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CULTURAL DIFFERENCES IN THE CRUSADE AGAINST INTERNATIONAL BRIBERY: RICE-CAKE EXPENSES IN KOREA AND THE FOREIGN CORRUPT PRACTICES ACT

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Jong Bum Kim[‡]

“Even if an object sent as a gift is very small, once one becomes sentimentally indebted then one’s actions will already be swayed by one’s personal feelings”—Chong Yakyong, Korean Confucian Scholar (1762-1836)

“They say the gods themselves are moved by gifts”—Euripides

Abstract: The expanding global movement against overseas bribery has emerged as one of the foremost issues in international trade. This paper explores the complex issues surrounding this multilateral anti-bribery movement, particularly focusing on one of the central concerns at the heart of this debate: what type of different cultural perspectives and legal traditions exists regarding questionable payments and whether they need to be respected. This study approaches this subject by discussing how the Korean legal system distinguishes between permissible gifts such as “rice-cake expenses” and illicit payments. In the process, the new legal interpretations that were developed by the Korean judiciary in the sensational slush fund trials of former presidents Chun Doo-Hwan and Roh Tae-Woo are reviewed. In conclusion, this paper suggests that an international consensus against foreign bribery might be able to better harmonize concerns such as cultural differences by incorporating certain elements of the U.S. Foreign Corrupt Practices Act.

I. INTRODUCTION

II. THE GROWING INTERNATIONAL MOVEMENT TO FIGHT OVERSEAS BRIBERY

A. Recent Undertakings by the OAS, OECD and EU

B. Problems In Creating an International Consensus and the Need for Greater International Anti-Bribery Efforts

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- III. CULTURAL DIFFERENCES AND THE EXAMPLE OF RICE-CAKE EXPENSES IN KOREA
 - A. *Origins of "Ttokkap" (Rice-cake expenses)*
 - B. *Bribery Under Korean Law*
 - C. *The Social Courtesy Exception*
 - D. *Ttokkap and Current Legal Trends*
- IV. THE FOREIGN CORRUPT PRACTICES ACT
 - A. *The History of The FCPA*
 - B. *Anti-Bribery Provisions*
 - C. *Affirmative Defenses and Permissible Payments*
 - 1. *The Lawfulness Affirmative Defense*
 - 2. *The Nominal Payment Affirmative Defense*
 - 3. *The Reasonable and Bona Fide Expenditures Affirmative Defense and the Routine Governmental Actions Exception*
- V. CONCLUSION: INCORPORATING CULTURAL DIFFERENCES INTO AN INTERNATIONAL ANTI-BRIBERY AGREEMENT
 - I. INTRODUCTION

Throughout the course of history every country in the world in varying degrees has been beset with the graft or corruption of their public officials. Bribery, in particular, endures as one of the most interminable forms of corruption.¹ Nations try their utmost to prohibit bribery and to punish contributors and participants, yet the practice persists and the campaign against it remains an unending endeavor.² The rapid expansion of transnational trade and the growth of multinational corporations has now transformed the traditional dimensions of bribery and has globalized the problem. The distribution of illicit payments in cross-border commerce has now become an international concern affecting all countries.³

¹ See generally Michael Hirsh, *Don Quixote at the Bank*, NEWSWEEK, Oct. 14, 1996, at 2 (on efforts against corruption by organizations such as the World Bank); Robert Keatley, *New Agency Girds to Fight Corruption, Widespread in International Contracts*, WALL ST. J., May 21, 1993, at A6 (discussing founding of Transparency International, an organization modeled after Amnesty International that is devoted to fighting corruption); Reginald Dale, *World Turns Against Corruption*, INT'L HERALD TRIB., Oct. 18, 1996, at 15; *Cleaning Up Latin America*, ECONOMIST, Apr. 6, 1996, at 41.

² Judson J. Wambold, Note, *Prohibiting Foreign Bribes: Criminal Sanctions for Corporate Payments Abroad*, 10 CORNELL INT'L L.J. 231, 235 n.26 (1977) (providing a survey on bribery laws of major countries).

³ Amy Borrus et al., *A World of Greased Palms*, BUS. WK., Nov. 6, 1995, at 36; Stephen Handelman, *Corruption Inc.*, TORONTO STAR, July 13, 1996, at 1. See Christopher Hall, Comment, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But For How Long?*, 2 TUL. J. INT'L &

Led by the United States, the OECD⁴ and the Organization of the American States ("OAS"),⁵ many countries and international bodies have determined that in addition to enforcement against domestic corruption, new laws need to be enacted to prevent local businesses operating overseas from bribing foreign officials. The United States singlehandedly pioneered such legislation when it enacted the Foreign Corrupt Practices Act ("FCPA") in 1977.⁶ In 1994, after several years of careful consideration, the member countries of the OECD followed suit and adopted a recommendation against the practice of international bribery.⁷ Most recently, the OAS, composed of several countries considered notorious for their corruption, made an extraordinary breakthrough when they joined to sign one of the toughest international anticorruption agreements to date.⁸ These various endeavors represent a growing international consensus that illicit payments should be eliminated from transnational business. Furthermore these efforts will act as a benchmark for future international undertakings against the practice of overseas bribery.

Noble intentions aside, these international efforts, however, are encountering increasing resistance from many countries. One of the strongest contentions comes from countries that argue that an international consensus against overseas bribery, particularly one that respects all cultural differences, would be impossible to achieve because countries inherit

COMP. L. 289, 291-292, n.7 (1994) (listing of articles documenting corruption in various countries). See generally Editorial, *The Greased Palm Issue*, WASH. POST, July 1, 1996, at A14.

⁴ Convention on the Organization for Economic Cooperation and Development, Dec. 14, 1960, 12 U.S.T. 1728, 888 U.N.T.S. 179 ("OECD Convention"). On December 12, 1996, the Republic of Korea became the 29th member country to join the OECD. *South Korea Joins the OECD*, ASIAN WALL ST. J., Dec. 13, 1996, at 25; *Korea's OECD Membership Takes Effect*, Dec. 13, 1996, at 1.

⁵ Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847.

⁶ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h); 78dd-1, 78dd-2, 78ff(a), (c) (West 1997)). See generally William Jennings & Craig A. Gillen, *Complying with the Foreign Corrupt Practices Act*, NAT'L L.J., Apr. 17, 1995, at C10.

⁷ Recommendation of the Council on Bribery in International Business Transactions, OECD, 829th Sess. (May 27, 1994), available at <<http://www.oecd.org/dat/cmris/bribrecm.htm>> [hereinafter 1994 OECD Recommendation]. See generally David Buchan & George Graham, *OECD Members Agree Action To Curb Bribery of Foreign Officials*, FIN. TIMES, Apr. 30, 1994, at 2.

⁸ Inter-American Convention Against Corruption, OAS, Mar. 29, 1996, 35 I.L.M. 724 (1996) [hereinafter OAS Convention]; *Organization of American States: United States Signs OAS Convention on Preventing Bribery, Corruption*, INT'L TRADE DAILY (BNA), at d4 (June 17, 1996). See generally Bruce Zagaris, *Constructing a Hemispheric Initiative Against Transnational Crime*, 19 FORDHAM INT'L L.J. 1888 (1996).

differing legal traditions and customs.⁹ While agreeing that egregious forms of influence buying should be prohibited, these objecting countries similarly decry that forcing them to enact such laws represents no more than extraterritorial bullying that infringes upon their national sovereignty.¹⁰ In particular, demands against countries that they must adopt expansive anti-bribery legislation such as the Foreign Corrupt Practices Act raises these various concerns. Other countries also contend that these international efforts are altogether problematic, unnecessary and unfair.¹¹ This article addresses these concerns in the growing international movement to curb the practice of bribery in international commerce, primarily focusing on what types of cultural differences exist, whether they need to be respected, and what effects these differences have. The first section of this article will provide a general introduction of the increased international efforts to curb corruption. It will then discuss the general problems that these efforts are encountering and the need for further international initiatives. The second section, will focus on the problems surrounding the cultural differences perspective through the example of "rice cake expenses" in Korea. Further, it will detail how certain countries maintain different standards concerning the acceptable forms of payments or gifts to public officials. The third section will discuss the anti-bribery provisions of the FCPA which is considered by many to be the appropriate model for the international community. This section will focus on how rice cake expenses might be considered under the FCPA. The last section of this article will seek to show that certain aspects of the FCPA, if incorporated, may allay concerns expressed by certain countries, thereby facilitating the eventual establishment of an even broader multilateral consensus. In conclusion, this article examines why the current efforts need to be expanded and will reassert the significance of adopting an effective international proclamation against overseas bribery.

⁹ For a recent discussion of the effect of cultural differences from a political perspective, see Samuel Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22, Summer 1993, at 22 ("The great divisions among humankind and the dominating source of conflict will be cultural"), and Samuel Huntington, *The West Unique, Not Universal*, 75 FOREIGN AFF. 28, Nov./Dec. 1996, at 28 ("In recent years Westerners have reassured themselves and irritated others by expounding the notion that the culture of the West is and ought to be the culture of the world"); Vincent Cable, *The New Trade Agenda: Universal Rules Amid Cultural Diversity*, 12 INT'L AFFAIRS 22 (1996).

¹⁰ Hall, *supra* note 3, at 311.

¹¹ Review and Outlook: Is Corruption An Asian Value?, ASIAN WALL ST. J., May 28, 1996, at 8.

II. THE GROWING INTERNATIONAL MOVEMENT TO FIGHT OVERSEAS BRIBERY

Several leading international organizations and bodies are uniting to find ways to fight corruption that occurs on an international level. Recently, efforts to fight international bribery have dramatically increased, especially with the progress achieved by the Organization of American States and the member countries of the OECD.¹² Multilateral efforts are even being further pursued at the World Trade Organization ("WTO") and at such regional blocs such as the European Union, the Asia-Pacific Economic Cooperation (APEC) forum and even the United Nations and gradually an international consensus does appear to be formulating. Many obstacles, however, remain in this growing crusade to eradicate bribery from international business. Any attempts to reach a wider, more effective international consensus will eventually have to address and resolve these differences.

A. Recent Undertakings by the OAS, OECD and EU

The most significant headway in the fight against corruption in international business transactions has been achieved by none other than the member countries of the OAS. On March 29, 1996, the thirty-four countries united to adopt the Inter-American Convention Against Corruption of the Organization of American States ("OAS Convention").¹³ The OAS Convention was the culmination of years of negotiations among the member countries. The OAS Convention not only criminalized a number of corrupt acts, ranging from bribery to influence peddling in the domestic arena but, most significantly, it also extended to prohibit these practices in international business transactions.¹⁴

With respect to transnational bribery, Article VIII of the OAS Convention specifically states that each country shall prohibit its nationals from giving "any article of value to foreign government officials in exchange for any act or omission in the performance of that official's public

¹² Beverley Earle, *The United States' Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation*, 14 DICK. J. INT'L L. 207, 226-227 (1996); *White House Initiates Consultations on Voluntary Code for Firms Abroad*, Daily Rep. for Exec. (BNA) No. 59, at d17 (Mar. 28, 1996); Rosie Waterhouse, *War Declared on Corruption*, INDEP., June 5, 1994, at 7.

¹³ OAS Convention, *supra* note 8.

¹⁴ See generally Zagaris, *supra* note 8.

functions.”¹⁵ The OAS Convention is particularly meaningful because under its provisions all thirty-four OAS member states are not requested but are obligated to criminalize transnational bribery.¹⁶ This extraordinary action by the OAS demonstrates that even developing nations can unite to fight against international corruption and that this is not an issue that can only be pursued and achieved by economically advanced countries.

Prior to this unprecedented breakthrough, the OECD remained the most prominent international organization seeking to curb the practice of overseas bribery. The OECD first adopted the Recommendation¹⁷ on Bribery in International Business Transactions (“1994 OECD Recommendation”) in 1994, which urged that “member countries take effective measures to deter, prevent and combat bribery of foreign public officials in connection with international business transactions (emphasis added).”¹⁸ The 1994 OECD Recommendation enjoined member countries to “take concrete and meaningful steps to meet this goal” such as examining existing laws and regulations related to bribery and furthermore requested that member countries cooperate with other member countries in investigations and other legal proceedings.¹⁹

Thereafter, the OECD’s Committee on Fiscal Affairs (“CFA”) reviewed the tax laws and regulations of OECD member countries with regard to bribery of foreign public officials.²⁰ Their research revealed that many of the OECD countries allowed bribes given to foreign public officials to be considered tax deductible business expenses.²¹ The CFA therefore agreed to a recommendation that OECD countries which currently allow such tax deduction should “re-examine” the practice and seek to deny such deductibility.²² In addition, the CFA stressed that denying tax

¹⁵ OAS Convention, *supra* note 8.

¹⁶ *Id.*

¹⁷ Acts of the OECD are generally divided into Decisions, which are binding on member countries, and Recommendations, which member countries may, “if they consider it opportune,” provide for their implementation. OECD Convention, *supra* note 4, art. V(a)(i), art. V(b).

¹⁸ 1994 OECD Recommendation, *supra* note 7, art. I. See generally *Anti-Bribery: OECD Charts Progress In Effort to Eliminate International Bribery*, Int’l Trade Daily (BNA), at d10 (May 22, 1996).

¹⁹ 1994 OECD Recommendation, *supra* note 7, art. III-IV.

²⁰ Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials [hereinafter 1996 OECD Tax Recommendation], C(96)27/FINAL, OECD, Apr. 17, 1996.

²¹ *Id.* annex II B. The tax deductibility depends on the circumstances; countries which allow deductibility include Austria, Belgium, France and Germany. *Id.*; *Review & Outlook: Competitive Bribing*, ASIAN WALL ST. J., Apr. 23, 1996, at 8; Frederick Studemann, *A Land Where Bribes are Tax-Deductible*, EUR., June 17-23, 1994, at 3.

²² 1996 OECD Tax Recommendation, *supra* note 20, art. I.

deductibility of bribes "may be facilitated by the trend to treat bribes to foreign public officials as illegal."²³ Similarly, the OECD Committee on International Investment and Multinational Enterprises ("CIME") has followed the progress of each member country's implementation of the provisions of the Recommendation and in 1996 conclusively reported to the OECD Council that "it is necessary to criminalize the bribery of foreign public officials in an effective and coordinated manner."²⁴

Nevertheless, for all its efforts, the OECD's undertakings remain incomplete, especially when compared with the OAS's recent pronouncement. First, all of the OECD initiatives remain non-binding propositions that do not require action by the member countries.²⁵ Similarly, the OECD's undertakings do not specify what type of legislation that members should enact and only request that its members generally "take effective measures."²⁶ The Recommendation also contains various vague and questionable provisions. According to the 1994 OECD Recommendation, one critical example is the term bribery itself is defined as the "offer or provision of any *undue* pecuniary or other advantage to or for a foreign public official, in violation of the official's legal duties, in order to obtain or retain business." (emphasis added)²⁷ It is therefore unclear what would be considered "undue." One author even suggests that under a simple "undue" standard one might argue that such practices as "gift-giving and other courtesies between business partners" should be deemed permissible.²⁸

²³ *Id.*

²⁴ Implementation of the Recommendation on Bribery in International Business Transactions (CIME) para. 13:1, OECD/GD(96)83 (1996) [hereinafter 1996 OECD Implementation]. See also 1994 OECD Recommendation, *supra* note 7, art. IV.

²⁵ See OECD Convention, *supra* note 4, art. V(a)(i), art. V(b).

²⁶ 1994 OECD Recommendation, *supra* note 7, art. I.

²⁷ 1996 OECD Implementation, *supra* note 22, annex II para. 5. See also Buchan & Graham, *supra* note 7.

²⁸ Earle, *supra* note 12, at 225. The Recommendation also does not explicitly provide who may be considered an offeror of a bribe, and it is unclear how an offeror's actions on behalf of an enterprise will affect the enterprise, particularly because many countries do not recognize corporate criminal liability. 1996 OECD Implementation, *supra* note 24, annex II para. 9. Similarly, the 1994 OECD Recommendation does not clarify who is an applicable "foreign public official." 1994 OECD Recommendation, *supra* note 7, annex II para. 10. Not only does the scope of this term vary among the member countries but a difficult question is whether it should be defined according to the offeror's laws or the recipient's laws. *Id.* annex II para. 12-13. The OECD is currently debating whether to adopt a Recommendation committing member countries to prohibit foreign bribes or whether to ratify an anti-bribery international treaty. *Fight Looms Over Foreign Bribery*, WASH. POST, May 9, 1997, at A22.

The European Union (EU) has also taken measures to criminalize the bribery of foreign public officials. The EU, for instance, drafted a protocol to the Convention on the Protection of the European Communities' Financial Interests criminalizing the bribery of EU officials and officials of EU member states when such bribery is "in connection with fraud against EU interests."²⁹ Because of this "against EU interest" condition, however, the effectiveness of the protocol has been limited.³⁰ Another draft convention consequently is being developed by the Italian Presidency of the EU which seeks to expand the coverage and criminalize bribery of EU public officials beyond the EU regardless of the financial interests of the EU.³¹ Therefore, particularly if this latter draft materializes, the EU's effort to criminalize the bribery of EU officials and officials of national governments will mark another important step in the criminalization of overseas bribery that occurs within a regional economic bloc.

In addition to these initiatives, the United States has been continuously pressuring various international organizations and entities such as the United Nations, International Chamber of Commerce ("ICC") and the WTO to establish prohibitions against bribery and corruption in international business transactions.³² At the United Nations, the General Assembly made its most forceful declaration so far when it adopted the Economic and Social Council's draft of the "United Nations Declaration against Corruption and Bribery in International Commercial Transactions" on December 16, 1996.³³ Following a path of numerous failed attempts, this Declaration provides that member states must "pledge" to deny tax deductibility and to criminalize bribery of foreign public officials in "an effective and coordinated manner" much like the OECD's Recommendation.³⁴ The International Chamber of Commerce (ICC) has

²⁹ Summary Record of the Meeting held on 11-12 April 1996, Working Group on Bribery in International Business Transactions, OECD, DAF/IME/BR/M(96)3, June 27, 1996, at 3

³⁰ *Id.*

³¹ *Id.*

³² Paul Lewis, *Nations Begin Following U.S. Curbs on Corruption*, N.Y. TIMES, Nov. 28, 1996, at D1; International Chamber of Commerce, Rules of Conduct to Combat Extortion and Bribery in International Business Transactions (visited Apr. 26, 1997) <<http://www.iccwbo.org/Cust/html/rules.html>>.

³³ *General Assembly Endorses Outcome of UNCTAD IX, Adopts Anti-Corruption Declaration, Stresses Challenges of Global Financial Integration*, GA/9206 Press Release, Dec. 16, 1996 [hereinafter U.N. General Assembly Declaration]. See generally BUS. AM., Sept. 1, 1996, at 112; Mark Murphy, Note, *International Bribery: An Example of an Unfair Trade Practice*, 21 BROOK. J. INT'L L. 385, 393-394 (1995).

³⁴ U.N. General Assembly Declaration, *supra* note 33. See American Bar Association Section of International Law and Practice Reports to the House of Delegates, *Corrupt Practices in the Conduct of*

also adopted a "Rules of Conduct to Combat Extortion and Bribery in International Business Transactions."³⁵ The ICC's Rules of Conduct outlines a variety of laudatory recommendations but given that the ICC remains a non-governmental organization these efforts remain relatively provisional. Most recently, the United States has been directing its efforts to compel the WTO to reach a global agreement to improve transparency and due process in the government procurement process.³⁶

B. Problems in Creating an International Consensus and the Need for Greater International Anti-Bribery Efforts

Significant progress has been achieved by these various organizations and regional blocs in the fight against international bribery. Countries are increasingly adopting laws according to such international efforts. A forceful international consensus joined by all the nations of the world would be the ultimate achievement in the fight against international bribery. Nevertheless, some argue that exemplary intentions aside these international efforts to globalize the issue are unnecessary, unfair and unrealistic.

One central problem is how to construct a forceful multilateral consensus. While agreeing that egregious forms of influence buying should be prohibited, for instance, many are skeptical that an effective universal proclamation against bribery can be constructed, particularly because many countries have different legal standards governing what constitutes bribery. Largely due to cultural differences, what may be considered an illicit punishable payment in one country may well be permitted in another. To create an international consensus to end the practice of bribery, these cultural differences cannot be disregarded and must be considered. Any efforts against international bribery will remain a contentious issue unless the fears that these cultural differences might be ignored in the process are allayed.

International Business, 30 INT'L LAW. 193, 194-95 (1996) (offering a general background on previous incomplete attempts by U.N. to combat issues surrounding illicit payments). Previous attempts by the U.N. include the U.N. Economic and Social Council's 1976 International Agreement on Illicit Payments and the U.N. General Assembly's 1979 condemnation against corrupt practices in international commerce. U.N. Report of the Economic and Social Council Committee on an International Agreement in Illicit Payments, U.N. Doc. E/1979/104 (May 25, 1979), reprinted in 18 I.L.M. 1025 (1979); see also G.A. Res. 3514 (XXX), U.N. Doc. A/10034 (1976), reprinted in 15 UNITED NATIONS RESOLUTIONS, 1974-1976, at 509-10 (Susan J. Djonovich, ed.) (1984).

³⁵ Lewis, *supra* note 32.

³⁶ John Zarocostas, *U.S. Offers Inducement for Bids by Foreign Firms*, J. COM., Oct. 23, 1996.

Similarly, some countries will decry that forcing them to enact such legislation constitutes extraterritorial browbeating that infringes on their sovereignty.³⁷ First, these critics would argue that how bribery is prohibited or punished, whether it occurs overseas or domestically, ultimately remains a domestic concern that each country has its own sovereign right to decide.³⁸ Furthermore, while they will be cooperative, these countries do not believe they need to burden themselves with bribery that occurs overseas. Thus, bribery occurring overseas should be the responsibility of the individual country where the injury occurs. Forcing countries to immediately adopt the broad reaches of the U.S.'s Foreign Corrupt Practices Act particularly raises these types of concerns. Overall, as noted by one commentator, "adopting such laws (as the FCPA) would result in a loss of lucrative contracts to 'deep pocketed' American companies and the United States would be perceived as imposing its values on other countries and as meddling in their domestic affairs."³⁹

For countries that follow the active nationality principle of jurisdiction, they may easily contend that they do not need such special legislation.⁴⁰ A strong argument can be made because these legal systems allow conduct to be punished wherever it occurs, inside or outside of their country.⁴¹ Most common law countries such as the United States, however,

³⁷ Hall, *supra* note 3, at 311.

³⁸ George Graham, *U.S. Seeks OECD Foreign Bribes Ban: Many Countries Wary of Extending Laws Beyond Their Own Frontiers*, FIN. TIMES, Dec. 6, 1993, at 3.

³⁹ A. Rushdi Siddiqui, *Corruption Overseas*, N.Y. TIMES, Dec. 5, 1993, at 40. See Paul Blustein, *Trendlines: Bribery's Economic Impact*, WASH. POST, July 17, 1996, at D01 (Malaysia Trade Minister deriding U.S. efforts to expand ban on international bribery as "cultural imperialism"); Gary G. Yerkey, *Corruption: Philippines Rejects U.S. Proposal for WTO Accord on Bribery, Corruption*, Int'l Trade Daily (BNA), at d3 (May 22, 1996) (Philippine official "precious multilateral energies should not be expended on problems with 'local' solutions, or those which lie in the strict sovereign domains of government").

⁴⁰ European Committee on Crime Problems, Council of Europe, *Extraterritorial Criminal Jurisdiction*, 3 Crim. L.F. 441, 448 (Spring 1992) (describing that in general European states from a non-Anglo-Saxon tradition follow the active nationality principle yet many variations to the principle exist); see generally, Gary Taylor, *States Can Export Cases*, NAT'L L.J., Mar. 7, 1994, at 3. For a general discussion on the active nationality principle see Restatement (Third) of Foreign Relations of the United States § 402(2) (1987); J.G. Starke, *Introduction to International Law* 177 (8th ed. 1984); Ian Brownlie, *Principles of Public International Law* 5 (4th ed. 1990); and Michael Akehurst, *A Modern Introduction to International Law* 105 (1987), which all explain the five basic principles of jurisdiction—territorial, universal, effects, active nationality and passive nationality—and how the active nationality principle is a well recognized basis of jurisdiction.

⁴¹ Korea, for instance, follows the active nationality principle under Article 3 of the Criminal Code. Therefore, in Korea one could be punished for giving a bribe to a foreign public official under Article 357 of the Criminal Code which arguably prohibits anyone from making an improper request while making a payment in relation to another person's duties. Loh Joon-sung, *Current Domestic Laws Relating to the Prevention of Corruption and Future Trends*, Presentation at the Second Trade and Corruption Study Group

require such specific statutory authority as the FCPA to punish actions committed overseas by domestic persons.⁴² Hence, it can be argued that companies from such countries as the United States are not competing on an uneven playing field because companies from a majority of such civil law countries already have a legal basis to enforce their own domestic bribery law against illicit overseas conduct.

The OECD itself, for instance, reports that eight OECD member countries have an existing legal basis for criminal prosecution of the bribery of foreign government officials.⁴³ Hungary, New Zealand, Sweden, Switzerland, and Turkey, for instance, have "dual criminality" provisions in their criminal laws, a form of the active nationality principle, which enables prosecution of an offense which occurs completely outside the country's territory.⁴⁴ The dual criminality principle will apply when "an action can be pursued in country A for conduct which occurred in country B if that conduct was a crime in country B, and the same conduct if committed in country A, would have been a crime there too."⁴⁵ On the basis of such principles, further action is unnecessary because existing laws that criminalize the bribery of domestic public officials can be applied to punish the bribery of foreign public officials.⁴⁶

Companies from countries that have already adopted such international anti-bribery legislation, most notably those from the United States, nevertheless believe that currently they are at a competitive disadvantage in the international arena.⁴⁷ They would argue that unless all

Meeting, Ministry of Trade and Industry, Mar. 21, 1997 (stating that Art. 357 should not apply to payments made to foreign public officials because of ex post facto concerns) (on file with the authors).

⁴² European Committee on Crime Problems, *supra* note 40. See generally Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41 (1992) (arguing that the U.S. needs to adopt statutorily the nationality principle); Christopher Blakesley & Otto Lagodny, *Finding Harmony Amidst Disagreements Over Extradition, Jurisdiction, the Role of Human Rights, and Issues of Extraterritoriality Under International Criminal Law*, 24 VAND. J. TRANSNAT'L L. 1, 14, 30 (1991) (shows how even the U.S. follows the nationality principle to a limited degree).

⁴³ Review of the Recommendation on Bribery in International Business Transactions, Working Group on Bribery in International Business Transactions, OECD, DAF/IME/BR(95)9, June 8, 1995, para. 10 [hereinafter 1995 OECD Review] (stating that the eight countries, excluding the U.S., are Canada, Hungary, New Zealand, Norway, Sweden, Switzerland, Turkey and United Kingdom).

⁴⁴ *Id.*

⁴⁵ *Id.* at 33.

⁴⁶ Michael Backman, *The Economics of Corruption*, ASIAN WALL ST. J., Sep. 3, 1996, at 8 (arguing that corruption can under certain circumstances be beneficial to economic growth in developing countries).

⁴⁷ U.S. losses from April 1994 to May 1995 to bribery amounted to \$ 45 billion according to former U.S. Trade Representative Mickey Kantor. Mark Felsenthal, *Corruption: Annual Trade Promotion Strategy Report Stresses Anti-Corruption, Small Exporters*, Int'l Trade Daily (BNA), at d4 (Sept. 26, 1996).

countries adopt such anti-bribery initiatives, only a select number of countries effectively follow and punish overseas bribery based on the active nationality principle and therefore they are at an unfair competitive disadvantage. They believe that unless everyone participates according to the same rules such international efforts to combat bribery merely distort competition unfavorably against progressive countries.⁴⁸ The United States for instance even claims that bribery and corruption in foreign countries act as a trade barrier.⁴⁹ According to United States Trade Representative Mickey Kantor, "continuing problems with bribery and corruption in markets of WTO members may compromise the progressive elimination of trade barriers we worked so hard to achieve."⁵⁰

Therefore, although progress is gradually occurring and momentum is building, a variety of obstacles remain in the attempts to establish a broad, effective international consensus against bribery. Because bribery is an international concern, it can only be eliminated through mutual cooperation. Only then can all participating parties escape the distortions that bribery creates⁵¹ and mutually benefit from the efficiencies of a corruption-free system.

The other benefits of creating such a forceful international consensus are manifold. The establishment of a forceful, binding international anti-bribery framework would provide a universal standard as to what types of payments or gifts are allowable and what the penalties are for giving or receiving them. This would provide greater certainty for all companies participating in overseas operations. Wherever they are doing business, businesses conducting international commerce will be able to operate more efficiently under these transparent standards. By joining forces under a common framework cooperation, enforcement could be enhanced through cooperation among countries. Awareness in the international community toward the seriousness of the offense would be heightened. Finally, and

⁴⁸ Gene Koretz, *Bribes Can Cost the U.S. an Edge*, BUS. WK., Apr. 15, 1996, at 30 (discussing James Hines study on U.S. corporate losses due to the FCPA); Lucinda Horne, *U.S. Corruption Laws "Hurt" Firms in China*, S. CHINA MORNING POST, Nov. 11, 1992, at 1 (outlining harm to U.S. businesses). But see Tom Plate, *The Soul of the World vs. Cold Cash Business: People Feel Hobbled by U.S. Antibribery Law*, L.A. TIMES, June 11, 1996, at B7; Hall, *supra* note 3, at 302-307 (showing that conflicting evidence exists whether U.S. companies are at a competitive disadvantages because they have to follow the FCPA); Andy Zipser, *A Rarely Enforced Law*, BARRON'S, May 25, 1992, at 14 (discussing how law is avoided and how the FCPA has been rarely enforced).

⁴⁹ See Murphy, *supra* note 33 (arguing that Section 301 of the Trade Act of 1974 should be used to combat international bribery).

⁵⁰ Office of the United States Trade Representative, Press Release, 96-19, Feb. 22, 1996.

⁵¹ See Murphy, *supra* note 33, at 390-92.

perhaps most importantly, a forceful international consensus will demonstrate a serious universal commitment by all participating members countries to end the practice of international bribery.⁵²

III. CULTURAL DIFFERENCES AND THE EXAMPLE OF RICE-CAKE EXPENSES IN KOREA

A. Origins of "*Ttokkap*" (*Rice-cake expenses*)

One of the most serious challenges against international efforts to combat bribery comes from those countries that assert that cultural differences must be respected in any attempt to reach an international consensus against bribery. The practice of giving "*ttokkap*" in Korea offers a representative example of how questionable gifts or payments may be viewed differently.⁵³ The diversity of opinion surrounding what constitutes impermissible action can be largely attributed to different cultural perceptions.⁵⁴

In Korean "*ttokkap*" literally means rice-cake expenses and traces its origins to payments that were offered to cover for the expenses for buying rice-cakes, a precious food source in earlier times.⁵⁵ *Ttokkap* was largely offered for the sake of hospitality or as a natural token of gratitude for deeds done.⁵⁶ Through the centuries, the practice of giving gifts or payments such

⁵² Hall, *supra* note 3, at 308-309 (describing the various benefits of the FCPA).

⁵³ Other forms of cultural gifts or payments include *ch'onji* (goodwill token), *miui* (trifling payment), *misong* (small gift), *bokjon* ("lucky money"), *semo* (new-year gift of money), and *chungch'u* (congratulatory payment made on the occasion of Ch'usok). *Ttokkap and Bribery*, KYUNGHYANG SHINMUN (Seoul), July 11, 1995, at 3, (offers a general description of these various practices); Yi Kyu-t'ae, *Gongmuwon pujung paekgwā* [Public Official Corruption Encyclopedia], CHOSON ILBO (Seoul), Sept. 6, 1995, at 5 (describing various other forms of payments). A derivation of *ttokkap*, *ttokgomul* (the outer powder sprayed on rice cakes), is considered a redistribution of a portion of the *ttokkap* that a person receives to other related persons, usually one's superior or coworkers. Throughout this piece, all of the foregoing practices will be described using the general term *ttokkap*.

⁵⁴ *The Greased Palm Issue*, *supra* note 3 (discussing how cultural differences exists because some countries value gift-giving more than others). Compare *Review & Outlook: Is Corruption an Asian Value?*, *supra* note 11, at 8 and Robert Chan, *Letters to the Editor: The Self-Righteous American*, WALL ST. J., May 28, 1996, at A19 (criticizing above May 3, 1996 editorial).

⁵⁵ Yi Kyu-t'ae, *Ttokkap*, CHOSON ILBO (Seoul), Jan. 5, 1994, at 5; Yi Kyu-t'ae, *Ttokkap*, CHOSON ILBO (Seoul), Nov. 29, 1995, at 5.

⁵⁶ Donald Kirk, *Padding Note Pads in Korea*, ASIAN WALL ST. J., May 31, 1993, at 10 (noting some argue that "Ch'onji is part of a Confucian society . . . [i]t is an expression of good will"); Kim Chuyon, *Hard Going for President Kim's Anti-Corruption Drive*, ASSOCIATED PRESS, Apr. 19, 1994 (describing ch'onji); David I. Steinberg, *Gift Giving and Politics in South Korea*, ASIAN WALL ST. J., Sep. 12, 1996, at 8 (while describing the general gift-giving culture and its effects on business and politics in Korea, "Korea

as *ttokkap* has become a customary practice, culturally ingrained into the fabric of Korean society.⁵⁷ It was generally given over the major holidays of the year, "*Ch'usok*" (Korean thanksgiving) and New Year's Day.⁵⁸ Many other countries throughout Asia have similar practices. These innocuous origins notwithstanding, the problem is that over the years *ttokkap* payments have often times degenerated into a means to improperly obtain favors from public officials.⁵⁹ From a legal perspective, the challenging question in Korea is whether, and under what circumstances, the payment of *ttokkap* might be considered an illegal bribe.

B. *Bribery Under Korean Law*⁶⁰

The Korean Criminal Code (*Hyongpop*) criminalizes the receiving and giving of bribes by public officials⁶¹ under Article 129 through Article 133.⁶² Officials that receive bribes will be sentenced to less than five years

is a gift-giving society where tokens are constantly exchanged in signs of respect"). The custom is also traced to offerings received by Buddhist priests from grateful parents whose children had received rice-cakes and blessings from the priests during the New Year's Day celebrations.

⁵⁷ See generally O YONG-GUN & YI SANG-YONG, A STUDY ON BRIBERY OFFENSES IN KOREA: SENTENCING PRACTICES AND MEASURES FOR PRESENTING BRIBERY, Korean Criminal Policy Research Institute 31-34 (1996) (a study discussing the various cultural origins of bribery in Korea).

⁵⁸ *Id.* Korea observes as official holidays the New Year's Days of both the solar and lunar calendar.

⁵⁹ According to a 1996 opinion survey of 660 corporate executives, 49.9 % believed that public officials received some type of systematic payment. '96 *Kiop ui kwan ae daehan yororchosa* 82 [1996 Corporate Survey Concerning Public Officials], Pujong bangji daech'ae uiwonhoe [Committee for the Prevention of Corruption] (June 1996); Jong Bum Kim & Joongi Kim, *Bupae-muyok yongyeae daehan yongu* [the U.S. Foreign Corrupt Practices Act], 22 TONGSANGPOPNYUL 95 (1996) [INTERNATIONAL TRADE LAW] (published by the Korean Ministry of Justice) (providing a brief economic overview of how Korean companies are affected by anti-bribery legislation such as the FCPA).

⁶⁰ For a discussion of the bribery laws in the Middle East, Germany, France and Switzerland see Bruce Zagaris, *Avoiding Criminal Liability in the Conduct of International Business*, 21 WM. MITCHELL L. REV. 749, 786-794 (1996). See also John E. Impert, *A Program for Compliance with the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*, 24 INT'L LAW. 1009.

⁶¹ The term "public officials" is limited to those defined under Korean law and therefore would exclude foreign officials. Yi Chae-sang, HYONGPOP KAKRON [Ed. Note: Throughout this piece, reference is made to various authors' works all entitled "Hyongpop Kakron," which means "Lectures in Criminal Law." These are all independent works, collections of a respected professor's lectures similar to the well-known treatises in American law like PROSSER AND KEETON ON TORTS. Therefore, this title should be translated YI CHAE-SANG'S LECTURES IN CRIMINAL LAW], at 624-627 (Pakyongsa 1996). Bribery of foreign officials, however, could arguably be punished under Section 357. *Supra* note 34.

⁶² Korea also has enacted the Enhanced Punishment Law for Specific Crimes, to combat illicit payments that, for instance, involve payments larger than 10 million won (US\$ 25,000), and the Enhanced Punishment Law for Specific Economic Crimes, to cover persons employed in the financial or banking sectors. T'ukchong bomjoe kajung ch'obol ae kwanhan bopnyul [Enhanced Punishment Law for Specific Crimes], Law No. 1744, Feb. 23, 1966; T'ukchong kyongjae bomjoe kajung ch'obol ae kwanhan bopnyul [Enhanced Punishment Law for Specific Economic Crimes], Law No. 3693, Dec. 31, 1983. Parties found

imprisonment or will be disqualified from government service for less than ten years for accepting bribes. Those that promise, give or express an intent to give bribes will be punished under Article 133 and will be sentenced to less than five years imprisonment or less than twenty million won (US\$ 25,000) in fines.⁶³

More specifically, the main section of the Criminal Code, Article 129, provides that any public official that "receives, demands or promises a bribe *in relation to his official duties* (emphasis added)" will be guilty of bribery.⁶⁴ To constitute bribery, therefore, Korean courts will generally seek to ascertain whether two factors have been met.⁶⁵ First, the official must receive a payment that must bear a relation to the official's duties. The question is how broadly to interpret the extent of an official's duties. For instance, payments made to an official in charge of the procurement of supplies in order to obtain a favorable tax break would not qualify because the payment does not have a sufficient relation with the official's responsibilities or duties.⁶⁶ The Supreme Court nevertheless affords some flexibility in determining the extent of an official's duties. The Court states that the duties need not be those specifically stipulated by law but may include "the entire scope of official duties that one is responsible for according to one's rank."⁶⁷ The scope of the duties therefore may include previous or future duties or, due to the division of work, may include duties not personally handled by the official but, for example, those that are still within their sphere of influence.⁶⁸

A second related element that courts will consider is if the payment was given "in consideration for" the official's duties.⁶⁹ Payment must thereby be given in return for a favor or as a *quid pro quo*.⁷⁰ Although these are all factors to consider, the Supreme Court has found that in determining

guilty under these special statutes can be subject to up to a minimum of 5 years imprisonment and for bribes greater than 50 million won (US\$ 125,000) life sentence can be imposed.

⁶³ Hyongpop, Art. 133.

⁶⁴ Hyongpop, Art. 129.

⁶⁵ KIM IL-SU, HYONGPOP KAKRON [LECTURES IN CRIMINAL LAW], at 653-58 (Pakyongsa 1996).

⁶⁶ Under the recently amended Enhanced Punishment Law for Specific Crimes, payments concerning *any* official's duties will be considered influence peddling and punished regardless of a relation finding. *Supra* note 62. Article 132 of the Criminal Code also criminalizes the arrangement of receipt of a bribe. This section applies when a bribe might not be for a favor within the recipient's official duties but concerns someone within his sphere of influence such as a subordinate.

⁶⁷ Judgment of Sept. 25, 1984, Taepopwon [Supreme Court], 84 Do 1568 (Korea).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

whether the payment was "in consideration for" an official's duties, the briber need not specifically request a favor nor does the bribe have to result in action or inaction.⁷¹ According to the Court, the payment, in other words, must amount to illegal compensation or improper profits for the actions of a public official.⁷²

Under this statutory framework, the leading Supreme Court case on bribery, decided in 1984, outlined the frequently cited principles involved in the prosecution of bribery.⁷³ While finding a provincial agriculture official guilty of bribery, the Court first described that the purpose of criminalizing bribery is to maintain the "fairness of official decisions and society's trust in these decisions."⁷⁴ The Court next added that in punishing bribery the "central protective interest involved is the incorruptibility of official actions."⁷⁵ In conclusion, the Court stated that the question of bribery does not depend on whether the violation of one's duty actually occurs, whether a favor was requested, or whether the bribe was received before or after an official decision.⁷⁶

C. *The Social Courtesy Exception*

The Korean Supreme Court has nevertheless acknowledged that a "social courtesy exception" exists under which certain payments or gifts made to officials may not be punishable as a bribe.⁷⁷ Under this exception, the courts have focused on the second element in determining bribery. Payments or gifts offered as mere social courtesies were viewed as not being given in consideration for an official's acts, and therefore did not amount to an impermissible bribe.⁷⁸ Instances where parties have attempted to use the social courtesy exception often times involve fees associated with

⁷¹ *Id.*

⁷² KIM IL-SU, *supra* note 65, at 656-57; Yi Chae-sang, *supra* note 61, at 638.

⁷³ Judgment of Sept. 25, 1984, *supra* note 67. See also Judgment of Sept. 5, 1995, Taepopwon, 95 Do 1269; Judgment of Mar. 22, 1994, Taepopwon, 93 Do 2962; Judgment of Feb. 28, 1992, Taepopwon, 91 Do 3364.

⁷⁴ Judgment of Sept. 25, 1984, *supra* note 67.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Judgment of June 7, 1955, Taepopwon, 4288 Hyongsang 129; Judgment of July 11, 1955, Taepopwon, 4283 Hyongsang 97; Judgment of June 12, 1959, Taepopwon, 4290 Hyongsang 380; Judgment of Apr. 15, 1961, Taepopwon, 4290 Hyongsang 210; Judgment of Apr. 10, 1984, Taepopwon, 83 Do 1499; Judgment of June 14, 1996, Taepopwon, 96 Do 865; KIM IL-SU, *supra* note 65, at 657.

⁷⁸ KIM IL-SU, *supra* note 65, at 657.

meals, drinks and entertainment, and gifts and contributions made in connection with a marriage or funeral ceremony.⁷⁹

The issue of how to determine when a payment or gift might be considered a social courtesy versus an illegal bribe under the law, however, has become a delicate balancing act. The primary emphasis appears to be whether the payment was sufficiently in consideration for action within an official's duties.⁸⁰ The courts will also consider whether the monetary payment or favor provided exceeds socially acceptable levels.⁸¹ Some scholars argue that even if a moderate degree of consideration can be found, if the payment still remains within socially acceptable levels then it should not be considered a bribe.⁸² As witnessed in the opinions described below, the Supreme Court, however, appears to believe that while the socially acceptable size of the payments will be considered, the primary factor remains whether the payment was in consideration for an official's actions.

In a 1979 case the Supreme Court disagreed with a lower court judgment and found that the social courtesy exception did not apply to the defendant.⁸³ The Supreme Court first noted that in its judgment sufficient evidence existed to find that the payment was part of a request for a favor in return for the duties of the public official from the Ministry of Culture.⁸⁴ At the same time, the Supreme Court justices did note the size of the payments and stressed that the two payments that were given to the official were significantly large because they were more than twice that of the public official's base salary of 90,000 won (US\$112.50). Thus, the payments exceeded socially acceptable levels.⁸⁵

Moreover, in 1984, in perhaps the leading case on the social courtesy exception, the Supreme Court found a Ministry of Labor official guilty of

⁷⁹ *Id.*

⁸⁰ Judgment of Apr. 10, 1984, *supra* note 77; Judgment of Sept. 14, 1982, Taepopwon, 81 Do 2774 (finding contributions of 50,000 won and 100,000 won for public official's son's wedding by a friend of the official not bribery even though the payor's business was related to the official's duty); PAE CHONG-DAE, HYONGPOP KAKRON, at 593 (Hongmunsa 1994); CHIN KYE-HO, SHIN GO HYONGPOP KAKRON, at 686 (Daewangsa 1990); Hwang San-dok, Hyongpop Kakron, at 54 (Bangmunsa 6th ed. 1989); CHONG YONGSOK, HYONGPOP KAKRON, at 48 (Popmunsa 5th ed. 1983); SO IL-KYO, HYONGPOP KAKRON, at 320 (Pakyongsa 1982).

⁸¹ Judgment of May 22, 1979, Taepopwon, 79 Do 303.

⁸² KIM IL-SU, *supra* note 65, at 657; YI CHAE-SANG, *supra* note 61, at 638 (Pakyongsa 1996); Chung Song-gun, HYONGPOP KAKRON, at 700 (Popchiksa 1996); YU KI-CH'ON, HYONGPOP KAKRON (HA), at 309 (Ilhogak 1982).

⁸³ Judgment of May 22, 1979, *supra* note 81.

⁸⁴ *Id.*

⁸⁵ *Id.*

bribery for, among other things, being treated to a 70,000 won (US\$88) dinner by a company director.⁸⁶ The Court held that sufficient consideration existed because the payor requested a favor within the official's duties.⁸⁷ Although the monetary sum involved was meager, this fact alone would not allow the payment to qualify as entertainment falling under the scope of the social courtesy exception.⁸⁸ The Court emphasized that the meal was clearly related to the duties of the official and that, in addition to the meal, the official, the Chief of the Foreign Employment Section, received two monetary payments, one before and one after the date of the dinner.⁸⁹ Therefore, despite the small sum involved with the dinner, the Court held it amounted to bribery because specific requests were made and overall additional monetary payments were also exchanged.⁹⁰

D. *Ttokkap* and Current Legal Trends

Ttokkap payments must be examined under the interpretive structure created by the Korean Supreme Court.⁹¹ Under this legal framework, *ttokkap* offered merely as a gift of hospitality during *Ch'usok* and over the New Year's Day holidays has been traditionally viewed as being exempt from criminal punishment in Korea.⁹² In essence, the social courtesy exception has been found to encompass the *ttokkap* giving practice. Such *ttokkap* is not considered a bribe because it is not given in return or in consideration for any official acts. Questionable *ttokkap* has avoided consideration as a bribe because frequently it is given merely as a type of insurance, not for immediate or specific benefits but for future favorable consideration.⁹³ Therefore, when initially given it lacks a nexus with a public official's actions. As for socially acceptable levels of permissible payments, while it varies depending upon the position of the recipient, many believe that payments must exceed ten million won (US\$12,500) for

⁸⁶ Judgment of Apr. 10, 1984, *supra* note 77. See also Judgment of June 14, 1996, *supra* note 77 (defendant convicted for receiving a bribe of 200,000 won (US\$ 250) for favors for favors related to personnel hiring).

⁸⁷ Judgment of Apr. 10, 1984, *supra* note 78.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See Ha T'aehoon, *Noemul gwa ttokkap* [Bribery and Ttokkap], *Onului popnyul* [Today's Law], Hyonamsa, 2753 (Vol. 87, Apr. 1996)(general discussion on the problems of bribery and ttokkap).

⁹² Hwang San-dok, *supra* note 80, at 54; Chong Yong-sok, *supra* note 80, at 48; So Il-kyo, *supra* note 80, at 320; Chin Kye-ho, *supra* note 80, at 956.

⁹³ Ha T'aehoon, *supra* note 91.

it to be considered an impermissible payment that would create a sufficient nexus and therefore amount to a bribe.⁹⁴

The practice of giving "rice-cake expenses" has recently received increased scrutiny due to several cases involving high profile figures receiving sums of extraordinary proportions.⁹⁵ Prosecutors still have been reluctant to bring cases based merely on *ttokkap* payments. Yet they have demonstrated recently that in certain circumstances they will seek convictions for certain types of payments. These cases have highlighted the issues surrounding the practice of giving *ttokkap*.

In the sensational slush fund scandal involving former President Chun Doo Hwan, Roh Tae Woo and over a dozen chaebol heads, the Korean courts for the first time developed a "comprehensive bribe theory" and found that payments given by these corporate leaders amounted to illicit payments.⁹⁶ Many of the payments, which over a several year period ranged

⁹⁴ Kim Yang Bae, *20 Billion Won Ttokkap*, JOONG-ANG ILBO (Seoul), Apr. 1, 1996, at 6; Kang Jin Ku, *Ttokkap: When it's Punished / Examples of the Handling of Public Officials*, KYUNGHYANG SHINMUN (Seoul), Nov. 12, 1995, at 3; Ha T'ae-hoon, *supra* note 91.

⁹⁵ According to one disputed account, the Korean 'chaebols' reportedly are "still obligated to pay each cabinet member *ttokkap*, or 'rice-cake expenses' of between 5 million won and 15 million won (\$6,500 and \$19,500) to mark the major holidays of the year." Steve Glain, *South Koreans Say Bribes Are Part of Life: Probe of Ex-President Doesn't Touch Systemic Graft*, WALL ST. J., Nov. 21, 1995, at A13. Chaebols are conglomerates that have been largely credited with Korea's enormous economic growth. See generally RICHARD M. STEERS ET AL., *THE CHAEBOL* (1989). The most recent high profile case involving alleged *ttokkap* payments concerns the now defunct Hanbo conglomerate. As of publication, however, this case had yet to be adjudicated. See Kim Il-su, *Ttokkap and Bribes*, JOONG-ANG ILBO (Seoul), Feb. 13, 1997, at 6; *Is Ttokkap Proper?*, CHOSON ILBO (Seoul), Feb. 12, 1997, at 3 (editorial); Kwon Dae-yol, *If a Crime Exists the Punishment Is*, CHOSON ILBO (Seoul), Jan. 29, 1997, at 4.

⁹⁶ Judgment of Aug. 26, 1996, Seoul Chibang popwon [District Court], Chae 30 Hyungsabu [30th Criminal Division], 95 Kohap 1228, 95 Kohap 1237, 95 Kohap 1238, 95 Kohap 1320, 96 Kohap 12, 96 Kohap 95. The defendants in the slush fund aspect of the trial included Lee Gunhee, Chairman of the Samsung Group, Kim Woojung, Chairman of the Daewoo Group, Choi Wonsuk, Chairman of the Donga Group, Chang Jinho, Chairman of the Jinro Group, Lee Junyong, Chairman of the Daelim Group, Kim Junkee, Chairman of the Dongbu Group, Chung Taesu, Chairman of the Hanbo Group, Lee Gun, Chairman of the Daeho Construction company, Lee Gun, Chairman of a Daewoo Subsidiary and several other former high-ranking government officials.

The charges surrounding the amassment of the slush funds comprised only one aspect of a consolidated trial that involved multiple actions. Most of the other charges concerned the initial rise to power of the former presidents following the death of President Park Chunghee in 1979. Judgment of Aug. 26, 1996, Seoul Chibang popwon, Chae 30 Hyongsabu, 95 Gohap 1280, 96 Gohap 38, 96 Gohap 76, 96 Gohap 127.

The Seoul High Court upheld the lower court's decisions on December 16, 1996. Judgment of Dec. 16, 1996, Seoul Kodung Popwon [High Court], Chae 1 Hyungsabu, 96 No 1892, 96 No 1893, 96 No 1894. The Supreme Court also affirmed the lower courts' decisions. Judgment of Apr. 17, 1997, Daebopwon, 96 Do 3376, 96 Do 3377. The Supreme Court's review was limited to those aspects of the lower decision that were appealed by the prosecution and certain defendants. Most of the defendants, including both former President Chun and Roh and most of the corporate heads, did not appeal the High Court's decisions. Nevertheless, the Supreme Court generally affirmed the lower courts' decisions concerning bribery.

by individual from 4 billion won (US\$5 million) to as much as 15 billion won (US\$18.8 million), were given around *Ch'usok* and New Year's Day without any specific requests associated with them or specific consideration in mind was difficult to find, and heretofore would most likely have been considered as permissible *ttokkap*.⁹⁷

The Seoul District Court and subsequently the High Court, however, emphasized a multitude of factors to find that taken as a whole the comprehensive nature of the payments amounted to illegal bribes.⁹⁸ They cited the vastness of the payments, which in total amounted to 510 billion won (US\$638 million) between the two ex-Presidents, and the continuous nature in which they were given.⁹⁹ The defendants challenged that the prosecution failed to provide a sufficient nexus between the payments and any specific acts done by the ex-presidents, but this argument was rejected by the courts.¹⁰⁰

The judges found that, as the head of the government, the Presidents had such a broad range of power that they could influence practically any decision.¹⁰¹ The clandestine nature of the payments, which were usually delivered during individual and informal closed meetings at the official residence of the Presidents, was also cited as a contributing factor.¹⁰² Similarly, they stressed that the funds were usually amassed under a complex scheme and laundered from secret corporate funds throughout a conglomerate's network of subsidiaries and related companies.¹⁰³ Finally, contradicting the argument that the funds were political donations, most of the funds were not expended for political purposes but were personally retained by the Presidents well after their terms had ended.¹⁰⁴ The High Court also suggested that as elected politicians, even if the payments were considered good will contribution, they were not solicited according to the Law Prohibiting Solicitations of Contributions and therefore must be

⁹⁷ Of the 510 billion won in total payments, approximately 204 billion won were given around *Ch'usok* and New Year's Day without any general requests associated with them. See generally Teresa Watanabe, *S. Korea's Culture of Corruption*, L.A. TIMES, Nov. 23, 1995, at A1; (describing the events surrounding the slush fund trial as "complex social practices steeped in centuries of history and tradition, combined with modern political necessities and the imperatives of South Korea's phenomenal economic growth").

⁹⁸ Judgment of Aug. 26, 1996, *supra* note 96; Judgment of Dec. 16, 1996, *supra* note 96.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Judgment of Apr. 17, 1997, Daebopwon, 96 Do 3377.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

viewed as illegal bribes.¹⁰⁵ While its review was limited, the Supreme Court briefly confirmed that as long as the payments were part of or were directly related to the President's overall duties, then they would be considered bribes. It added that the payments did not have to be given specifically for some consideration.¹⁰⁶

In sum, although in many instances no specific requests were made with the payments, the courts held that given the comprehensive nature of the payments they amounted to bribes given as general compensation for "preference over other competing companies or at least to avoid any negative consequences."¹⁰⁷ Testimony also existed to the effect that the senior government officials involved in managing the money also believed that the payments were suspect.¹⁰⁸ Therefore, the courts held that sufficient consideration existed between the payments and official acts, and that the levels of the payments far exceeded socially acceptable standards.¹⁰⁹

Another illustrative case that recently ended deserves attention. Following accusations from a National Assemblyman from the leading minority party, on March 23, 1996, Chang Hak-ro, a presidential secretary in charge of personal matters for the current President Kim Young Sam, was arrested for receiving bribes and delivering favors in return.¹¹⁰ It is interesting to note that in the process of indicting Chang for receiving 621 million won (US\$ 776,000) in bribes, the Seoul District Public Prosecutor's Office, specifically stated that they excluded a total of 2.1 billion won (US\$ 2.6 million) in additional payments given by various individuals because they were only viewed as "*ttokkap*" or "friendly allowance money."¹¹¹ These payments were apparently given without any specific expectation for anything in return and lacked a sufficient nexus. Chang's official duties had

¹⁰⁵ Kibukummojip kumjipop [Law Prohibiting Solicitations of Contributions], Law No. 224, Nov. 17, 1951.

¹⁰⁶ Judgment of Apr. 17, 1997, *supra* note 96.

¹⁰⁷ Judgment of Aug. 26, 1996, *supra* note 96.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ See Judgment of June 11, 1996, Seoul Chibang popwon [Seoul District Court], Chae 11 Hyongsabu [11th Criminal Division], 96 Godan 3168; Judgment of Sept. 18, 1996, Seoul Chibang popwon ponwon hapui 1 bu [First Court of Appeal for Appeals from Seoul District Court], 96 No 4146; see generally Ch'oe Byong-muk & Kim Ki-hun, *Chang Hakro gusuksukam* [Chang Hak-ro Arrested], CHOSON ILBO (Seoul), Mar. 24, 1996, at 1-2; David Holley, *S. Korean Leader's Ex-Aide Pleads Guilty to Bribery*, L.A. TIMES, Apr. 24, 1996, at 8.

¹¹¹ Yi Ch'ang-won, *Chang's 2.1 billion won in Ttokkap Excluded from Indictment*, CHOSON ILBO (Seoul), Mar. 31, 1996, at 31; Sang-hun Choe, *Corruption has Many Names in South Korea*, ASSOCIATED PRESS, Apr. 7, 1996 (while discussing the case states that "the difference between casual gift-giving and bribery has never been clear in South Korea").

little direct relation to any policy making decisions because he acted merely as a personal steward to the President.¹¹² In addition, prosecutors apparently believed that because the sums were relatively small they were within the socially acceptable standards. Although the *ttokkap* payments were excluded, Chang was nevertheless convicted and sentenced to four years for receiving bribes and ordered to pay a 700 million won confiscatory penalty.¹¹³

Taken together, these two cases illustrate the continuing difficulties the Korean legal process faces when trying to determine the illegality of *ttokkap* gifts or payments. Although the decision in the slush fund trials marked a notable shift in the prosecution of certain forms of payments, the law still remains uncertain toward seasonal offerings. It should also be noted that the slush fund actions were being undertaken in a highly charged political atmosphere. They were tightly intertwined with the consolidated trial¹¹⁴ which also involves charges for treason and mutiny. One might easily argue, however, that the payments in the slush fund trial only apply to the peculiar and special circumstances involved in that sensational trial.¹¹⁵

The views toward *ttokkap* remain in a state of flux and a shift in public sentiment, especially in light of the recent campaigns against corruption and the slush fund trials, appears to be occurring. The People's Solidarity for Participatory Democracy, one of the leading civil action organizations in Korea, has recently proposed the enactment of an Irregularities and Corruption Prevention Law that would prohibit all or gifts to public officials with seniority over a certain level.¹¹⁶ In April 1993, the current government also established the Committee for the Prevention of Corruption, an organization whose single mission is to combat corruption

¹¹² Some criticize the prosecutor's decision to exclude such payments given the perceived influence Chang appeared to have because of his constant and close proximity to the President and his assistant minister level government ranking. Ha T'ae-hoon, *supra* note 91.

¹¹³ Kwon Hyuk-ch'ul, *Changhakrossi hangsoshim 4 nyon sungo 7 ok ch'ujing* [Chang on Appeal Sentenced to 4 years and Ordered to Pay a 700 million won confiscatory penalty], HANKYOREH SHINMUN (Seoul), Sept. 19, 1996, at 23; Kim Hyun-tae, *Changhakrossi hyongjibheng jongji* [Chang Released and Sentence Suspended], HANKYOREH SHINMUN, Nov. 26, 1996, at 27 (Chang's Sentence was suspended on November 25, 1996 due to a serious medical condition).

¹¹⁴ See *supra* note 98.

¹¹⁵ But cf. Ch'oe Byong-muk, *Uihok jaeki 3 ilmanae shin sokch'uri* [Case handled quickly 3 days after suspicion aroused], CHOSON ILBO (Seoul), Mar. 24, 1996, at 3 (citing that the slush fund trial and the Chang trial only differ in the size and manner in which the funds were collected).

¹¹⁶ Article 12 of proposed law. *Puchong pop'ae ipbopgwachae ae kwanhan taet'oronhwoe* [Symposium on the legislative enactment of the Irregularities and Corruption Prevention Law], People's Solidarity for Participatory Democracy, at 50-51 (1996). See generally *Pup'ae bangjibop to isang mirul su opda* [The Corruption Prevention Law Can No Longer Be Delayed], L. TIMES (Seoul), Apr. 11, 1996, at 1.

throughout all sectors of society.¹¹⁷ The Committee has proposed a comprehensive revision to the Public Officials Ethics Law that would practically prohibit all payments to public officials except those given by relatives.¹¹⁸ Yet, the practice of sharing offerings such as *ttokkap* continues to remain a socially prevalent and acceptable cultural practice. At present, countries such as Korea can strongly argue that they still need flexibility to be allowed to shape their own penal standards as befits their socio-cultural heritage.

IV. THE FOREIGN CORRUPT PRACTICES ACT

A. *History of FCPA*

The Foreign Corrupt Practices Act ("FCPA") was adopted in 1977 following such incidents as the Watergate scandal and revelations about Lockheed's overseas bribery which eventually brought down governments in Italy, Holland, and Japan.¹¹⁹ In a study commissioned as a result of these incidents, the Senate and the Securities and Exchange Commission ("SEC") had found that U.S. corporations were making staggering amounts of influence-buying payments to foreign government officials.¹²⁰ Congress found that this type of corporate participation in foreign corruption not only tarnished the U.S.'s image but also undermined public confidence. As a result, the United States enacted the FCPA to prohibit U.S. concerns from participating in corruption overseas.¹²¹

Against this background, the FCPA is being touted as a future model for an international anti-corruption accord. The FCPA seeks to broadly regulate two types of activities. First, it prohibits certain types of payments

¹¹⁷ *Pujong bangji daech'ek uiwonhoe paljok* [Committee for the Prevention of Corruption], JOONG-ANG ILBO (Seoul), Apr. 9, 1993, at 2.

¹¹⁸ Gongjikkjayullibop (Public Ethics Law), Law No. 3250, Dec. 31, 1981; Chae Byung-gun, *Ttokkapdo hyungsachubol* [Criminalization of *ttokkap*], JOONG-ANG ILBO (Seoul), Apr. 3, 1997, at 1.

¹¹⁹ See GEORGE C. GREANIAS & DUANE WINDSOR, *THE FOREIGN CORRUPT PRACTICES ACT* (1982) for a history of previous legislative efforts to end corporate bribery; *On the Take*, ECONOMIST, Nov. 19, 1988, at 21; Andy Pasztor, *Lockheed Settlement Reflects New U.S. Antibribery Focus*, WALL ST. J., Jan. 30, 1995, at B6.

¹²⁰ SECURITIES AND EXCHANGE COMM'N, 94TH. CONG., 2D SESS., *REPORT ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES* (Comm. Print 1976) (detailing such examples as Exxon paying bribes totaling \$ 56.7 million, Northrop, \$ 30.7 million and Lockheed, \$ 25 million). See generally *United States v. Blondek*, 741 F. Supp. 116, 117-18 (N.D. Tex. 1990) (discussing background of enactment of Act).

¹²¹ *Id.*

to certain foreign officials.¹²² Second, the Act requires U.S. concerns to meet exacting standards by forcing them comply with stringent accounting and reporting standards.¹²³ Violators of the Act can be subject to criminal and civil penalties, including fines, imprisonment, and injunctive relief.¹²⁴ To date, the United States remains the only country in the world with laws that specifically punish the corruption of foreign government officials.¹²⁵ Many believe that the FCPA serves as a model for other countries to follow. The Act also requires the President to endeavor to convince the OECD countries to adopt a similar international agreement.¹²⁶

B. *Anti-Bribery Provisions*

Under the FCPA's anti-bribery provision, persons¹²⁷ will violate the act if they meet the following criteria.¹²⁸ First, the actions involved must be done "corruptly."¹²⁹ Second, the expenditure must be for the purpose of "influencing" any official act or inducing the official to use his influence "to

¹²² Foreign officials that receive the bribes are not subject to the Act. *United States v. Blondek*, 741 F. Supp. 116, 120 (N.D. Tex. 1990), *aff'd sub nom*; *United States v. Castle*, 925 F.2d 831, 832 (5th Cir. 1991); *Dooley v. United Technologies Corp.*, 803 F. Supp. 428, 439 (D.D.C. 1992).

¹²³ 15 U.S.C. § 78m(a),(b).

¹²⁴ Depending on the type of violation, the Department of Justice or the SEC may bring criminal or civil charges. 15 U.S.C. §§ 78 dd-1, dd-2, and f. The most significant fine paid to date involved a \$ 21.8 million criminal fine and a \$ 3 million civil settlement recently paid by Lockheed for conspiring to violate the Act. The fine amounted to twice the profit from sales achieved by Lockheed's impermissible action. *\$ 24.8 Million Penalty Paid by Lockheed*, N.Y. TIMES ABSTRACTS, Jan. 28, 1995, at 35. See generally *U.S. is Investigating if an Ex-Boeing Unit Paid Bribes for a Job*, WALL ST. J., May 13, 1996, at A8 (describing recent FCPA enforcement efforts).

¹²⁵ Jeffrey P. Bialos & Gregory Husisian, *The Foreign Corrupt Practices Act: Dealing with Illicit Payments in Transitional and Emerging Economies*, in 1 FOREIGN CORRUPT PRACTICES ACT REP. 103.023 (Feb. 1996). See 1995 OECD Review, *supra* note 43, at 9-10. Gail Chaddock, *Ethics in Business Dealing Urged by World Lenders: Bribery on the Block*, CHRISTIAN SCI. MONITOR, Nov. 20, 1996 (states that Sweden also has a such a law).

¹²⁶ § 5003(b) of Pub. L. 100-418, set out as a note under 15 U.S.C. §§78dd-1.

¹²⁷ The Act broadly divides applicable persons into either "issuers" or "domestic concerns." Issuers are those entities having a class of securities registered under § 781 or those required to file reports under § 78o(d) of the 1934 Securities Exchange Act. 15 U.S.C. § 78c(8). Domestic concerns include U.S. citizens, nationals, or residents, and those business entities such as corporations or business trusts that have their principal place of business in the U.S. or those that are organized under the laws of the U.S. 15 U.S.C. § 78dd-2(h)(1). Nevertheless, the anti-bribery provisions for issuers or domestic concerns nevertheless are virtually identical.

¹²⁸ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a). Compare Delia Poon, Note, *Exposure to the Foreign Corrupt Practices Act*, 19 HASTINGS INT'L & COMP. L. REV. 327, 331-332 (1996) and Hall, *supra* note 3, at 295-296 (dividing relevant factors differently depending on emphasis).

¹²⁹ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a); S. REP. NO. 95-114, at 10 (1977), reprinted in 1977 U.S.C.C.A.N. 4098, 4108.

assist in the obtaining or retaining of business.”¹³⁰ One of the few cases describing these two requirements involved Richard Liebo, an executive of a military equipment company, who was convicted for violating the FCPA based mostly on plane tickets that he had purchased for a Niger diplomat named Tahirou Barke. Barke was a close relative of Captain Ali Tiemogo, the chief of maintenance for the Niger Air Force.¹³¹ The defendant Liebo claimed that he purchased the tickets for Barke as a gift for Barke who was returning home to get married. As a result, Liebo argued that this payment was not made to “influence any official act to assist in obtaining business” and also was not “corrupt.”¹³²

The appeals court rejected these arguments based on a variety of factors. The court stressed that the timing of the purchase of the plane tickets was just before Liebo’s company won its third lucrative contract with the Niger Air Force.¹³³ Furthermore, the court stressed that Barke and his cousin Tiemogo were particularly close and that Barke himself considered that some of the money that Liebo had previously given to him was deposited for some of the business that they all had done together.¹³⁴ The defendant Liebo himself it was noted had classified the plane tickets as “commission payments” for accounting purposes.¹³⁵ Therefore, based on these and other factors, the court held that a jury could reasonably find that Liebo’s purchase of the tickets for Barke was given “corruptly” to “influence” the Niger government’s contract approval process.¹³⁶

In addition to the “corruptly” and “influencing” standards, the FCPA requires that the action must be knowingly in furtherance of an offer, gift, payment, promise to pay, or authorization of the payment of money or anything of value.¹³⁷ Under this knowing standard, even an awareness of “a high probability of the existence” that bribery has occurred will be deemed sufficient.¹³⁸ In addition, the act must use the mail or any means of interstate commerce.¹³⁹ Payments arranged by a foreign agent acting solely

¹³⁰ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

¹³¹ *United States v. Liebo*, 923 F.2d 1308 (8th Cir. 1991).

¹³² *Id.* at 1311.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 1312.

¹³⁶ *Id.*

¹³⁷ 15 U.S.C. §§ 78dd-1(a)(3), 78dd-1(f)(2), 78dd-2(a)(3), 78dd-2(h)(3).

¹³⁸ 15 U.S.C. §§ 78dd-1(f)(2), 78dd-2(h)(3). *See generally* Poon, *supra* note 128, at 337-338 (describing knowledge concerns when using overseas agent or when a joint venture partner).

¹³⁹ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a).

on behalf of a foreign subsidiary, for instance, in which no connection exists with the parent company in the United States would be exempt from the statute.¹⁴⁰ Lastly, the statute prohibits expenditures to be given to any foreign official, foreign political party or any candidate for a foreign political party, or to intermediaries who will subsequently offer it to such persons.¹⁴¹

It should be noted that in the case of corporations, the Act only applies to corporations whose officers, directors, employees, or stockholders make bribes in a foreign country "on behalf of" the corporation.¹⁴² The legislative history explains that actions committed by an individual on its own initiative will therefore not bind the corporation.¹⁴³ Congress stated that in determining when an individual is acting on its own or for the company, such factors as the position of the employee and the care in which the board of directors supervised management or employees in sensitive positions should be considered.¹⁴⁴ In addition, the Act prohibits companies from indemnifying their officers and employees for liability arising under the Act.¹⁴⁵

C. *Affirmative Defenses and Permissible Payments*

Despite the expansive prohibitions in the Act, it should be emphasized that the FCPA provides two affirmative defenses and an exception for violators of the statute. The two affirmative defenses were added as part of the 1988 amendments of the Act to help allay concerns among U.S. corporations about the scope of the Act.¹⁴⁶

1. *The Lawfulness Affirmative Defense*

First an affirmative defense exists if the "payment, gift, offer or promise of anything of value," otherwise illegal under the Act, is in

¹⁴⁰ S. REP. NO. 95-114, *supra* note 98, at 4109. See generally Poon, *supra* note 128, at 337.

¹⁴¹ 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3).

¹⁴² S. REP. NO. 95-114, *supra* note 98, at 4108.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 4108; H.R. CONF. REP. 95-831, at 14, *reprinted in* 1977 U.S.C.C.A.N. 4098, 4126 (specifically excluded foreign subsidiaries of U.S. companies from scope of Act [unless acting at the bidding of a U.S. company]).

¹⁴⁵ 15 U.S.C. §§ 78ff(c)(3), §§ 78dd-2(g)(3).

¹⁴⁶ Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, 102 Stat. 1107; H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 1 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1949, 1954-1955.

accordance with the written laws of the foreign country.¹⁴⁷ Unfortunately, no published case law and little legislative history exists that provides interpretation of this affirmative defense.¹⁴⁸ The legislative history provides only general clues as to how this affirmative defense was established and how it should be interpreted.¹⁴⁹

According to the House Conference Report of the FCPA, Congress decided to adopt the Senate version of the bill which required that the payment be "lawful" under the laws of the foreign country, instead of the House version which stated that the payment must be "expressly permitted" under the laws of the foreign country.¹⁵⁰ This distinction suggests that Congress sought a more flexible interpretation of this affirmative defense whereby the "lawfulness" of an action need not be expressly stated but can be also implied from the laws of the foreign country.

At the same time, the legislative history also emphasizes that the action must be lawful under the "written" laws of the foreign country.¹⁵¹ This therefore further qualifies the "lawfulness" standard. While the lawfulness of an action in the foreign country may be implied, this language suggests that "lawfulness" must be implied from written statutes or case law. Finally, the legislative history adds that the mere absence of written laws in the foreign country will not by itself satisfy this defense.¹⁵² This suggests that the absence of written laws nevertheless will be a factor to consider and therefore greater latitude can exist in implying lawfulness from the written law.¹⁵³

2. *The Nominal Payment Affirmative Defense*

This lawfulness affirmative defense must be considered in the context of another affirmative defense that was proposed by the Senate Banking

¹⁴⁷ 15 U.S.C. §§ 78dd(c)(1), §§ 78dd-2(c)(1).

¹⁴⁸ The only reference that could be found was in *Blondek*, 741 F. Supp. at 119-20, *supra* note 122 (making a passing reference while discussing Congress's intent to exempt foreign officials from the Act).

¹⁴⁹ H.R. Conf. Rep. No. 576, *supra* note 146, at 1954-55.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Hall, *supra* note 3, at 301; John Impert, *A Program for Compliance With the Foreign Corrupt Practices Act and Foreign Law Restrictions on the Use of Sales Agents*, 24 INT'L LAW. 1009, 1015 (1990).

Committee but was excluded from the final 1988 amendments to the Act.¹⁵⁴ This "nominal payment" affirmative defense would have explicitly created a type of cultural exception to certain payments. According to the Senate proposal, nominal payments which constituted a "courtesy, a token of regard or esteem or in return for hospitality" would be exempt if they were of "reasonable value in the context of the type of transaction involved, local custom, and local business practices."¹⁵⁵

By allowing these types of nominal payments, the FCPA would have expressly provided that monetary payments may be given as long as they were tailored to local customs. It is unclear as to whether it can be inferred that this means that such "nominal payments" are impermissible under the statute. One could argue that because Congress was aware of these types of payments, debated its merits but clearly rejected them, nominal "cultural" payments are not allowed.¹⁵⁶ Instead, nominal payments must independently seek to meet the standards of the lawfulness affirmative defense. The counter-argument would provide that if Congress wanted to outlaw such payments it could have but did not. Given that such nominal payments are largely impermissible in the United States, it is reported that House advocates found this cultural provision too broad a loophole.¹⁵⁷ Therefore, the overall effects of the abandonment of this affirmative defense are inconclusive.

The question is what effect might this abandoned affirmative defense have on the "lawfulness" affirmative defense. One may argue that by excluding this defense, Congress stated its intent that it would not go so far as to expressly allow such nominal payments. Including such a nominal payment defense, for instance, would have allowed such payments to be made without the need for implying the law, particularly in the more

¹⁵⁴ The United States Trade Enhancement Act of 1987: Report on S. 1409 Before the Comm. on Banking, Housing, and Urban Aff., 100th Cong., 1st Sess. 49, 53 (1987); H.R. Conf. Rep. No. 576, *supra* note 146, at 1955.

¹⁵⁵ *Id.*

¹⁵⁶ H. Lowell Brown, *Foreign Corrupt Practices Act: The Anti-Bribery Provisions of the Foreign Corrupt Practices Act*, 12 INT'L TAX & BUS. L. 260, 282 (1994) (arguing that because the defense was rejected the FCPA therefore does not recognize "business courtesies" as a defense).

¹⁵⁷ See Michael D. Nillson, *Foreign Corrupt Practices Act*, 33 AM. CRIM. L. REV. 803, n.65 (1996) (defense not included because of "apparent difficulty in establishing the appropriateness of a payment in a particular situation"; Julia Christine Bliss, Gregory J. Spak, *The Omnibus Trade and Competitiveness Act of 1988: Where it Came From and What It Means for U.S. Business*, *The Foreign Corrupt Practices Act of 1988: Clarification or Evisceration*, 20 LAW & POL'Y INT'L BUS. 441, 459 & n.94 (1989) (defense similar to that found in Foreign Gifts and Decoration Act and Congressional Rules to receive nominal gifts from foreigners; the House initially sought to stipulate an amount of \$ 5,000 or a specific value).

demanding situation when applicable written laws are absent. In another sense, one could argue that notwithstanding their legal status in the foreign country, if the payments could be considered customary then they could be deemed permissible.

3. *The Reasonable and Bona Fide Expenditures Affirmative Defense and the Routine Governmental Actions Exception*

The second affirmative defense that was included in the 1988 Amendments concerned illicit payments given as part of "reasonable and bona fide expenditures."¹⁵⁸ This affirmative defense concerns payments made as a "reasonable and bona fide expenditure" for particular expenses incurred by or on behalf of a foreign official. The expenses incurred by the foreign official must be directly related to either the promotion, demonstration or explanation of products or services or the execution or performance of a contract.¹⁵⁹ The examples include lodging and travel expenses.¹⁶⁰ Overall, no reported case law exists where an FCPA defendant used either of these affirmative defenses in the Act.¹⁶¹

In addition to these affirmative defenses, the Act includes a category of payments altogether exempt from scrutiny. Payments made to facilitate or expedite the performance of "routine governmental actions" by a foreign official are specifically exempted from the Act.¹⁶² Commonly known as grease payments, these types of expenditures for actions such as obtaining permits, government documents or mail services were exempted under provisions added in the 1988 amendments to the Act.¹⁶³ To qualify for this exception, the action must not involve any discretionary acts that would be the "functional equivalent of obtaining or retaining business for or with, or directing business to, any person."¹⁶⁴ This exception, however, has also not been interpreted in by any courts.¹⁶⁵

¹⁵⁸ 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2).

¹⁵⁹ H.R. Conf. Rep. No. 576, *supra* note 146, at 1955.

¹⁶⁰ *Id.*

¹⁶¹ William Pendergast, *Foreign Corrupt Practices Act: An Overview of Almost Twenty Years of Foreign Bribery Prosecutions*, 1 FOREIGN CORRUPT PRACTICES ACT REP. 102.

¹⁶² 15 U.S.C. §§ 78dd-1(b), 78dd-2(b).

¹⁶³ 15 U.S.C. §§ 78dd-1(f)(3), 78dd-2(h)(4).

¹⁶⁴ H.R. Conf. Rep. No. 576, *supra* note 146, at 1954.

¹⁶⁵ Poon, *supra* note 128, at 332.

D. *Ttokkap* under the FCPA

At first blush, a U.S. corporation giving a gift or payment such as *ttokkap* to a Korean official would most likely violate the FCPA. As stated earlier, under the Act, the central considerations surrounding *ttokkap* payments would be whether the giving of *ttokkap* was done "corruptly" and whether the expenditure was for the purpose of "influencing" an official's act or to induce the official to use his influence "to assist in the obtaining or retaining of business."¹⁶⁶ While not entirely clear, nevertheless based on the Eighth Circuit's interpretation in *Liebo* one may assert that given the expansive nature of the FCPA, *ttokkap* would most likely be considered as an expenditure made for the "purpose of influencing" an official's actions and therefore "corrupt" and prohibited under the Act.¹⁶⁷

Yet, it is important to note that although contributors may be charged for violating the Act for making *ttokkap* payments to a Korean public official, they might still avoid liability by possibly pleading the lawfulness affirmative defense. They would have to prove that the payments they made were permissible in Korea because they fall within the social courtesy exception under Korean case law. These defendants then could probably make a claim that the payments were "in accordance with the written laws" of Korea and therefore should escape liability under the lawfulness affirmative defense of the Act. If the FCPA had adopted the nominal payments affirmative defense the defendant's case would be even stronger. While challenging, the *ttokkap* payment example demonstrates that certain aspects of the FCPA could perhaps help to harmonize cultural differences into an broad and effective international consensus against overseas bribery.

V. CONCLUSION: INCORPORATING CULTURAL DIFFERENCES INTO AN INTERNATIONAL ANTI-BRIBERY AGREEMENT

Bribery remains a universal and historic problem that has plagued all countries through the ages. With the end of the Cold War and the increasing globalization of the world, efforts to limit such practices which

¹⁶⁶ 15 U.S.C. §§ 78dd-1(b), 78dd-2(b).

¹⁶⁷ See Laura Carlson Chen, *Corporate Counsel's Primer on the Foreign Corrupt Practices Act*, in 1 FOREIGN CORRUPT PRACTICES ACT REP. 101.011 (Sept. 1996) (questioning whether payments to develop good will would be applicable under the Act).

affect the integrity of the global market economy and international competition have gained renewed vigor. Few disagree that, if possible, all forms of bribery should be punished across the globe. Eventually, any international efforts against overseas bribery should culminate into a three-pronged effort. First, each country should strengthen their existing laws to circumscribe all forms of bribery.¹⁶⁸ Second, enforcement of these laws should be strengthened.¹⁶⁹ Third, countries should eventually adopt a forceful, global standard which would ultimately serve to provide an effective deterrent against international bribery.

The problem—as seen above with the single issue of what constitutes a permissible payment—remains how to achieve this in the current international environment. Deciding what amounts to an illegal payoff versus a permissible gift remains a contentious issue. As seen in the practice of giving *ttokkap*, countries have different perspectives regarding what constitutes an acceptable form of gift or payment. Many culturally ingrained practices exist that remain difficult to regulate but that does not necessarily mean that they can be immediately prohibited.

Trying to immediately force countries to unconditionally adopt an international consensus against overseas bribery would encounter strong resistance for fear that these culturally sensitive differences would be ignored. Cultural differences such as *ttokkap* nevertheless could be harmonized into an international framework in a different manner. First, by adopting such a provision as the “lawfulness affirmative defense” of the FCPA a certain degree of flexibility could be provided.¹⁷⁰ Because certain types of *ttokkap* are considered permissible in Korea, by including such an

¹⁶⁸ Dana Milbank & Marcus Brauchli, *Greasing Wheels*, WALL ST. J., Sep. 29, 1995 (on various ways U.S. companies circumvent FCPA); Zipser, *supra* note 48, at 14 (also showing how FCPA liability avoided by U.S. companies through use of junkets, gambling meccas, offsets, shopping sprees, expensive consultants, dummy charities, non existing construction projects); Poon, *supra* note 128, at 341-42 (describing various gray areas of the FCPA itself through the example of U.S. companies doing business in China).

¹⁶⁹ Sebastian Rotella, *IBM Scandal is Equal Parts Spectator Sport and Lesson Argentina*, L.A. TIMES, Aug. 11, 1996 (reporting Argentina's prosecution of IBM officials for bribery); *Ramos Orders Probe into Gov't Computer Deals*, ASIAN ECON. NEWS, May 20, 1996 (discussing Philippine efforts to end bribery); Poon, *supra* note 128, at 344 (“PRC apparently has adequate laws, but seems to inadequately enforce those laws”); Daniel Kwan, *Criminals and Corrupt Cadres Face “No Mercy”*, S. CHINA MORNING POST, Mar. 14, 1995, at 8; Scott Boylan, *Organized Crime and Corruption in Russia: Implications for U.S. and International Law*, 19 FORDHAM INT'L L.J. 1999, 2022-24 (1996) (noting efforts in Russia to end corruption); Zagaris, *supra* note 50, at 791 (discussing the “uneven and inconsistent” enforcement in the Middle East).

¹⁷⁰ Hall, *supra* note 3, at 300 (dismissed that this affirmative defense practically had “little significance”).

affirmative defense, countries wary of such antibribery legislation could be more easily persuaded.¹⁷¹ Moreover, if an international consensus included a "nominal payments" affirmative defense, as was proposed but abandoned in the 1988 amendments to the FCPA, countries concerned that cultural traditions might be ignored could be offered even greater comfort and would be far more receptive to the growing international efforts.

The inclusion of these types of affirmative defenses would attract more countries to an international consensus against overseas bribery. Such a consensus with these types of defenses that is joined by as many countries as possible might be viewed as an intermediary solution. Some may even view the inclusion of such affirmative defenses or exceptions as too great a loophole, but reaching a forceful, binding international consensus alone is a monumental step worth achieving in the ultimate goal of eradicating corruption in international business.

¹⁷¹ From a different perspective, foreign companies operating in Korea would be more receptive to the enactment of FCPA-type laws in their home country because they would also be on the same competitive playing field with local Korean companies which may pay *ttokkap*.