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Cultural Differences in the Crusade Against International Bribery

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by

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Cultural Differences in the Crusade Against International Bribery: Rice-Cake Expenses in Korea and the Foreign Corrupt Practices Act

"They say the gods themselves are moved by gifts" -- Euripides

"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

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I. Introduction

Throughout the course of history every country in the world has been beset with the problem of graft and corruption of its public officials. Bribery, in particular, endures as one of the most interminable forms of corruption.[1] Although many nations try their utmost to prohibit bribery and to punish contributors and participants, the crusade against bribery remains an unending endeavor.[2] With the rapid expansion of transnational trade and the growth of multinational corporations, the scope of bribery has expanded

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[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)(survey on bribery laws of world).

to take on an increasingly international dimension.[3]

Led by the U.S. and the OECD[4], many countries 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 U.S. singlehandedly pioneered such legislation when it enacted the Foreign Corrupt Practices Act ("FCPA") in 1977.[5] In 1994, after several years of careful consideration, the member countries of OECD followed suit and adopted a recommendation against the practice of international bribery.[6] Most recently, the Organization of the American States (OAS)[7],

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[3] Amy Borrus, *A World of Greasy Palms*, BUSINESS WEEK, Nov. 6, 1995; Stephen Handelman, *Corruption Inc.*, TORONTO STAR, July 13, 1996. See Christopher Hall, Comment, *The Foreign Corrupt Practices Act: A Competitive Disadvantage, But For How Long?*, 2 TUL. J. INT'L & COMP. L. 289, 291, n.7 (1994), for a list 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.

[5] 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) (1988 & Supp. V 1993)). *See generally* William Jennings & Craig A. Gillen, *Complying with the Foreign Corrupt Practices Act*, NAT'L L.J., Apr. 17, 1995, at C10.

[6] Recommendation of the Council of the OECD on Bribery in International Business Transactions [hereinafter 1994 OECD Recommendation], OECD Press Release, SG/Press 94(36), Paris, May 27, 1994. *See generally* David Buchan & George Graham, *OECD Members Agree to Action To Curb Bribery of Foreign Officials*, FIN. TIMES, Apr. 30, 1994, at 2.

[7] 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,

composed of several countries considered notorious for their corruption, passed a model anticorruption agreement.[8] These endeavors should act as a benchmark for future international undertakings against the practice of overseas bribery.

These international efforts, however, are encountering increasing resistance from many countries. While agreeing that egregious forms of influence buying should be prohibited, they argue that because countries inherit different legal traditions and customs a uniform international anti-bribery agreement, particularly one that respects all cultural differences, would be impossible to achieve.[9] These objecting countries also decry that forcing them to enact such laws represents no more than extraterritorial bullying that infringes upon their national sovereignty.[10] The universal adoption of expansive legislation such as the Foreign Corrupt Practices Act particularly raises these various concerns.

T.I.A.S. No. 6847.

[8] Inter-American Convention Against Corruption [hereinafter OAS Convention], Mar. 29, 1996, OEA/ser.K/XXXIV.1 CICOR/doc.14/96 rev.2.; *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).

[9] For a fascinating discussion of the effect of cultural differences from a political perspective see Samuel Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22 (Summer 1993) ("The great divisions among humankind and the dominating source of conflict will be cultural"), and *The West Unique, Not Universal*, 75 FOREIGN AFF. 28 (Nov./Dec. 1996).

[10] Hall, *supra* note 3, at 311.

This article examines why the current efforts need to be expanded and why a forceful international proclamation against bribery should be eventually adopted. It will offer suggestions as to how this might be achieved, particularly in view of the concerns toward respecting cultural differences. Considered by some a model to follow, the FCPA still raises many concerns. This article suggests, however, that certain aspects of the FCPA, if incorporated, may allay concerns expressed by certain countries, thereby facilitating the eventual establishment of a multilateral consensus.

The first section of this article will provide a general introduction of the increased international efforts to curb corruption and then will discuss the need for further international initiatives and the problems that these efforts are encountering. Through the example of "rice cake expenses" in Korea, the second section will describe how 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 with particular focus on how rice cake expenses might be considered. The last section will seek to show how the inclusion of FCPA-type affirmative defenses in a multilateral agreement may provide a mechanism by which the need to respect cultural differences may be respected. In conclusion, this article will reassert the importance and significance of adopting an effective international proclamation against bribery.

II. International Movements to Fight Corruption

Several leading international organizations are uniting to find ways to fight the practice of corruption 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.[11] Multilateral efforts are even being further pursued at the World Trade Organization and at such regional blocs such as the European Union, the Asia-Pacific Economic Cooperation (APEC) forum and the United Nations.

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 Organization of American States (OAS). On March 29, 1996, the thirty-four countries united to adopt the Inter-American Convention Against Corruption of the Organization of American

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[11] Beverley Earle, *The United States's 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. (London), June 5, 1994, at 7.

States ("OAS Convention").[12] The OAS Convention was the culmination of years of negotiations among the member countries. The OAS Convention not only criminalizes a number of corrupt acts, ranging from bribery to influence peddling in the domestic arena but, most significantly, it also extends to prohibit these practices in international business transactions.[13]

With respect to transnational bribery, Article VIII of the OAS Convention specifically states that each country shall prohibit its national 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 functions."[14] The OAS Convention is particularly meaningful because it under its provisions all thirty-four OAS member states are obligated to criminalize transnational bribery. This extraordinary action by the OAS demonstrates that the fight against international corruption is not confined to economically advanced countries and can even be achieved by developing nations.

Prior to this unprecedented breakthrough, the OECD remained the most prominent international organization seeking to curb the practice of overseas bribery. The OECD first

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[12] OAS Convention, *supra* note 8.

[13] *See generally* Zagaris, *supra* note 8.

[14] OAS Convention, *supra* note 8.

adopted the Recommendation[15] 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)."[16] 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.[17]

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.[18] Their research revealed that many of the OECD countries allowed bribes given to foreign public officials to

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[15] 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. 5(a)(i), art. 5(b).

[16] 1994 OECD Recommendation, *supra* note 6, at 2; *see generally Anti-Bribery: OECD Charts Progress In Effort to Eliminate Int'l Bribery*, Int'l Trade Daily (BNA), at d10 (May 22, 1996).

[17] *Id.* at 2-3.

[18] 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.

be considered tax deductible business expenses.[19] The CFA therefore agreed to a recommendation that OECD countries which currently allow such tax deduction should "reexamine" the practice and seek to deny such deductibility.[20] In addition, the CFA stressed that denying tax deductibility of bribes "may be facilitated by the trend to treat bribes to foreign public officials as illegal."[21]

Overall, 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."[22] Nevertheless, for all its efforts, all of the OECD initiatives remain non-binding propositions that do not require action by the member countries. Similarly, the OECD's undertakings do not specify what type of legislation that members should enact and contain various vague and questionable provisions. According to the

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[19] *Id.* at Annex II.B (although it depends on the circumstances, countries which allow deductibility include Austria, Belgium, France and Germany); *Review & Outlook: Competitive Bribing*, ASIAN WALL ST. J., Apr. 23, 1996, at 8; Frederick Studemann, *A Land Where Bribes are Tax-Deductible*, EUROPEAN, June 17-23, 1994, at 3.

[20] 1996 OECD Tax Recommendation, *supra* note 18, at 2.

[21] *Id.*

[22] Implementation of the Recommendation on Bribery in International Business Transactions (CIME) [hereinafter 1996 OECD Implementation], OCDE/GD(96)83 (1996), at 6; 1994 OECD Recommendation, *supra* note 6, at 4.

1994 OECD Recommendation, for instance, 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)[23] 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.[24]

The European Union (EU) has also taken measures to criminalize 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 connection with fraud against EU interests.[25] Another draft convention is also

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[23] 1996 OECD Implementation, *supra* note 22, at 9; Buchan & Graham, *supra* note 6.

[24] Earle, *supra* note 11, 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 22, at 9. Similarly, the 1994 OECD Recommendation does not clarify who is an applicable "foreign public official." *Id.* 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.* at 10.

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

being developed by the Italian Presidency of the EU which would criminalize bribery of EU public officials regardless of the financial interests of the EU.[26] The EU's effort to criminalize the bribery of EU officials and officials of national government is another important step in the criminalization of overseas bribery that occurs within a regional economic bloc.

In addition to these initiatives, the U.S. has been continuously pressuring various international organizations and entities to establish prohibitions against bribery and corruption in international business transactions.[27] At the United Nations Economic and Social Council, the United States proposed the adoption of the "United Nations Declaration on Corruption and Bribery in Transnational Commercial Activities" in July 1996, but progress at the U.N. still remains incremental.[28] This proposal follows a path of numerous failed attempts to mobilize the United Nations.[29] Most recently, the U.S. has been directing its efforts to compel the World Trade Organization to reach a global agreement to improve transparency and due process in the government

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[26] *Id.*

[27] Paul Lewis, *Nations Begin Following U.S. Curbs on Corruption*, N.Y. TIMES, Nov. 28, 1996, D2.

[28] BUSINESS AMERICA, Sept. 1, 1996, at 112. *See generally*, Mark Murphy, Note, *International Bribery: An Example of an Unfair Trade Practice*, 21 BROOK. J. INT'L L. 385, 393-394 (1995).

[29] *See* E.S.C. Res. 2041, U.N. ESCOR, 61st Sess, 2032d mtg., at 17, U.N. Doc. E/5883 (1976)(1976 agreement on illicit payments that was never adopted).

procurement process.[30]

B. 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. In the end, an international consensus joined by all the nations of the world would be the ultimate achievement. Nevertheless, some argue that exemplary intentions aside these international efforts are problematic, unnecessary and unfair.

One central problem is how to construct a multilateral consensus. While agreeing that egregious forms of influence buying should be prohibited, for instance, many are skeptical that a 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 all together in another. To create an international consensus to end the practice of bribery, these cultural differences must be respected. Any efforts against international bribery will remain a contentious issue unless

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[30] John Zarocostas, *U.S. Offers Inducement for Bids by Foreign Firms*, J. COMMERCE, Oct. 23, 1996.

the fears that these cultural differences might be ignored in the process are allayed.

Similarly, some countries will decry that forcing them to enact such legislation constitutes extraterritorial intimidation that infringes on their sovereignty.[31] 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.[32] Furthermore, while they will be cooperative, they do not feel they need to burden themselves with bribery that occurs overseas. 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. 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."[33]

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[31] Hall, *supra* note 3, at 311.

[32] 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.

[33] 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

For countries that follow the active nationality principle of jurisdiction, they may contend that they do not need such special legislation.[34] A strong argument can be made because these legal systems allow conduct to be punished wherever it occurs, inside or outside of their country.[35] Many civil law countries, for instance, follow the principle of active nationality which punishes persons based on their citizenship regardless of where they are located. Most common law countries such as the U.S., however, require such specific statutory authority as the FCPA to punish actions committed overseas by domestic persons. Hence, it is argued that U.S. companies are not competing on an uneven playing field because companies from the majority of such foreign countries already

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(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").

[34] *Extraterritorial Criminal Jurisdiction*, 3 CRIM. L.F. 441, 448 Council of Europe (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, *Mexico Prosecutes U.S. Suspects*, 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.

[35] Korea, for instance, follows the active nationality principle under Section 3 of the Criminal Code. Therefore, in Korea one could be punished for giving a bribe to a foreign public official under Section 357 of the Criminal Code which prohibits anyone from making an improper request while making a payment in relation to another person's duties.

have a legal basis to enforce their own domestic bribery law to overseas conduct.[36]

The OECD itself, for instance, reports that eight member countries have an existing legal basis for criminal prosecution of the bribery of foreign government officials.[37] 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.[38] 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."[39] On the basis of such principles, further action is unnecessary because

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[36] *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).

[37] Review of the Recommendation on Bribery in International Business Transactions [hereinafter 1995 OECD Review], Working Group on Bribery in International Business Transactions, OECD, DAFFE/IME/BR(95)9, June 8, 1995, at 4 (the eight countries excluding the U.S. are Canada, Hungary, New Zealand, Norway, Sweden, Switzerland, Turkey and United Kingdom).

[38] *Id.*

[39] *Id.* at 33.

existing laws that criminalize the bribery of domestic public officials can be applied to punish the bribery of foreign public officials.[40]

Companies from countries that have already adopted such international anti-bribery legislation, most notably those from the U.S., nevertheless believe that they are at a competitive disadvantage in the international arena.[41] They would argue that unless all 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.[42] The U.S. for

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[40] 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).

[41] U.S. losses from April 1994 to May 1995 to bribery amount to $ 45 billion according to 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).

[42] Gene Koretz, *Bribes Can Cost the U.S. an Edge*, BUSINESS WEEK, Apr. 15, 1996, at 30 (discussing James Hines study on U.S. corporate losses due to Act); Lucinda Horne, *U.S. Corruption Laws "Hurt" Firms in China*, S. CHINA MORNING POST, Nov. 11, 1992, at 1 (outlines harm to U.S. businesses outlined). *Contra* 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 (discusses how law is avoided

instance even claims that bribery and corruption in foreign countries act as a trade barrier.[43] According to U.S. 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."[44]

Therefore, many obstacles remain in the recent efforts to establish an international consensus against bribery. The benefits of an international consensus nevertheless are manifold and cannot be denied. A single unified framework will provide greater transparency and certainty for all companies with overseas operations. It will increase awareness and provide detailed standards for all to follow wherever they are doing business. It will provide a universal standard as to what types of payments or gifts are allowable and what the penalties are for giving or receiving them. More importantly, it will demonstrate a universal commitment by all participating countries to end the practice of international bribery.[45]

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and how the FCPA has been rarely enforced).

[43] *See* Murphy, *supra* note 28 (arguing that Section 301 of the Trade Act of 1974 should be used to combat international bribery).

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

[45] Hall, *supra* note 3, at 308-309 (describing the various benefits of the FCPA); Murphy, *supra* note 28, at 390-392.

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 these international efforts 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.[46] The diversity of opinion surrounding what constitutes impermissible action can be largely attributed to different cultural perceptions.[47]

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

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[46] Other forms of cultural gifts or payments include ch'onji, miui, misong, bokjon, semo, chungch'u. *Ttokkap and Bribery*, KYUNGHYANG SHINMUN (Seoul), July 11, 1995, at 3, (offers a general description of these various practices); Yi Kyut'ae, *Gongmuwon pujung paekgwa* [Public Official Corruption Encyclopedia], CHOSUN 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.

[47] *Editorial: The Greased Palm Issue*, WASH. POST, July 1, 1996, at A14 (discussing how cultural differences exists because some countries value gift-giving more than others). *Compare Review & Outlook: Is Corruption an Asian Value?*, ASIAN WALL ST. J., May 3, 1996, at 8 *and Letters to the Editor: The Self-Righteous Americans*, WALL ST. J., May 28, 1996, at A19 (criticizing above May 3, 1996 editorial).

food source in earlier times.[48] Ttokkap was largely offered for the sake of hospitality or as a natural token of gratitude for deeds done.[49] Through the centuries, the practice of giving gifts or payments such as ttokkap has become a customary practice, culturally ingrained into the fabric of Korean society.[50] It was generally given over the major holidays of the year, "Ch'usok" (Korean thanksgiving) and New Year's Day.[51] 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.[52] From a legal perspective, the

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[48] Yi Kyut'ae, *Ttokkap*, CHOSUN ILBO (SEOUL), Jan. 5, 1994, at 5; Yi Kyut'ae, *Ttokkap*, CHOSUN ILBO (SEOUL), Nov. 29, 1995, at 5.

[49] 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 is a gift-giving society where tokens are constantly exchanged in signs of respect").

[50] *See generally* O YONGGUN & YI SANGYONG, 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).

[51] *Id.*; Korea observes New Year's Day according to both the solar and lunar calendar.

[52] 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 yoronchosa* [1996 Corporate Survey Concerning Public Officials], Pujong bangji daech'aek uiwonhoe [Committee for the Prevention of Corruption] (June 1996).

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[53]

The Korean Criminal Code criminalizes the receiving and giving of bribes by public officials[54] under Section 129 through Section 133.[55] Officials that receive bribes will be sentenced to less than five years imprisonment or will be disqualified from government service for less than ten years for accepting bribes. In addition, Section 133 punishes the

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[53] 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*, in 1 Foreign Corrupt Practices Act Rep. (Business Laws, Inc.) 200.0141 (1996) [hereinafter FCPA Rep.].

[54] The term "public officials" is limited to those defined under Korean law and therefore would exclude foreign officials. Yi Chaesang, HYONGBOP KAKRON, at 624-627 (Bakyongsa 1996). Bribery of foreign officials, however, can be punished under Section 357. *Supra* note 35.

[55] 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 ($ 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 gyungjae bomjoe kajung ch'obol ae kwanhan bopnyul [Enhanced Punishment Law for Specific Economic Crimes], Law No. 3693, Dec. 31, 1983. Parties found 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 ($ 125,000) life sentence can be imposed.

promising, giving or expressing an intent to give bribes and provides that those guilty payors will be sentenced to less than five years imprisonment or less than twenty million won ($ 25,000) in fines.

More specifically, the main section of the Code, Section 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. To constitute bribery, therefore, Korean courts will generally seek to ascertain whether two factors have been met.[56] 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 procurement 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.[57] The Supreme Court nevertheless affords some flexibility in determining the extent of an official's duties, and states that the duties need not be those specifically stipulated by law but includes "the entire scope of official duties that one is responsible

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[56] KIM ILSU, HYONGBOP KAKRON [Criminal Law], at 653-58 (Bakyongsa 1996).

[57] 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 54. Section 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.

for according to one's rank."[58] 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 his sphere of influence.[59]

A second related element that courts will consider is if the payment was given "in consideration for" the official's duties. Payment must thereby be given in return for a favor or as a quid pro quo. Although these are all factors to consider, the Supreme Court has found that in determining 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.[60] According to the court, the payment, in other words, must amount to illegal compensation or improper profits for the actions of a public official.[61]

Under this statutory framework, the leading Supreme Court case on bribery, decided in 1984, outlined the frequently cited principles involved in the prosecution of

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

[59] *Id.*

[60] *Id.*

[61] KIM IlSU, *supra* note 56, at 656-57; YI CHAESANG, *supra* note 54, at 638.

bribery.[62] 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."[63] The Court next added that in punishing bribery the "central protective interest involved is the incorruptibility of official actions."[64] In conclusion, the Court stated that the question of bribery does not depend on whether the actual violation of one's duty occurs, on whether a favor was requested, or whether the bribe was received before or after an official decision.[65]

C. The Social Courtesy Exception

The Korean Supreme Court has acknowledged that a "social courtesy exception" exists under which certain payments or gifts made to officials may not be punishable as a bribe.[66] Under this exception, the courts have focused on the

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[62] Judgment of Sept. 25, 1984, *supra* note 58; See also Judgment of Sept. 5, 1995, Taebopwon, 95 Do 1269; Judgment of Mar. 22, 1994, Taebopwon, 93 Do 2962; Judgment of Feb. 28, 1992, Taebopwon, 91 Do 3364.

[63] Judgment of Sept. 25, 1984, *supra* note 58.

[64] *Id.*

[65] *Id.*

[66] Judgment of June 7, 1955, Taebopwon, 4288 Hyongsang 129; Judgment of July 11, 1955, Taebopwon, 4283 Hyongsang 97; Judgment of June 12, 1959, Taebopwon, 4290 Hyongsang 380; Judgment of Apr. 15, 1961, Taebopwon, 4290 Hyongsang 210; Judgment of Apr. 10, 1984, Taebopwon, 83 Do 1499; Judgment of June 14, 1996, Taebopwon, 96 Do 865; KIM IlSU, *supra* note 56,

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.[67] Parties that have attempted to use the social courtesy exception often times involve fees associated with meals, drinks and entertainment and gifts and contributions made in connection with a marriage or funeral ceremony.

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 courts appear to consider the social courtesy exception in the following manner. The primary emphasis appears to be whether the payment was sufficiently in consideration for action within an official's duties.[68] The courts will also consider whether the monetary payment or favor provided exceeds socially acceptable levels.[69] Some scholars argue that even if a moderate degree of consideration can be found

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at 657.

[67] KIM IlSU, *supra* note 56, at 657.

[68] Judgment of Apr. 10, 1984, *supra* note 66; Judgment of Sept. 14, 1982, Taebopwon, 81 Do 2774 (finding contributions of 50,000 won and 100,000 won for public official's son wedding by a friend of the official not bribery even though the payor's business was related to the official's duty); BAE JONGDAE, HYONGBOP KAKRON [Criminal Law], at 593 (Hongmunsa 1994); CHIN GYEHO, SHIN GO HYONGBOP KAKRON, at 686 (Daewangsa 1990); HWANG SANDOK, HYONGBOP KAKRON, at 54 (Bangmunsa 6th ed. 1989); CHONG YONGSOK, HYONGBOP KAKRON, at 48 (Bopmunsa 5th ed. 1983); SOH IlGYO, HYONGBOP KAKRON, at 320 (Bakyongsa 1982).

[69] Judgment of May 22, 1979, Taebopwon, 79 Do 303.

if the payment still remains within socially acceptable levels then it should not be considered a bribe.[70] 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.[71] 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. 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 ($ 112.50) and therefore exceeded socially acceptable levels.

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

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[70] KIM IlSU, *supra* note 56, at 657; YI CHAESANG, *supra* note 54, at 638 (Bakyongsa 1996); CHUNG SONGGUN, HYONGBOP KAKRON, at 700 (Bopjigsa 1996); YU KICH'ON, HYONGBOP KAKRON (HA), at 309 (Iljogak 1982).

[71] Judgment of May 22, 1979, *supra* note 69.

things, being treated to a 70,000 won ($ 88) dinner by a company director.[72] The court held that sufficient consideration existed because the payor requested a favor within the official's duties. The court stated that even though 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. 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 once before and once after the date of the dinner. 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.

D. Ttokkap and Current Legal Trends

Ttokkap payments must be examined under this overall interpretive structure.[73] 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

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[72] Judgment of Apr. 10, 1984, *supra* note 66. *See also* Judgment of June 14, 1996, Taebopwon, 96 Do 865 (defendant convicted for receiving a bribe of 200,000 won ($ 250) for favors for favors related to personnel hiring).

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

as being exempt from criminal punishment in Korea.[74] 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 consideration for any official acts. Questionable ttokkap has particularly 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.[75] Therefore, when initially given it lacks a nexus with a public official's actions. As for socially acceptable levels of permissible payments, unofficially, while it varies depending upon the position of the recipient, many believe that payments must exceed ten million won ($ 12,500) for it to be considered an impermissible payment that would create a sufficient nexus and therefore amount to a bribe.[76]

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.[77] Prosecutors have been still reluctant many

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[74] HWANG SANDOK, *supra* note 68, at 54; CHONG YONGSOK, *supra* note 68, at 48; SOH IlGYO, *supra* note 68, at 320; CHIN GYEHO, *supra* note 68, at 956.

[75] Ha T'aehoon, *supra* note 73.

[76] *Ttokkap: When it's Punished / Examples of the Handling of Public Officials*, KYUNGHYANG SHINMUN (Seoul), Nov. 12, 1995, at 3; Ha T'aehoon, *supra* note 73.

[77] 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*

times 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 which were adjudicated in lower courts have highlighted the issues surrounding the practice of giving ttokkap.

In the sensational slush fund scandal involving former President Chun Doohwan and Roh T'aewoo and over a dozen chaebol heads, the Seoul District Court applied a "comprehensive bribe theory" and found that payments given by these corporate leaders amounted to illicit payments.[78] Many of the payments, which over a several year period ranged by individual from 4 billion won ($ 5 million) to as much as 15 billion won ($ 18.8 million), were given around Ch'usok and New Year's Day without any specific requests associated with them, and heretofore would most likely have been considered as

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Bribe Are Part of Life: Probe of Ex-President Doesn't Touch Systematic Graft, WALL ST. J., Nov. 21, 1995, 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).

[78] Judgment of Aug. 26, 1996, Seoul Chibang bopwon [District Court], Chae 30 Hyungsabu, [30th Criminal Division], 95 Gohap 1228, 95 Gohap 1237, 95 Gohap 1238, 95 Gohap 1320, 96 Gohap 12, 96 Gohap 95. The other related actions in the consolidated trial concern 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 bopwon, 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 and these decisions are being appealed to the Supreme Court. Judgment of Dec. 16, 1996, Seoul Godung bopwon [High Court], Chae 1 Hyungsabu, 96 No 1892, 96 No 1893, 96 No 1894.

permissible ttokkap.[79]

The courts, however, emphasized a multitude of factors to find that taken as a whole the comprehensive nature of the payments amounted to illegal bribes. They cited the vastness of the payments, which in total amounted to 510 billion won ($ 638 million) between the two ex-presidents, and the continuous nature in which they were given. 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.

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. 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. Similarly, the court 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. Finally, contradicting

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[79] 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").

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. The High Court also suggested that as elected politicians even if the payments were considered good will contributions they were not solicited according to the Law Prohibiting Solicitations of Contributions and therefore must be viewed as illegal bribes.[80]

In sum, although in many instances no specific requests were made with the payments, the lower 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."[81] Testimony also existed that the senior government officials involved in managing the money also believed that the payments were suspect. Therefore the courts held that a sufficient consideration existed between the payments and official acts and the levels of the payment far exceeded socially acceptable standards.

Another illustrative case that recently ended must also be examined. Following accusations from a National Assemblyman from the leading minority party, on March 23, 1996, Chang Hakro, a presidential secretary in charge of

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[80] Kibugummojip gumjibop [Law Prohibiting Solicitations of Contributions], Law No. 224, Nov. 17, 1951.

[81] Judgment of Aug. 26, 1996, *supra* note 78.

personal matters for the current President Kim Youngsam, was arrested for receiving bribes and delivering favors in return.[82] It is interesting to note that in the process of indicting Chang for receiving 621 million won ($ 776,000) in bribes, the Seoul District Public Prosecutor's Office, however, specifically stated that they excluded a total of 2.1 billion won ($ 2.6 million) in additional payments given by various individuals because they were only viewed as "ttokkap" or "friendly allowance money."[83] These payments were apparently given without any specific expectation for anything in return and lacked a sufficient nexus. Chang's official duties had little direct relation to any policy making decisions because he merely acted as a personal steward to the President.[84] In addition, prosecutors apparently believed that because the sums were relatively small they were within the socially acceptable standards. Although the ttokkap

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[82] *See* Judgment of June 11, 1996, Seoul Chibang bopwon [Seoul District Court], Chae 11 Hyongsabu [11th Criminal Division], 96 Godan 3168; Judgment of Sept. 18, 1996, Seoul Chibang bopwon bonwon hapui 1 bu [First Court of Appeal for Appeals from Seoul District Court], 96 No 4146; *see generally* Ch'oe Byongmuk & Kim Kihun, *Chang Hakro gusuksukam* [Chang Hakro Arrested], CHOSUN 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.

[83] Yi Ch'angwon, *Chang's 2.1 billion won in Ttokkap Excluded from Indictment*, CHOSUN ILBO (Seoul), Mar. 31, 1996, at 31; Ch'oe Sanghun, *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").

[84] 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 with the President and his assistant minister level government ranking. Ha T'aehoon, *supra* note 73.

payments were excluded, Chang was nevertheless convicted and sentenced to 4 years for receiving bribes and ordered to pay a 700 million won confiscatory penalty.[85]

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 lower court decisions 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 and it is unclear what impact the decision will have on the law until the Supreme Court gives its final opinion. It should also be noted that the slush fund actions are being undertaken in a highly charged political atmosphere, tightly intertwined with the overall consolidated trial which also involves charges for treason and mutiny. If upheld one might easily argue that the payments in the slush fund trial only apply to the peculiar and special circumstances involved in that sensational trial.[86]

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

[86] *But cf.* Ch'oe Byongmuk, *Uihok jaeki 3 ilmanae shin sokch'uri* [Case handled quickly 3 days after suspicion aroused], CHOSUN 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).

The Chang case offers a clearer example of how ttokkap can be considered. Korea's courts have been careful to construct a legal framework which encompasses the cultural nature of gifts or payments such as ttokkap. 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 a Irregularities and Corruption Prevention Law that would prohibit all or gifts payments to public officials over a certain degree.[87] In April 1993, the current government also established the Committee for the Prevention of Corruption, an organization whose single mission is to combat corruption throughout all sectors of society.[88] Yet, the practice of sharing offerings such as ttokkap overall continues to remain a socially prevalent and acceptable cultural practice. Countries such as Korea therefore still need to be allowed to shape their own penal standards as befits their socio-cultural heritage.

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[87] Article 12 of proposed law. *Puchong pup'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], BOPNYUL SHINMUN [Legal Times] (Seoul), Apr. 11, 1996, at 1.

[88] *Pujong bangji daech'ek uiwonhoe paljok* [Committee for the Prevention of Corruption], Joong-ang Ilbo (Seoul), Apr. 9, 1993, at 2.

IV. The Foreign Corrupt Practices Act

A. History of FCPA

The Foreign Corrupt Practices Act 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.[89] In a study commissioned as a result of these incidents, the Senate and the Securities Exchange Commission (SEC) had found that U.S. corporations were making staggering amounts of influence-buying payments to foreign government officials.[90] 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 U.S. enacted the FCPA to prohibit U.S. concerns from participating in corruption overseas.

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.

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[89] 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.

[90] 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* U.S. v. Blondek, 741 F. Supp. 116, 117-118 (N.D. Tex. 1990)(discussing background of enactment of Act).

First, it prohibits certain types of payments to certain foreign officials.[91] Second, the Act requires U.S. concerns to meet exacting transparency standards by forcing them to comply to stringent accounting and reporting standards.[92] Violators of the Act can be subject to criminal and civil penalties, including fines, imprisonment and injunctive relief.[93] To date, the U.S. remains the only country in the world with laws that specifically punish the corruption of foreign government officials.[94] 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

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[91] 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).

[92] 15 U.S.C. § 78m(a), (b).

[93] Depending on the type of violation, the Department of Justice or the SEC may bring criminal or civil charges. 15 U.S.C. §§ 78dd-1(d), 78ff(b), (c). 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, Jan. 28, 1995, at 35; Pasztor, *supra* note 89. *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).

[94] 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. (Business Laws, Inc.) 103.023 (Feb. 1996); See 1995 OECD Review, *supra* note 37, at 9-10. *Contra* 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).

countries to adopt a similar international agreement.[95]

B. Anti-Bribery Provisions

Under the FCPA's anti-bribery provision, persons[96] will violate the act if they meet the following criteria.[97] First, the actions involved must be done "corruptly."[98] Second, the expenditure must not be for the purpose of "influencing" any official act or inducing the official to use his influence "to assist in the obtaining or retaining of business." One of the few cases describing these two requirements involved Richard Liebo, an executive of a military equipment company, who was convicted for violating

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[95] 15 U.S.C. §§ 78dd-1; *U.S. is Investigating if an Ex-Boeing Unit Paid Bribes for a Job*, WALL ST. J., May 13, 1996, at A8 (for examples of recent FCPA enforcement efforts).

[96] The Act broadly divides applicable persons into either "issuers" or "domestic concerns." Issuers are those entities having a class of securities registered under Section 12 or those required to file reports under Section 15(d) of the 1934 Securities Exchange Act. 15 U.S.C. §§ 78dd-1(a). 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.

[97] 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).

[98] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a); S. Rep. No. 114, 95th Cong., 1st Sess. 4 (1977), *reprinted in* 1977 U.S.C.A.N. 4098, 4108.

the statute 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 Niger Air Force official in charge of maintenance.[99] Liebo claimed that he purchased the tickets 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.[100]

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 the Liebo's company won its third lucrative contract with the Niger Air Force. 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. Liebo himself it was noted had classified the plane tickets as "commission payments" for accounting purposes.[101] Therefore, based on these and other factors, the court held that a jury could reasonably find that Liebo's purchase of the tickets was given "corruptly" to influence the Niger government's contract approval process.[102]

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[99] United States v. Liebo, 923 F.2d 1308 (8th Cir. 1991).

[100] *Id.* at 1311.

[101] *Id.*

[102] *Id.*

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. Under this knowing standard, even a "high probability of the existence" that bribery has occurred will be deemed sufficient.[103] In addition, the act must use the mail or any means of interstate commerce. Payments arranged by a foreign agent acting solely on behalf of a foreign subsidiary, for instance, in which no connection exists with the parent company in the U.S. would be exempt from the statute.[104] Lastly, these expenditure may not be given to any foreign official, foreign political party or any candidate for foreign political party or to intermediaries who will subsequently offer it to such a person.

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. The legislative history explains that actions committed by an individual on its own initiative will therefore not bind the corporation.[105] Congress stated that in determining when an individual is

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[103] 15 U.S.C. §§ 78dd-1(f)(2), 78dd-2(h)(3). *See generally* Poon, *supra* note 97, at 337-338 (describing knowledge concerns when using overseas agent or when a joint venture partner).

[104] S. Rep. No. 114, *supra* note 98, at 4109; see also Poon, *supra* note 97, at 337.

[105] S. Rep. No. 114, *supra* note 98, 4108.

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. Payments arranged by a foreign national acting solely on behalf of a foreign subsidiaries, however, in which no connection exists with the U.S. parent would be exempt from the statute.[106] In addition, the Act prohibits companies from indemnifying their officers and employees for liability arising under the Act.[107]

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 statue. 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.[108]

i. The Lawfulness Affirmative Defense

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[106] *Id.* at 4109; H.R. Conf. Rep. 831, 95th Cong., 1st Sess., at 14 (specifically excluded foreign subsidiaries of U.S. companies from scope of Act).

[107] 15 U.S.C. §§ 78ff(c)(1)-(3), §§ 78dd-2(g)(1)-(3).

[108] 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.

First an affirmative defense exists if the "payment, gift, offer or promise of anything of value," otherwise illegal under the Act, is in accordance with the written laws of the foreign country. Unfortunately, no published case law and little legislative history exists that provides interpretation of this affirmative defense.[109] The legislative history provides only general clues as to how this affirmative defense was established and how it should be interpreted.[110]

According to the House Conference Report, 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. 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. This therefore further qualifies

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[109] The only reference that could be found was in U.S. v. Blondek, 741 F. Supp. 116, 119, 121 (N.D. Tex. 1990)(making a passing reference while discussing Congress's intent to exempt foreign officials from the Act).

[110] H.R. Conf. Rep. No. 576, *supra* note 108, at 1954-1955.

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. 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.[111] Overall, it appears that under this affirmative defense, lawfulness may be implied, and the absence of written laws may be a factor in implying, but it must nevertheless be implied from written statutes or case law.

ii. 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 Committee but was excluded from the final 1988 amendments to the Act. This "nominal payment" affirmative defense would have explicitly created a 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

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[111] 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).

in the context of the type of transaction involved, local custom, and local business practices."[112]

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.[113] Nominal payments therefore must instead independently seek to meet the standards of the lawfulness affirmative defense. The counterargument 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 U.S., it is reported that House advocates found this cultural provision too broad a loophole.[114] Therefore, the overall

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[112] 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 108, at 1955.

[113] 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).

[114] *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.

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 interpretation is 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 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.

iii. 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."[115] This affirmative defense concerns payments made as a "reasonable and bona fide expenditure" for particular expenses incurred by

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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).

[115] 15 U.S.C. §§ 78dd-1(c)(2), 78dd-2(c)(2).

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.[116] The examples include lodging and travel expenses. Overall neither of these two affirmative defenses in the Act have not been used by any FCPA defendants.[117]

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.[118] 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.[119] 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."[120] The implementation of this exception, however, has not been

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[116] H.R. Conf. Rep. No. 576, *supra* note 108, at 1955.

[117] William Pendergast, *Foreign Corrupt Practices Act: An Overview of Almost Twenty Years of Foreign Bribery Prosecutions*, FCPA Rep. 102.004.

[118] 15 U.S.C. §§ 78dd-1(b), 78dd-2(b);

[119] 78dd-1(f)(3), 78dd-2(h)(4).

[120] H.R. Conf. Rep. No. 576, *supra* note 108, at 1954.

interpreted in by any courts.[121]

D. Ttokkap under the FCPA

Under the FCPA, a U.S. corporation giving a gift or payment such as ttokkap to a Korean official would most likely violate the Act. 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." While not entirely clear, nevertheless based on the Eighth Circuit's interpretation in *Liebo* one may assert that under 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 illegal under the Act.[122]

Yet, it is most important to note that although contributors may be charged for violating the Act for making ttokkap payments they could still avoid liability by possibly pleading the lawfulness affirmative defense. If they could

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[121] Poon, *supra* note 97, at 332.

[122] See Laura Carlson Chen, *Corporate Counsel's Primer on the Foreign Corrupt Practices Act*, in 1 Foreign Corrupt Practices Act Rep. (Business Laws, Inc.) 101.021 (Sept. 1996) (questioning whether payments to develop good will would be applicable under the Act).

prove that the payments were within the social courtesy exception in Korea, then they could probably make a claim that the payments were "in accordance with the written laws" of Korea and therefore subject to the lawfulness affirmative defense of the Act.

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 affect the integrity of the global market economy and international competition have gained renewed vigor. Few disagree that bribery should be punished at all times. Eventually, these international efforts should culminate into a three-pronged effort. First, each country should strengthen their existing laws to circumscribed all forms of bribery.[123] Second, enforcement of these laws should be strengthened.[124] Third, countries should

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[123] Dana Milbank & Marcus Brauchli, *Greasing Wheels*, WALL ST. J., Sep. 29, 1995 (on various ways U.S. companies circumvent FCPA); Zipser, *supra* note 42, 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 97, at 341-342 (describing various gray areas of the FCPA itself through the example of U.S. companies doing business in China).

[124] Sebastian Rotella, *IBM Scandal is Equal Parts Spectator Sport and Lesson Argentina*, L.A. TIMES, Aug. 11, 1996 (reporting Argentina's prosection of IBM officials for

eventually adopt a global standard which would serve to provide an additional deterrent against international bribery.

Such a single unified framework will provide greater transparency and certainty in international business such that the most capable parties will be awarded and thereby provide the best service or products. It will also provide a more definite standard as to what are impermissible payments and what the penalties are for giving or receiving them. It will increase awareness and provide detailed standards for all to follow wherever they are doing business in the global theater. Perhaps, most importantly, it will demonstrate a universal commitment to end the practice of international bribery.

The problem -- as seen above with the single issue of what constitutes a permissible payment -- remains how to achieve this in an 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 what constitutes an acceptable form of gift or payment. Many culturally ingrained practices exist that may be difficult to

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bribery); *Ramos Orders Probe into Gov't Computer Deals*, ASIAN ECONOMIC NEWS, May 20, 1996 (discussing Philippine efforts to end bribery); Poon, *supra* note 97, 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 53, at 791 (discussing the "uneven and inconsistent" enforcement in the Middle East).

regulate but that does not mean that they can be immediately prohibited.

Trying to force countries to adopt an international consensus that contains the main features of the antibribery provisions of legislation such as the FCPA would encounter strong resistance for fear that these culturally sensitive differences would be ignored. Cultural differences such as ttokkap nevertheless could be respected 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.[125] Because certain types of ttokkap are considered permissible in Korea, by including such an affirmative defense, countries wary of such legislation as the FCPA could be more easily persuaded.[126] 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 these international efforts.

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[125] Hall, *supra* note 3, at 300 (dismissed that this affirmative defense practically had "little significance").

[126] 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.

The inclusion of these types of affirmative defenses would attract more countries to an international consensus against overseas bribery. Such a consensus 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 an international consensus alone is a monumental step worth achieving in the ultimate goal of eradicating corruption in international business.