, for example, company having a class of securities registered under Section 12 of the Exchange Act, any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, etc.[38] This means to set out a large scope of legal entities subject to criminal liability under the FCPA, irrespective of their structures and sizes.

The UK, by contrast, does not clearly provide criminal liability for legal entities under the Bribery Act. However, such liability is confirmed to exist under the common law. "The Bribery Act retains the traditional regime of corporate liability based on the identification theory described in Tesco Supermakets Ltd. v. Nattrass, [1972] AC (H.L.)."[39]

[37] 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3

[38] See Chapter 2 of the Resource Guide by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission.

[39] See: United Kingdom: Phase 1 ter Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions, p.10.

In China, both companies and individuals can be punished under the Amendment of China's Criminal Law on foreign bribery as it applies to all companies, enterprises, and institutions organized under the Chinese law, wholly foreign-owned enterprises, Sino-foreign joint ventures and representative offices established in China by foreign companies are also subject to the Amendment (Article 164).

Similarly, in Japan if an individual bribed a foreign official in connection with the business of a legal person, such legal person may be subject to a fine of no more than ¥ 5millions. If a company is actually charged with bribing foreign public officials, such company will not only face criminal punishment but also be burdened with enormous loss such as termination of business transactions with its customers or damage to its brand value (Article 22 of UCPL).

For South Korea, Article 4 of the FBPA establishes criminal responsibility of legal persons for bribery of a FPO. This provision was established specifically to satisfy requirements of the OECD Convention because of the fact that there is no equivalent provision dealing with domestic bribery offences. Legal persons will be responsible for foreign bribery in cases where a representative, agent, employee or other individual working for legal persons has committed the offence under Article 3(1) in connection to their business. South Korea authorities explain that under their law, legal persons can take various forms, including associations, foundations, joint-stock corporations, limited liability companies, unlimited or limited partnerships, etc and both state-owned and state-controlled companies are equal under foreign bribery provisions.[40]

1.4. Jurisdiction of Foreign Bribery Law

To effectively prevent and combat bribery of FPOs, these five countries provide jurisdiction of foreign bribery law over all bribery acts committed both inside and outside the country, by their citizens and non-nationals.

The FCPA of the US sets out jurisdiction over offences committed in whole or in part within the territory of the United States, including bribery of FPOs, whether or not by the US nationals.[41] The Act covers all "issuers" and other businesses ("domestic concerns") that are "organized under the laws of the US, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof", all businesses organized under the law of a foreign country, as well as US nationals[42] and non-US nationals. That is the territorial jurisdiction. However, from nationality jurisdiction perspective, there isa different treatment for the acts committed by non-US nationals and businesses and that by US nationals and businesses organized under the laws of the US. For issuers, domestic concerns and US nationals, the FCPA requires that some acts "in furtherance of" the corrupt activity have a connection to the mails or any means of interstate commerce. Under this provision, it does not matter whether the act takes place in or outside the US. The FCPA only requires that an act in furtherance takes place. For non-US businesses and non-US nationals, the FCPA does not require a connection to mails or any means of interstate commerce. The Act, however, asserts jurisdiction over non-US companies and nationals who take any acts in furtherance of a bribe of a foreign public official while within the US.[43]

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[40] See: Phase 1 Report on Korea Review of the Implementation of the Convention and 1997 Recommendation, accessed at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2388296.pdf

[41] 15 U.S.C. § 78dd-1(g)(1)(2).

[42] Who are as defined in Section 101 of the Immigration and Nationality Act.

[43] See: Phase 1 Report on United State Review of Implementation of the Convention and 1997 Recommendation, accessed at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2390377.pdf on 16 November 2017.

The Bribery Act of the UK sets out even more extensive jurisdiction. Section 12 of the Bribery Act provides that the courts will have jurisdiction over the offence of bribery of a FPO committed in the UK, but they will also have jurisdiction over such offence committed outside the UK where the person committing bribery has a close connection with the UK,by virtue of being a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership. So the Act has its jurisdiction even in cases where bribery of a FPO takes place outside the UK by non-nationals, as long as they have such close connection with the UK. It can be seen that the Bribery Act has an extensively extra-territorial jurisdiction.

The jurisdiction of the UCPL of Japan is also as broad as the above countries' anti-foreign bribery laws as it applies to the following cases: (i) any individual committed offense in Japan regardless of nationality; (ii) person with Japanese nationality committed this offense in or outside Japan territory. Especially, UCPL also applies to representative of legal entity, staff, or agent committing bribery in both above cases. The Guidance explains that UCPL can apply to Japanese individual or entities (companies) including foreign companies because the Article 22.1 does not point out the difference between domestic and foreign companies.[44] It should be noted that foreign company committed bribery in Japan can be prosecuted under Article 1 of the Penal Code in case all or a part of offence was committed in Japan or all or part of the result of a crime happened within Japan territory. Example given in Box 3 below is illustrated for the extra-territorial jurisdiction of the UCPLof Japan in case of foreign bribery offence.

Box 3: Example of jurisdiction of the UCPL

Foreign companies can be prosecuted under the UCPL where a foreign company hires a Japanese national and the Japanese national gives a bribe to a foreign official on behalf of his or her employer (the foreign company), either inside or outside of Japan. This is based on the reason that Japanese foreign bribery laws shall apply to any Japanese nationals who commit foreign bribery not only in Japan, but also outside of Japan.

(Art. 21.6 of the UCPL, Art. 3 of the Penal Code)

In the case of South Korea the FBPA does not define clearly its jurisdiction. However, Article 2 of South Korea's Criminal Code establishes jurisdiction over any offence that has been committed in the territory of the Republic of Korea. This means that South Korea has jurisdiction over any part of an act constituting the offence of bribing a FPO under the FBPA. Under Article 3 of the Criminal Code, South Korea has jurisdiction to prosecute its nationals for offences committed abroad. That is because of the principle of nationality. South Korea's Criminal Code states that this principle applies to any criminal offence by South Korean nationals, including the bribery of a FPO, regardless of where it is committed.

Similar to the case of South Korea, the PRC provides criminal jurisdiction in the Penal Code which applies for individual and company committing the bribery offence in or outside territory of China including joint ventures and foreign-owned 100% companies (Articles 6 and 7, the PRC

[44]Accessed at http://www.meti.go.jp/policy/external_economy/zouwai/pdf/GuidelinesforthePreventionofBriberyofForeignPublicOfficials.pdf on 18 October, 2017.

Criminal Law). Chinese Criminal Laws prosecute both Chinese nationals and foreigners committing crimes in Chinese territory. Under Article 6 of the Criminal Law, "the Courts would have jurisdiction over:

- bribery and other crimes that are committed by PRC or foreign individuals or entities within China;
- bribery and other crimes that are committed by PRC or foreign individuals or entities on board PRC ships or PRC aircraft;
- bribery and other crimes that are committed outside China with the intention of obtaining improper benefits within China;
- bribery by PRC individuals of foreign officials or officers of a public international organization outside China;
- bribery and other crimes committed by PRC nationals outside China which are punishable under the PRC Criminal Law by a fixed term imprisonment of three years or longer; and
- bribery and other crimes committed outside China by PRC state functionaries or military personnel."[45]

Regards to jurisdiction of foreign bribery law, the countries all set out a broad jurisdiction over the offence of bribery of FPOs. However, the US and the UK clearly and specifically set out their law jurisdiction over bribery of FPO offence while Japan, South Korea and China provide for general jurisdiction over all crimes, including foreign bribery, under their Penal Codes. It can be seen that the way of clarifying jurisdiction over foreign bribery offence, as the US and the UK do in the specialised law, may be better for law application.

1.5. Detection and Law Enforcement

This section examines the situation of foreign bribery detection and law enforcement on such cases. It first shows a general fact of the detection and law enforcement in each comparative country. According to a report by the OECD in June 2014, the US sanctioned 128 foreign bribery cases, becoming the country who conducted the highest number of cases; South Korea takes the third place with 11 cases; the UK conducted fewer cases (6); Japan only sanctioned 3 cases.[46] China seems to have no result in detecting and sanctioning foreign bribery despite the fact that the country has developed investment in many other countries, including countries with high risk of corruption.

Among the five countries, the US deserves to be the best practicer in detecting foreign bribery cases and enforcing law thereon as it has large number of FCPA enforcement actions. Up to the end of 2017, it can be confirmed that the US has investigated, prosecuted and convicted the most foreign bribery cases among the Parties to the OECD Convention. Only in 2017, 13 cases of bribery of FPOs have been brought to the US criminal courts.[47]

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[45] See: Global Legal Insights, *Bribery and Corruption*, second eddition, p.80, accessed on 28 November 2017 at https://m.lw.com/thoughtLeadership/bribery-and-corruption-second-edition-china

[46] See: OECD (2014), *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Forign Public Officials*, OECD Publishing. http://dx.doi.org/10.1787/9789264226616-en, accessed on 1 December 2017.

[47] Data on foreign bribery cases dealt with by the courts of the US til November 2017 can be obtained at https://www.justice.gov/criminal-fraud/related-enforcement-actions, accessed on 1December 2017. See more information on the enforcement of anti-foreign bribery law of the OECD Convention's States in the *OECD Foreign Bribery Report – An Analysis of the Crime of Bribery of Foreign Public Officials* at http://www.oecd.org/daf/oecd-foreign-bribery-report-9789264226616-en.htm or the *2016 Data on Enforcement of the Anti-Bribery Convention,*

According to a recent report by OECD Convention Working Group in 2017,[48] the UK has taken significant steps to increase enforcement of the foreign bribery offence. In March 2012, the UK has just concluded four cases of foreign bribery but it has conducted nine additional cases involving criminal liability of ten individuals and six companies, imposing civil remedies in three cases and administrative sanctions in two foreign bribery-related cases by January 2017. A number of prosecutions of foreign birbery cases and pre-charged investigations have also been underway.

The OECD Working Group in contrast has continually criticized Japan for its relatively low enforcement of anti-corruption. Significantly, only four cases of bribery of foreign public officials have been prosecuted since 1999 in Japan, which raises the concern to the lack of enforcement of this crime in Japan by OECD Working Group even though a lot of cases, committed by Japanese companies, reported by mass media have not yet been prosecuted. Typically, Japan prosecuted this offence committed by Japan, for instance, the Japan Transportation Consultants, Inc. to foreign officials in Viet Nam, Indonesia, and Uzbekistan for winning the bids of the railway projects. There is also rising concern on increasing possibility of bribery in relation to medical and pharmaceutical companies.[49]

South Korea has a better result than Japan, but still is considered weak in enforcement of foreign bribery law. There has been a few cases of bribery of FPOs which were detected, prosecuted and convicted under the FBPA. From 1999, when the FBPA came into force, to October 2011, South Korea has prosecuted and obtained convictions in nine separate cases, including three convictions of legal persons.[50] More recently, few other cases have been detected and convicted. Up to October 2015 there were about 12 cases that South Korea detected and convicted. In some cases, the South Korean prosecution authorities decided not to initiate formal investigations for the reason that such cases were being investigated as domestic bribery by foreign law enforcement authorities.[51] In addition, the South Korean Maritime Police detected several cases upon referral from foreign authorities but most of them was then suspended because these were hold to be concerned small facilitation payments.[52]

Regarding China's law enforcement and related cases, the Amendment of the Criminal Law requires business entities to adopt preventive measures to ensure its compliance fully. [53] Significantly, in 2006, Premier Wen Jiabao requested Chinese companies doing business in foreign countries to follow international rules, carry out proper bidding, forbid inappropriate deals, and refuse corruption and kickbacks. [54] Although several cases of bribery of FPOs committed by Chinese companies in UK were handled under the UK Bribery Act[55], detecting and

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special focus on international cooperation, OECD Working Group on Bribery, November 2017, accessed at http://www.oecd.org/daf/anti-bribery/Anti-Bribery-Convention-Enforcement-Data-2016.pdf on the same day.

[48] *Phase 4 Report: United Kingdom* at http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf, accessed on 20 November 2017.

[49] The information accessed at https://www.globallegalinsights.com/practice-areas/bribery-and-corruption/global-legal-insights---bribery-and-corruption/japan on 28 November 2017.

[50] See: Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Korea, October 2011, accessed at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Koreaphase3reportEN.pdf on 20 November 2017.

[51] Ibid.

[52] Ibid.

[53] China Briefing, "China's Criminal Law tackles with Bribery of Foreign Officials", China Briefing News, July 30, 2013, at http://www.china-briefing.com/news/2013/07/30/chinas-criminal-law-tackles-bribery-of-foreign-officials.html, accessed on 30 November 2017.

[54] Ibid.

[55] Ibid.

handling the bribery of FPOs under the Amendment of Criminal Code 2011 committed by Chinese individuals and companies still remain very weak. Until now, there is no report about law enforcement in relation to this crime under the new amendment of Criminal Code 2011.

Following the above comparative description on the situation, there should be a discussion on the reasons for such success or failure in detecting and enforcing bribery of FPOs.

For the US and the UK, the first reason for their effective detection and enforcement is their comprehensive legal frameworks which include adequate instruments, including supported and related laws and guidelines. Important legislative reform can be seen in case of the UK when it first enacted the Bribery Act in 2010 and then follows the US by the introduction of deferred prosecution agreements that the US has showed their effectiveness in sanctioning settlement. Case law is also another source for clarifying the elements of foreign bribery offence. In addition, these countries have strong mechanisms for the detection and the enforcement. [56] The effectiveness of such mechanisms are recognized as well as highly appreciated by the enforcement authorities evident in several reports on these countries' implementation of the OECD Convention and in evaluations given to the research team through interviews.[57] Voluntary self-reporting by companies resulted in a significant number of investigations both in the US and the UK. Some other good channels for detecting foreign bribery in the US and the UK are securities filings, whistleblowers, victims and witnesses, referrals from other government agencies or other law enforcement agencies, intelligence analysis, strategic and tactical intelligence analysis across certain sectors and regions of interest, reports or referrals from foreign law enforcement, investigative journalism, individual complaints, etc. Recently, UK has set a good example in using mutual legal assistance channel for effective detection and prosecution of foreign bribery (see Box 4).

Box 4: UK's good practice in detecting bribery of FPO through Mutual Legal Assistance

According to UK authorities, there has been the case in particular with the US Securities Exchange Commission and ØKOKRIM (Norway), as well as with the World Bank and the European Bank for Reconstruction and Development (EBRD) that the UK commenced domestice investigation based on mutual legal assistance channels. The UK reports that three of the finalized foreign bribery cases were detected through foreign jurisdictions or joint investigations.

Source: Phase 4 Report: United Kingdom (Implementing the OECD Convention)

[56] Detail information on the detection and law enforcement on foreign bribery cases in these two countries can be obtained in: OECD (2014), *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Forign Public Officials*, OECD Publishing; in the website of the US Department of Justice at https://www.justice.gov/criminal-fraud/related-enforcement-actions; and in *Phase 4 Report: United Kingdom* at http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf; in *Phase 3 Report on Implementing of the OECD Anti-Bribery Convention in the United States* (October 2010) at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedStatesphase3reportEN.pdf; and in Margot Cleveland, Christopher M. Favo, Thomas J. Frecka, Charles L. Owens (2009), "Trends in the International Fight Against Bribery and Corruption", *Journal of Business Ethics* (2009) 90:199-244. DOI 10.1007/s10551-010-0383-7.

[57] The research team has conducted interviews with Mr. Gerry McGowam, Investigator from National Crime Agency of the UK, International Liaison Officer (Viet Nam/Malaysia/Laos) at the UK Embassy to Viet Nam on 19 January 2018 and Mr. Carlos J. Costa-Rodrigues, Attorney Adviser, International Enforcement for the Office of International Affairs – U.S Securities and Exchange Commission on 9 February 2018.

The US has even more experiences of using MLA in bribery cases. This country also has experiences in resolving issues concerning MLA with countries without legal basis for MLA in criminal matters, for instance through directly contacting foreign competent authorities and using case-by-case basic.[58] It was concluded that "Countries appear to be cooperating more on foreign bribery cases, with press releases showing more than 40% of the resolutions in US foreign bribery cases involved co-operation with foreign law enforcement agencies, well up from 10 years ago."[59]

Furthermore, the role of specilized units in detecting and investigating foreign bribery is very important. In the US, the Criminal Division of the Department of Justice ("DOJ") and the Enforcement Division of the US Securities and Exchange Commission ("SEC") are mainly responsible for preventing, detecting and investigating foreign bribery practices. They share the FCPA enforcement authority, being committed to fight foreign bribery through robust enforcement.[60] In the UK, the essential agency is the Serious Fraud Office ("SFO"). It takes the role in investigating and prosecuting foreign bribery cases and it includes case teams of investigators and prosecutors. "This integrated approach affords the SFO a broad range of investigative tools necessary in foreign bribery investigations."[61] In addition to these specialized agencies, other related authorities also give hands to the detection and investigation of foreign bribery cases. The International Corruption Unit of the National Crime Agency, the Tax Administration in the UK are good examples of it. In case of the US, the Criminal Division' Fraud Section often collaborates with for instance the US Attorney's Offices and the FBI. That is the reason why the Working Group of the OECD Convention calls for the UK, for example, to maintain the role of the SFO in foreign bribery cases, to further improve interagency cooperation, and to ensure effective measures are in place to safeguard the independence of investigations and prosecutions. It further urges other related authorities to conduct a comprehensive review of their methods and capacity to detect and report foreign bribery.[62]

The US and the UK seem to succesfully apply mechanisms such as plea agreements, deferred prosecution agreements ("DPAs") in settling cases of foreign bribery.[63] Especially the DPAs require convicted persons to agree to pay a monetary penalty, enter into certain compliance and remediation commitments, cooperate with the government, etc, so these handle foreign bribery cases in a restorative and economic manner. Recently, the US DOJ and SEC have applied such agreements to resolve effectively up to 90% of the foreign bribery cases involving enterprises.[64]

The US and the UK is succesful in developing, monitoring and maintaining an effective anti-bribery compliance program under the FCPA and the Bribery Act, which includes program development, risk assessments, compliance audits and investigations of potential issues. The US,

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[58] Such experiences are shared by Mr. Carlos J. Costa-Rodrigues, Attorney Adviser, International Enforcement for the Office of International Affairs – U.S Securities and Exchange Commission in the interview by the research team on 9 February 2018.

[59] 2016 Data on Enforcement of the Anti-Bribery Convention, Special focus on international cooperation, OECD Working Group on Bribery, November 2017, at http://www.oecd.org/daf/anti-bribery/Anti-Bribery-Convention-Enforcement-Data-2016.pdf, accessed on 1st December 2017.

[60] See: A Resource Guidance to the U.S. Foreign Corrupt Practices Act, Chapter 1. Introduction, accessed at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf

[61] See: *Phase 4 Report: United Kingdom,* para.62, accessed at http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf.

[62] Ibid.

[63] Ibid.

[64] The information is provided by Mr. Carlos J. Costa-Rodrigues, Attorney Adviser, and International Enforcement for the Office of International Affairs – U.S Securities and Exchange Commission in the interview by the research team on 9 February 2018.

for example, considers "A focus on compliance and prevention is no doubt the most cost-effective method of limiting corporate losses resulting from the FCPA violations."[65] Actually the effective enforcement of compliance program and good training in anti-corruption also contribute to the detection of foreign bribery actions.[66]

Japan also established a Compliance System for Prevention of Bribery of Foreign Public Officials to strengthen detecting this offence. Consequently, Japan has detected a number of cases committed in foreign countries, especially in the US, including a case which imposed penalty of nearly 100 billion Yen.[67] Regarding to prevention of bribery of foreign public officials, Japanese companies are also required to establish internal system to control foreseeable fraudulent acts as directors have duty to give due care in any cases at risk of bribery of foreign public official. Establishment of prevention system in consistence with domestic and foreign applicable laws is an essential way to protect the value of company.[68]

In case of South Korea, it was evaluated that significant measures were taken in collaboration with South Korean businesses and associations to raise awareness among the private sector about preventing and detecting foreign bribery, specifically about matters such as whistleblower protection, reports of FBPA violations to law enforcement authorities, liability of legal persons for foreign bribery.[69] In comparison with law enforcement in the US and the UK, South Korea's law enforcement seems lower and not adequately sufficient.

By contrast to the US and the UK, the biggest challenge for Japan in enforcing the Article 18 of UCPL is creating a self-report system or encouraging whistleblowers to report. For instance, if Japan introduces the whistleblower reward program as the US Securities and Exchange Commission initiated, they would face difficulties in encouraging a firm to self-report because the maximum fine of 300 million Yen may not be large enough to justify all the trouble facing the firm.[70] It is considered as one of the reasons for weak enforcement of the UPCL in Japan.

Finally, it can be seen that bribery of FPO offence was poorly prosecuted under the Criminal Law of China since its amendment in 2011 because of weak enforcement reasons such as the symbolic existance of the sub-article on foreign bribery in the Criminal Law, unclear provision on elements of the offence, lack of concern from law enforcement authorities regarding bribery of FPOs, criminal penalties for foreign official bribery being generally less severe than those relating to public official bribery. It is also commented that only foreign individuals or entities in the PRC or whose acts of bribery have consequences in China will be prosecuted as there is no jurisdiction for applying this provision to foreign public official committing this offence in foreign countries.[71]

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[65] Margot Cleveland, Christopher M. Favo, Thomas J. Frecka, Charles L. Owens (2009), "Trends in the International Fight Against Bribery and Corruption", *Journal of Business Ethics* (2009) 90:199-244. DOI 10.1007/s10551-010-0383-7., p.219.
[66] Ibid, p.217-220; see more in OECD (2014), *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Forign Public Officials*, OECD Publishing, p.33-34.
[67] See: Global Legal Insights, *Bribery and Corruption*, Second edition, accessed on 28 November 2017 at: https://m.lw.com/thoughtLeadership/bribery-corruption-second-edition-japan
[68] Guidelines for the Prevention of Bribery of Foreign Public Officials, accessed on October 18, 2017 at: http://www.meti.go.jp/policy/external_economy/zouwai/pdf/GuidelinesforthePreventionofBriberyofForeignPublicOfficials.pdf
[69] See: Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Korea, October 2011, accessed at http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Koreaphase3reportEN.pdf, para.6.
[70] See: Global Legal Insights, Japan I Bribery & Corruption 2018 I Laws and Regulations, accessed on January 15, 2018, at: https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/japan
[71] Fighting transactional bribery: China's gradual approach, accessed on 28 November 2017, at: https://hosted.law.wisc.edu/wordpress/wilj/files/2014/01/Gintel_final.pdf

2. Viet Nam's Contexts and Applicable International Practices

2.1. Legal Framework and Enforcement Mechanisms on Bribery of FPOs in Viet Nam: Advantages and Challenges

Viet Nam's Legal framework on bribery of FPOs

The legal framework on detection and criminal treatment of giving bribes to FPOs, official of international organization includes provisions of the 2015 Penal Code (the 2015 PC), the 2015 Criminal Procedural Code (the 2015 CPC), the Law on Anti-Corruption 2005 (the 2005 ACL), and the 2007 Law on Mutual Legal Assistance (the 2007 MLA Law). The PC, the CPC and the MLA Law are legal bases for international cooperation in specific cases as well as conditions for developing bilateral and multilateral treaties on legal assistance in criminal matters. These laws create general and fundamental legal framework on international cooperation on legal assistance in criminal matters including principles, scope, and refusing cases, central organs, finance in extradition and transfer of persons, legal assistance in criminal justice.

The legal framework on handling bribery of FPOs includes provisions of the 2015 PC. The 2015 PC officially criminalizes bribery of FPOs by adding a sub-section to Article 364 of the PC (Sub-section 6) as follows: "*Any person who promises to bribe a foreign official, an official of a public international organization or an office holder in an enterprise or organization other than state organizations shall be dealt with in accordance with this Article*." This provision is similar to China's law on bribery of FPOs, but different from other countries's such as the US, the UK, Japan and South Korea as they set out bribery of FPOs offense separately in one article. Hence it can be perceived that determining the elements and penalties of bribery of FPOs or officials of international public organizations is the same as that of giving bribes to Vietnamese position holders.

In addition, other related provisions of the 2015 CPC should be included in the legal framework on bribery of FPOs. Provisions on special investigative techniques (Chapter XVI), protection of crime whisteblowers and other participants in criminal proceedings (Chapter XXXIV), international cooperation (Part Eight) are guaranteed measures for the enforcement of provisions on bribery of FPOs under the PC.

The 2007 MLA Law defines principles, competence, procedures in implementing legal assistance in criminal matters including extradition and transfer of persons who are serving imprisonment sentences between Viet Nam and foreign countries, and responsibilities of Vietnamese state agencies in legal assistance. These provisions play a complementary role in handling with any person who commits bribery of FPOs offense.

The 2005 ACL sets out roles and responsibilities of enterprises in preventing and combating corruption. Accordingly, enterprises shall have responsibilities to report corrupt acts to and coordinate with competent agencies, organisations or individuals in verifying and concluding on corrupt acts; to engage in fair competition, to work out mechanisms for internal control in order to preclude acts of corruption, bribe giving (Article 87), and to internationally cooperate in anti-corruption (article 71, 89, and 90). These provisions will form a part of the legal framework for preventing and handling bribery of FPOs.

Elements of the offense

Bribery of FPOs is a new provision under Article 364 on the offence of giving bribes. Therefore, in general, its elements are the same as the giving bribe offense. The only difference is the element 'bribee'. The subject of offense (the briber) refers to anyone who has criminal capacity and reach the age of criminal responsibility as prescribed by laws. Therefore, the briber in bribery of FPOs can be Vietnamese citizens or foreigners.

The bribee must be a FPO or official of international public organization. The concept "FPO" or "official of international public organization" has not yet defined officially by any legal documents of Viet Nam. The 2008 Law on Public Officials and Civil Servants only defines the concept civil servant who is Vietnamese citizen (Article 4.2). The 2014 Law on Laws on entry, exit, transit, and residence of foreigners in Viet Nam only refer to concept "foreigner" as follows: *"Foreigners are those who carry papers proving their foreign nationalities, or those without nationalities who enter, leave, transit through, or reside in Viet Nam*" (Article 3.1). The provisions on bribery of FPOs will face two main challenges in implementation. Firstly, the definition of the concept of "position or power holder" defined by the Penal Code and the Law on Anti-Corruption[72] is inconsistent what is defined as "foreign public official" that has been introduced to the 2015 PC at the request for implementation of UNCAC.[73] Secondly, there are not yet definitions for these new concepts.[74]

However, it has also been argued that the lack of such definitions does not affect the application of the PC for handling bribery of FPOs and/or those working for international public organization. This argument indicates that determining a person who is a public official of a country must base on the country's law or practices of identifying public official in this country. Therefore, in Viet Nam, in order to handle the bribery of FPOs offense defined by the 2015 PC, there are two ways for determining a person who is foreign pubic official. First, if a member country of UNCAC where bribee is its citizen and bribe related to his/her duties, so determining "FPOs" will base on Article 2 of UNCAC or the definition of "public officials" of this country. Second, if the briber is not a citizen of a member country of UNCAC and bribes related to his/her duties, determining a person as "a public official" must base on his/her national laws.[75]

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[72] The 2015 PC, instead of using the term "public official" as other administrative laws, uses the term "posision or power holder" and defines: "A posision-holder means a person who is given certain duties and power through appointment, election, contract conclusion or another method. A posision-holder might or might not receive salaries." (Article 352). The ACL 2005 defines a posision-holder under the scope of this law by giving a list that includes: a) Public servants; b) Officers, professional army men, defense workers in agencies or units of the People's Army; officers, non-commissioned officers, professional- technical officers, non-commissioned officers in agencies or units of the People's Police; c) Leading, managerial officials in state enterprises; leading, managerial officials being representatives of the State's contributed capital portions at enterprises; d) Persons assigned tasks or official duties who have powers while performing such tasks or official duties (Article 1).

[73] UNCAC (Article 2) defines as follows:

(b) Foreign public official" shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise;

(c) "Official of a public international organization" shall mean an international civil servant or any person who is authorized by such an organization to act on behalf of that organization.

[74] Officials of the Government Inspectorate, the Supreme People's Procuracy, the Supreme People's Court, the Central Committee of Internal Affairs who were interviewed on January 12, 2018 pointed out that it is a difficulty for implementation of the provison on bribery of FPOs under the Penal Code 2015.

[75] This opinion shared by an oficial of Criminal and Administrative Law Department of Ministry of Justice in interview held on 8 January 2018.

That argument seems persuasive in theory. But it should be noted that the lack of definitions of "FPOs" or officials of international public organization will make it difficult to determine this offense as well as for international cooperation in dealing with it. This is due to the fact that in criminal justice matters Viet Nam does not apply directly international treaties/conventions, and therefore, it cannot refer to the definition of the treaties/convention for its law application. On the other hand, Viet Nam cannot apply the concept of "public official" under a foreign law in the prosecution of bribery of FPOs under the Article 364.6 of the PC. Therefore, it is essential for Viet Nam to define the concept of FPOs based on standards of UNCAC in order to prosecute bribery of FPOs.[76] This definition must be satisfied with minimum standards under Article 2 of UNCAC. Providing the concept of "FPOs" is not only useful for criminalizing and prosecuting bribery of FPOs as requirement of UNCAC but also contributes to the international cooperation in fighting with giving bribes to FPOs.

The next element of this offense is "the *bribe*". According to the 2015 PC, the bribe includes tangible and intangible benefits which are similar to the US, UK, Japan and South Korea's laws. The inclusion of intangible benefits to the offence of giving bribes shows great effort of Viet Nam in compliance with requirements of UNCAC as well as respond to the need of fighting against bribery offense. Other elements such as bribery through an intermediary or a third-party beneficiary are provided for in the same manner as those provided for in the laws of the five country case studies.

However, different from the five country cases where bribery of FPOs is characterized by seeking improper benefits in international commercial transaction, Viet Nam's PC does not describe the purpose and limit the scope of bribery of FPOs. Therefore, it has a broader scope in comparison with the other countries as well as the UNCAC's provisions,[77] or the OECD's Convention on combating bribery of FPOs.[78] This provision would lead to a wider scope of the crime than required in UNCAC and a wider scope of criminal treatment than other countries. This provision seems too strict for its implementation while Viet Nam is in the context where the new PC and its application should be suitable for practices as well as the need of fighting against crime. It is also not in consistence with common international practices.

Jurisdiction of the Criminal Law of Viet Nam

The jurisdiction of Viet Nam's Penal Code is determined based on territorial principle, nationality principle, and universal principle. Firstly, the PC applies to every criminal offence committed within the territory of the Socialist Republic of Viet Nam as well criminal offences committed on sea-going vessels and airplanes having Vietnamese nationality or operating in Viet Nam's exclusive economic zones or continental shelves or consequences thereof (Article 5.1). "Criminal liability of foreigners who commit criminal offences within the territory of the Socialist Republic of Viet Nam and are granted diplomatic immunity according to Viet Nam's law or under an international agreement to which the Socialist Republic of Viet Nam is a signatory or according

[76] This opinion shared by an oficial of Criminal and Administrative Law Department of Ministry of Justice in interview held on 8 January 2018. All people who were interviewed indicate the need of providing a guideline for implementation of some provisions on position-related crimes (Chapter XXIII), including definitions of 'foreign public oficials' and 'officials of an international public organization'.

[77] According to Article 16.1 of the UNCAC: the purpose of bribery of FPOs is: "in order to obtain or retain business or other undue advantage in relation to the conduct of international business."

[78] According to Article 1.1 of OECD Convention, the purpose of bribery of FPO is: " to obtain or retain business or other improper advantage in the conduct of international business"

to international practice shall be dealt with in accordance with the international agreement or practice. If the case is not set out in any international agreement or there is no such international practice, their criminal liability shall be dealt with in a diplomatic manner." (Article 5.2)

Any Vietnamese citizen that commits an act outside the territory of Viet Nam which is defined as a criminal offence by the PC shall face criminal prosecution in Viet Nam as prescribed by this Code. This provision also applies to stateless residents of Viet Nam (Article 6.1). Any foreigner that commits a criminal offence outside the territory of Viet Nam shall face criminal prosecution as prescribed by PC if such offence infringes the lawful rights and interests of Vietnamese citizens or interests of the Socialist Republic of Viet Nam or under an international agreement to which Viet Nam is a signatory (Article 6.2). If a criminal offense or its consequence occurs on an airplane or sea-going vessel that does not have Vietnamese nationality at sea or outside Viet Nam's airspace, the offender shall face criminal prosecution under an international agreement to which Viet Nam is a signatory (Article 6.3). In addition, according to the 2017 MLA Law, the 2015 CPC and bilateral treaties signed between Viet Nam and the other countries, if Viet Nam denies extradition of a Vietnamese citizen, it must ensure to prosecute or enforce a foreign court's criminal sentences and decisions against that citizen.[79]

Upon such provisions, it is possible to determine that the bribery of "FPOs" will be handled under the PC in two cases: any act committed in territory of Viet Nam and any act committed outside Viet Nam's territory. A foreigner can be subjected to the Penal Code if the bribery of "FPOs" happens in territory of Viet Nam. In addition, if the foreigner commits an act of bribery of FPOs outside the territory of Viet Nam, he/she still holds a criminal responsibility under the Vietnamese PC because this offense is defined by the UNCAC as a member country. Therefore, the PC's provisions comply with Article 42 of UNCAC and similar to regulations on jurisdiction of the five countries under this study. These regulations meet the requirements of UNCAC in general, and requirement of bribery of FPOs in particular.

Criminal liability of legal persons

The 2015 PC officially defines criminal liability of commercial legal entity under Article 8 (Definition of Crime) and Chapter XI (Provisions applied to commercial legal entities committing criminal offences). Significantly, Article 2.2 defines that: "No corporate legal entity that commits a criminal offence that is not regulated in Article 76 hereof has to incur criminal liability." However, Article 76 which defines the scope of criminal liability of commercial legal entity does not include a bribe-giving offense; therefore, commercial legal entities are not responsible for bribe-giving offense. Consequently, any commercial legal entity that gives bribe to FPOs will not be prosecuted under the PC of Viet Nam. The lack of corporate liability for the offence of giving bribes can be considered as the main challenge in handling giving bribe to FPOs because it will be an obstacle for the criminal responsibility of a commercial legal entity to be dealt with comprehensively and equally as well as for handling the real causes and consequences of bribery of FPOs.[80]

[79] See for example Article 498 of Criminal Procedure Code 2015.

[80] Through interviewing, almost interviewed person indicated that it is essential to define criminal liability of legal person as well as enhancing responsibility of commercial legal entities in carry out program for ensuring intergrity of business environment.

Mechanisms for detection and enforcement

- **Mechanism for preventing and detecting corruption of enterprises**

The 2005 ACL has some principle provisions on responsibilities of enterprises in detecting and reporting corrupt acts, building a fair business environment, anti-corruption, encouragement of fair competition, developing internal control system in order to preclude acts of corruption and bribe giving (Article 87). These provisions support the prevention and detection of bribery of FPOs. However, such provisions are criticized as not effective and clear enough due to the lack of specific mechanisms on prevention, detection and treatment of corruption in business sector. Therefore, it is essential to improve and clarify such provisions in the upcoming amendment of the ACL, focusing on provisions in relation to scope of corrupt acts, and measures of prevention, detection of bribery and treatment of violations.[81]

In addition, the Anti-Corruption Law provides for granting awards to whisteblowers (Article 67). However, this provision is hard to be enforced because giving bribe is not defined among corrupt acts under the 2015 PC as well as the 2015 ACL.

- **Mechanism for protection of whistleblowers**

It is the first time the 2015 CPC sets out mechanism for protection of whistleblowers. The CPC defines that the whistleblower is a participant in criminal proceedings and has a right to request competent authorities to protect him/her (Article 56). In addition, the relatives of whistleblowers are also protected. Measures for protecting whistleblowers, witness, victims and their relatives defined by the CPC ensure that those people feel safe in participating in criminal proceedings and they are able to exercise fully their rights and duties, and to be protected from harmful acts committed by offenders and their relatives. The provisions on such protection are introduced in the 2015 CPC because of the needs seen from the practices of criminal proceedings, becoming essential mechanism for the protection of human rights.[82]

Article 484.2 of the 2015 CPC defines rights and obligations of person under protection. This provision enables person under protection to request competent authorities to select protective measure quickly and appropriately. Whistleblower is among persons who have the right to request for protection. He/she has a right to send request in written form to competent authorities to apply protective measures. Their request can be sent at any time of criminal proceedings. In emergency case, person under protection can request directly to competent organ/person to apply protection measure through the means of communication, however, such requests must later be submitted in writing. Competent authorities and individuals, when receiving the petitions and requests, must execute written records for the archive of protection-related files (Article 487.1 and 2 of CPC 2015).

In addition to protection requested by whistleblowers, some authorities responsible for criminal proceedings have the power to propose the application of the protective measures. There authorities include People's Procuracies and the People's Courts at all levels if there is a need to apply protective measures (Article 485.3, CPC 2015). This provision responds to the current practical issues. In reality, the person in danger may not understand clearly or know about their

[81] This opinion shared by an official of Legal Department – Governmental Inspectorate at interview dated 12 January 2018.

[82] Nguyễn Văn Huyên - Lê Lan Chi (2016), *Comment on Criminal Procedure Code* 2015, Labour Publishing House , p. 597.

rights or they are too afraid to request for protection because they are threatened at that time. If such authorities are not given power to propose the application of protective measures, the person in question may be harmed.[83]

Depending on a specific case, circumstance or condition, competent authorities of criminal proceedings shall decide to implement appropriate protective measures (Article 486, CPC 2015), for example: arrangement of guardians, implementation of professional measures, use of weapons, providing equipments and other means for guard and protection; controling protected persons' traveling and interaction for their safety; maintaining and requesting other people to maintain the confidentiality of information related to protected persons; displacing protected persons; changing their whereabouts, personal records and identities, with their consent, etc… These protective measures are commonly applied over the world and also suitable for Viet Nam.[84]

- **New provisions of the 2015 CPC on special investigative methods may support detection, investigation and prosecution of bribery of FPOs offense.**

Special investigative methods have just been added to the CPC because the traditional methods of investigation under the 2003 CPC did not show their effectiveness in some cases as well as a response to a need of the fight against crimes. It is highly appreciated that, "*special investigative methods are the most effective methods for detecting, investigating, collecting evidences of crimes and offenders. Especially, in the era of rapid technological development, almost every country allows to apply special investigative methods in fighting against crimes, especially the most serious crime and organized crimes….*"[85] Moreover, it is confirmed that "new provisions of the CPC are essential for creating a legal framework on investigation and now what is obtained from such methods are legally recognized as evidences."[86] It is also commented that "defining special methods of investigation under the CPC of Viet Nam is also clear evidence of its commitment to international obligations in fighting against serious crimes while ensuring its protection of human rights and citizen's rights, as well as promoting globalization and integration."[87]

Special investigative methods defined under the Article 223 of the CPC include: (i) secret recording by sound or sound-and-visual means; (ii) secret phone tapping; and, (iii) secret collection of electronic data. It is commented that the common requirement of all special methods of investigation prescribed by laws is to ensure confidentiality which aims at effectively collecting evidence, especially in cases where traditional investigation methods cannot support collecting evidences or are difficult to collect necessary evidences.[88] In fact, these three special methods in practice are among technical investigation techniques which are now legalized under

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[83] Nguyễn Hải Ninh (2016), "Protection of whisteblower, witness, victim and other persons involved in criminal proceedings", *Journal of Procuracy,* No. 11, June, 2016, page.46.

[84] Nguyễn Văn Huyên - Lê Lan Chi (2016), *Comment on Criminal Procedure Code* 2015, Labour Publishing House , p. 599-600.

[85] Trần Đình Nhã (2016), *Special investigation methods, New Contents of the Criminal Procedure Code 2015*, National Political Publishing House, page 291.

[86] Nguyễn Quang Lộc (2017), "Special investigative methods in the Criminal Procedure Code 2015", *Journal of Supreme People's Court*, No. 21 (Vol. 1), November, p.20.

[87] Trần Đình Nhã (2016), *Special investigation methods, New Contents of the Criminal Procedure Code 2015*, National Political Publishing House, page 291.

[88] Nguyễn Văn Huyên - Lê Lan Chi (2016), *Comment on Criminal Procedure Code* 2015, Labour Publishing House, p. 295.

the CPC for proving crimes and offenders.[89] However, the CPC only allows special methods of investigation to be applied after and based on the decision of criminal charges, and obviously this provision will affect investigation result. It is argued that it is more feasible and effective if the law allows using these special methods of investigation before issuing the decision of criminal charges, because the investigation result is commonly used as the basic for issuing the decision of criminal charges.[90]

Article 224 of the CPC defines that special methods of investigation are applicable for investigating some crimes, including corruption, terrorism, money laundering, or other crimes categorized as 'particularly serious crimes' and committed in 'organized manner'. However, under the 2015 PC giving bribes to the FPOs are not defined as corrupt crime; therefore, these special methods can only be applied in cases where bribery of FPOs is determined as "particularly serious crimes" and committed in "an organized manner". So special methods for investigating the act of giving bribe to FPOs are used only in cases where bribery of FPOs falls within the concept of 'particularly serious crimes' under Article 9.1 (on classification of crimes) and Article 17.2 (on complicity in organized mamner) of the 2015 PC. The circumstances for applying special methods defined under the CPC are considered as a challenge in application of those methods in bribery of FPOs cases as this crime is often committed secretly and difficult to detect and prove in criminal proceedings.

- **International cooperation in criminal matters as a mechanism in fighting corruption**

International cooperation in criminal proceedings is an effective channel in the enforcement of the PC's provision on giving bribes to FPOs. The 2003 CPC only defined international cooperation as a general principle, and lacked of specific provisions on competences, procedures, time limitation and collaborative relationships among enforcement authorities in international cooperation for dealing with transnational crimes. There is also the lack of provisions on legal use of documents, evidences transferred through mutual legal assistance in criminal matters. Several commitments to international treaties (such as carrying out special investigative techniques, establishing a joint investigation team, foreign investigator and prosecutor involved in investigation in Viet Nam and vice versa, recovery of illegal assets, etc.) have not yet been implemented under Viet Nam's Criminal Procedural Code. Therefore, international cooperation in criminal proceedings has faced difficulties and obstacles. To implement international standards in international cooperation in criminal matters as well as to avoid overlaps with the MLA Law, the 2015 CPC set up: (1) General principle of international cooperation in criminal proceedings; (2) Some specific procedures of international collaboration in criminal proceedings.

According to the CPC and the MLA Law, international cooperation in criminal proceedings of Viet Nam still follows international treaties of which Viet Nam is a State Party or bases on the principle of reciprocity in accordance with the provisions of the CPC, the MLA Law, and other relevant provisions of Vietnamese laws. Thus, it can be seen that Viet Nam undertakes international cooperation in solving a specific case based on the following grounds:

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[89] See more explanations on these methods in: Nguyễn Văn Huyên - Lê Lan Chi (2016), *Comment on Criminal Procedure Code* 2015, Labour Publishing House, pages 295, 696; Trần Đình Nhã (2016), *Special investigation methods, New Contents of the Criminal Procedure Code 2015*, National Political Publishing House, p. 294.

[90] Nguyễn Quang Lộc (2017"Special investigative methods in the Criminal Procedure Code 2015", *Journal of Supreme People's Court*, No. 21 (Vol. 1), November, p.22.

First, if Viet Nam and a country have signed bilateral treaties or both are members of relevant multilateral conventions, international cooperation will be made accordingly to those treaties or Conventions, except in cases where Viet Nam or any other member state does not accept provisions of international conventions as the ground for international cooperation.

Second, if Viet Nam and a country have not yet signed a bilateral treaty on relevant matters, international cooperation will be conducted based on specific cases in accordance with the principle of reciprocity and in consistence with laws of each country.

According to the Article 491.2 of the CPC, international cooperation includes MLA in criminal matters, extradition, acquisition and transfer of persons serving time and other international cooperation activities as defined in this Code, other laws on mutual judicial assistance and international agreements that the Socialist Republic of Viet Nam has signed.

- **Mutual legal assistance (MLA) in criminal matters**

The MLA Law defines the scope of mutual legal assistance (MLA) in criminal matters to include: service of papers, dossiers and documents related to mutual criminal assistance; summon of witnesses and experts; collection and supply of evidence; criminal liability examination; information sharing; and other requests for MLA in criminal matters (Article 17). The Supreme People's Procuracy of Viet Nam is a central competent authority responsible for international cooperation in criminal matters (Article 493.2 of the CPC). This authority carries out mutual legal assistance in accordance with the MLA Law. The Supreme People' Procuracy is responsible to receive, transfer, monitor and urge the performance of criminal legal mandates; to consider and decide on the performance of, and request the competent People's Procuracies or investigating bodies to perform criminal legal mandates; and, to refuse or postpone the performance of criminal legal mandates according to its competence (Article 64.1 of the MLA Law).

The basic conditions for MLA can be seen in the current related laws. The CPC 2015 first time defines the legality of documents and assets collected through international cooperation in criminal proceedings. Hence, the documents and objects collected by foreign competent bodies under the jurisdiction of competent Vietnamese agencies or documents or objects sent by competent agencies of Viet Nam for authorizing criminal prosecution shall be considered as evidences (Article 89 of the CPC). In order to support mutual legal assistance, the 2015 CPC also give power to competent Vietnamese authorities to perform judicial proceedings abroad as well as to foreign competent authorities to do so in Viet Nam; to propose foreign competent authorities to permit witness testifiers, expert witnesses and persons serving imprisonment abroad to be present in Viet Nam and vice versa for the settlement of a criminal case (Articles 495, 496). In addition to the CPC, the 2015 ACL defines the responsiblities of the Supreme People's Procuracy, Ministry of Justice, Ministry of Public Security, within the scope of their respective duties and powers, to carry out international cooperation in judicial assistance for fighting against corruption.

In practice, since the MLA Law was promulgated in 2007, MLA in criminal matters has achieved significant results. Receiving and responding to the request of MLA have been carried out with good results and contributed to handling criminal cases involving foreign elements, which were serious and complicated.[91]

[91] The result is highlighted in the Report No.11/BC-VKSTC dated 19 January 2015 of the Supreme People's Procuracy on 10 years implementation of the Criminal Procedure Code 2003. In addition, according to Report No. 501/TB-

In addition to the national law on MLA, Viet Nam has signed 22 multilateral treaties and 12 bilateral treaties with other countries (see Appendix 2) in which MLA in criminal matters are included. Moreover, Viet Nam has also signed 11 separate bilateral treaties and one multilateral treaty only on MLA in criminal matters. In general, these treaties provide the obligations of MLA, scope of MLA, refusing MLA, obligations of criminal prosecution, extradition, evidence transfer, etc. All of these treaties require state members implementing MLA in criminal proceedings with such activities as collecting evidences or taking testimony, investigating and arresting, checking the suspicous objects and networks, providing information and evidence, examining evidence, criminal prosecution, extradition for prosecution or execution of judgement. Regarding how to request for MLA, all treaties confirm that state members may send request for MLA in accordance with its laws. The requested party may provide legal assistance in the way that the requesting party proposes if the requests are not in conflict with its laws.

However, these treaties can only define principles and some specific matters such as scope of legal assistance, cases of providing MLA, extradition, refusing MLA, procedures of receiving or transfering requests of MLA, expenditures. Other matters such as competent authorities, procedures of execution of MLA requests must be recognized by national laws because they cannot be prescribed in detail in those treaties.

To conclude, Vietnamese laws in terms of MLA is basically in consistent with UNCAC. Especially, the new provisions of the 2015 CPC create favorable conditions for international cooperation in fighting against crimes in general and corruption crimes defined by UNCAC in particularly. However, mechanisms for MLA still reveal some shortcomings as follows:

First, law on MLA still conflict with international standards to a certain extent. For example, in general, committment of non-imposition of death penalty is a basic condition for negotiating and signing the treaty on MLA in criminal matters. Vietnamese laws, however, have not yet defined in detail procedures for the commitment of non-imposition of death penalty in MLA for criminal cases.

Second, Vietnamese laws do not provide specifically procedures of execution of MLA requests, such as calling for attendance of witness, judicial expertise performers, transfering person being detained for supporting investigation or collecting evidences, transfering of criminal proceedings, ect.

Third, the number of treaties dealing with MLA in criminal matters between Viet Nam and other countries are still limited, consequently causing difficulties for international cooperation between Viet Nam and other countries in fighting against crimes in general as well as crimes defined by UNCAC in particular.

- **Extradition**

Extradition is an effective mechanism for international cooperation in criminal proceedings. In the context where the number of transnational crimes are increasing, the UN Convention against

VKSTC-HTQT&TTTPHS dated 07 August 2014 of Supreme People''s Procuracy on 6 year implementation of Law on Legal Assitance 2007 since 01 July 2008 to 30 June 2014, 1.289 case files related to request for mutual legal assistance from the foreign countries were received; in which 367 case files requested by Vietnamese authorities sent to foreign countries for mutual legal assistance.

Transnational Organized Crime (UNTOC) and UNCAC define clearly responsibilities of state parties in case of receiving requests for extradition from other state parties, or refusing extradition requests being applied to their citizens from other states. As a state party of these treaties, Viet Nam has implemented international standards in extradition. The CPC, the MLA Law and related international conventions, including extradition treaties and treaties on MLA in criminal matters between Viet Nam and other countries, are legal tools for implementing extradition in Viet Nam. Extradition and related issues are defined by the Eighth Part of the 2015 CPC and Chapter 4 of the MLA Law. The MLA Law defines the cases of extradition (Article 33) and refusal of extradition (Article 35).

The 2003 CPC and the 2007 MLA Law have not yet stipulated specifically about refusal of extradition of Vietnamese citizens. The CPC 2015 has made a significant improvement through providing competent Vietnamese authorities responsible for considering requests by foreign competent authorities to initiate criminal prosecution or enforce a foreign Court's criminal sentences and rulings against Vietnamese citizens whose extradition is refused (Article 498). This provision overcomes difficulties and obstacles that occur in practice as well as set up legal basis for Viet Nam as a State Party to fulfil its obligations under international conventions. As consideration of requests for extradition and execution of extradition is much depending on the subjects to this measure, the 2015 CPC defines some preventive measures including arrests, temporary detainment, residential confinement, surety or exit restriction to be imposed on such subjects (Article 502).

However, Viet Nam's legal system does not have any provision on consultation with the requesting State Party before refusal of extradition. The current related bilateral treaties have not yet stipulated this issue. This is compulsory under the UNCAC (Article 44. 17) so it is essential to revise national laws for implementing these obligations. For example, it should be provided that before refusing extradition, Vietnamese competent authorities must consult with the requesting country, present its opinions and provide supplemented documents or evidence.

In addition, Vietnamese law on extradition is still in conflict with international standards. For example, emergent arrest before a state party sending official request of extradition has not yet stipulated whereas the UNCAC or the other bilateral treaties on extradition often stipulate this issues in order to prevent person supposed to be extradited from escape. The 2015 CPC added preventive measures which impose only on persons who are considered to be applied extradition or extradited after the Court's decision reviewing requision of extradition or extradition is executed. This may give an opportunity for the person subjected to the requested extradition to escape. In addition, the law on procedures of extradition is still simple; especially there is a conflict between the MLA Law and international treaties in application of death penalty on persons subjected to requested extradition. The limited number of bilateral agreements also poses a challenge for extradition. When ratifying the UNCAC, Viet Nam declared that the UNCAC is not considered as direct legal basis for execution of extradition; therefore, establishing bilateral treaties on extradition with other member's countries is crucial for execution of extradition. The lack of bilateral agreements on extradition raises difficulties for Viet Nam to fulfil its obligations under the UNCAC.

- **Transfer of criminal cases (criminal proceedings)**

Viet Nam's law has stipulated transfer of criminal cases (criminal proceedings) to competent authorities of foreign countries for prosecution. However, it has not yet clearly defined the general principles and purposes of transferring criminal cases between Viet Nam and other countries. According to Article 28 of the MLA Law, in cases involving foreigners who committed crimes in the territory of Viet Nam but have fled abroad and Viet Nam has made an extradition request which was, however, refused by the requested country, the authorities handling the cases shall transfer the case files to the Supreme People's Procuracy for requesting the countries where the offenders are present to continue with the prosecution. Together with transfering the case files, the Supreme People's Procuracy may also transfer material evidence of the cases. Article 29 of this Law also defines handling of foreign requests for prosecution of Vietnamese citizens in Viet Nam.

In addition, some bilateral treaties on MLA between Viet Nam and other countries define transferring criminal proceedings for prosecution or request for criminal prosecution between Viet Nam and other member countries. For example, the Treaty on Mutual Legal Assistance in Civil and Criminal Matters, signed in 2012, between Viet Nam and Russia in defining scope of legal assistance (Article 5) confirms that transfering criminal proceedings for prosecution is among MLA measures. Articles (58 -61) of this treaty provide in detail the procedures for transferring criminal proceedings for prosecution.

(a) International cooperation in confiscation of proceeds of crimes

International cooperation is the practical need and defined under some international conventions in which Viet Nam is a state party. However, these international conventions do not define systematically the measures for assets recovery. Responding to this practice, the 2015 CPC has been supplemented with general principles on international cooperation in confiscation of proceeds of crimes. Article 507 defines as follows:

> *1. The competent Vietnamese authorities shall cooperate with foreign competent authorities to seek, impound, distrain, freeze, seize and appropriate proceeds of crimes for investigation, prosecution, adjudication and criminal sentence enforcement.*
>
> *2. The pursuit, impoundment, distrainment, freezing and seizure of proceeds of crimes in Viet Nam shall abide by this Law and other relevant laws of Viet Nam.*
>
> *3. Proceeds of crimes in Viet Nam shall be handled according to international agreements that the Socialist Republic of Viet Nam has signed or on a case-by-case basis between relevant competent Vietnamese authorities and foreign competent authorities.*

Hence, the 2015 CPC creates legal basis for international cooperation in seeking, impounding, distraining, freezing, seizing proceeds of crimes and supports investigation, prosecution, settlement, and enforcement of judgement of bribery of FPOs offense. However, this is only a general principle that has not been specified. To implement these provisions, it is essential to provide detail guidelines on the competences and procedures of international cooperation.

The MLA Law has detailed provisions in relation to international cooperation between Viet Nam and the other countries in confiscation of proceeds of crimes. Article 19.2 of this Law requires the requesting country to be responsible for providing information of assets and places where assets need to be searched for; grounds for determining that the proceeds of crimes are located in the requested country and may fall under the jurisdiction of the requested country; the execution of court judgments or rulings on mandate for search, seizure of, or look for, confiscation of proceeds of crimes.

In addition, several treaties signed between Viet Nam and foreign countries also define the transfer of assets. For example, Article 14 of Treaty on Extradition between Viet Nam and South Korea defines: "in accordance with specific conditions negotiated between two parties and based on the protection of legitimate interests of the third party, all proceeds of crimes or assets used as exhibits which were found in territory of the requested party may be transferred if the request of extradition is allowed."

The challenge remains in international cooperation in confiscating proceeds of corruption crimes. According to the UNCAC, each State Party has to apply neccessary measures to permit its competent authorities to give effect of an order of confiscation issued by a court of another State Party (Article 54 (1) (a). However, Vietnamese laws have not yet defined this matter, therefore, it is difficult for enforcing the judgement of foreign court in Viet Nam. In addition, Viet Nam also does not have a mechanism such as non-convicted confiscation in cases in which the offender cannot be prosecuted because of death or flight or absent or in other appropriate circumstances.

(b) International cooperation in investigation (joint investigation)

Joint investigation is the way that the competent authorities of Viet Nam cooperate with foreign competent authorities to investigate a specific case which is under jurisdiction of an agency in Viet Nam or a foreign country. Joint investigation and using special investigation methods are essential requirements in international cooperation in criminal proceedings. UNCAC defines joint investigation (Article 49) and special investigation techniques (Article 50) as mechanisms for international cooperation in criminal proceedings. It can be sure that joint investigation and special investigation methods are necessary measures in enforcement of provisions of the 2015 PC on bribery of FPOs because of international and secret features of this offense.

The MLA Law and the 2003 CPC have not yet defined this matter. Therefore, the 2015 CPC provides joint investigation and application of special investigation methods to respond to the requirement of international conventions in which Viet Nam is a state party as well as to create more comprehensive legal mechanisms for international cooperation in criminal proceedings. Article 508 defines as follows:

> *"1. Competent Vietnamese authorities can cooperate with foreign competent authorities to jointly carry out investigation or implement special investigation methods and proceedings. The cooperation in investigation or special investigation methods and proceedings shall adhere to international agreements that the Socialist Republic of Viet Nam has signed or on a case-by-case basis between relevant competent Vietnamese authorities and foreign competent authorities.*
>
> *2. Joint investigative activities in the territories of the Socialist Republic of Viet Nam shall be governed by this Law and other relevant laws of Viet Nam."*

It is noted that Viet Nam's laws have established a legal basis in principle for joint investigation, and, for application of special investigation methods in criminal cases in general and corruption cases in particular. Accordingly, joint investigation and special investigation methods are carried out under the international bilateral treaties or on a case-by-case basis. However, Viet Nam has neither signed any bilateral treaties on joint investigation nor has any experience on practical joint investigation. This has posed a challenge for Viet Nam to enforce anti-foreign bribery provision in the 2015 PC.

From the practical point of view, some public officials interviewed for this research raised the concern that the provisions on joint investigation and international cooperation in criminal proceedings defined under the 2015 CPC are not specific and adequate. Especially, there is a

weakness in cooperation mechanism among authorities responsible for criminal proceedings; and, a lack of specific methods of joint investigation, exchange of information, transfer of evidence. The lack of procedures of recognizing, enforcing judgement or decisions of foreign criminal proceeding authorities in Viet Nam is considered significant. These shortcomings are considered as the major obstacles to the enforcement of provisions on bribery of FPOs in the 2015 PC.[92]

2.2. International Practices and Application for Viet Nam

The first lesson learnt for Viet Nam is to develop a comprehensive legal framework to fight bribery of FPOs effectively. Through reviewing experiences of the five selected countries, it can be seen that substantive criminal laws cannot fight bribery of FPOs effectively without other legal tools and mechanisms. In addition to substantive criminal laws on fundamental issues of bribery of FPOs offenses such as jurisdiction of anti-bribery of FPOs, elements of the offence and criminal liability of a legal person, the legal framework needs to include other laws supporting implementation of criminal provisions. Countries like the US, the UK have great efforts in developing other laws and regulations (as well as case laws) to improve their legal frameworks on anti-foreign bribery. Other countries's experience in making a comprehensive legal framework is to ensure the consistency of relevant laws which clarify the use of concurrent concepts, the use of consistent sanctions and measures, the relationship between substantive and procedual laws, as well as the unity of laws on prevention, detection and treatment.

The comparative analysis of current legal frameworks on fighting against bribery of FPOs of Viet Nam and selected countries shows that, Viet Nam has established a foundational and necessary legal basis for preventing and combating foreign bribery. However, there remain gaps and shortcomings which are considered as major challenges for detection of bribery of FPOs and enforcement of the related laws. Therefore, reforming and developing related laws is esstential for filling such gaps. For example, Viet Nam can consider making laws and regulations on prevention and detection of bribery of FPOs in commercial transactions as the US and the UK have done; clearly defining the concept of FPOs and officials of international public organization as in the FBPA of South Korea, the FCPA of the US, and the Bribery Act of the UK, and, the UCPL of Japan. The unity and coherence of different aspects of the legal framework on bribery of FPOs is also a lesson that must be learnt from good international practices for Viet Nam. For example, Viet Nam should ensure consistency and coherence of provisons on both preventing and combating (treating) bribery of FPOs, as the UK and the US have done.

In addition, providing guidance for the implementation of related laws as well as making case laws on bribery of FPOs is also a good example for Viet Nam. In the context of implementing provisions on giving bribes to FPOs under the 2015 PC, studying experiences of the UK, the US, and Japan in providing a guidance on application of bribery of FPOs offense is esstential. These countries have developed comprehensive guidances including guidelines on jurisdiction, bribers (citizens or foreigners), subjects to criminal liability (individuals and legal entities), concepts of FPOs and officials of international public organization, defences in foreign bribery cases, settlement mechanisms, and related procedures, etc. These guidelines are also illustrated by specific case studies with hypothetical scenarios, which can be a good experience for Viet Nam in issuing explanatory regulations in the coming time thereon.

[92] This comment shared by officials of the Government Inspectorate and the Central Committee of Internal Affairs in the interview held on 12 January 2018.

The second lesson learnt from international practices is the method for defining offense and elements of the offense. The PC of Viet Nam criminalizes bribery of FPOs by adding this act to the crime of giving bribe which is similar to the China's way of legislating. This is the weakness that has been pointed out hereinabove. Therefore, there are two main issues which should be addressed by following good practices: (i) giving explanation and guidance for determining elements of the offense in the upcoming time; and, (ii) considering to provide bribery of FPOs as a separate crime which clearly includes all elements reflecting its special characteristics. Experiences from the US, the UK, Japan and South Korea indicate the best practices in the way of criminalizing bribery of FPOs through providing it as a standalone crime which includes specific elements and appropriate penalties. Moreover, it is essential for Viet Nam to improve the 2015 Penal Code in the future through studying experiences of the US, the UK, Japan, and South Korea because these four countries have stipulated clearly such elements of the crime as the briber to FPOs (including individuals and companies as under the US's FPCA); the bribee (defining "FPOs" or official of international public organization as under the FCPA of the US or the UCPL of Japan), the scope of bribery of FPOs (limiting in international commercial transactions, as the five countries under this study do). These international practices are meaningful for Viet Nam to set out a guidance on bribery crimes under the 2015 PC which determines and explains the special elements of bribery of FPOs.

Considering amendment to the Penal Code, Viet Nam can learn from the experiences of the five selected countries in determining criminal liability of legal entities of bribery of FPOs. The laws on anti-corruption of these five countries mainly aim at preventing and dealing with enterprises that use bribes as a way to obtain or maintain their benefits and advantages regardless of requirements of fair competition and intergity of business. Therefore, defining criminal liability of legal entities for bribery of FPOs is a crucial need to these countries. The practices of law enforcement on bribery of FPOs in these countries, epecially in the US and UK, have revealed that companies are responsible for and convicted of almost every bribery offence including bribery of FPOs. Providing criminal liability of legal entities for bribery of FPOs as being done in these countries has contributed to prevent enterprises from unfair competition and to encourage them to establish codes of conduct and develop compliance programmes. Good practices in imposing criminal liability on legal persons of the US or the UK also help recover damages and losses due to the crime, confiscate the proceeds of crimes, and reset the compliance programmes of enterprises.

Developing and strengthening mechanisms for detection of and enforcement of laws on bribery of FPOs of these countries is also a good lesson for Viet Nam. First, it is essential to study mechanisms for preventing bribery of FPOs from the US, UK, South Korea, and Japan as these countries require and guide enterprises to develop codes of conduct in doing business and compliance programmes. Such preventive mechanisms need to be observed because the enforcement of laws on foreign bribery is not only for punishing bribery acts but also for educating and preventing such acts. In addition, the mechanism of rewards and protection of whistleblowers has a certain effect on the effectiveness of detecting bribery of FPOs. In sum, Viet Nam should follow these countries by developing a mechanism to encourage self-detection and self-reporting of bribery of FPOs as in the case of the US or UK.

Viet Nam also needs to learn from the selected countries about how to improve international cooperation mechanisms for detecting, investigating, prosecuting, adjudicating, and executing of judgments on this offense because bribery of FPOs is a transnational offence. International cooperation mechanisms developed by the UK and the US including bilateral or multilateral MLA

in criminal matters as well as participation in international action plans have achieved significant results in detecting and enforcing law on bribery of FPOs offense.

Finally, it is obvious that maintaining power and improving capacity of related competent authorities is also an important factor for detecting and enforcing law on bribery of FPOs. Viet Nam may learn from good models of powerful and independent authorities such as the Serious Fraud Office of the UK or Criminal Division of the Department of Justice and the Enforcement Division of the Securities and Exchange Commission of the US as well as practices of building capacity of law enforcement officials of these countries.

3. Conclusions and Recommendations

3.1. Conclusions

Anti-bribery of FPOs with relevant considerations including the legal framework, elements of the offence, criminal liability of legal persons, jurisdiction of the law, the law enforcement has been analyzed and discussed from comparative perspectives with practices of the US, the UK, South Korea, Japan and China. Experiences from the five cases with different extents of legal framework development and law enforcement on bribery of FPOs, however, show that strong institutional will to improve legal frameworks is the key to combating bribery of FPOs.

The US and the UK have been cited as successful cases in handling bribery of foreign public officials thanks to their comprehensive legal framework, detailed guidances, case law, specialized units, detecting allegations through foreign requests for legal assistance, availability of concerned information, etc. The lessons learnt from the US and the UK are to encourage whistleblowers to come forward, with good protections provided both under the law and in practice, and reporting channels made available and improved, while MLA is well-developed to fight against such transnational crime.

The cases of South Korea and Japan show efforts in improving their systems to fight bribery of FPOs, although they still have some weaknesses such as unclear definition of foreign public official, a lack of relavant case studies focusing on bribery of FPOs, a lack of effective mechanisms for self-reporting and whistleblowing. For China, the additional provision on foreign bribery is merely for its tokenistic compliance with UNCAC in terms of criminalization of foreign bribery. Symbolic compliance needs to be avoided.

After reviewing experiences of the five selected countries, Viet Nam's contexts were analyzed and discussed to see how the provisions on bribery of FPOs under the 2015 Penal Code will be enforced. Firstly, Viet Nam has established a fundamental legal framework on handling bribery of FPOs. The most important legal basis is Article 364(6) of the 2015 Penal Code. Other related provisions under the AC Law, the CPC and the MLA Law also partly form the legal basis for detecting and handling bribery of FPOs. However, in comparision with relevant legal frameworks of the US and the UK, there are weaknesses in the Vietnamese legal framework which may affect the effectiveness in fighting against bribery of FPOs. The stipulations on bribery of FPOs under the 2015 Penal Code is too simple in comparison with the laws of the UK, the US, Japan and South Korea. The missing unity and consistency between the legal framework that define bribery of FPOs and other laws on preventing, detecting and prosecuting the crime is the most critical problem that needs to be addressed.

The 2015 Penal Code does reflect special feature of foreign bribery through the element of "FPOs" or "officials of international public organization". However, it does not define the concept of bribery of FPOs. In addition, through comparative analysis as well as opinions received from interviews, it can be concluded that the way of criminalizing giving bribes to FPOs under the Penal Code of Viet Nam neither reflects all its special features nor fully complies with requirements of UNCAC. In particular, the combination of bribery of FPOs with domestic bribery in legislation is inappropriate to correctly determine what bribery of FPOs damages. Further, such a combination does not show differences between foreign bribery and domestic bribery, including the briber, some requirements of the intent and purpose (the scope as well) of the offence.

Regarding the mechanism in detecting of bribery of FPOs, although the AC Law recognizes awarding whistleblowers but giving bribe is not classified as corruption crime as provided in the PC so whistleblowers of foreign bribery have not fallen under the scope of this Law. In addition, the AC Law has a provision on encouraging self-detection of corrupt acts in businesses, but it is not clear enough. Unlike the other five countries' legislations, Viet Nam's AC Law lacks provisions on self-reporting and detecting bribery of FPOs within bussineses.

Through reviewing the current legal framework on MLA in criminal matters, extradition, joint investigation, transfer of criminal proceedings, it can be seen that the framework still has loopholes that may negatively affect the effectiveness of international cooperation in investigation, prosecution, adjudication of and execution of judgment on bribery of FPOs. Current laws do not cover the competence and procedures for dealing with issues raised by the requests of MLA from other countries like, for example, urgent arrest of person to be extradited before receiving official requests of extradition; freezing assets or limitation of asset transfers, or seizing assets in Viet Nam based on the orders of a foreign court. The MLA Law and the treaties on MLA in criminal matters between Viet Nam and other countries only mention transferring criminal proceedings but have not yet stipulated for general principles. The 2015 CPC also does not define this matter. In addition, although Viet Nam has taken part in some bilateral, multilateral and regional cooperation, its actions are not adequate. Moreover, it is the fact that Viet Nam does not apply directly international treaties, making it an obstacle for international cooperation.

In summary, Viet Nam still lacks necessary machanisms to enforce provisions on bribery of FPOs and officials of international public organizations under the 2015 Penal Code. The capacity of law enforcement officials in criminal cases of transnational crimes is still limited. Mechanisms for cooperation in criminal proceedings, especially international cooperation in investigation, prosecution, and adjudication of criminal cases are also unclear, and difficult to implement.

3.2. Recommendations for Viet Nam

- **Recommendations on guiding principles**

Firstly, Viet Nam needs to develop a comprehensive legal framework on fighting bribery of FPOs in order to ensure its unity and consistency. As above analysis, the first and foremost advantage of the US, the UK and South Korea in dealing with bribery of FPOs is a comprehensive legal framework in which a special law on anti-bribery or bribery of foreign public officials is a key tool. Studying the weaknesses, gaps, inconsistency and incoherence of the legal framework of Viet Nam on bribery of FPOs as well as experiences of the other countries in developing their frameworks is essential for Viet Nam in improving legal system in near future. To improve the current legal framework, Vietnamese law makers should review laws and regulations that may

support the implementation of the 2015 Penal Code in terms of bribery of FPOs to identify the gaps and inconsistencies.

Secondly, it is an urgent requirement of providing guidelines for explanation and application of relevant laws as well as developing precedents on bribery of FPOs. The 2015 Penal Code defines bribery of FPOs and officials of public international organizations for the first time; however, this provision remains simply a statement. Enforcement authorities will have to provide guidance for the application of provisions regarding "Position-related crimes", including bribery of FPOs.[93] Importantly, the Supreme People's Court should issue a resolution on guidelines for implementation of such provisions. In addition, it is essential to develop precedents for clearly defining the concept "foreign public officials", "officials of international public organizations", as well as determining the bribe in form of "intangible advantages". Moreover, it is necessary to provide for a guideline to implement new provisions of the 2015 CPC on special investigative techniques, international cooperation in criminal proceedings to support the investigation, prosecution and adjudication of the act of bribery of FPOs.

Thirdly, reforming related provisions of the 2005 AC Law is essential for developing a comprehensive legal framework for preventing and combating bribery of FPOs. The provisions on the scope of the Law, prevention and detection of corrupt acts by businesses, rewarding whistleblowers, and international cooperation need to be further specified and consolidated to support detecting and handling of bribery of FPOs.

Fourthly, it is important to reform laws on international cooperation in criminal proceedings, including strengthening mechanisms of MLA in criminal matters to contribute to the enforcement of substantive criminal law on foreign bribery. Bribery of FPOs has an international element in itself; therefore, Viet Nam needs to develop more bilateral treaties on MLA in criminal matters, extradition, joint investigation and application of special methods of investigation, transfer and receipt of criminal cases to improve the fundamental legal framework on international cooperation with the other UNCAC state members. In addition, the MLA Law also needs to be revised to incorporate requirements of MLA in handling bribery of FPOs.

As a recommendation for a long-term reform, it is essential to consider amending the provision on bribery of FPOs under the 2015 Penal Code. The provision on bribery of FPOs under the PC can be a starting point in response to international requirements (under UNCAC). In order to have a comprehensive basis for determining bribery of FPOs, this provision should be revised in both its content and form to reflect all special elements of foreign bribery and provide respective penalties.

- **Specific recommendations**

On amendment of the 2005 AC Law

It is strongly advised that the AC Law include new provisions on business integrity and hold businesses accountable for developing and implementing codes of conduct and internal control mechanisms. The experiences of the US, the UK, South Korea and Japan indicate that the

[93] Through interviews, officials of Supreme People's Court, Supreme People's Procuracy agreed that it is essential to provide a guideline on implementation of Chapter XXIII on "Position-holder Crimes" of the Penal Code 2015, including provision on bribery of FPOs. The Official of Supreme People's Procuracy indicated that this new content should be included in the special training document prepared by judicial authorities of the Penal Code in the upcoming time (Interviews were conducted on 12 January 2018).

prosecution of bribery of FPOs should not be the first and sole solution. Mechanisms for early prevention and detection act are essential. These countries criminalize bribery of FPOs not only to punish it but also to promote the use of preventive and self-detection mechanisms by businesses to avoid criminal liability (as these are defences). Requiring businesses to establish their codes of conducts and internal control mechanisms will be a starting point for imposing criminal liability of commercial organs for bribery of FPOs in the future.

As discussed in this paper, the Law on Anti-corruption still contains inconsistencies in the scope of corrupt acts subject to prevention and handling. Excluding giving bribes to FPOs from the list of corrupt acts in the law prevents the detection and handling of such acts. In order to ensure the consistency of the legal framework on anti-bribery, the law should be revised by expanding the scope of acts under its jurisdiction to giving bribes, including bribery of FPOs. By introducing provisions on prevention and detection of giving bribes to FPOs into the law, the basis to fight corruption will be improved.

Guidelines on handling the offense of bribery of FPOs under the 2015 Penal Code

The following elements should be included and clarified in the guidelines:

- The concept of 'foreign public officials' and 'officials of international public organizations';
- The scope of benefits or areas of transactions for which bribery of FPOs is committed: is it all kinds of benefits and advantages that the briber wants to gain through the performance of FPOs' duties, or only business and/or advantages obtained through international commercial transactions?
- The purpose of bribery of FPOs.
- Bribes in form of intangible advantages.

On reforming the relevant provisions in the 2015 Penal Code

It is essential to establish bribery of FPOs as a seperate crime under the Penal Code. With a thorough analysis on the interests harmed by the crime, the international feature of the bribee, the purpose and area of business deals or advantages that the briber wants to gain, there are clear differences in the elements and the level of seriousness between bribery of FPOs and that of domestic officials. It is therefore crucial to set up a separate crime of bribery of FPOs, clarify the elements of the crime and differentiate the severity of criminal penalties.

Reforming the 2015 Penal Code should include definitions of FPOs and officials of international public organizations in order to ensure the consistent understanding of such concepts to facilitate and enable investigation, prosecution and adjudication of criminal cases. Legal definitions of these concepts need to include the fundamental elements defined by Article 2 of the UNCAC. In addition, the definition of FPOs should be more specific to include, for example, officials of state owned enterprises as defined under the UK and South Korea's laws.

Furthermore, in the context where Viet Nam has criminalized giving and taking bribes in the private sector and giving bribes to FPOs, it is essential to consider imposing criminal liability on legal entities for the crime of giving bribes to FPOs. This study observes that defining criminal liability of legal persons for active bribery is common international practices, because many countries see the need of preventing businesses from corrupt practices and punishing them for damaging fair competition and business integrity. In addition, corrupt practices by enterprises are now pervasive. A study on business integrity conducted in 2016 by the Government Inspectorate and other business surveys conducted by the Vietnam Chamber of Commerce and Industry have pointed out that giving bribes

is often conducted through businesses' representatives for obtaining commercial advantages. Defining criminal liability for individuals is neither fair nor sufficient enough in cases where bribery is committed with the agreement by and on behalf of the legal entities, especially in the context where some legal entities are established to commit organized crimes.

On improving the mechanisms for international cooperation in detecting and prosecuting bribery of FPOs

- It is essential to revise the Law on Mutual Legal Assistance by clearly defining its scope in relationship with the Criminal Procedural Code. The revision of the law needs to be done in a way that it ensures coherence while avoiding overlaps with the Criminal Procedural Code.
- It is important to provide competence and procedures for dealing with requests of MLA from other countries and to fill the gaps in the legislation for extraditions, transfer of criminal cases as presented and analyzed in this report.
- It is also recommended that Viet Nam facilitate negotiations for and expand MLA in criminal matters, extradition, and transfer of sentenced persons by signing MLA treaties with more countries, especially where there are high risks of bribery of FPOs by Vietnamese businesses. Increased bilateral cooperation in the judicial sector will also help avoid the transfer of assets gained through corruption crimes.

On raising awareness of law enforcement officials and businesses on bribery of FPOs

- It is necessary to introduce provisions on bribery of FPOs to training materials when disseminating the 2015 Penal Code.
- Providing traning courses on bribery of FPOs offense for law enforcement officials is essential.
- Making businesses aware of the criminalization of foreign bribery under the 2015 Penal Code and training them how to prevent and combating bribery of FPOs.

The above analysis shows that the main purpose of criminalization of foreign bribery is to prevent illicit payments for obtaining or maintaining advantages in business transactions. Therefore, the focus is on businesses. They need to be fully aware of the seriousness of bribery of FPOs, criminal liability imposed thereon, and especially measures to prevent and combat foreign bribery. Raising their awareness on anti-bribery of FPOs should be considered as the first and foremost resolution to prevention and detection of foreign bribery, making law enforcement more effective.

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Act on Preventing Bribery of Foreign Public Officials in International Business Transactions of South Korea

Bribery Act of the United Kingdoms

Foreign Corrupt Practices Act of the United States

Penal Code of the People Republic of China

Unfair Competition Prevention Act of Japan

Guidelines for the Prevention of Bribery of Foreign Public Officials of the Japan's Ministry of Economy, Trade and Industry

Guideline for Referral of Reported Cases of South Korea

Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing of the UK's Ministry of Justice

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Appendixes

Appendix 1: Summary of Chapter 2 of the Resource Guide to the U.S FCPA

Chapter 2 of the FCPA, what is called "The FCPA: Anti-Bribery Provisions", first states that the FCPA addresses the problem of international corruption in two ways: (1) the anti-bribery provisions prohibit individuals and businesses from bribing foreign government officials in order to obtain or retain business and (2) the accounting provisions (discussed in Chapter 3) impose certain record keeping and internal control requirements on issuers, and prohibit individuals and companies from knowingly falsifying issuer's books and records or circumventing or failing to implement an issuer's system of internal controls. Violations of the FCPA can lead to civil and criminal penalties, sanctions, and remedies, including fines, disgorgement, and/or imprisonment.

Who is covered by the Anti-Bribery Provisions?

The FCPA's anti-bribery provisions apply to three categories of persons and entities: (1) "issuers" and their officers, directors, employees, agents, and shareholders; (2) "domestic concerns" and their officers, directors, employees, agents, and shareholders; and (3) certain persons and entities, other than issuers and domestic concerns, acting while in the territory of the United States.

Regarding issuers, Section 30A of the Securities Exchange Act of 1934 (the Exchange Act), which can be found at 15 U.S.C. § 78dd-1, contains the anti-bribery provisions governing issuers. A company is an "issuer" under the FCPA if it has a class of securities registered under Section 12 of the Exchange Act. In practice, this means that any company with a class of securities quoted in the over-the-counter market in the United State and required to file periodic reports with SEC, is an issuer. A company thus need not be a U.S. company to be an issuer. Foreign companies with American Depository Receipts that are listed on a U.S. exchange are also issuers. Officers, directors, employees, agents, or stockholders acting on behalf of an issuer (whether U.S. or foreign nationals), and any co-conspirators, also can be prosecuted under the FCPA.

The FCPA also applies to "domestic concerns" (15 U.S.C. § 78dd-2). A domestic concern is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States. Officers, directors, employees, agents, or stockholders acting on behalf of a domestic concern, including foreign nationals or companies, are also covered.

What Jurisdictional Conduct Triggers the Anti-Bribery Provisions?

The FCPA anti-bribery provisions can apply to conduct both inside and outside the United States. Issuers and domestic concerns - as well as their officers, directors, employees, agents, or stockholders – may be prosecuted for using the U.S. mails or any means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign official. The Act defines "interstate commerce" as "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof…" (15 U.S.C. §§ 78dd-2(h)(5)). Thus, placing a telephone call or sending an email, text message, or fax from, to, or through the United States involves interstate

commerce – as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or travelling across state borders or internationally to or from the United States.

Those who are not issuers or domestic concerns may be prosecuted under the FCPA if they directly, or through an agent, engage in any act in furtherance of a corrupt payment while in the territory of the United States, regardless of whether they utilize the U.S. mails or a means or instrumentality of interstate commerce. Thus, for example, a foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution, as may any co-conspirators, even if they did not themselves attend the meeting. A foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or act as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States.

What is covered? – The Business Purpose Test

The FCPA applies only to payments intended to induce or influence a foreign official to use his or her position "in order to assist…in obtaining or retaining business for or with, or directing business to, any person." This requirement is known as the "business purpose test" and is broadly interpreted. Many enforcement actions involve bribes to obtain or retain government contracts. The FCPA also prohibits bribes in the conduct of business or to gain a business advantage. For example, bribe payments made to secure favourabe tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement, all satisfy the business purpose test.

What does "Anything of Value" mean?

In enacting the FCPA, Congress recognized that bribes can come in many shapes and sizes – a broad range of unfair benefits – and so the statute prohibits the corrupt "offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to" a foreign official (15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

An improper benefit can take many forms. While cases often involve payments of cash (sometimes in the guise of "consulting fees" or "commissions" given through intermediaries), others have involved travel expenses and expensive gifts. Like the domestic bribery statute, the FCPA does not contain a minimum threshold amount for corrupt gifts or payments. Indeed, what might be considered a modest payment in the United States could be a larger and much more significant amount in a foreign country.

Regardless of size, for a gift or other payment to violate the statute, the payor must have corrupt intent – that is, the intent to improperly influence the government official. The corrupt intent requirement protect companies that engage in the ordinary and legitimate promotion of their business while targeting conduct that seeks to improperly induce officials into misusing their positions. Thus, it is difficult to envision any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent, and neither DOJ nor SEC has ever pursued an investigation on the basis of such conduct. Certain patterns, however, have emerged: DOJ's and SEC's anti-bribery enforcement actions have focused on small payments and gifts only when they comprise part of a systemic or long-standing course of conduct that evidences a scheme to corruptly pay foreign officials to obtain or retain business. The assessments are necessarily fact specific.

In addition, improper travel and entertainment, trips characterized as “factory inspections” or “training” with government customers, payments disguised as gifts, pretense of charitable contributions are all considered bribes.

Who is a Foreign Official?

The FCPA’s anti-bribery provisions apply to corrupt payments made to (1) “any foreign official”; (2) “any foreign political party or official thereof”; (3) “any candidate for foreign political office”; or (4) any person, while knowing that all or a portion of the payment will be offered, given, or promised to an individual falling within one of these three categories.

The FCPA defines “foreign official” to include: any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

As this language makes clear, the FCPA broadly applies to corrupt payments to “any” officer or employee of a foreign government and to those acting on the foreign government’s behalf. The FCPA thus covers corrupt payments to low-ranking employees and high-level officials alike.

The FCPA prohibits payments to foreign officials, not to foreign governments. That said, companies contemplating contributions or donations to foreign governments should take steps to ensure that no money is used for corrupt purposes, such as the personal benefit of individual foreign officials.

Foreign officials under the FCPA include officers or employees of a foreign government or any department, agency, or instrumentality thereof. When a foreign government is organized in a fashion similar to the U.S. system, what constitutes a government department or agency is typically clear. However, governments can be organized in different ways. Many operate through state-owned and state-controlled entities, particularly in such areas as aerospace and defense manufacturing, banking and finance, healthcare and life sciences, energy and extractive industries, telecommunications, and transportation. By including officers or employees of agencies and instrumentalities within the definition of “foreign official”, the FCPA accounts for this variability.

The term “instrumentality” is broad and can include state-owned and state-controlled entities. Whether a particular entity constitutes an “instrumentality” under the FCPA requires a fact-specific analysis of an entity’s ownership, control, status, and function. A number of courts have approved final jury instructions providing a non-exclusive list of factors to be considered:

- The foreign state’s extent of ownership of the entity;
- The foreign state’s degree of control over the entity (including whether key officers and directors of the entity are, or are appointed by, government officials);
- The foreign state’s characterization of the entity and its employees;
- The circumstances surrounding the entity’s creation;
- The purpose of the entity’s activities;
- The entity’s obligations and privileges under foreign state’s law;
- The exclusive and controlling power vested in the entity to administer its designated functions;

- The level of financial support by the foreign state (including subsidies, special tax treatment, government-mandated fees, and loans);
- The entity's provision of services to the jurisdiction's residents;
- The general perception that the entity is performing official or governmental functions.

Companies should consider these factors when evaluating the risk of FCPA violations and designing compliance programs.

DOJ and SEC have pursued cases involving instrumentalities since FCPA's enactment and have long used an analysis of ownership, control, status, and function to determine whether a particular entity is an agency or instrumentality of a foreign government.

Appendix 2: Treaties on International Cooperation in Criminal Matters Viet Nam Has Signed

	Treaties on MLA	Date of effect	Including MLA in criminal matters	Including extradition	Including transfer of persons serving imp. sentences
1	Bilateral Treaty on Mutual legal assistance in Criminal and Civil matters between Vietnam and Czech Republic	16/4/1984	X	x	
2	Bilateral Treaty on Mutual legal assistance in Criminal and Civil, and Family matters between Vietnam and Hungary	17/02/1986	X	x	X
3	Bilateral Treaty on Mutual legal assistance in Criminal and Civil, and Family matters between Vietnam and Bulgaria	05/71987	X	x	
4	Bilateral Treaty on Mutual legal assistance in Criminal and Civil, and Family matters between Vietnam and the Republic of Cuba	19/9/1987			
5	Bilateral Treaty on Mutual legal assistance in Criminal and Civil, Family, and Labour matters between Vietnam and Poland	18/1/1995	X	X	X
6	Bilateral Treaty on Mutual legal assistance in Criminal and Civil matters between Vietnam and People Republic of China	25/12/1999	X		
7	Bilateral Treaty on Mutual Legal assistance in Criminal and Civil matters between Vietnam and The Lao People's Democratic Republic	19/02/2000	X	X	
8	Bilateral Treaty on Mutual legal assistance in Criminal and Civil, and Family matters between Vietnam and Belarus	18/10/2001	X	X	
9	Bilateral Treaty on Mutual legal assistance in Criminal and Civil, and Family matters between Vietnam and Mongolia	13/6/2002	X	X	
10	Bilateral Treaty on Mutual legal assistance in Criminal and Civil matters between Vietnam and Ukraine	19/8/2002	X	X	
11	Bilateral Treaty on Mutual legal assistance in Criminal and Civil, and Family matters between Vietnam and Democratic People's Republic of Korea	24/2/2004	X	X	
12	Bilateral Treaty on Mutual legal assistance in Criminal and Civil matters between Vietnam and Russia	27/8/2012	X	X	

	Treaties on MLA in criminal matters	Date of effect
1	Treaty on Mutual Legal Assistance on Criminal Matters between Vietnam and Korea	19/4/2005
2	Treaty on Mutual Legal Assistance on Criminal Matters between Vietnam and India	15/7/2008
3	Treaty on Mutual Legal Assistance on Criminal Matters between Vietnam and The United Kingdom and North Ireland	30/9/2009
4	Treaty on Mutual Legal Assistance on Criminal Matters between Vietnam and Algeria	28/3/2014
5	Treaty on Mutual Legal Assistance on Criminal Matters between Vietnam and Indonesia	22/01/2016
6	Treaty on Mutual Legal Assistance on Criminal Matters between Vietnam and Australia	05/4/2017
7	Treaty on Mutual Legal Assistance on Criminal Matters between Vietnam and Spain	8/7/2017
8	Treaty on Mutual Legal Assistance on Criminal Matters between Vietnam and France	Not come into effect yet
9	Treaty on Mutual Legal Assistance on Criminal Matters between Vietnam and Hungary	30/6/2017
10	Treaty on Mutual Legal Assistance on Criminal Matters between Vietnam and Cambodia	Not come into effect yet
11	Treaty on Mutual Legal Assistance on Criminal Matters between Vietnam and Kazakhstan	Not come into effect yet
12	Treaty on Mutual Legal Assistance on Criminal Matters between Vietnam and South Africa	(Negotiation in 2012)

	Treaties on Extradition	Date of effect
1	Treaty on Extradition between Vietnam and South Korea	19/4/2005
2	Treaty on Extradition between Vietnam and India	12/8/2013
3	Treaty on Extradition between Vietnam and Algeria	28/3/2014
4	Treaty on Extradition between Vietnam and Australia	7/4/2014
5	Treaty on Extradition between Vietnam and Indonesia	26/4/2015
6	Treaty on Extradition between Vietnam and Cambodia	09/10/2014
7	Treaty on Extradition between Vietnam and Hungary	30/6/2017
8	Treaty on Extradition between Vietnam and Sri Lanka	01/12/2017
9	Treaty on Extradition between Vietnam and Spain	01/5/2017
10	Treaty on Extradition between Vietnam and China	Signed on April 07, 2015 (not come into effect yet)
11	Treaty on Extradition between Vietnam and France	Ratified on June 06, 2017 (not come into effect yet)
12	Treaty on Extradition between Vietnam and Kazakhstan	Signed on June 15, 2017
13	Treaty on Extradition between Vietnam and South Africa	Negotiation in 2012

	Treaties on transfer of persons serving imprisonment sentences	**Date of effect**
1	Treaty on transfer of persons who are serving imprisonment sentences between Vietnam and the United Kingdom and North Ireland	20/9/2009
2	Treaty on transfer of persons who are serving imprisonment sentences between Vietnam and Australia	11/12/2009
3	Treaty on transfer of persons who are serving imprisonment sentences between Vietnam and South Korea	30/8/2010
4	Treaty on transfer of persons who are serving imprisonment sentences and cooperation in criminal judgement enforcement between Vietnam and Thailand	19/7/2010
5	Treaty on transfer of persons who are serving imprisonment sentences between Vietnam and Hungary	30/6/2017
6	Treaty on transfer of persons who are serving imprisonment sentences between Vietnam and India	Ratified on March 28, 2017
7	Treaty on transfer of persons who are serving imprisonment sentences between Vietnam and Russia	15/5/2017
8	Treaty on transfer of persons who are serving imprisonment sentences between Vietnam and Sri Lanka	16/5/2017
9	Treaty on transfer of persons who are serving imprisonment sentences between Vietnam and Spain	01/5/2017
10	Treaty on transfer of persons who are serving imprisonment sentences between Vietnam and Czech Republic	Signed on June 7, 2017 (not come into effect yet)
11	Treaty on transfer of persons who are serving imprisonment sentences between Vietnam and Cambodia	Signed on December 20, 2016 (not come into effect yet)