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# KOREAN IMPLEMENTATION OF THE OECD BRIBERY CONVENTION: IMPLICATIONS FOR GLOBAL EFFORTS TO FIGHT CORRUPTION

Jong Bum Kim\*

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## I. INTRODUCTION

Bribery and corruption have no national boundaries. As the rapid growth of international trade, investment, and multinational corporations leads to deeper global economic integration, bribery and corruption create trade and investment barriers that undermine international competitive conditions. In the past, nations mainly were concerned with prohibiting domestic bribery of public officials.<sup>1</sup> However, as bribery and corruption increasingly affects international trade and investment, nations have started fighting corruption in cross-border commerce. Led principally by the Organization of Economic Cooperation and Development ("OECD"), major trading nations now attempt to combat corruption by criminalizing bribery of foreign public officials.

Efforts by the OECD member countries to stem corruption culminated in the signing of the OECD Convention on Combating Bribery of Foreign Public Officials ("OECD Bribery Convention") on December 17, 1997.<sup>2</sup> The OECD Bribery Convention would now make the bribery of a foreign public official a criminal offense under the implementing laws of the respective ratifying countries.<sup>3</sup> The convention is undoubtedly an important milestone in the effort to combat bribery and corruption in international commerce. However, its approach is less than comprehensive because it tackles the problem only from the supply side,

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1. Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L., 257, 258 (1997).

2. See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, OECD Doc. DAFFE/IME/BR(97)20, (last modified Feb. 10, 2000) <<http://www.oecd.org/daf/nocorruption/20nov1e.htm>> [hereinafter OECD Bribery Convention].

3. Twenty-nine OECD member countries and five non-member countries including Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic signed the convention on December 17, 1997. Australia, an OECD member, signed the convention on December 7, 1998. In accordance with the conditions set out in Article 15 of the OECD Bribery Convention, the convention entered into force on February 15, 1999. As of October 25, 1999, 18 member countries of the OECD and non-member countries ratified the convention. See OECD Doc. DAFFE/IME/BR(99)22, (Oct. 25, 1999).

omitting treatment of the demand side of bribery. The convention's provisions against bribery apply only to the bribe giver's country, but not to the bribe receiver's country.<sup>4</sup> Therefore, the prosecution of a foreign public official who receives a bribe is left to the domestic criminal laws of that official's country. Moreover, the prosecution of a bribe giver by the host country<sup>5</sup> of the bribe is not included in the scope of the convention.

Despite its limited approach, the OECD Bribery Convention will have important domestic implications in countries ratifying the convention. In the course of implementing the OECD Bribery Convention, Korea<sup>6</sup> enacted the Foreign Bribery Prevention Act ("FBPA") on December 28, 1998.<sup>7</sup> The FBPA's enactment, however, created an anomaly. Specifically, the sanctions against those who bribe a domestic public official under the bribery statutes of the Korean Criminal Code<sup>8</sup> are less severe than the sanctions against those who bribe a foreign public official under the FBPA. This anomaly is justified on the ground that the legal purpose behind the FBPA is different from that behind the bribery statutes of the Korean Criminal Code. The FBPA aims to support fair and competitive conditions in international business transactions<sup>9</sup>, whereas the bribery statutes of the Korean Criminal Code aim to protect the sanctity of the domestic public official's duty.<sup>10</sup> The Korean laws on bribery make a clear distinction between bribery in domestic as opposed to international business transactions.

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4. In particular, the convention provides for the prosecution of a bribe giver for "active bribery," but not a foreign public official for "passive bribery." In general, "active bribery" refers to the offense committed by the person who promises or gives a bribe, as opposed to "passive bribery", which refers to the offense committed by an official who receives a bribe.

5. See *infra* note 33.

6. Korea became the 29<sup>th</sup> member country of the OECD on December 12, 1996. See OECD Economic Surveys, 1997-1998, Korea, 1 (OECD), 1998. Korea was the OECD's eighth largest exporting country based on the exports between 1990 and 1996. See *supra* note 2 at 9 (Annex to the OECD Bribery Convention).

7. Korea ratified the OECD Bribery Convention on January 4, 1999, and the domestic implementing legislation, Foreign Bribery Protection Act ("FBPA"), entered into force when the OECD Bribery Convention took effect on February 15, 1999. See *Steps Taken and Planned Future Actions by Each Participating Country to Ratify and Implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD Doc. DAFFE/IME/BR(99)22, (October 25, 1999) (last modified Mar. 30, 2000) <<http://www.oecd.org/daf/nocorruption/annex2.htm>> [hereinafter FBPA].

8. See *infra* note 95.

9. The preamble of the OECD Bribery Convention explicitly states that among other things bribery distorts competitive conditions in the international market. See *supra* note 2, at Preamble.

10. See also the text accompanying notes 137 and 138 for explanation of the legal purpose of the bribery statutes of the Korean Criminal Codes.

Nevertheless, the distinction is becoming less pertinent as the border between national markets and foreign markets blurs and global economic integration deepens.<sup>11</sup> Multinational companies increasingly invest in many countries, and bribery takes place across national borders involving various nationalities. In an integrating world economy, where corruption distorts competition, there are global repercussions. Therefore, in order to combat bribery and corruption effectively, governments must fight bribery of foreign as well as national public officials with equal intensity. It is no longer possible for a government to support a high global standard in the international market when they are not maintaining an equivalent standard in the national market.<sup>12</sup>

In Korea, corruption was one of the root causes of its economic and financial crisis in 1997. The entrenched corruption of public officials at all levels undermined fair competition in the economy and contributed significantly to the economic crisis. Realizing this problem, the new government took concrete steps to fight domestic corruption as part of its efforts toward economic restructuring.<sup>13</sup>

Paralleling those efforts, Korea also participated in the multilateral forum to combat transnational corruption by ratifying the OECD Bribery Convention. Interestingly, Korea's benefits resulting from participation in the global arena have not been confined to the fight against transnational bribery.<sup>14</sup> There will

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11. The expansion of international investment and operation of multinational companies drive the "deep integration" of the global economy. See ROBERT Z. LAWRENCE, REGIONALISM, MULTILATERALISM, AND DEEPER INTEGRATION 17 (The Brookings Institution 1996).

12. The multilateral harmonization of policies against transnational bribery can be understood as a form of deep integration of the global economy. See *id.*

13. One of the most notable measures by the government was the launching of Banbupaetukwee [the Special Committee on Corruption Prevention] directly under the president's office on September 10, 1999. The committee is in charge of designing national anti-corruption policy and receiving petitions by insiders on corruption among other duties. See Jin Sik Lee, *What is the Role of Special Committee on Corruption Prevention?* MUNWHA-ILBO [MUNWHA DAILY], Sept. 10, 1999. As another concrete step in fighting corruption, the Supreme Public Prosecutor's office has set up a Special Anti-Corruption Investigation Headquarters in order to intensify crack-downs on corruption among businessmen, government officials, and politicians. See Seok-jae Kang, *Prosecution Declares War on Corruption*, THE KOREA HERALD, Sept. 18, 1999, (last modified Sept. 18, 1999) <<http://www.koreaherald.co.kr>>. As an indication of the government's increased effort to fight corruption, the number of public officials caught on corruption charges in Seoul increased by 98 percent from a year ago. See *1,900 officials caught for corruption over past year*, THE KOREA HERALD, Oct. 6, 1999, (last modified Oct. 6, 1999) <<http://www.koreaherald.co.kr>>.

14. The enactment of the FBPA has prompted Korean companies to establish corporate guidelines and codes of ethics concerning bribery and corruption. The companies that are making efforts to develop internal controls against corruption are mainly those in the construction and general trading business, which operate

be spillover effects in the fight against domestic bribery. Specifically, as a consequence of the domestic implementation of the OECD Bribery Convention<sup>15</sup>, the bribery statutes of the Korean Criminal Codes will now have to be amended to provide for more effective measures to fight corruption in the domestic market.

In this paper, I analyze the process of an international convergence of norms in criminal laws. I do this by examining the case of the OECD Bribery Convention affecting Korean Criminal Codes on bribery. The second section of this paper introduces the increased multilateral efforts to fight corruption. In particular, this section describes how awareness of the various harms of corruption generated the multilateral momentum to fight bribery and corruption. The third section of this paper discusses the significance of the OECD Bribery Convention by focusing on its various instruments that fight transnational bribery, followed by a section describing Korea's implementation of the OECD Bribery Convention. The fifth section analyzes how the FBPA and the Korean Criminal Codes differ in their purposes and in some of their elements. The final section suggests that the differences between the two laws eventually may have to be reconciled. In conclusion, this article draws a few lessons from Korea's implementation of the OECD Bribery Convention and applies them to the on-going global efforts to combat both national and transnational corruption.

## II. MULTILATERAL EFFORTS TO COMBAT CORRUPTION

### A. OVERVIEW OF THE CONSEQUENCES OF CORRUPTION

Corruption benefits few at the expense of many by distorting public policy decision-making. Particularly in developing countries, it undermines efficient allocation of badly needed financial resources for economic development. Moreover, corruption undermines the legitimacy of the political process, resulting in the breakdown of public trust in the government. To maintain the public's trust, a government needs to promote "good governance."<sup>16</sup> Lack of good governance will erode the institutions of a

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both in the national as well as overseas market. *See Corporations Undertaking Anti-Bribery Campaigns*, KOREA ECON. DAILY, Mar. 31, 1999.

15. Philip M. Nichols analyzes transnational bribery in the context of the anomaly arising from globalization and the remaining fragmentation of decision-making at local levels. He strongly argues against leaving the prohibition of transnational bribery in the hands of the host country of bribery. Nichols, *supra* note 2, at 269-270.

16. Corruption distorts various aspects of "good governance" such as the rule of law and public sector management. Thus, corruption is considered the principal op-

market economy and will weaken various policies of a government. Therefore, governmental policy measures that combat corruption are a necessary part of promoting sound economic development.<sup>17</sup>

An important lesson from the Asian financial crisis of 1997 is that countries that are riddled with graft and corruption are subject to the risks of the volatile international financial market. A sound business enterprise that attracted investors suddenly becomes unattractive if it is known that the enterprise is involved in corruption. Also, a country becomes unattractive to foreign investors, as investing in the country becomes riskier due to corruption that exposes structural problems in the economy. Furthermore, because it can create a major obstacle to restoring confidence during the course of an economic recovery, pervasive corruption weakens the implementation of necessary responses that are critical to the country's recovery and stability.<sup>18</sup> Specifically, global investors would not find confidence in an economy unless they saw the government's clear commitment to fighting corruption.

In a recent study, it was shown that countries suffering from pervasive corruption invest less and achieve lower economic growth.<sup>19</sup> Another study linking corruption and foreign direct investment showed that "an increase in corruption level from that of Singapore to that of Mexico is equivalent to raising the tax rate by over 20 percentage points."<sup>20</sup> The study implies that a high degree of corruption in an economy such as Mexico effectively creates a tax on foreign direct investments. Corruption, however, distorts an economy more than taxation. The illegal nature of corruption and the need for secrecy make it much more

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posite of good governance. See Dionysis Spinellis, *Phenomenon of Corruption*, OECD Doc. OCDE/GD(96)129 (last modified Aug. 26, 1996) <<http://apple1.oecd.org/OLIS/1996DOC.NSF/9718115052a44d4080256564005f88b5/596a04050200d2a1c1256392004e79c2?OpenDocument>>.

17. See Robert Rubin, *Statement of Treasury Secretary Robert Rubin*, A Global Forum on Fighting Corruption: Safeguarding Integrity Among Justice and Security Officials, Speech at the Global Forum on Fighting Corruption (Feb. 24, 1999) (last modified Feb. 25, 1999) <<http://www.insidetrade.com>>. Robert Rubin refers to good governance as an important dimension of an environment conducive to attracting private capital.

18. See *id.*

19. Paolo Mauro, *The Effects of Corruption on Growth, Investment, and Government Expenditure*, at 7, IMF Working Paper WP/96/98, (Kimberly Ann Elliott, ed., Institute for International Economics, Washington D.C. 1997).

20. Shang-jin Wei, *How Taxing is Corruption on International Investors?* (NATIONAL BUREAU ECONOMIC RESEARCH WORKING PAPER W6030) (1997) (last modified May 1997) <<http://papers.nber.org/papers/W6030>>.

costly than taxation of lawful economic activity.<sup>21</sup> This is because the market has difficulty valuing a business enterprise accurately when the enterprise is engaged in illicit activities.

Corruption in developing countries not only stunts economic growth but also alters the composition of public expenditures. Specifically, corrupt governments spend less on welfare and health care.<sup>22</sup> As a result, corruption inflicts heavy costs on the most disadvantaged population in a country. Also, corruption inflicts heavier burdens on ordinary citizens in developing countries because corruption of low-ranking officials handling administrative services makes the daily life of ordinary citizens difficult. As an example of corruption in a developing country, in Nigeria, wealth from oil exports since 1974 has failed to contribute to economic growth, because of private enrichment of the ruling elite.<sup>23</sup> The deeply entrenched corruption undermined economic growth, which resulted in the national income of Nigeria in 1984 amounting to less than it was in 1974.<sup>24</sup> The Nigerian economy diminished by 0.4% annually during the 1980s.<sup>25</sup>

In addition to the negative consequences of corruption on economic development, with the growth of world trade and investment, the international dimension of corruption is also a serious problem. Corruption increasingly involves multinational companies operating both in developing as well as developed countries. Thus, bribery and corruption, which distort the competitive conditions in international business, have become a concern of major trading nations.<sup>26</sup> On the one hand, governments have felt the need to protect their firms from corrupt activities of firms from other countries.<sup>27</sup> On the other hand, governments

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21. Andrei Shleifer and Robert W. Vishny, *Corruption*, 58 Q. J. ECON., 599, 616 (1993).

22. Paolo Mauro, *Corruption: Causes, Consequences, and Agenda for Further Research*, 11 FIN. & DEV. 12 (1998).

23. Susan Rose-Ackerman, *The Political Economy of Corruption*, in *CORRUPTION AND THE GLOBAL ECONOMY* 44, (Kimberly Ann Elliott, ed., Institute for International Economics, Washington D.C. 1997).

24. *See id.*

25. *See id.*

26. The U.S. considers bribery and corruption as structural barriers to trade, which needs to be addressed by the World Trade Organization ("WTO"). U.S. Trade Representative Charlene Barshefsky called for the WTO "to take up the work of the OECD and to begin tackling head on bribery and corruption." *See Barshefsky calls on WTO to Reduce Structural Barriers to Trade*, INSIDE U.S. TRADE, Apr. 17, 1998.

27. As a result of U.S. companies competing with firms from countries permitting bribery of foreign public officials, the U.S. government claimed that it lost international contracts estimated at 30 billion dollars annually. *See Clinton Signs Implementing Law for OECD Bribery Convention*, WORLD TRADE ONLINE: AROUND THE WORLD TRADE (last modified Nov. 10, 1998) <<http://www.insidetrade.com>>. U.S. companies have contended that they have been forced



have come under pressure to prohibit their firms from giving bribes to foreign public officials. In order to combat corruption and to assure the continued growth of world trade and investment, governments has come to realize the necessity of concerted multilateral efforts. Indeed, it is not an exaggeration to state that "today's decisive battles for free trade, development, and democracy may well be fought in the campaign against corrupt practices."<sup>28</sup>

## B. CORRUPTION AS TRADE AND INVESTMENT BARRIER

As world trade and investment expands, so does the scope of bribery involved in international transactions. If only 5% of the 28 billion dollars of the world FDI inflows to developing countries is used for bribery, the total bribe payment would amount to 6.4 billion dollars.<sup>29</sup> More importantly, if a similar method of calculation is used for world trade in goods and services, the estimated amount of bribe payments involved in world trade would be more than 652 billion dollars.<sup>30</sup> Not only do exporters and foreign investors shoulder the enormous costs of corruption, but so do consumers of the bribe-receiving public official's country.

Skeptics contend that if companies resort to bribery as a way of bypassing existing trade barriers, then it will arguably expand trade and investment which otherwise would have been suppressed. For instance, bribes may be given to a foreign public official to reduce tariffs, resulting in a lower government revenue but perhaps in increased trade. Also, bribes might be given to bypass inefficient regulations that discriminate against foreign investors. Moreover, small-scale bribes that, for example, facilitate the passage of imports through customs may arguably promote trade and investment. As described above, some trade expanding effects of bribery may exist, but bribery and corruption in reality is not limited to greasing the system to facilitate trade and investment. Officials who are unscrupulous enough to take small-scale bribes to facilitate trade will undoubtedly also take large-scale sums that influence decisions in obtaining and retain-

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to compete on an uneven playing field because companies from other countries have not been constrained from giving bribes to foreign public officials by criminal laws similar to the Foreign Corrupt Practices Act ("FCPA"). See Christopher L. Hall, Comment, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But For How Long?* 2 TULANE J. OF INT'L & COMP. L. 289, 302-06 (1994).

28. See Robert S. Leiken, *Controlling the Global Corruption Epidemic*, Foreign Policy, Winter 1996, at 73.

29. See Ackerman, *supra* note 23, at 32.

30. See *International Trade Statistics*, THE WORLD TRADE ORG. ANN. REP. (1998). The calculation is based on 1996 total world trade in goods and services. *Id.*

ing business or that gain other important advantages. In return for the bribe, the corrupt official may, for example, allow the company to violate important environmental and safety standards. Thus, small-scale bribes are just another aspect of the overall phenomenon of corruption.

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

As evidence of corruption posing as a non-tariff barrier, a recent survey in Korea showed that high-level executives of multinational companies found it difficult to do business in Korea, where public officials solicited bribes in the form of pecuniary payments as well as other services. Among the executives surveyed, 73% of the respondents said that they had been asked to pay bribes in some form, either directly or indirectly, and 50% of respondents complied with the solicitation by paying some sort of bribe.<sup>31</sup> As many as 30% of the respondents also said that because of pervasive corruption, they are seriously considering the option of moving their business to another country.<sup>32</sup> The survey clearly indicates that corruption makes it unattractive for foreign business to operate in Korea. If Korea does not vigorously enforce bribery laws against its national public officials, it is possible that the competition will be tilted in favor of domestic firms, which are well-versed in corrupt local practices. Moreover, the field of competition will be further tilted in favor of domestic firms, if the bribery statutes of the Korean Criminal Codes impose weaker sanctions than the foreign countries' implementing laws of the OECD Bribery Convention.<sup>33</sup>

The primary responsibility of fighting corruption to uphold the international trading system must be borne by those coun-

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31. Young-soo Kim, *Foreign Companies Victims of Extortion*, DIGITAL CHOSUN ILBO (last modified June 27, 1999) <<http://www.chosun.com/w21data/html/news/199906/199906270455.html>>.

32. *See id.*

33. The terminology of "home country" of the bribe is borrowed from literature on foreign investment. The "home country" of the bribe is defined as the country from which a bribe giver originates, while the "host country" of the bribe refers to the country for which the bribe receiving public official works. Nicholls gives a similar definition. *See Nicholls supra* note 1, at 259.

tries that are major trading nations because firms from these countries are also major participants in the bribery that occurs in international commerce. Those companies from the major trading nations giving bribes to foreign public officials are not only undermining the competitive market system in the foreign country but also the fair international trading system. In recent years, member countries of the OECD that are major world trading nations have been building a consensus in which each nation takes responsibility for the conduct of its own companies regardless of where they operate in order to support the international trading system. On the basis of this consensus, the OECD member nations have agreed to the OECD Bribery Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. By successfully binding national governments to a framework for criminalizing the bribery of a foreign public official, the OECD Bribery Convention has built the most significant multilateral instrument in the fight against bribery and corruption.

### C. MULTILATERAL EFFORTS TO FIGHT TRANSNATIONAL CORRUPTION

Worldwide initiatives against corruption employ many different tools. Some tools deal with transnational bribery alone, while others deal with transnational bribery in conjunction with national bribery. At the functional level, international measures to fight corruption can be divided into supply side measures or demand side measures.<sup>34</sup> Supply side measures focus on prevention and punishment of offering of bribes, while demand side measures counter a public official's incentive to receive bribes. The OECD Bribery Convention is mainly a supply side measure against transnational bribery, as it focuses on punishing a bribe giver's act, but not a bribe recipient's act.

Earlier efforts to combat corruption go back to the 1970s when the U.S. pushed hard in the Economic and Social Council ("ECOSOC") for an international agreement on illicit payments. The draft of the international agreement was modeled after the U.S. FCPA which prohibited U.S. companies from giving bribes to foreign public officials. However, the effort failed because of the division between developed and developing countries over

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34. The conceptual distinction between the supply side and demand side measures to fight corruption is based on the idea that bribery is an illicit payment for governmental services or governmental property for personal gain. See Mauro *supra* note 19.

the definition of an illicit payment.<sup>35</sup> The United Nations ("U.N.") efforts were later rekindled in the 1990s with the adoption of the U.N. Declaration against Corruption and Bribery in International Commercial Transactions on February 21, 1997. The declaration urged countries to make commitments to take effective actions to combat all forms of corruption and bribery and related illicit practices in international commercial transactions.<sup>36</sup> It also urged countries to commit themselves to criminalize bribery of a foreign public official in an effective and coordinated manner.<sup>37</sup> However, the declaration is not binding, and an escape clause allows the implementation of the declaration to be subject to each nation's own constitution and fundamental legal principles.<sup>38</sup>

In addition to the declaration, the U.N. adopted the International Code of Conduct for Public Officials ("ICCP") on December 12, 1996. The code is an example of a demand side measure at the multilateral level to counter corruption. It sets out principles for public officials of all nations to uphold in order to preserve the integrity of public offices. It broadly states that public officials' ultimate loyalty is to the public interests of their country and that public officials shall not use their official authority for improper advancement of their own or their family's personal or financial interests.<sup>39</sup> Although these are non-binding clauses, the ICCP shows that important principles regarding the duty of public officials can be universally agreed upon among the U.N. member countries.

Although limited to OECD members, who are mostly developed countries, the OECD has worked towards adopting a more concrete and binding anti-corruption program than the U.N. In the process, the OECD member countries agreed on a formal recommendation in 1994, calling on member countries to take "effective measures to deter, prevent, and combat the bribery of a foreign public official."<sup>40</sup> This recommendation was followed by another measure in 1996, which called for the elimination of the practice of allowing tax deductibility of bribes paid to foreign public officials. In 1996, at least fourteen OECD member coun-

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35. See Mark Pieth, *International Cooperation to Combat Corruption*, in CORRUPTION AND THE GLOBAL ECONOMY, 122 (Kimberly Ann Elliott, ed., Institute for International Economics, Washington D.C. 1997).

36. See *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*, at art. 1 (last modified Dec. 12, 1997) <<http://www.un.org/ga/documents/gares52/res5287.htm>>.

37. See *id.* art. 2.

38. See *supra* note 36, Chapeau, Annex.

39. U.N. General Assembly, U.N. Document A/RES/51/59, Annex, International Code of Conduct for Public Officials (1997).

40. See OECD Document, C(94)75/FINAL.

tries allowed tax deductions in various forms, but this has been reduced to eight countries as of February, 1999.<sup>41</sup>

In addition to the above set of recommendations, the OECD took a bold step in 1997 to launch a negotiation on an international treaty to criminalize the bribery of a foreign public official. The twenty-nine member countries of the OECD and five non-member countries signed the OECD Bribery Convention on December 17, 1997.<sup>42</sup> The treaty is a historic achievement; it was the first binding international treaty to criminalize bribery of foreign public officials. Moreover, the OECD Bribery Convention has ensured effective implementation of the treaty by providing follow-up monitoring mechanisms.

In the western hemisphere, the member states of the Organization of American States ("OAS"), which is comprised of thirty five states in North and South America<sup>43</sup>, adopted the Inter-American Convention against Corruption ("OAS Convention") in March 1996. The OAS Convention has made a successful attempt to fight the supply side of corruption by harmonizing rules against both national as well as transnational bribery. In order to criminalize both national and transnational bribery, the OAS Convention employed a broader definition of bribery. The convention tackles illicit enrichment and other corrupt conduct which goes beyond offering, promising or giving payments "in order to obtain or retain business or other improper advantage in the conduct of international business."<sup>44</sup> Despite its broad scope, the convention includes an escape clause that allows each country to adopt its own measures to punish the bribery of foreign public officials subject to its constitution and the fundamental principles of its legal system.<sup>45</sup>

In Europe, efforts to fight corruption have also made significant progress. However, the coverage of these efforts have been limited to EU community officials and officials of EU member states. The first major effort is the First Protocol to the Conven-

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41. See Stuart E. Eizenstat, *An Anti-Corruption and Good Governance Strategy for the Twenty-First Century*, Address at the Global Forum on Fighting Corruption (Feb. 24, 1999).

42. The OECD Bribery Convention went into effect on February 15, 1999 after five of the top 10 OECD exporters, which account for 60 percent of the group's exports, ratified the OECD Bribery Convention. See *Global Anti-Bribery Convention Set To Go Into Effect Next Year*, INSIDE US TRADE, Dec. 25, 1998.

43. See The OAS and the Inter-American System, (last modified May 7, 1999) <<http://www.oas.org/en/pINFO/OAS/oas.htm>>.

44. See Rex J. Zedalis, *Internationalizing Prohibitions on Foreign Corrupt Practices: The OAS Convention and the OECD Revised Recommendation*, 31 J. WORLD TRADE 51 (1997).

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

tion on the Protection of the Financial Interests of Community adopted on September 27, 1996.<sup>46</sup> It asks member states to criminalize active and passive bribery committed by or against Community officials and public officials of member states that affects the financial interests of the Community. Taking a step forward in the following year, the EU member states agreed on the Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union ("EU Bribery Convention"), which was adopted by the Council on May 26, 1997. The convention expanded the scope of the criminalization of bribery by dropping the reference to the financial interests of community officials.<sup>47</sup> Still, in contrast to the OECD Bribery Convention, the EU Bribery Convention does not cover the bribery of public officials of non-EU member countries. In this regard, the EU Bribery Convention is therefore aimed at protecting the internal trade and economic interests of member states in the European Union, not international trade and commerce, from corruption. The EU's efforts to fight corruption within the European Union is regarded as a part of a larger arrangement according to the Maastricht Treaty to foster coordination on the basis of unanimity among EU member states.<sup>48</sup>

On another front, the Council of Europe<sup>49</sup> has drafted the Criminal Law Convention on Corruption, which was signed on January 27, 1999.<sup>50</sup> The draft convention fights corruption both on the demand side as well as on the supply side. Unlike the approach taken in the European Union, the Council of Europe is seeking a comprehensive fight against corruption by addressing both national and transnational bribery. The current draft attacks both active and passive bribery of national as well as foreign public officials. In addition, it is also noteworthy that the draft convention expands the notion of bribery to trading of influence involving public officials.<sup>51</sup>

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46. U.N. ECOSOC, *Promotion and Maintenance of the Rule of Law: Action Against Corruption and Bribery*, at 10, E/CN.15/1998/3 (1998) (last modified Mar. 23, 1998) <<http://www.uncjin.org/Documents/7comm/3e.pdf>>.

47. *See id.*

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

49. The Council of Europe is an international governmental organization established in 1949 with the signing of the Statute of the Council of Europe. The role of the organization is to strengthen democracy, human rights and the rule of law throughout its member states in Europe. *See About the Council of Europe*, (last modified Aug. 12, 1999) <<http://www.coe.fr/eng/present/about.htm>>.

50. *See The Criminal Law Convention on Corruption*, (last modified Jan. 27, 1999) <<http://www.coe.fr/eng/legaltxt/173e.htm>>.

51. *See* U.N. ESOSOC, *supra* note 47.

Behind the multilateral governmental efforts, which made historic progress during the 90s, non-governmental organizations, such as Transparency International ("TI"), have mobilized worldwide public opinions against corruption at grass-root levels. TI has successfully stimulated public discussion of corruption with its publication of the Corruption Perception Index ("CPI") since 1995. The index ranked countries according to the degree of corruption in the countries. As a result of the CPI publication, some countries have launched substantive anti-corruption reforms.<sup>52</sup> As another contribution, the CPI has revealed the correlation between corruption and the level of living standard. High corruption is usually associated with low economic development. Based on this observation, international lending institutes are now making use of the CPI as a valuable tool for fighting corruption in developing countries.<sup>53</sup>

Lastly, as late comers in the fight against corruption, international lending institutions such as the World Bank and the International Monetary Fund ("IMF") are using their lending power to induce loan-receiving countries to clean up corruption in their countries.<sup>54</sup> This is a concrete effort to fight corruption on the demand side. In the past, the issue of corruption was never raised because of political considerations.<sup>55</sup> However, international-lending institutes have started losing patience with governments that fail to tackle corruption and misappropriate development money. Today, corruption is explicitly taken into account in country risk analysis, lending decisions, and portfolio supervisions. In all of its lending decisions, the World Bank now considers whether bank projects are likely to be affected by corruption and the extent to which development objectives are likely to be compromised by corruption.<sup>56</sup> For instance, the World Bank recently reduced its lending to Kenya and Nigeria because of the pervasive corruption that had posed substantial risks to loans in those countries.<sup>57</sup> In another case, the World Bank is contemplating sanctions against a dozen international companies linked to bribery charges involving an international

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52. See *1998 Corruption Perceptions Index*, Transparency International Press Release (last modified Sept. 24, 1998) <<http://www.gwdg.de/~uwww/>>.

53. See *id.*

54. See THE WORLD BANK, *HELPING COUNTRIES COMBAT CORRUPTION: THE ROLE OF THE WORLD BANK* 51 (Sept. 1997).

55. Steven Swindells, *Report on Business: International World Bank Vows Corruption Fight*, THE GLOBE AND MAIL, Oct. 12, 1999, at B12.

56. See *id.*

57. See *Honest Trade: A Global War against Bribery*, ECONOMIST, Jan. 16, 1999, at 23.

project in South Africa.<sup>58</sup> The bank can declare a firm ineligible for bank financed contracts either for a period of time or indefinitely if it determines that the firm is involved in corrupt activities.

### III. OECD BRIBERY CONVENTION

#### A. OVERVIEW OF THE CONVENTION

The OECD Bribery Convention, which came into effect on February 15, 1999, adopts various instruments to fight transnational bribery. The convention focuses on solving bribery and corruption from the supply side by criminalizing the active bribery of a foreign public official. In addition, in its accounting provisions the convention requires countries to take measures against false accounting practices such as establishing off-the-books accounts.<sup>59</sup> As another instrument to fight corruption, the convention adopts a money-laundering clause that makes bribery of a foreign public official a predicate offence for the purpose of money laundering legislation.<sup>60</sup> In addition to these instruments, the treaty requires signatories to provide each other mutual legal assistance. Signatories cannot decline to render mutual legal assistance on the grounds of bank secrecy.<sup>61</sup> Furthermore, the treaty requires each party to allow extradition of bribe givers.<sup>62</sup> Each party shall take measures to extradite its nationals or prosecute its nationals for the offense.<sup>63</sup> Although the convention narrowly focuses on dealing with active bribery of foreign public officials, when combined, the totality of those measures are powerful tools in the fight against bribery and corruption.

The OECD Bribery Convention is noteworthy because it is the first successful effort to establish a binding international obligation among major trading and investing nations of the world to fight transnational bribery. Most significantly, the treaty employs monitoring and follow-up measures to promote the full implementation of the OECD Bribery Convention.<sup>64</sup> The job of

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58. A former head of the Lesotho Highlands Water Project in South Africa, Masupha Sole, was charged with taking 12 million Rand in bribes from a dozen international companies over 10 years. The World Bank assisted 150 million dollars in the project that channeled the water from Lesotho to the Gauteng Province in South Africa. See David Greybe, *World Bank Backs Crackdown*, BUS. DAYS, July 30, 1999, at 1.

59. See OECD Bribery Convention, *supra* note 2, art. 8.

60. The money laundering requirement applies only to those countries, which have made bribery of its own public officials a predicate offense for the purpose of the application of its money laundering legislation. See *id.* art. 7.

61. See *id.* *supra* note 2, art. 9.

62. See *id.* art. 10.

63. See *id.* art. 10.3.

64. See *id.* art. 12.



monitoring the implementation is entrusted to the OECD Working Group on Bribery in International Business Transactions. This process will include two phases. The first phase will evaluate whether the domestic implementing legislation meets the standards set by the treaty. The second phase will study and assess the institutional structures to enforce the laws and the application of the laws and rules in practice.<sup>65</sup>

Another notable aspect of the OECD Bribery Convention is that it seeks harmonization of an individual country's domestic policy against bribery and corruption with its own goals, but achieves this without compromising the fundamental principles of each country's legal system. This harmonization is achieved by pursuing "functional equivalence" among the measures taken by each country to punish the bribery of a foreign public official.<sup>66</sup> This approach was put to test in the context of corporate liability and monetary sanctions against proceeds obtained from bribery. With regard to corporate criminal liability, a country can substitute criminal sanctions of a legal person for the bribery of a foreign public official with non-criminal sanctions that are effective, proportionate and dissuasive.<sup>67</sup> However, such substitution is permitted only upon establishing that the liability imposed by the OECD on the legal person conflicts with the legal principles of the country. With regard to seizure and confiscation of bribe proceeds, the treaty allows for a substitute monetary sanction for those countries where the legal tradition is inconsistent with such sanctions.<sup>68</sup> In both cases, the treaty requires certain measures to be implemented, but allows substitute measures when the measures conflict with the legal principles or traditions of the country.

## B. PURPOSE OF THE CONVENTION

The convention states three major harms of bribery and corruption. First, bribery raises serious moral and political concerns.<sup>69</sup> Second, it undermines good governance and economic

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65. See *The Procedure of Self and Mutual Evaluation of Implementation of the OECD Bribery Convention and the Revised Recommendation* (last modified Feb. 10, 2000) <<http://www.oecd.org/daf/nocorruption/selfe.htm>>.

66. See *The Commentaries on the Convention on Combating Bribery of Officials in International Business Transactions*, para. 2, (last modified Feb. 10, 2000) <<http://www.oecd.org/daf/nocorruption/20nov2e.htm>> [hereinafter Commentaries]. Given the different legal systems of the 34 participating governments, it would have been very difficult to agree on a treaty that requires absolute uniformity of criminal legislation in the signatories. See Stuart E. Eizenstat, Letters to the Editor, *The Anti-Bribery Treaty*, WASH. POST, Jan. 16, 1998, at A20.

67. See OECD Bribery Convention, *supra* note 2, art. 3.2.

68. See *id.* art. 3.3.

69. See *id.* preamble, para. 1.

development.<sup>70</sup> Third, it distorts international competitive conditions.<sup>71</sup> The treaty aims to provide effective multilateral measures to deter, prevent, and combat the bribery of foreign public officials which causes the above harms in connection with international business transactions. In order to harmonize various countries' measures to fight transnational corruption, the treaty adopted the principle of functional equivalence. As a guiding principle, functional equivalence is intended to achieve equivalence in the effects of the measures adopted by each party at the functional level.<sup>72</sup>

### C. ELEMENTS OF BRIBERY

Article I of the OECD Bribery Convention defines the offence of bribery of a foreign public official as an undue pecuniary or other advantage offered, promised or given to a foreign public official that is intended "to obtain or retain business or other improper advantage in the conduct of international business."<sup>73</sup> The bribe can be paid to a foreign public official directly or through an intermediary.<sup>74</sup> Also, the prohibited beneficiary of a bribe payment could be the foreign public official or a third party.<sup>75</sup> However, a "small facilitation payment" would not be an offense, because it is excluded from the definition of payment "to obtain and retain business." It is thought that the bribe recipient's country should fight this type of bribery through promotion of good governance.<sup>76</sup> Moreover, it is thought that criminalization by other countries would not be a practical or effective measure to fight this type of payment.<sup>77</sup>

The definition of a foreign public official in the convention is a mixture of an autonomous definition independent of local laws and a definition implicitly dependent on the national laws of the bribe receiving public official's country. First, any person holding a legislative, administrative or judicial office in a foreign country is defined as a foreign public official.<sup>78</sup> Since the respective laws of a foreign country will have varying definitions of legislative, administrative or judicial offices, this definition is complemented by a functional definition of a foreign public official, "which is any person exercising a public function for a for-

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70. *See id.*

71. *See id.*

72. *See id.* preamble, para. 8.

73. *See* OECD Bribery Convention, *supra* note 2, art. 1.1.

74. *See id.*

75. *See id.*

76. *See* Commentaries, *supra* note 66, para. 9.

77. *See id.*

78. *See* OECD Bribery Convention, *supra* note 2, art. 1.4.a.

eign country, including for a public agency or a public enterprise."<sup>79</sup> The functional definition is further elaborated by providing follow-up definitions of public function, public enterprise, and public agency in the Commentaries.<sup>80</sup> In accordance with this functional definition, if a private person by the law of a bribe recipient's country engages in a public function by participating, for example, in a committee with the authority to decide on a public procurement, then the person will be considered a public official. In addition to the above definition, any official or agent of a public international organization is separately defined as a foreign public official.<sup>81</sup> According to this definition, for example, an official of a regional inter-governmental organization such as European Communities will be considered a public official.

It is important to note that the bribe recipient covered under the convention is limited to the foreign public official as defined above. The definition of a foreign public official in the convention includes an official of a state owned enterprise such as a public steel company. However, once the public enterprise is privatized, officials of the privatized enterprise will not be considered foreign public officials under the OECD Bribery Convention.<sup>82</sup>

In defining a bribe giver, the OECD Bribery Convention includes both a natural and legal person. The convention explicitly establishes the liability of a legal person for the bribery of a foreign public official.<sup>83</sup> In countries where the criminal responsibility of a legal person is not applicable, the countries shall not be required to establish such criminal responsibility.<sup>84</sup> For example, although the criminal responsibility of a legal person is generally not established for other domestic crimes in Korea, by implementing legislation of the OECD Bribery Convention, Korea explicitly adopts the criminal responsibility of legal persons.<sup>85</sup>

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79. See Commentaries, *supra* note 66, para. 9.

80. See *id.* para. 12 -14.

81. See OECD Bribery Convention, *supra* note 2, art. 1.4.a.

82. The OECD is currently pursuing the issue of "commercial bribery", the bribery of private enterprises, as a part of future activities. See Donald Johnston, *The Importance of Being Honest*, WALL ST. J. EUR., Aug. 28, 1998, at 6.

83. See OECD Bribery Convention, *supra* note 2, art. 2.

84. See Commentaries, *supra* note 66 at para. 20.

85. See FBPA, *supra* note 7 *popryul* 5588 at para. 4. An unofficial translation is obtained from Fourth Prosecution Division, Prosecution Bureau, Ministry of Justice, Republic of Korea.

## D. JURISDICTION

The OECD Bribery Convention requires its signatories to establish effective jurisdiction to fight bribery of a foreign public official. It allows jurisdiction based on a territoriality principle, nationality principle or both.<sup>86</sup> Territorial jurisdiction can be found if the offence is committed in whole or in part in the bribe giver's territory. The interpretation of "in whole or in part" is broad enough such that an extensive physical connection to the act of bribery is not required.<sup>87</sup> Nationality jurisdiction can be found for crimes that are committed abroad. If a country has jurisdiction to prosecute its own national for offences committed abroad, it shall also establish the same jurisdiction with respect to the bribery of a foreign public official according to the same principles.<sup>88</sup>

Based on above jurisdictional principles, a non-national who bribes a foreign public official would be subject to prosecution if the crime is committed in part in the territory. This would be true regardless of whether the foreign public official is the same nationality as the bribe giver or a national of a third country. In addition, the bribe giver's country can also exercise nationality jurisdiction over the offense. Therefore, it is possible for two different countries to assert jurisdictions over the same offense, one on the basis of nationality, the other on the basis of territoriality. Jurisdictional conflict can also arise when the law is applied to a legal person. For example, the U.S. FCPA would apply to a foreign national who is an officer, director, agent, or employee of a domestic concern or an issuer of securities registered under U.S. federal laws.<sup>89</sup> In this case, the FCPA applies to an individual who is not a U.S. citizen, if he or she is hired by a U.S. firm. In addition, the employee's country can prosecute the person based on nationality jurisdiction. If a jurisdictional conflict arises, as more than one country asserts jurisdiction over the offense, the conflict will be resolved through a consultation process initiated at the request of one of the countries involved.<sup>90</sup>

Finally, the convention provides that each country shall review whether the current basis of jurisdiction is effective in the fight against the bribery of a foreign public official, and if it is not, the country shall take remedial steps.<sup>91</sup> If a country provides jurisdiction for the offense only on the basis of territoriality, ju-

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86. See OECD Bribery Convention, *supra* note 2, art. 4.1 and 4.2.

87. See Commentaries, *supra* note 66, at para. 25.

88. See OECD Bribery Convention, *supra* note 2, art. 4.2.

89. 15 U.S.C. §§ 78dd-1, 78dd-2 (1994).

90. See OECD Bribery Convention, *supra* note 2, art. 4.3.

91. See *id.* art. 4.4.

risdiction will be established when the act of bribery occurs within its territory or some evidence of a territorial link of the act is found. However, it is questionable whether territorial jurisdiction alone could be effective when the principle of nationality is not provided.

#### E. ENTRY INTO FORCE

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

### IV. KOREAN IMPLEMENTATION OF THE OECD BRIBERY CONVENTION

#### A. ENACTMENT OF THE FBPA

Korea enacted a special law, the Foreign Bribery Prevention Act ("FBPA") as the implementing legislation of the OECD Bribery Convention with the purpose of fully incorporating the OECD Bribery Convention into its national law. The FBPA follows to a large extent the text of the convention. In areas where direct transposing of the text of the convention conflicts with the current legal tradition of Korean laws, the FBPA has sought a functional equivalence to the OECD Bribery Convention.<sup>92</sup> The FBPA achieved functional equivalence first by adopting the purpose of the OECD Bribery Convention as its own purpose.<sup>93</sup>

In line with the OECD Bribery Convention, the FBPA explicitly states that its aim is to establish a sound practice in international business transactions.<sup>94</sup> It also states that the law is intended to provide the details necessary to implement the OECD Bribery Convention. During the process of negotiating the convention, Korea considered the possibility of implementing the OECD Bribery Convention by amending the bribery statutes of the Korean Criminal Codes. However, the bribery statutes of the Korean Criminal Codes (*Hyongpop*) are not intended to pro-

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92. For example, instead of confiscation of the proceeds obtained from bribery, the FBPA provides a fine sentence as an alternative monetary sanction against proceeds. See the text *infra* accompanying notes 121 and 125.

93. See FBPA, *supra* note 7, art. 1.

94. See *id.*

tect fair competition in international business transactions.<sup>95</sup> Moreover, it would have taken too much time to amend the Korean Criminal Codes because the codes contain basic principles of the Korean Criminal law system. Another option was to implement the OECD Bribery Convention through fair competition law by amending the Monopoly Regulation and Fair Trade Act that protects fair competition in the national market.<sup>96</sup> However, this option was not chosen because the Monopoly Regulation and Fair Trade Act does not extend its coverage to international business transactions.<sup>97</sup> After considering various options, the government decided to enact a special law to deal with the offense of bribery of foreign public officials. The special law would work in concert with the provisions of Korean Criminal Codes which would apply in principle to the offences prescribed by special criminal laws, unless stipulated otherwise in the special law.<sup>98</sup>

## B. DEFINITION OF BRIBERY

Under the FBPA, any person who promises, gives or offers a bribe to a foreign public official in relation to his or her official duties in order to obtain improper advantage in the conduct of international business transactions shall be subject to prosecution.<sup>99</sup> This language closely follows the language in Article 1.1 of the OECD Bribery Convention. Under the Convention, the act of offering, promising or giving any undue pecuniary or other advantage constitutes bribery when two conditions are met. First, the payment has to be made "in order that the official act or refrain from acting in relation to the performance of official duties."<sup>100</sup> Second, the payment has to be made "in order to obtain or retain business or other improper advantage in the conduct of international business."<sup>101</sup> Unlike the OECD Bribery Convention, the FBPA does not explicitly state whether the bribe

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95. Hyongpop (Korean Criminal Codes) criminalize both active and passive bribery of domestic public officials under Articles 129 through 133.

96. See Dokjummit Gongjung Gurae Gwanhan Popryul [Monopoly Regulation and Fair Trade Act], Law No. 4198, Jan. 13, 1990. Unlike Korea, Japan chose to amend its *Unfair Competition Prevention Law*. The amendment was adopted by the *National Diet* on September 18, 1998. See FBPA, *supra* note 7.

97. The purpose of Korea's Monopoly Regulation and Fair Trade Act is "to encourage fair and free economic competition by prohibiting the abuse of market-dominant positions and the excessive concentration of economic power and by regulating improper concerted acts and unfair business practices, thereby stimulating creative business activities, protecting consumers, and promoting the balanced development of the national economy." See *supra* note, 96, art. 1.

98. See Hyongpop, *supra* note 95, art. 8.

99. See FBPA, *supra* note 7, art. 3.1.

100. See OECD Bribery Convention, *supra* note 2, art. 1.1.

101. See *id.*

must be for the benefit of a foreign public official or a third party in order to constitute bribery. In addition, the FBPA does not explicitly state whether the payment must be made directly or through intermediaries.

In general, the domestic bribery offense under the Korean Criminal Codes is much more broadly construed than the foreign bribery offense under the FBPA. In contrast to the foreign bribery offense defined by the FBPA, the bribery statutes of the Korean Criminal Codes simply provide that any public official who "receives, demands or promises a bribe in relation to his official duties" commits a bribery offense.<sup>102</sup> Under the Korean Criminal Codes, the key element of bribery is the payment to an official made specifically in relation to his or her official duties.<sup>103</sup> This element is analogous to the first element of bribery to a foreign public official under the FBPA. However, the second "quid pro quo" element of bribery required by the FBPA does not explicitly appear in the Korean Criminal Codes. Thus, the "quid pro quo" element is left to the interpretation of the courts with regard to domestic bribery offenses. The Korean Supreme Court has held that even when a payment is made as a gift or as a demonstration of social courtesy, the payment will nonetheless be considered an illicit bribe if the payment is made as a "quid pro quo in relation to the official's duty."<sup>104</sup>

The Korean Supreme Court has broadly interpreted the nature of the relationship between a bribe and a public official's duty. The Supreme Court has held that when establishing a bribery offense, it does not matter whether any of the public official's duties is violated, whether favors have been requested, or whether the public official's act or omission is within his or her authorized duty or competence.<sup>105</sup> The Korean Supreme Court has also broadly interpreted a public official's duty to include those duties for which he or she was responsible in the past, as well as duties the public official would be responsible for in the future.<sup>106</sup> More importantly, the Supreme Court has held that the timing of a payment to a public official to secure an act or omission of official duty is not relevant to establishing a bribery offense.<sup>107</sup>

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102. See Hyongpop, *supra* note 96, art. 129.

103. See also, Joongi Kim and Jong Bum Kim, *Cultural Differences in the Crusade against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act*, 6 PAC. RIM L. & POL'Y J. 549, 562-64 (1997).

104. Jong Won Kim v. Republic of Korea, Taepopwon [Supreme Court], 96 Do 865 (1996).

105. Hyung Bok Shin v. Republic of Korea, Taepopwon [Supreme Court], 84 Do 1568 (1984).

106. See *id.*

107. See *id.*

In contrast to the bribery statutes of the Korean Criminal Codes, the FBPA contains an explicit requirement that prosecutors must establish that the payment is made "in order to obtain or retain business or other improper advantage in the conduct of business."<sup>108</sup> The favor or benefit that a briber receives in return for the bribe payment is specifically defined in relation to the operation of business. Therefore, if the favor or benefit is unrelated to the operation of business, the payment will not constitute a bribe under the FBPA. For example, a payment to a foreign judge in order to influence the judge's decision and obtain an acquittal will not be considered a bribe.

### C. DEFINITION OF FOREIGN PUBLIC OFFICIAL

The FBPA's definition of "foreign public official" closely follows the text of the OECD Bribery Convention and its Commentaries. Under the FBPA, a "foreign public official" is broadly defined in three ways. First, any person holding a legislative, administrative or judicial office of a foreign government, whether elected or appointed, is considered a foreign public official.<sup>109</sup> Second, any person who exercises a "public function" for a foreign government and who works in one of the following three specific capacities is defined as a foreign public official:<sup>110</sup> (1) the person conducts a business delegated by a foreign government for the public interest; (2) the person works for a public organization or agency established by law to carry out a specific business for the public interest<sup>111</sup>; or (3) the person works as an executive or employee of any enterprise over which a foreign government exercises controlling power.<sup>112</sup> Because the FBPA does not explicitly define "public function," the definition of "public function" in the Commentaries of the OECD Bribery Convention provides a basis for interpreting "public function" under the FBPA. Lastly, the definition of "foreign public official" includes any person who works for a public international organization.<sup>113</sup>

Because the FBPA functionally defines "foreign public official," the scope of public officials covered under the FBPA in a foreign country may be broader than the scope of public officials covered under the bribery statutes of the Korean Criminal Codes. This difference in scope could raise the possibility of a situation in which a Korean individual who bribes a person exercising a public function for the national government is not cov-

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108. See FBPA, *supra* note 7, art. 3.1.

109. See *id.* art. 2.1.

110. See *id.* art. 2.2.

111. See *id.*

112. See *id.*

113. See *id.* art. 2.3.



ered by the bribery statutes of the Korean Criminal Codes while a Korean individual who bribes a person exercising an identical public function for a foreign government is covered by the FBPA. Under Article 2.2 of the FBPA, any person who conducts a business delegated by a foreign government for the public interest and exercises a public function would be considered a foreign public official. However, for purposes of the Korean Criminal Codes, a person who exercises an identical public function and conducts a business in the public interest for the Korean government may not be considered a public official. For example, a person giving consulting advice to a government on an issue involving the public interest would be considered a public official under the FBPA, but not under the Korean Criminal Codes. The anomaly arises because the Korean Criminal Codes do not provide a functional definition of a public official. Instead, various laws such as the National Civil Service Law,<sup>114</sup> the Regional Civil Service Law<sup>115</sup>, and special acts such as the Bank of Korea Act<sup>116</sup> define which public officials are subject to the bribery statutes of the Korean Criminal Codes.

#### D. PERMISSIBLE PAYMENTS

The FBPA creates two classes of permissible payments that are also provided for in the Commentaries of the OECD Bribery Convention. First, "if the payment is permitted or required by the law of the foreign public official's country," the undue payment to that foreign public official will not constitute bribery.<sup>117</sup> The term "law" implies regulations and case law in addition to statutes.<sup>118</sup> Second, if only small pecuniary or other advantage is promised, given or offered to a foreign public official in order to facilitate the legitimate performance of the official's business, such payment will not be considered a bribe.<sup>119</sup> The payment is

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114. The law defines various types of public officials according to their duties. See Kuga Gongmuwon Pop [National Civil Service Act], Law No. 1325, Apr. 17, 1963.

115. The law defines various types of public officials in the local government according to their duties. See Jibang Gongmuwon Pop [Regional Civil Service Law], Law No. 1427, November 1, 1963.

116. The act gives a public official status to an employee of the Bank of Korea. See Hanguk Eunhaeng Pop [Bank of Korea Act], Law No. 5491, December 31, 1997, art. 112.2.

117. See FBPA, *supra* note 7, art. 3.1

118. The law (*popryung*) in the FBPA literally implies both law and regulation. The Commentaries make it explicit that in addition to written laws, if regulations and case laws permit the payment, then the payment, otherwise illegal, will not be deemed an offence. See Commentaries, *supra* note 66, para. 8. Both the exceptions have their origin in the U.S. FCPA. See Kim & Kim, *supra* note 103, at 574-77.

119. See FBPA, *supra* note 7, art.3.2.b.

considered permissible if it is made to an official who is engaged in ordinary and routine works.<sup>120</sup>

### E. SANCTIONS

The bribery of a foreign public official under the FBPA is punishable by a maximum of 5 years' imprisonment or the imposition of a maximum fine of 20 million won.<sup>121</sup> If the proceeds obtained from bribery exceed 10 million won, a fine of up to twice the amount of the proceeds will be imposed on the briber, in addition to a maximum sentence of five years' imprisonment.<sup>122</sup> The fine sentence must be imposed in addition to the imprisonment sentence.<sup>123</sup>

Unlike the bribery statutes of the Korean Criminal Codes, the proceeds obtained from the bribery of a foreign public official are subject to fine under the FBPA.<sup>124</sup> In addition, when the legal person is found liable, fines up to 1 billion won will be imposed on the legal person under the FBPA. However, when the proceeds obtained from the bribery exceeds 500 million won, the legal person will be subject to a fine up to twice the amount of the proceeds.<sup>125</sup> The FBPA does not impose a ceiling on the amount of fine that can be imposed as a monetary sanction against proceeds.

### F. RESPONSIBILITY OF LEGAL PERSONS

The OECD Bribery Convention establishes the liability of a legal person for bribing a foreign public official.<sup>126</sup> However, liability is imposed in accordance with the legal principles of individual countries.<sup>127</sup> Following the provisions set forth in the OECD Bribery Convention, Korea established the criminal liability of a legal person with the proviso that "if the legal person has paid due attention or has exercised proper supervision to prevent the offense," it would not be liable under the FBPA.<sup>128</sup> Therefore, to prove the liability of a legal person under the FBPA, it has to be shown that the legal person was negligent in

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120. *See id.*

121. *See FBPA supra* note 7, art. 3.1.

122. *See id.* The Korean word used for proceeds is "leeyik" which includes both profits and other earnings.

123. *See id.* art. 3.3.

124. The bribery of a national public official shall be punishable by a maximum of five years of imprisonment or a fine less than 20 million won. *See Hyongpop, supra* note 95, art. 133.

125. *See FBPA supra* note 7, art. 4.

126. *See OECD Bribery Convention, supra* note 2, art. 2.

127. *See id.*

128. *See FBPA, supra* note 7, art. 4.

paying due attention or exercising proper supervision to prevent the offense.<sup>129</sup>

The Korean Supreme Court has held that general and abstract supervision by a legal person to prevent an offense by its employees was an insufficient defense to liability.<sup>130</sup> In the above case, employees of a company violated sections of the Public Health Law by mediating prostitution. The company, however, objected to its criminal liability on the ground that it instructed its employees not to engage in the prostitution business and required them to submit written promises not to engage in such business.<sup>131</sup> The Korean Supreme Court found that these supervisory activities by the company were inadequate grounds for defense. The court held that the existence of a defense clause within the provisions establishing a legal person's criminal liability reflects an intent to create a strong presumption of a legal person's negligence.<sup>132</sup> Moreover, "the burden of proof is on the part of the legal person so that the purpose of having the dual liability of a legal person and its employee is achieved."<sup>133</sup>

#### G. JURISDICTIONS

Korea has jurisdiction over the bribery of a foreign public official that occurs in whole or in part in its territory. Article 2 of the Korean Criminal Codes states that "the law applies to offenses committed by nationals as well as foreigners in the territory of the Republic of Korea."<sup>134</sup> This jurisdictional clause applies to the FBPA, so that when bribery of a foreign public official occurs entirely in Korean territory, the Korean authorities can exercise jurisdiction over the offense. When the offense occurs only "in part" in its territory, Korea can exercise its jurisdiction pursuant to the OECD Bribery Convention, which is given the same legal effect as Korea's national laws. In addition, Korea has jurisdiction over offenses committed abroad by its nationals.<sup>135</sup> Therefore, when bribery of a foreign public official is committed abroad by one of its nationals, the Korean authorities can exercise jurisdiction over the offense.

In the very plausible case in which a bribe is paid to a foreign public official by a foreign employee of a Korean company, the Korean authorities will not have jurisdiction over the foreign

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129. *See id.*

130. *Dae-Heung Corp. v. Republic of Korea*, Taepopwon [Supreme Court], 92 Do 1395 (1992).

131. *See id.*

132. *See id.*

133. *See id.*

134. *See Hyongpop, supra note 95 art. 2.*

135. *See id.* art. 3.

employee because it is committed by a foreign national. However, the Korean authorities may exercise jurisdiction over the legal person whose employee has committed the foreign bribery offense. This is because the responsibility of a legal person under the FBPA is strictly conditioned upon the fact that a representative, agent, employee or other individual working for the legal person has committed the offense as set out in Article 3.1 of the FBPA. Because a non-Korean who bribes a foreign public official outside of the territory of Korea commits an offense under Article 3.1 of the FBPA, the Korean company that employs the non-Korean will be liable for the bribery of a foreign public official, unless the company has paid due attention or exercised proper supervision to prevent the offense.”<sup>136</sup>

However, the above conclusion is given with some reservation because the jurisdiction over the offense of a legal person in the Korean Criminal Codes is still unclear. The Korean authority has jurisdiction over the Korean “person” committing an offense outside the territory of Korea according to Article 3 of the Korean Criminal Codes. However, the Korean Criminal Codes do not provide a separate clause on jurisdiction with regard to the offense of a legal person. Since the responsibility of a legal person is established with regard to the offense of the bribery of a foreign public official, the term “person” in Article 3 of the Korean Criminal Codes could be interpreted to include a legal person as well. However, it would be premature to conclude that the Korean authorities clearly have jurisdiction over a legal person for the offense committed outside of the Korean territory without the benefit of a court’s decision regarding the interpretation of Article 3 of the Korean Criminal Codes.

## V. COMPARISON OF THE FBPA AND THE KOREAN CRIMINAL CODES ON BRIBERY

### A. LEGAL PURPOSES

The purposes underlying the bribery statutes under the Korean Criminal Codes and the FBPA differ. The leading Korean Supreme Court case on bribery lays out the principles involved in the prosecution of bribery offenses. The Court noted that the purpose of criminalizing bribery is to maintain the “fairness of official decisions and society’s trust in these decisions, such that

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136. See FBPA, *supra* note 7, art. 4.

incorruptibility<sup>137</sup> of official actions as a central protective interest will be guarded."<sup>138</sup>

In contrast to the bribery statutes of the Korean Criminal Codes, which remain silent as to the underlying purposes, Article 1 of the FBPA explicitly states two purposes. First, the law aims to establish a sound practice in international business transactions.<sup>139</sup> Second, it aims to provide the details necessary to implement the OECD Bribery Convention.<sup>140</sup> The second aim implies that the purposes of the OECD Bribery Convention would be adopted by the FBPA as well. Thus, like the OECD Bribery Convention, the FBPA aims to combat bribery which "raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions."<sup>141</sup>

### B. LIABILITY OF LEGAL PERSONS

The FBPA establishes the liability of a legal person for bribery of a foreign public official. Pursuant to Article 4 of the FBPA, if an employee of a company bribes a *foreign* public official in relation to the business of the firm, the company will face sanctions, unless it has exercised adequate supervision of the employee.<sup>142</sup> However, if an employee of a company bribes a *national* public official, the company will not face any sanctions.

The bribery statutes of the Korean Criminal Codes do not establish the liability of a legal person for the bribery of a national public official. As a result, the bribery statutes do not prevent and deter corporations from engaging in bribery and corruption.<sup>143</sup> Past experience in Korea has proven this to be

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137. The "incorruptibility (maesu bulgasung)" implies that the public duty of the official cannot be bought off by bribery.

138. *Hyung Bok Shin v. Republic of Korea, Taepopwon* [Supreme Court], 84 Do 1568 (1984). A leading scholar on Korean criminal law observes that the primary purposes behind bribery statutes under the Korean Criminal Codes is to protect "the fairness of public office and functions of public office and public's trust in the incorruptibility of public function." Kim Il-Su, *Hyongpop Kakron* [Lectures in Criminal Law], at 665 (Pakyongsa 1996). A more recent Supreme Court case in 1994 also outlines identical principles. See 94 Do 3022 (Judgment of Jan. 23, 1996), *Taepopwon* [Supreme Court].

139. See FBPA, *supra* note 7, art. 1.

140. See Hyongpop, *supra* note 95, art. 8.

141. Since the bribery dealt in the FBPA is the bribery of a foreign public official, it is the foreign official's country that suffers from the bribery. See OECD Bribery Convention, *supra* note 2, preamble.

142. See FBPA, *supra* note 7, art. 4.

143. In the slush fund scandal involving former Presidents Chun Doo Hwan and Rho Tae Woo, over a dozen heads of major conglomerates (Chaebol) were found to have paid bribes over a several year period ranging by individual from 4 billion won (US\$ 5 million) to as much as 15 billion won (US\$ 18.8 million). See Kim & Kim, *supra* note 103, at 567-68.

true. Major conglomerates were not criminally prosecuted when their employees bribed public officials, and therefore conglomerates continued their illicit practices.

### C. SANCTIONS AGAINST PROCEEDS OF BRIBERY

Another element that is not found in the bribery statutes of the Korean Criminal Codes is the fine imposed against the proceeds obtained from bribery to ensure that bribery is unprofitable.<sup>144</sup> The Korean legal system has yet to provide guidelines on what "proceeds from bribery" means, and therefore it is uncertain how the fine would be calculated in practice. In sum, the sanctions imposed by the FBPA against transnational bribery are potentially more severe than those imposed by the Korean bribery statutes against national bribery. As a result, the Korean legal system, as it stands now, provides more deterrence against the bribery of a foreign public official than against the bribery of a national public official.

## VI. IMPLICATION FOR COMBATING CORRUPTION IN KOREA

With the enactment of the FBPA, Korea has established a set of legal instruments against transnational bribery that is more powerful than that against national bribery. This difference in the treatment of national and transnational bribery is justified on the ground that the FBPA and bribery statutes of the Korean Criminal Codes have different legal purposes. However, the purpose of the bribery statutes of the Korean Criminal Codes should be reformulated. In line with the FBPA, the Korean bribery statutes should aim to protect the competitive conditions in the domestic economy and should promote good governance and economic development within the nation. Therefore, the bribery statutes of the Korean Criminal Codes should be amended in order to make new instruments available for combating bribery of national public officials.

First, the bribery statutes of the Korean Criminal Codes should be amended to provide for the liability of a legal person for the bribery of a national public official. Imposing liability on legal persons will more effectively combat the problem of bribery of national officials. Second, the bribery statutes should be amended to impose fines against proceeds obtained from the bribery of a public official. By making fines proportionate to the

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144. The bribery statutes under the Korean Criminal Codes provide for confiscation of the bribe itself, but not proceeds. If confiscation of the bribe itself is not feasible, a monetary sanction equivalent to the amount of the bribe can be imposed. See Hyongpop, *supra* note 95, art. 134.

gains obtained from bribery, the deterrent effect of a fine would be strengthened, especially for large enterprises that can absorb the existing fines relatively easily. Once the bribery statutes are amended as recommended above, the sanctions imposed for national and transnational bribery would become comparable. The amendments would also satisfy Article 3.1 of the OECD Bribery Convention, which requires that the ranges of penalties for the bribery of a foreign public official must be comparable to those applicable to the bribery of a domestic public official.<sup>145</sup>

## VII. CONCLUSION

Bribery and corruption no longer remain a solely domestic concern. Because "no country can seal itself off from the impact of corruption beyond its borders,"<sup>146</sup> all nations must cooperate with one another to fight corruption, regardless of where it happens. The OECD Bribery Convention, though an important instrument in the fight against corruption, deals only with active bribery or the supply side of corruption in connection with international business transactions. As a result, the Convention establishes instruments against transnational corruption only in the country where the bribery occurs. However, this approach overlooks the fact that the host country of the bribe needs to strengthen its existing instruments further to fight its national corruption. This is especially true for developing countries whose instruments to fight domestic corruption are at best weak or not effectively enforced.<sup>147</sup> Since anti-corruption tools that deal with the problem only in the home country are inherently limited, the international effort should focus on strengthening criminal laws

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145. See OECD Bribery Convention, *supra* note 2, art. 3. Since the OECD Bribery Convention deals with only transnational bribery, the intention of making the penalties comparable arguably was to prevent signatories from applying lesser sanctions against the transnational bribery offense than against the domestic bribery offense. Nevertheless, a literal interpretation of Article 3.1 of the OECD Bribery Convention would imply that the fines imposed on a national bribery offense should not exceed nor fall short of those imposed on a transnational bribery offense.

146. A keynote address by U.S. Vice President Al Gore given at the Global Forum on Fighting Corruption held in the U.S. on February 24, 1999 (last modified Apr. 4, 2000) <<http://usinfo.state.gov/topical/econ/integrity/document/gore.htm>>.

147. As an outreach effort to raise awareness of the seriousness of the corruption problem among developing countries, the OECD and the Asian Development Bank jointly organized a workshop on "Combating Corruption in Asia/Pacific Economies" in Manila, Philippines, from Sep. 29 thru Oct. 1, 1999. The conference participants recognized that, based on recent experience in the Asian and Pacific region and on a growing body of empirical evidence, corruption has a devastating effect on investment, growth, and development. In addition, they recognized the need to address the international dimension of corruption and to fight all types of corruption on all levels. See Conclusions and Recommendation, ADB/OECD Workshop on Combating Corruption in Asia/Pacific Economies, (last modified Mar. 13, 2000) <<http://www.oecd.org/daf/nocorruption/pdf/Manilaco.pdf>>.

that deal with bribery within a host country's borders as well. This would help prevent and deter transnational bribery in the country where the demand for the bribery arises.

Countries that fight corruption to protect the fair competitive conditions in international business transactions must also fight national corruption to ensure competitive conditions in their national economies. To combat corruption effectively, nations must fight corruption everywhere, whether it occurs inside or outside their borders. In this respect, the OECD Bribery Convention can serve a useful purpose by exerting pressure to strengthen instruments against national bribery and corruption in countries ratifying the Convention.<sup>148</sup> In the case of Korea, the instruments available in the OECD Bribery Convention indeed set an important standard for fighting bribery and corruption of both national and foreign public officials.

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148. Steven Salbu argues that instead of prohibiting transnational bribery by home country laws, efforts should be directed at convincing host countries to develop and enforce their own domestic anti-bribery laws. See Steven R. Salbu, *Extra-territorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 *YALE J. INT'L L.* 223, 254-55 (Winter 1999).