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Fair Government at Home and Abroad: Improving Korea's Foreign Bribery Prevention Act

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Abstract

The globalization of business transactions in recent years has drawn greater attention to the problem of foreign bribery. Like domestic bribery, bribery of foreign public officials can lead to a number of adverse consequences, including loss of economic efficiency and government revenue, diminished public trust, and a culture of corruption. To prevent such adverse consequences, anti-foreign bribery statutes, such as the United States' Foreign Corrupt Practices Act, the Organisation for Economic Co-operation and Development's Anti-Bribery Convention, and Korea's Foreign Bribery Prevention Act, are crucial in ensuring the fair and impartial exercise of government functions around the world.

This Article thus examines Korea's legal regime against outbound foreign bribery, the Foreign Bribery Prevention Act (FBPA). In particular, this Article notes three major areas of concern in the FBPA. First, the definition of a "foreign public official" is too vague and unpredictable, particularly where state-owned enterprises are concerned. Second, a statutory defect in the FBPA means that foreign bribery involving a third-party beneficiary is technically not prohibited by the FBPA. Third, the authorized punishment under the FBPA can be insufficient. In order to improve the effectiveness of the FBPA, this Article proposes a set of legislative solutions, including utilizing state control and preferential treatment as a proxy for the exercise of a public function, expanding the scope of the anti-bribery provision to cover bribery with a third-party beneficiary, and authorizing debarment for FBPA violators.

KEY WORDS: bribery, corruption, debarment, the Foreign Bribery Prevention Act, the Foreign Corrupt Practices Act, the OECD Anti-Bribery Convention, public official, third-party bribery

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Introduction

With the globalization of the modern economy, the dark underbelly of business transactions has globalized as well: bribery. While bribery used to be confined to *quid pro quo* transactions between a domestic briber and a domestic public official, transnational or foreign bribery, in which one country's individual or business pays a bribe to another country's public official to obtain favors for its business abroad, has become more prevalent. The perverse effects of foreign bribery are just as severe as those of domestic bribery, such as diminished public trust in government, loss of public revenue, and the spread of a culture of corruption.

The domestic nature of criminal prosecution, however, makes the prohibition of foreign bribery particularly difficult. For one, many countries' bribery statutes only prohibit bribery of their own public officials, so individuals or businesses that bribe a foreign official are not subject to such anti-bribery statutes (although a domestic public official bribed by a foreign citizen is subject to such anti-bribery law). Worse, while a state has vested interest in prohibiting inbound transnational bribery (bribery of domestic public officials by a foreign citizen), incentives are much weaker in preventing outbound transnational bribery (bribery of foreign public officials by a domestic citizen), as the perverse effects of such bribery appear to be largely borne by the foreign country. In fact, a state may even turn a blind eye to outbound transnational bribery, as it can help that state's citizens win business abroad.

Recognizing this limitation, in 1977 the United States took the first step in combating outbound transnational bribery by enacting the Foreign Corrupt Practices Act (FCPA), which punishes bribery of foreign officials. Following this lead, the Organisation for Economic Co-operation and Development (OECD) adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (commonly called OECD Anti-Bribery Convention) in 1997. As a signatory to the OECD Anti-Bribery Convention, Korea has also adopted an implementing statute, the Act on Combating Bribery of Foreign Public Officials in International Business Transactions, or the Foreign Bribery Prevention Act (FBPA), outlawing outbound transnational bribery.

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Twenty years after the FBPA came into force, however, there remain a number of gaps in Korea's efforts to combat outbound transnational bribery. Based on comparisons with the FCPA and the OECD Anti-Bribery Convention, as well as drawing on recent cases and other Korean statutes, this Article examines three of such points of concern. First, the definition of a "foreign public official" under the FBPA can be vague and problematic, particularly in the context of state-owned enterprises. Second, as a result of a statutory defect, the FBPA does not adequately address outbound transnational bribery with a third-party beneficiary. Lastly, the penalties authorized under the FBPA and imposed in practice can be insufficient to deter illegal behavior. In response, this Article proposes a package of solutions, including using state control and preferential treatment as proxy for the exercise of a public function in the definition of a "foreign public official," expanding the scope of the prohibited bribery of a third party under the FBPA to include third-party *beneficiaries* (in addition to third-party *intermediaries*), and authorizing debarment for individuals and businesses convicted of FBPA violations in government contracting.

The rest of this Article proceeds as follows. Part I discusses the historical process that resulted in the current legal regime against outbound transnational bribery, including the FCPA in the United States, the OECD Anti-Bribery Convention, and the FBPA in Korea. Part II examines legal, social, and economic arguments for anti-bribery laws and highlights the need for an effective legal regime against foreign bribery. In light of this need, Part III then addresses three ways in which Korea's FBPA can be improved. Conclusion follows.[1]

I. The Genesis of the Prohibition on Foreign Bribery

The prohibition on bribery, as a concept protecting the integrity of the state system, is typically a national concept. As noted above, traditionally,

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1) While foreign bribery can encompass both inbound transnational bribery and outbound transnational bribery, since the focus of this Article is with outbound transnational bribery, "foreign bribery" will be used interchangeably with "outbound transnational bribery."

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many countries have prohibited only the bribery of their *own* public officials, Korea being no exception, so this prohibition only covered domestic bribery (the bribery of domestic officials by domestic actors) and inbound transnational bribery (the bribery of domestic officials by foreign actors). Thus, the recent expansion of bribery laws to cover outbound transnational bribery is a remarkable development. In this Part, we survey the development of the prohibition against outbound transnational bribery, from the genesis of the concept in the United States' FCPA to its internationalization in the OECD Anti-Bribery Convention to Korea's implementation and enforcement of the OECD Anti-Bribery Convention.

1. U.S. Foreign Corrupt Practices Act

The prohibition on outbound transnational bribery originated in the United States' Foreign Corrupt Practices Act of 1977 (FCPA), which itself was a response to the bribery, corruption, and slush fund scandals of the 1970s involving various prominent American companies. After the Watergate scandal, in which the Office of the Special Prosecutor found that a number of large corporations had established slush funds for political contributions, the U.S. Securities and Exchange Commission (SEC) conducted a study of American companies' use of corporate funds for illicit payments, both domestic and foreign.[2] In its study, the SEC found widespread use of corporate funds for "questionable or illegal foreign and domestic payments and practices."[3] Of the ninety-five companies examined by the SEC that made a disclosure regarding questionable or illegal payments, fifty-four reported payments to foreign officials, seventeen reported foreign political payments, and twenty-nine reported foreign sales-type commissions.[4]

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2) David Lawler, Frequently Asked Questions in Anti-Bribery and Corruption 8 (2012) ("During his investigation of corporate payments to Nixon's election campaign, the Watergate special prosecutor found evidence of hidden 'slush funds' being set up by some of the US's largest companies, including such stalwarts as 3M, American Airlines and Goodyear Tire & Rubber."); U.S. Sec. & Exch. Comm'n, Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices (1976).

3) *Id.* at 1.

4) *Id.* at 38-39. A number of companies reported payments that fall into multiple

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Moreover, several high-profile scandals involving American companies' bribery of foreign officials drew attention to the issue of outbound transnational bribery. In 1976, it was revealed that the aerospace company Lockheed Corporation had paid bribes totaling tens of millions of dollars to high-ranking officials in West Germany, Italy, the Netherlands, and Japan for nearly two decades in connection with its aircraft sales.[5] The revelation led to the resignation of Italy's president, a crisis for Japan's ruling party, and embarrassment for the Netherlands' Prince Consort. Likewise, in a scandal dubbed "Bananagate," United Brands was found to have paid Honduran President Oswaldo Lopez Arellano $1.2 million in bribes in exchange for a lower banana export tax, leading to Lopez's overthrow and the suicide of United Brands' CEO.[6] A number of other scandals involving prominent companies such as Gulf Oil and Northrop were revealed around the same time.[7]

These scandals prompted the U.S. Congress to action. A number of proposals were put forth to remedy the problem of foreign bribery, including denying certain tax benefits to bribers,[8] denying Overseas Private Investment Corporation benefits,[9] requiring disclosure of illicit foreign payments,[10] and directly outlawing foreign bribery.[11] Of these proposals, the disclosure approach and the criminalization approach became the most favored, and considering the criminalization approach to be "the most effective deterrent, the least burdensome on business, and no more difficult to enforce than disclosure," the U.S. Congress opted for the criminalization approach.[12] Thus, with Congressional support for the criminalization of

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categories. *Id.*

5) Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 Ohio St. L.J. 929, 934 (2012).

6) *United Brands Bribe is Laid to Honduran*, N.Y. Times, May 16, 1975, https://www.nytimes.com/1975/05/16/archives/united-brands-bribe-linked-to-honduran-honduran-official-named-in.html.

7) Koehler, *supra* note 5, at 977.

8) *Id.* at 981 [citing S. 3150, 94th Cong. (1976)].

9) *Id.* [citing H.R. 14681, 94th Cong. (1976)].

10) *Id.* at 988-96.

11) *Id.* at 996-98.

12) H.R. Rep. No. 95-640, at 6 (1977).

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outbound transnational bribery, the FCPA was enacted in December 1977.

In passing the FCPA, the U.S. Congress cited several rationales. First, it noted bribery's distortive effect on competition between U.S. companies; the House Report stated, "[Foreign bribery] short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business."[13] Second, Congress focused on the foreign policy problems caused by the revelations of outbound transnational bribery by American companies. The perception that American companies are buying influence abroad would erode the public image of the United States in other countries and hamstring its foreign policy. As an example, Congress highlighted how the fallout from the Lockheed scandal drove a wedge between the United States and Japan and destabilized the government in Italy.[14] Lastly, Congress emphasized how the law could help American companies tie their hands and refuse bribery demands from foreign officials.[15]

As passed in 1977, the FCPA comprised two main parts. The first, commonly called the "books and records provision," mandated that all registered securities issuers "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer" and "devise and maintain a system of internal accounting controls" sufficient to ensure that transactions are executed and recorded correctly.[16]

The second part—the anti-bribery provisions—prohibited corruptly offering, paying, promising to pay, or authorizing payment of any money or anything of value to a foreign official for the purposes of "influencing

13) *Id.* at 5-6. Likewise, the Senate Report noted, "Foreign corporate bribes also affect our domestic competitive climate when domestic firms engage in such practices as a substitute for healthy competition for foreign business." S. Rep. No. 95-114, at 4 (1977).

14) H.R. Rep. No. 95-640, at 5.

15) The House Report cited Gulf Oil's former chairman, Bob Dorsey, who stated, "If we could cite our law which says we just may not [pay bribes], we would be in a better position to resist these pressures [to pay bribes] and refuse those requests." *Id.* at 5.

16) Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 102, 91 Stat. 1494, 1494-95.

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any act or decision of such foreign official in his official capacity" or "inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality," in each case in order to assist such offeror "in obtaining or retaining business for or with, or directing business to, any person."[17] Additionally, offering, paying, promising, or authorizing payment of such a bribe to a third party "while knowing or having reason to know that all or a portion of such money or thing of value will be offered" to a foreign official were prohibited to prevent any circumvention of the bribery provision by inserting a third-party intermediary between the payer of the bribe and the ultimate recipient.[18]

For purpose of the anti-bribery provisions, the covered persons and entities included "issuers,"[19] "domestic concerns,"[20] officers, directors, employees, agents of such issuers or domestic concerns, and stockholders acting on behalf of such issuers or domestic concerns. Prohibited recipients of such bribes included "foreign official[s]" and "foreign political part[ies] or official[s] thereof, or any candidate for foreign political office."[21] In particular, a "foreign official" included employees of and any person acting officially on behalf of a foreign government or any "department, agency, or instrumentality" of such foreign government.[22]

Since its original enactment, the FCPA has been subject to two major amendments. The first, in 1988, amended the books and records provision

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17) *Id.* §§ 103-104. Strictly speaking, the prohibited activity is using "the mails or any means or instrumentality of interstate commerce corruptly in furtherance of" such bribery. *Id.* § 103(a).

18) *Id.* § 103(a).

19) An "issuer" is an entity that has a class of securities registered under Section 12 of the Securities Exchange Act or that is required to make periodic filings and reports under Section 15(d) of the Securities Exchange Act. *Id.* § 103(a).

20) A "domestic concern" includes: (a) American citizens, nationals, or residents; and (b) a corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that has its principal place of business in the United States or that is organized under the laws of a state, territory, possession, or commonwealth of the United States. *Id.* § 104(d)(1).

21) *Id.* § 103(a).

22) *Id.*

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to state that a criminal penalty would only be imposed for *knowingly* circumventing or failing to implement a system of internal controls or *knowingly* falsifying books and records.[23] The 1988 amendment also provided that an issuer is only required to "proceed in good faith to use its influence" to cause the companies in which it holds a minority stake to maintain an adequate internal control system.[24] With respect to the anti-bribery provision, the 1988 amendment: (1) refined the purpose element of foreign bribery to match domestic bribery; (2) replaced the "knowing or having reason to know" standard for third-party bribery to a "knowing" standard, which is defined as actual knowledge or firm belief that a circumstance exists or is "substantially certain to occur" and which is satisfied if a person is "aware of a high probability" of the circumstance's existence;[25] (3) provided an exception for facilitating or expediting payments for the "performance of a routine government action"; and (4) added affirmative defenses for any payments legal in such foreign country and for reasonable and bona fide expenditures.[26] Thus, the 1988 amendments, while maintaining the core of the books and records provision and the anti-bribery provision of the FCPA, loosened its restrictions at the margins.

The second amendment to the FCPA, in 1998, made a number of changes to the FCPA to conform to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (commonly called OECD Anti-Bribery Convention).[27] It added "securing any improper advantage" to the purpose prong of the anti-bribery provision and expanded the scope of foreign officials to include officials of public international organizations.[28] Most importantly, the 1998 amendment substantially expanded the scope of U.S. jurisdiction over foreign bribery. First, a U.S. issuer or a U.S. person could be prosecuted for an act outside the U.S. in furtherance of foreign bribery, regardless of

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23) Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5002, 102 Stat. 1107, 1415.

24) *Id.*

25) *Id.* § 5003(a), (c).

26) *Id.*

27) The OECD Anti-Bribery Convention is discussed in greater detail in Part I.2.

28) International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, §§ 2-3, 112 Stat. 3302, 3302-05.

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whether the mails or instrumentalities of interstate commerce are used. Second, a person other than an issuer or a domestic concern could be prosecuted for an act in furtherance of foreign bribery, if said person committed such an act while in the United States.[29] Thus, as a result of the 1998 amendment, as currently in effect, the FCPA covers a wide range of actors. Issuers and domestic concerns are subject to the FCPA anywhere in the world, and non-U.S. persons are subject to the FCPA to the extent they commit an act in furtherance of a foreign bribery while in the United States.[30] This expansive scope of the FCPA, coupled with the United States' central position in international business transactions, has made the FCPA a key element in the prohibition of foreign bribery.

2. OECD Anti-Bribery Convention

Particularly for the decade following its enactment, the FCPA came under heavy criticism from U.S. businesses for creating an uneven playing field between American businesses and their foreign counterparts. As a result of the FCPA, American businesses were prohibited from offering bribes to foreign officials, but foreign businesses were not. American businesses pushed for the rollback or repeal of the FCPA, arguing that they could not compete with their foreign counterparts while subject to the FCPA's anti-bribery provisions.[31]

In 1988, Congress responded to the complaints of the American industry not by repealing the FCPA (although, as noted above, it was rolled back somewhat), but by pushing for the export of the FCPA's ideals around the world. The 1988 amendment to the FCPA directed the U.S. President to begin negotiations with OECD member countries for an international agreement regarding the prohibition of foreign bribery.[32] If the FCPA put American businesses at a disadvantage by prohibiting their foreign bribery

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29) *Id.* § 4.

30) 15 U.S.C. §§ 78dd-1, -2, -3 (2018).

31) Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 674 (2004).

32) Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003(d), 102 Stat. 1107, 1424-25.

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but not their foreign competitors', then the United States would seek to even the playing field by targeting foreign companies' bribery as well.

Although the Bush administration in the United States began its push for an international agreement and the OECD also established an "Ad Hoc Group on Illicit Payments" to study the problem of international bribery, progress was slow in the initial years.[33] Negotiations were conducted mostly at the staff level, and the studies performed by the OECD's Ad Hoc Group were limited to comparative reviews and feasibility studies, with few concrete commitments.[34]

The negotiations for an international agreement, however, received a boost in the early 1990s as a result of a confluence of several factors. In contrast to the Bush administration, the Clinton administration (elected in 1992) in the United States made an international agreement on foreign bribery a priority, elevating the negotiations to the cabinet level.[35] Additionally, several high-profile FCPA enforcement actions, such as one against General Electric in 1991 with a monetary sanction of $68 million, convinced American businesses that a repeal of the FCPA was not foreseeable, leading them to push instead for the internationalization of the prohibition against foreign bribery.[36] Outside the United States, a growing awareness of corruption as an impediment to economic development produced an environment suitable for an international agreement on foreign bribery.[37]

Aided by these factors, in 1994, the OECD Ministerial Council adopted the Recommendation of the Council on Bribery in International Business Transactions. It recommended that "Member countries take effective measures to deter, prevent and combat the bribery of foreign public

33) THE OECD CONVENTION ON BRIBERY: A COMMENTARY 14-15 (Mark Pieth, Lucinda A. Low & Nicola Bonucci eds. 2d ed. 2014); Tarullo, *supra* note 31, at 677; INT'L MONETARY FUND, OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 3 (2001).

34) THE OECD CONVENTION ON BRIBERY: A COMMENTARY, *supra* note 33, at 15; Tarullo, *supra* note 31, at 677.

35) *Id*.

36) *Enforcement Actions*, STAN. L. SCH. FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, http://fcpa.stanford.edu/enforcement-actions.html (last visited June 7, 2019).

37) Tarullo, *supra* note 31, at 675; INT'L MONETARY FUND, *supra* note 33, at 3.

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officials" and that "each Member country . . . take concrete and meaningful steps to meet this goal."[38] In addition, the OECD established a Working Group on Bribery in International Business Transactions to make further progress in this area. While it contained few concrete terms, the 1994 Recommendation was a symbolic gesture of international commitment.

As a result of continued progress, the 1994 Recommendation was revised three years later to contain a specific recommendation that member countries criminalize foreign bribery.[39] The revised 1997 Recommendation also contained some agreed-upon common elements of the crime of foreign bribery, essentially setting forth a uniform core standard while leaving the implementation to individual countries.[40] After frenzied negotiations over the course of the year, the ideas contained in the revised 1997 Recommendation formed the basis for the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was signed in December 1997.[41]

The OECD Anti-Bribery Convention, like the 1997 Recommendation, took a "collective unilateralism" approach to combating foreign bribery.[42] The Convention set forth the minimum standards to be followed in criminalizing foreign bribery, but was not self-executing in that each member state was responsible for its implementation following their respective domestic legal frameworks. Whether it be the revision or enactment of a separate statute (as is the case in the United States and in Korea) or expansion of the scope of the offense of bribery (as is the case in Germany), each state was left to choose its method of implementation so long as that method met the minimum standards of the Convention. If a

38) Recommendation of the Council on Bribery in International Business Transactions, para. III, OECD/LEGAL/0276 (May 27, 1994).

39) Revised Recommendation of the Council on Combating Bribery in International Business Transactions, para. III, OECD Doc. No. C(97)123/FINAL (May 23, 1997) ("The Council . . . recommends that Member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner . . . .").

40) *Id*.

41) The Convention provided that it would enter into force sixty days after five of the top ten exporters that represent sixty percent of the exports of the top ten exporters ratify the Convention. Following Canada's ratification on December 17, 1998, the Convention came into effect on February 15, 1999.

42) THE OECD CONVENTION ON BRIBERY: A COMMENTARY, *supra* note 33, at 30.

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member state chose to, it could even criminalize foreign bribery with a definition more expansive than that provided in the Convention.

First and foremost, the OECD Anti-Bribery Convention mandated that each state criminalize intentionally offering, promising, or giving "any undue pecuniary or other advantage to a foreign public official, for that official, or for a third party" (including through intermediaries) to influence performance of official duties or to obtain or retain business or other improper advantage in the conduct of international business.[43] Second, the OECD Anti-Bribery Convention also required signatories to take necessary measures to prevent the falsification of books and records and other improper accounting to bribe foreign public officials or to hide such bribery.[44] Lastly, the OECD Anti-Bribery Convention provided a number of measures to aid and ensure enforcement of the prohibition against foreign bribery, including mutual legal assistance, extradition, and collective monitoring.[45]

3. Korea's Implementation: Foreign Bribery Prevention Act

Since 1997, forty-four countries (thirty-six OECD member states and eight non-member states), including Korea, have signed on to the OECD Anti-Bribery Convention. As one of the early signatories, Korea ratified the Convention in January 1999, with entry into force on February 15, 1999 (the effective date of the Convention itself).[46]

Korea's implementation of the OECD Anti-Bribery Convention took the

43) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 1, para. 1, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 [hereinafter OECD Anti-Bribery Convention]. "Foreign public official" was defined as "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization." *Id.* art. 1, para. 4.

44) *Id.* art. 8.

45) *Id.* arts. 9, 10, 12.

46) OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of May 2017, ORG. FOR ECON. CO-OPERATION & DEV., http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf (last accessed June 7, 2019).

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form of a separately enacted statute, the Act on Combating Bribery of Foreign Public Officials in International Business Transactions, or the Foreign Bribery Prevention Act (FBPA).[47] The FBPA, which was passed in December 1998 and took effect on February 15, 1999 (consistent with the Convention's effective date), is a short five-article statute that largely mirrors the Convention. It prohibits "[promising], [giving], or [expressing intention] to give a bribe to a foreign public official in relation to any international business transaction with intent to obtain any improper advantage for such transaction" and imposes a maximum punishment of up to five years in prison and/or a fine of up to twenty million won.[48] Additionally, giving a bribe to a third party for the purpose of bribing a foreign public official or receiving a bribe knowing such a purpose are prohibited and subject to the same punishments.[49] The FBPA does have one exception for payments that are legal in the applicable foreign country.[50]

"Foreign public official" is defined largely in line with the OECD's definition, including foreign government employees, public international organization employees, and persons exercising a public function for a foreign country who conduct delegated public business, work for a public agency established to perform a specific public business, or are officers or employees of an enterprise controlled or majority-owned by a foreign government.[51]

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47) Gookje sanggeore-e iteoseo oegook gongmoowon-e daehan noemool bangjibeop [Act on Combating Bribery of Foreign Public Officials in International Business Transactions], Act No. 5588, Dec. 28, 1998, *amended by* Act No. 15972, Dec. 18, 2018 (S. Kor.) [hereinafter Foreign Bribery Prevention Act]. The FBPA implemented the anti-bribery part of the Convention. The books and records part was included in the Act on External Audit of Stock Companies. Since this Article's focus is on the prohibition on bribery of foreign officials, it will focus on the anti-bribery provisions.

48) If the pecuniary advantage gained from the bribery exceeds ten million won, the FBPA increases the maximum fine to twice that pecuniary advantage. *Id.* art. 3(1). When a company's officer, agent, or other employee violates the anti-bribery provision in relation to the company's business, the company is also subject to a fine of up to one billion won (or twice the pecuniary advantage gained, if the advantage exceeds 500 million won), unless such company took due care and diligence to prevent such a violation. *Id.* art. 4.

49) *Id.* art. 3(2).

50) *Id.* art. 3(3).

51) However, if the state-owned enterprise competes on even ground with its private counterparts and does not receive any discriminatory subsidies, officers and employees of

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Since its enactment, the FBPA has been subject to two substantive amendments, in 2014 and 2018.[52] As originally enacted, the FBPA also contained an exception for facilitating payments for routine government action, but that exception was deleted in 2014, in accordance with OECD and Transparency International's recommendations.[53] Moreover, there had been no case up to that point that relied on the facilitating payment exception, so it was deemed effectively irrelevant.[54]

The 2018 amendment added the prohibition on bribery through a third party described above.[55] Korea's Criminal Act already prohibited both direct bribery of public officials and indirect bribery through a third party, so the amendment conformed the FBPA with the bribery provision of the Criminal Act.[56]

Given the complementary nature of the OECD Anti-Bribery Convention, the FBPA, and Korea's Criminal Act, it is worth clarifying the relationship among them. First, between the FBPA and the Criminal Act, Article 8 of the Criminal Act specifically provides that the general provisions of the Criminal Act apply to acts criminalized by other laws, unless such law provides otherwise.[57] Therefore, general provisions, such as those governing jurisdiction and punishment of instigators and accessories, would apply to the FBPA as well. Furthermore, although not explicitly provided in the statute, given that the FBPA borrows a number of terms and wording from the Criminal Act's bribery provisions and that the

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such state-owned enterprise are not considered foreign public officials.

52) The FBPA's first amendment in 2010 was a non-substantive one that refined the statute's wording.

53) Gookje sanggeore-e iteoseo oegook gongmoowon-e daehan noemool bangjibeop [Act on Combating Bribery of Foreign Public Officials in International Business Transactions], Act No. 5588, Dec. 28, 1998, *amended by* Act No. 12775, Oct. 15, 2014 (S. Kor.).

54) Gookje sanggeore-e iteoseo oegook gongmoowon-e daehan noemool bangjibeop gaejeong eeyoo [Reason for Amendment of the Act on Combating Bribery of Foreign Public Officials in International Business Transactions], Act No. 5588, Dec. 28, 1998, *amended by* Act No. 12775, Oct. 15, 2014 (S. Kor.).

55) Foreign Bribery Prevention Act, art. 3(2).

56) Hyongbeop [Criminal Act], Act No. 293, Sept. 18, 1953, *amended by* Act No. 15982, Dec. 18, 2018, art. 133(2) (S. Kor.) [hereinafter Criminal Act].

57) Foreign Bribery Prevention Act, art. 8; Yeong-Don Loh & Yong-Chun Cui, *A Study on the Implementing Legislation of the OECD Anti-Bribery Convention*, 45 Legis. Res. 305, 321 (2013).

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OECD Anti-Bribery Convention permits signatories to define the offense of foreign bribery under their respective domestic legal frameworks, subject to the OECD Anti-Bribery Convention's standards, interpretation of the FBPA should largely follow the Criminal Act's bribery provisions, unless specifically provided otherwise.[58] For example, although the FBPA does not define what constitutes a "bribe" or what constitutes "promising, giving, or expressing intention to give" a bribe, interpretation of those concepts would follow the Criminal Act.

Between the OECD Anti-Bribery Convention and the FBPA, in light of the OECD Anti-Bribery Convention's non-self-executing nature, it would be difficult to directly apply the Convention to the criminal prosecution of individuals and corporations for foreign bribery. However, since the FBPA is an implementing legislation of the OECD Anti-Bribery Convention, to the extent there are ambiguities in statutory construction, the OECD Anti-Bribery Convention would be a persuasive authority.

A problematic situation arises when there is a conflict between the interpretation of the FBPA in light of the OECD Anti-Bribery Convention and the interpretation of the FBPA in light of the Criminal Act. In particular, such a situation may arise when the FBPA, on its terms, does not meet the standards set by the OECD Anti-Bribery Convention, as the Convention actually establishes a relatively expansive definition of foreign bribery. In such a case, it would be more reasonable to follow the terms of the FBPA, standing alone or as interpreted in light of the Criminal Act. Enlarging the FBPA's reach through an expansive reading of the statute to meet the standards set by the OECD Anti-Bribery Convention would run counter to the governing principle of criminal law that there be no crime without law (*nullum crimen sine lege*). If the FBPA falls short of the OECD Anti-Bribery Convention's standards, then it is the National Assembly's role to fix that shortcoming.

58) OECD Anti-Bribery Convention, *supra* note 43, art. 1 (commentary); Loh & Cui, *supra* note 57, at 323.

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4. *The Current State of the Prohibition on Foreign Bribery and Its Enforcement*

Of course, no law can be effective without enforcement. In that sense, the OECD Anti-Bribery Convention can be considered a mission half accomplished. On the positive side, it succeeded in establishing a legal framework for the prosecution of foreign bribery, creating a level playing field among multinational businesses in signatory countries. Additionally, between 1999 and 2017, 560 individuals and 184 legal entities were sanctioned by Convention signatories, and an empirical study found that multinational corporations based in signatory countries reduced their incidence of bribery compared to their peers in non-signatory countries.[59)]

On the other hand, some of the signatories to the OECD Anti-Bribery Convention have lagged behind in their implementation and enforcement. Enforcement is heavily concentrated in a relatively small number of active countries, such as the United States and Germany. Five countries (Germany, the United States, Hungary, Brazil, and the United Kingdom) punished 480 individuals, or 86 percent of all individuals sanctioned by signatories to the OECD Anti-Bribery Convention.[60)] The landscape for enforcement against legal entities is similar; the top five countries (the United States, Germany, the United Kingdom, Netherlands, and Italy) accounted for 156 sanctions, or 85 percent of sanctions against legal entities by Convention signatories.[61)] As of the end of 2017, of the forty-four signatories to the OECD Anti-Bribery Convention, twenty-one signatories had never imposed a sanction for foreign bribery.[62)] Taking these together, while the OECD Anti-Bribery Convention succeeded in internationalizing

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59) OECD Working Group on Bribery, *2017 Enforcement of the Anti-Bribery Convention*, Org. for Econ. Co-operation & Dev. (Nov. 2018), http://www.oecd.org/daf/anti-bribery/OECD-WGB-Enforcement-Data-2018-ENG.pdf [hereinafter *2017 Anti-Bribery Convention Enforcement*]; Nathan M. Jensen & Edmund J. Malesky, *Nonstate Actors and Compliance with International Agreements: An Empirical Analysis of the OECD Anti-Bribery Convention*, 72 Int'l Org. 33 (2018).

60) *2017 Anti-Bribery Convention Enforcement*, *supra* note 59, at 5-6.

61) *Id.*

62) *Id.* at 1.

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criminal prohibition of foreign bribery, it has only been half successful in ensuring the effective enforcement of such prohibition.

In Korea, since 1999, there have been thirty-nine allegations of foreign bribery, one-third (thirteen) of which have resulted in criminal convictions. While Korea's enforcement record ranks just outside those of the top five signatories to the OECD Anti-Bribery Convention, given Korea's economic size and export share, the OECD Working Group on Bribery has recommended more active enforcement as part of its Phase 4 review of Korea's implementation of the OECD Anti-Bribery Convention. A number of high-profile cases have recently come to light, including a large-scale bribery of a U.S. military official involving more than three billion won in bribes and bribery of the head of the Korean office of China Eastern Airlines, increasing the focus on the FBPA and its application and enforcement.[63]

In particular, Korea's unique situation has made the FBPA an important device in combating corruption. Korea's export-oriented economy makes it more susceptible to the temptation of foreign bribery to obtain business overseas. Moreover, with a large American military presence (and corresponding opportunities for business with the U.S. military), there is a risk of foreign bribery with domestic characteristics; in many ways, the bribery of American military officials in Korea to obtain business with the United States Forces Korea (USFK) has both domestic and foreign characteristics, but because American military officials do not fall under the definition of public officials for the purpose of the Criminal Act's bribery provisions, prosecution of such corruption must be based on the FBPA.

Thus, the prohibition and prosecution of foreign bribery, both around the world and in Korea, remain an unfinished business. While the legal framework has progressed since the 1990s, including adoption of the OECD Anti-Bribery Convention, that framework (including its enforcement) is still subject to a number of weaknesses and gaps. In light of this situation, this Article now examines the importance of a legal framework against foreign bribery and solutions to achieve such an important objective.

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63) Press Release, Seoul Central Prosecutor's Office, Interim Result of Investigation into Bribery in Construction of United States Military Base in Pyeongtaek (Feb. 7, 2018); Shin & Kim, Scope of Foreign Public Official in the Crime of Foreign Bribery (2013).

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II. Justifications for Anti-Bribery Laws

1. General Legal and Economic Objectives of Anti-Bribery Laws

As a fundamental matter, in Korean jurisprudence, the primary objective of an anti-bribery law is to ensure the fair exercise of public function by preventing *quid pro quo* transactions involving public officials that could undermine such fairness.[64] More specifically, there are two diverging—but overlapping—views about the interpretation of this primary objective in Korean legal scholarship. One view is that anti-bribery provisions protect the inalienability of the public function; thus, the public function is not something that can be bought or sold.[65] The other view is that anti-bribery provisions protect the purity of the public function; public officials must exercise their delegated authority without violating their duties by being influenced in an illicit manner.[66] In many ways, these two views are related, as bribery often leads to the violation of both inalienability and purity of the public function. However, the former is slightly broader than the latter in that according to the former view, acts of bribery ought to be penalized regardless of whether there has been a violation of the duty of fair and impartial exercise of the public function.[67] As long as the public function has been bought or sold, its inalienability has been violated. In contrast, under the latter view, bribery ought to be penalized if it has led a public official to violate the duty of fair and impartial exercise of his or her authority.[68]

Korean courts largely support the former, broader view but take a hybrid approach. Courts have held that anti-bribery provisions protect the

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64) Jae-Hak Lee, *A Review of the Structural Limit of Bribery Statutes and the Enlargement of Comprehensive Bribery*, 38 Ilkam L. Rev. 137, 144 (2017); Junghwan Han, *Noemooljoe eui bohobeopik geurigo noemoolgwa jikmoohaengwiwaeui daegagwangye [Protected Interest of the Crime of Bribery and the Relationship Between Bribe and Official Act]*, 9 J. Crim. L. 261, 263 (1996).

65) Jae-sang Lee, Young-Min Chang & Dong Beom Kang, Hyongbeop Gakron [Criminal Law] 716 (10th ed. 2018).

66) *Id.*

67) Lee, *supra* note 64, at 145.

68) *Id.*

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fairness of the public function, the society's trust in such fairness, and the inalienability of official acts.[69] Given this view, Korean case law does not require that there be a specific illicit act by the public official (aside from the receipt of the bribe itself) as a result of the bribe.[70]

Taking one step further from this legal debate, we can ask a more fundamental question: why should we protect the inalienability of the public function, and why should the public function be exercised on an even ground? While the answer to these questions appears obvious—bribery offends our sense of justice and fairness—the economic answer is less so. Some take the view that bribes can actually increase economic efficiency, particularly in societies with poor institutions and systems.[71] Those who subscribe to the so-called "greasing the wheels" hypothesis argue that when a society has inefficient regulations and systems, bribery can help entrepreneurs and other market participants bypass such inefficient roadblocks. For example, a businessman facing an excessive amount of red tape can bribe an official to reduce such burden. Additionally, under this view, when there are insufficient resources, bribes can help discriminate between those who need and value the resource the most and those who do not; those who value the resource the most can bribe the public officials in charge to direct those resources to them, enhancing economic efficiency.[72] In this view, a bribe is simply a form of a market price.

The majority view based both on theoretical and empirical studies, however, is that the "greasing the wheels" hypothesis applies in a very limited set of circumstances, if ever, and that corruption's economic and social consequences are largely negative. First and foremost, economic and social institutions are not exogenous variables. Market participants and

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69) Supreme Court [S. Ct.] 2017Do12346, Dec. 22, 2017 (S. Kor.); Supreme Court [S. Ct.] 2007Do5190, Feb. 1, 2008 (S. Kor.).

70) Supreme Court [S. Ct.] 2017Do12346, Dec. 22, 2017 (S. Kor.).

71) Susan Rose-Ackerman & Bonnie J. Palifka, Corruption and Government: Causes, Consequences, and Reform 32, 86 (2d ed. 2016); Chris Blattman, *Corruption and Development: Not What You Think?* (Nov. 5, 2012), https://chrisblattman.com/2012/11/05/corruption-and-development-not-what-you-think/; Douglas A. Houston, *Can Corruption Ever Improve an Economy?*, 27 Cato J. 325 (2007).

72) Ray Fisman & Miriam A. Golden, Corruption: What Everyone Needs to Know 85 (2017).

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public officials mold their behavior regarding bribes to fit the existing economic and social framework, but they also mold the economic and social framework to fit their agenda regarding bribes. While market participants may engage in bribery to bypass excessive red tape, public officials may increase red tape in order to extract more bribes.[73] This creates a vicious cycle; businesses pay bribes to bypass the inefficient structures set up by public officials, and in turn, corrupt public officials set up even more inefficient structures to extract more bribes, forcing more businesses to engage in bribery. In a dynamic setting, bribery can therefore lead to the very problem that it purports to solve.

More generally, the existence of bribery can distort public officials' decisions in a manner that is suboptimal for the society as a whole but beneficial for those corrupt public officials. In fact, corruption's very definition captures this distortion: abuse of public office for private gain.[74] For example, in making public investment decisions, corrupt public officials favor large-scale projects that are not efficient from a cost-benefit perspective but yield the best opportunities for corrupt dealings.[75] The costs of these projects are borne by the society as a whole, but corrupt officials reap a significant benefit. The officials invested with public authority to further the society's welfare may forsake that responsibility to line their own pockets, and bribery deepens this principal-agent problem.

Furthermore, many forms of bribery merely lead to a wealth transfer from those who do not pay bribes to those who do (and the recipients of those bribes), creating a race to the bottom.[76] For example, in a competitive procurement process, even if company A's product is of higher quality and/or lower cost, company B may distort the process in its favor through bribery. The less competitive company B may be able to extract information about the bidding process, tweak the specifications in its favor, or outright rig the process. These distortions may be easier if there is some element of

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73) Rose-Ackerman & Palifka, *supra* note 71, at 83.

74) Fisman & Golden, *supra* note 72, at 24; *What is Corruption?*, Transparency Int'l, https://www.transparency.org/what-is-corruption (last accessed June 7, 2019).

75) Vito Tanzi & Hamid Davoodi, *Corruption, Public Investment, and Growth* (Int'l Monetary Fund Working Paper No. WP/97/139, 1997).

76) Rose-Ackerman & Palifka, *supra* note 71, at 33.

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discretion involved in the process; if the companies are not only competing on price but also on performance or capacity, corrupt public officials may tweak such performance or capacity evaluations. The result for honest company A is to either lose out on the contract (wealth transfer from an honest participant to a corrupt participant) or engage in bribery itself. In the absence of legal sanctions—a free-for-all world—bribery is therefore a dominant strategy.[77] Thus, honest participants cannot survive in a corrupt world, and bribery becomes essential for survival. This race to the bottom has a further complication in that it can undermine the social fabric and reduce citizens' trust in the government.[78] In turn, the erosion of social trust can make reform policies more difficult to implement.

To the extent that, in an unequal society, the wealthy are more able to pay bribes to obtain various advantages, corruption can accelerate inequality for a number of reasons. First, particularly in societies with poor governance, the wealthy can pay bribes to distort the playing field in their favor, further entrenching themselves.[79] Second, progressive tax measures designed to mitigate income inequality can be short-circuited by corruption in tax assessment and collection, and fixed bribes for certain officials acts can be a form of regressive taxation.[80] Lastly, the loss of government funds from corruption can starve inequality-reducing projects such as public

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77) A number of scholars have likened this to a prisoner's dilemma. The best aggregate outcome for both competitors would be to remain honest together but the equilibrium outcome is for both to be corrupt. John Macrae, *Underdevelopment and the Economics of Corruption: A Game Theory Approach*, 10 World Dev. 677, 681-82 (1982); Tarullo, *supra* note 31, at 670.

78) Org. for Econ. Co-operation & Dev., Government at a Glance 34 (2013); Vitor Gaspar, Paolo Mauro & Paulo Medas, *Tackling Corruption in Government*, IMFBlog (Apr. 4, 2019), https://blogs.imf.org/2019/04/04/tackling-corruption-in-government/; Bo Rothstein & Eric M. Uslaner, *All for All: Equality, Corruption, and Social Trust*, 58 World Pol. 41, 54 (2005); Fisman & Golden, *supra* note 72, at 99-101; Rose-Ackerman & Palifka, *supra* note 71, at 85.

79) Jong-Sung You & Sanjeev Khagram, *A Comparative Study of Inequality and Corruption*, 70 Am. Soc. Rev. 136, 154 (2005).

80) Marie Chene, *The Impact of Corruption on Growth and Inequality*, Transparency Int'l (Mar. 15, 2014), https://www.transparency.org/files/content/corruptionqas/Impact_of_corruption_on_growth_and_inequality_2014.pdf; Jennifer Hunt, *Bribery in Health Care in Uganda*, 29 J. Health Econ. 699, 704 (2010) (finding that the rich pay more than the poor to obtain healthcare in Uganda, but the poor pay a greater share of their income as bribes).

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education.[81] A number of studies have confirmed empirically that bribery increases income inequality, showing that the burdens of bribery are borne disproportionately by the poor.[82]

As noted above, bribery's perverse effects are numerous, spanning the deterioration of governance and institutions, reduction in economic growth, increase in income inequality, and reduction in social trust. These effects of corruption therefore justify why the public function cannot be bought or sold and why it must be exercised impartially without being influenced by illicit payments.[83] Anti-bribery laws thus protect this essential integrity of the public function.

2. Objectives of the Prohibition on Foreign Bribery

Despite the various ills of bribery noted above, however, one may argue that they only apply to domestic bribery. After all, if country A's companies pay bribes in country B to obtain business and that act of bribery undermines the fair and impartial exercise of the public function in country B, it is country B that directly suffers the adverse consequences of such bribery. From country A's perspective, foreign bribery may appear attractive, since its companies obtain business abroad, but other countries suffer the negative consequences of such bribery.

This Part II.2 therefore extends the discussion of the objectives of anti-bribery laws in Part II.1 to the prohibition of foreign bribery and examines why the prohibition of foreign bribery is necessary. The first and most persuasive argument for anti-foreign bribery law is that bribery at the international level is a prisoner's dilemma, just like bribery at the domestic

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81) ROSE-ACKERMAN & PALIFKA, *supra* note 71, at 33.

82) You & Khagram, *supra* note 79; Nicholas Apergis, Oguzhan C. Dincer & James E. Payne, *The Relationship Between Corruption and Income Inequality in U.S. States: Evidence from a Panel Cointegration and Error Correction Model*, 145 PUB. CHOICE 125 (2010).

83) Korea's Act on the Aggravated Punishment of Specific Crimes, which, among others, expands the scope of public officials subject to anti-bribery provisions and increases punishment for bribery, acknowledges this economic and social argument against bribery. Teukjeong beomjoe gajungcheobeol deung-e gwanhan beopryul [Act on the Aggravated Punishment of Specific Crimes], Act. No. 15981, Dec. 18, 2018, art. 1 (S. Kor.) ("The purpose of this Act is to contribute to the maintenance of sound social order and the development of the national economy by stipulating aggravated punishment . . . for specific crimes . . . .").

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level. If country A prohibits foreign bribery but country B does not, country A's businesses would be at a disadvantage compared to country B's, prompting country A to relax its restrictions as well. As a result, the equilibrium outcome becomes both countries turning a blind eye to foreign bribery, to the delight of corrupt foreign officials but to the loss of both country A and country B. Country A and country B's businesses may engage in corruption in a third country to compete for business. Worse, country A's businesses may pay bribes in country B, and country B's businesses may pay bribes in country A, causing mutual damage.

These were precisely the criticisms levied at the FCPA prior to the adoption of the OECD Anti-Bribery Convention: that the United States, by prohibiting foreign bribery while other countries did not, hurt American business competitiveness abroad. In order to move to and maintain an equilibrium in which no country's businesses pay bribes abroad, coordinated legal efforts against foreign bribery are necessary.[84] In a way, this need for a coordinated international effort to achieve a better equilibrium outcome in international bribery is analogous to the need for bilateral and multilateral trade agreements to lower trade barriers.

More broadly, foreign bribery can feed back to the home country in two other ways. First, deteriorating legal and business environment abroad as a result of corruption hurts home country businesses investing or otherwise doing business in that corrupt foreign country as well. The negative effects of corruption, such as inefficient governance and institutions, in a country that is the recipient of foreign investment reduces the returns on such investment, ultimately hurting the country from which that investment originated. The bribe-paying business may benefit in the short run, but in the long run, inefficient institutions and poor economic growth as a result of bribery hurt the bribe-paying business.[85] Second, corruption, whether domestic or foreign, can have a significant adverse effect on the bribe-paying company's culture. Corruption and corporate culture can create a

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84) Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 Chi. J. Int'l L. 84, 96 (2014).

85) Susan Rose-Ackerman & Sinead Hunt, *Transparency and Business Advantage: The Impact of International Anti-Corruption Policies on the United States National Interest*, 67 N.Y.U. Ann. Surv. Am. L. 433, 462 (2012).

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vicious cycle, in which corruption (and a lack of repercussions for those corrupt individuals) pollutes corporate culture, and corrupt corporate culture, in turn, induces more illicit acts by attracting more corrupt individuals to the firm and/or by inducing otherwise honest individuals to engage in such corrupt behavior.[86] Foreign corruption can weaken the corporate culture of a multinational business, making it more likely to engage in bribery in the domestic context as well.[87]

Additionally, legal sanctions against foreign corruption can help bind a business's hands, helping it resist bribery demands from foreign officials.[88] Particularly when a company has made substantial investments in a foreign country, it is vulnerable to extortion from foreign officials. A company can either lose its investments in that foreign country (if it does not pay the bribe demanded) or pay a bribe to avoid such losses, so in the absence of legal sanctions, that corrupt foreign official can demand bribes up to the losses that the corrupt official can inflict on the investing company. However, if foreign bribery can result in legal sanctions in the home country, the company's potential losses when it does pay the bribe increase from just the amount of the bribe to the sum of the amount of the bribe and the potential legal sanctions. Knowing this payoff structure, the foreign official can only demand a bribe up to the company's investment in the country minus the potential legal sanctions; otherwise, the bribe demand will be rejected. If the potential legal sanctions are large enough, foreign

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86) *See, e.g.*, Xiaoding Liu, *Corruption Culture and Corporate Misconduct*, 122 J. Fin. Econ. 307 (2016); Alison Taylor, *What Do Corrupt Firms Have in Common?*, Ctr. for Advancement of Pub. Integrity (Apr. 2016), https://web.law.columbia.edu/sites/default/files/microsites/public-integrity/files/what_do_corrupt_firms_have_in_common_-_capi_issue_brief_-_april_2016.pdf; Rose-Ackerman & Palifka, *supra* note 71, at 256.

87) In Korea's context, the presence of several large United States armed forces bases and potential for corruption to obtain business with the American military add a domestic dimension as well. Since part of the funding for the American military presence in Korea comes out of the Korean government, corruption involving the American military in Korea hurts Korean interests in a more direct manner.

88) Kevin E. Davis, *Why Does the United States Regulate Foreign Bribery: Moralism, Self-Interest, or Altruism?*, 67 N.Y.U. Ann. Surv. Am. L. 497, 497 (2012) (noting in the context of the FCPA that "[b]ribery is a relatively expensive way to obtain favors from foreign officials. Consequently, it is in the United States' economic interest to tie its firms' hands by preventing them from paying bribes for favors that they might otherwise be able to obtain by less costly and more legitimate means.").

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officials know that a company would rather lose out on its investment than face the wrath of the home country's law enforcement officials, preempting extortionary demands. Legal sanctions against foreign bribery can act as a credible commitment device for companies to resist corrupt demands from foreign officials.[89)]

Therefore, laws against foreign bribery serve a number of purposes, including coordination to achieve a better equilibrium outcome, indirect self-interest, and a commitment device against corrupt foreign officials. Many of the rationales offered for anti-bribery laws in the domestic context continue to apply in the foreign context as well, including preventing a race to the bottom and ensuring economic growth; taken together, these provide a robust justification for a legal framework against foreign bribery.[90)]

III. Strengthening Korea's Prohibition on Foreign Bribery

Based on the adverse effects of bribery, both generally and specifically in the context of foreign bribery, it is essential that Korea take active measures to prosecute and deter foreign bribery. In this sense, Korea's quick ratification and implementation of the OECD Anti-Bribery Convention is a positive development. However, there are a number of features of Korea's FBPA that fall short of the statute's goal of stamping out foreign bribery. This Part III thus outlines three of these weaknesses—definition of a foreign public official, treatment of bribery to or through a third party, and measures to deter future foreign bribery—and proposes ways to improve the FBPA to further Korea's efforts against foreign bribery.

1. Defining "Foreign Public Official"

The first issue with the FBPA concerns the scope of its application: who

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89) As noted above, this was one of the rationales offered for the original FCPA. *See also*, Rebecca L. Perlman & Alan O. Sykes, *The Political Economy of the Foreign Corrupt Practices Act: An Exploratory Analysis*, 9 J. Legal Analysis 153, 169-70 (2017).

90) Some scholars have also noted that the adverse effects on domestic firms from the prohibition on foreign bribery are not as large as critics assert. Rose-Ackerman & Hunt, *supra* note 85, at 453-61; Perlman & Sykes, *supra* note 89, at 178.

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is a "foreign public official"? As noted above, the FBPA defines a "foreign public official" in line with the OECD Anti-Bribery Convention and includes three categories of persons in that definition. First, any person holding a legislative, administrative, or judicial office of a foreign government, whether appointed or elected, is a foreign public official.[91] This is perhaps the core definition of a "foreign public official." Second, any person working for a public international organization (e.g., the United Nations) is a foreign public official.[92] Third, a foreign public official includes any person who exercises a public function for a foreign government who (1) "[conducts] a business, in the public interest, delegated by a foreign government," (2) works for "a public organization or agency established by law to carry out specific business in the public interest," or (3) is an executive or an employee of "any enterprise over which a foreign government holds over 50 percent of its subscribed capital or exercises substantial controlling power over its overall management" (state-owned enterprise or SOE) unless such SOE competes with private businesses without any preferential treatment or subsidy.[93]

The first two categories of foreign public officials have been subject to little debate. It is typically very clear whether the recipient of a bribe holds an office in a foreign government or works for a public international organization. However, the scope of the third category, intended to capture individuals who are quasi-public officials, is less clear. For instance, in defining an SOE whose executives and employees are deemed to be foreign public officials, the FBPA's language ostensibly requires two elements: first, the actor must exercise a public function; second, the foreign government must hold a majority interest in or control the enterprise and provide preferential treatment or subsidy to that enterprise. In this two-part test, while the second part appears more clear-cut, what constitutes a "public function" in the first element? The role of government differs from jurisdiction to jurisdiction. In some jurisdictions where government intervention is a way of life, the public function may be defined broadly, while in others it may be defined more narrowly. In particular, as SOEs,

91) Foreign Bribery Prevention Act, art. 2, para. 1.

92) *Id.* art. 2, para. 3.

93) *Id.* art. 2, para. 2.

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both wholly-owned and partially-owned, play a significant role in the economy of many developing countries, such as China, the definition of SOE executives and employees subject to the FBPA is important to distinguish between commercial bribery and bribery of a foreign public official.

A recent Korean case involving a Chinese SOE illustrates this potential ambiguity. In 2011, two individuals were indicted under the FBPA, among other statutes, for bribing China Eastern Airlines' country head in Korea in order to obtain preferential business dealings with China Eastern. One major issue in this case was whether China Eastern's country head constitutes a foreign public official. Convicting the defendants on a commercial bribery charge but acquitting them on the FBPA charge, the district court held that while there are indications that China Eastern is controlled by the Chinese government and that it does not compete on an even ground with its private counterparts, that China Eastern is controlled by and receives preferential treatment from the Chinese government has not been established beyond a reasonable doubt in the absence of additional, official proof.[94)]

While the court in this case acquitted the defendants on the FBPA charge based solely on the control/preferential treatment test and did not address the public function test at all, had the court found the requisite control/preferential treatment, we would then have had to ask whether an executive of an airline serves a public function. In many countries, airlines are entirely privatized and largely deregulated, and the citizens of such countries would often consider airlines to not be performing a public function. But one can also argue that airlines are crucial transportation providers and have some public characteristics as well. The outcome of the public function test is quite uncertain. In Korean jurisprudence, criminal

94) Incheon District Court [Dist. Ct.], 2011Go-Hap277, 294, 757, Feb. 14, 2012 (S. Kor.). On appeal, the prosecution presented a number of evidence in support of the FBPA charge, including that China Eastern is majority-owned by China Eastern Air Holding Company, which is in turn wholly owned by the Chinese government, that the Chinese government appoints China Eastern's chief executive, that China Eastern is subject to audit by China's National Audit Office, and that the Chinese government provides substantial funding to China Eastern, but the appellate court dismissed the appeal of the FBPA acquittal without explanation. Seoul High Court [Seoul High Ct.], 2012No865, 2685, Feb. 1, 2013 (S. Kor.).

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law must offer a certain level of predictability to ensure that citizens can understand what activities are permitted or prohibited, and such an uncertain test may fall short of that predictability threshold.[95)]

In light of this uncertainty, one potential approach would be to restructure the two-part test such that when the control/preferential treatment test is met, the public function test is deemed satisfied. For example, paragraph 2 of Article 2 of the FBPA can be amended such that a foreign public official includes anyone who exercises a public function for a foreign government, but when one is an executive or an employee of an SOE that is controlled by and receives preferential treatment from a foreign government, *inter alia*, that person is deemed to be exercising a public function. Under this approach, the control/preferential treatment test is not a standalone element but a proxy for whether the public function test is satisfied. Collapsing the two-part test into a one-part test with a proxy not only improves the predictability of the statute but also allows the FBPA to cover situations in which an entity meets the functional test (and therefore should be subject to anti-bribery laws) but, due to idiosyncratic structure, does not satisfy the institutional classification element.

This approach is in line with the OECD Anti-Bribery Convention's intent as well. In defining a "foreign public official," the Convention takes a hybrid approach: a foreign public official is a member of a foreign government/public international organization or who exercises a public function for a foreign government/public international organization. The first part, the institutional classification, applies to those who belong to a foreign government or a public international organization. The second part, the functional classification, applies to SOE officials and other non-government officials who nevertheless perform roles similar to government officials.[96)] With respect to the second part, the various formalistic definitions and classifications that follow, such as what level of government control is sufficient, are not independent requirements but signals that

95) Hojin Shin, Hyongbeop Yoron [Criminal Law] 26 (2017).

96) The OECD Convention on Bribery: A Commentary, *supra* note 33, at 77 ("The functional understanding is the basic principle [in the definition of foreign public official] and may be summarized as follows: a foreign public official is anyone who carries out a public function for another country or for an international organization.").

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indicate when a person is exercising a public function. In line with this approach, the commentary to the OECD Anti-Bribery Convention clarifies that "[a]n official of a public enterprise shall be *deemed* to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market . . . . (emphasis added)"[97] Our proposal to make the control/preferential treatment test a sufficient condition (but not a necessary condition) would align the Korean approach with that of the OECD Anti-Bribery Convention.

One could be skeptical whether the control/preferential treatment test is indeed a good proxy for the exercise of a public function. If it were not, the scope of the FBPA would diverge from the goals of an anti-bribery law. In response to this view, it should be noted that even in those cases where an SOE appears to be pursuing private business, to the extent that a state's unique powers are involved, heightened scrutiny should be applied on the exercise of those powers. For example, if an SOE has a government-granted monopoly in a particular market (satisfying the preferential treatment and control test), that monopoly derives from the exclusive regulatory powers of the government, which ought to be exercised fairly and impartially, both directly and derivatively. With this view, it is difficult to envision a situation in which an entity satisfies the control and preferential treatment tests but the exercise of its powers does not justify application of anti-bribery laws.

Another potential objection to this Article's proposal is that using control and preferential treatment as a proxy for the exercise of a public function risks expanding indefinitely the scope of enterprises subject to the FBPA. For example, where a private enterprise was temporarily nationalized by a foreign government as a bailout measure, that enterprise would appear to be both controlled by a foreign government and in receipt of preferential treatment and/or a subsidy. We acknowledge that in such a circumstance, it would be unwise to include the executives of such firms in the definition of a foreign public official. This problem can be easily addressed by defining preferential treatment and subsidy to include only those that are systematic, repeated, and/or fundamental to the enterprise's

97) OECD Anti-Bribery Convention, *supra* note 43, art. 1, para. 4 (commentary).

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business model. A state-owned power company that receives regular cash infusions from the government and whose business model assumes continued government subsidy or a state-owned telephone company that has a government-granted monopoly would rightly be subject to the FBPA under this definition. A bank that has temporarily been nationalized to prevent its failure would not be subject to the FBPA, since the government support is one-time and not fundamental to the enterprise's business model.

The American experience with defining the scope of a foreign public official can be a helpful comparison. As noted above, the FCPA's definition of a "foreign official" includes: (1) an officer or employee of a foreign government; (2) an officer or employee of any department, agency, or instrumentality of a foreign government; (3) an officer or employee of a public international organization; and (4) any person acting in an official capacity for or on behalf of the foregoing entities. In particular, what constitutes "an instrumentality of a foreign government" has been subject to substantial uncertainty.

The U.S. Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) have provided scant guidance as to which SOEs are instrumentalities of foreign government for the purposes of the FCPA. The SEC and the DOJ's FCPA Resource Guide notes that "whether a particular entity constitutes an 'instrumentality' under the FCPA requires a fact-specific analysis of an entity's ownership, control, status, and function."[98] The DOJ has issued a number of opinion releases that tangentially touch on the issue, but has not laid out a specific set of criteria.[99]

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98) U.S. Dep't of Justice & U.S. Sec. and Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act 20 (2012).

99) *Foreign Corrupt Practices Act Review: Opinion Procedure Release No. 93-01*, U.S. Dep't of Justice (Apr. 20, 1993), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/9301.pdf; *Foreign Corrupt Practices Act Review: Opinion Procedure Release No. 93-02*, U.S. Dep't of Justice (May 11, 1993), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/9302.pdf; *Foreign Corrupt Practices Act Review: Opinion Procedure Release No. 94-01*, U.S. Dep't of Justice (May 13, 1994), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/9401.pdf; *Foreign Corrupt Practices Act Review: Opinion Procedure Release No. 08-01*, U.S. Dep't of Justice (Jan. 15, 2008), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0801.pdf. *See also*, Joel M. Cohen, Michael P. Holland & Adam P. Wolf, *Under the FCPA, Who is a Foreign Official*

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In the judicial sphere, in two 2011 cases, the United States District Court for the Central District of California addressed whether SOEs can be foreign government instrumentalities. In *United States v. Carson*, in which the defendants were alleged to have bribed a number of SOEs in power and oil sectors in Asia, the court noted that "instrumentality" means entities other than government agencies and departments that "nevertheless carry out governmental functions or objectives" and that SOEs can qualify as government instrumentalities depending on the circumstances.[100] The court also noted that whether an entity constitutes a government instrumentality depends on a number of non-exhaustive factors, such as "the foreign state's characterization of the entity and its employees," "the foreign state's degree of control," "the purpose of the entity's activities," "the entity's obligations and privileges under the foreign state's law," "the circumstances surrounding the entity's creation," and "the foreign state's extent of ownership of the entity."[101] That same year, in *United States v. Aguilar*, a case involving the bribery of officials of an electric utility wholly owned by the Mexican government, the court likewise presented a number of non-exhaustive factors to be considered in government instrumentality determination, including whether "the entity provides a service to the citizens," how the officials are appointed, how the entity is financed, whether "the entity is vested with and exercises exclusive or controlling power to administer its designated functions," and whether "the entity is widely perceived and understood to be performing official (i.e., governmental) functions."[102]

At the appellate court level, the United States Court of Appeals for the Eleventh Circuit had the rare opportunity to opine on the topic in a 2014 case, *United States v. Esquenazi*, involving bribery of officials of Haiti's landline telephone service company (Haiti Teleco) that is 97 percent owned by Haiti's central bank. In upholding the FCPA conviction, the court defined a government instrumentality as "an entity controlled by the government of a foreign country that performs a function the controlling

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Anyway?, 63 Bus. Lawyer 1243, 1251-53 (2008).

100) United States v. Carson, 2011 U.S. Dist. LEXIS 88853, at *16 (C.D. Cal. May 18, 2011).

101) *Id.* at *11.

102) United States v. Aguilar, 783 F. Supp. 2d 1108, 1115 (C.D. Cal. 2011).

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government treats as its own."[103] In essence, an instrumentality of a foreign government must pass a two-part test, consisting of control ("controlled by the government of a foreign country") and function ("that performs a function the controlling government treats as its own").[104]

The tests presented in *Carson*, *Aguilar*, and *Esquenazi*, however, offer little predictability. For instance, among *Aguilar*'s factors, whether "the entity is widely perceived and understood to be performing official (i.e., governmental) functions" is essentially a tautology. Likewise, in *Esquenazi*'s two-part test, whether an entity "performs a function the controlling government treats as its own" is subject to a number of differing interpretations.[105] Taking these cases together, we note the difficulty of defining what a "public function" or a "government function" is and the need for a way to make the public function test more manageable to implement in practice.

In the first best world, we could perfectly and directly align the scope of the FBPA with the goals of an anti-bribery statute by defining "public function" precisely. But that is no easy task. Given that criminal statutes must offer a degree of predictability and certainty, using control and preferential treatment as proxies for public function in the FBPA is not only consistent with the OECD Anti-Bribery Convention but also presents a

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103) United States v. Esquenazi, 752 F.3d 912, 925 (11th Cir. 2014).

104) The court also listed several factors to determine whether an entity satisfies each of the two prongs. For factors to be considered in the "control" prong of the *Esquenazi* test, see *id*. at 925 ("To decide if the government 'controls' an entity, courts and juries should look to the foreign government's formal designation of that entity; whether the government has a majority interest in the entity; the government's ability to hire and fire the entity's principals; the extent to which the entity's profits, if any, go directly into the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed."). For factors to be considered in the "function" prong, see *id*. at 926 ("Courts and juries should examine whether the entity has a monopoly over the function it exists to carry out; whether the government subsidizes the costs associated with the entity providing services; whether the entity provides services to the public at large in the foreign country; and whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function.").

105) *See*, *e.g.*, Recent Case, United States v. Esquenazi, *752 F.3d 912 (11th Cir. 2014)*, 128 HARV. L. REV. 1500, 1506 (2015) ("Regarding the *function* prong, the [*Esquenazi* court's] confidence that it will be 'relatively easy' to determine whether the foreign government and public generally view the entity as performing a government function seems misguided.").

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practicable way of defining the scope of the FBPA.

2. Preventing Foreign Bribery through or to a Third Party

In today's business environment, no anti-bribery law can be wholly effective by only targeting direct *quid pro quo* transactions between a bribe payer and a bribe recipient. Sometimes a third party acts as an intermediary and relays the bribe from the payer to the recipient. In other scenarios, a foreign public official, instead of receiving a bribe directly, may instruct or request that it be relayed to a third party, perhaps a family member, a business associate, or his/her political party. This Part III.2 therefore address whether the FBPA sufficiently prevents such bribery through or to a third party, which essentially has the same end effect as direct bribery of a foreign public official but involves different sets of transactions.

The first scenario outlined above—a third party acting as the intermediary—is particularly important in the foreign bribery context, as international business transactions often involve barriers that necessitate the use of third-party intermediaries, unlike domestic transactions.[106] These third-party intermediaries can be innocuous and law-abiding: an example would be a consultant who merely provides guidance on local business customs and regulations to a multinational corporation otherwise not familiar with the local market. Third-party intermediaries may also leverage their local network to make introductions between local officials and the multinational corporation. On the other end of the spectrum, however, some intermediaries may act as unethical "fixers" and funnel bribes from multinational corporations to local officials, facilitating foreign bribery. In some cases, such intermediaries may deliver a bribe at a client's

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106) Brian McCann, *Managing Distributors and Third-Party Intermediaries: Coping with the Long-Arm of FCPA Enforcement*, Corp. Counsel Bus. J. (May 1, 2015), https://ccbjournal.com/articles/managing-distributors-and-third-party-intermediaries-coping-long-arm-fcpa-enforcement ("Most U.S. companies realize that globalization is one of the best opportunities for growth; however, entering into international markets requires an understanding of the local rules of the road in each respective territory or region that the company wishes to enter. While this is an excellent avenue for growth, it also involves assessing cultural nuances and different ways of doing business. This is often a challenge for companies. Local intermediaries understand these cultural issues and can help companies navigate them.").

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direction; in other cases, a client may pay a significant consulting fee to an intermediary, who, without that client's express direction, redirects some of those funds as bribes to local officials.

As a result of this prevalent use of third-party intermediaries in international business transactions, a significant majority of foreign bribery enforcement actions involve bribery through an intermediary. In the United States, of 173 FCPA enforcement actions between 2009 and 2018, 161 (93 percent) involved a third-party intermediary.[107] One of the largest foreign bribery cases in recent years in Korea, the U.S. military base relocation case, involved executives of a major construction company that paid 3.8 billion won ($3.2 million) to a retired Korean Air Force officer, who in turn funneled 2.5 billion won ($2.1 million) as bribes to an American contracting official involved in U.S. military base construction in Korea.[108] Hence, without preventing bribery through third-party intermediaries, the FBPA will effectively be reduced to a hollow shell.

Fortunately, the FBPA was recently amended in 2018 to cover such foreign bribery through a third-party intermediary. Before the amendment, the FBPA only prohibited giving a bribe to a foreign public official, so defendants could argue that, according to a strict interpretation of the statute, they did not violate the law, because they gave a bribe to a third party rather than to a foreign public official. The 2018 FBPA amendment inserted new Article 3(2), which punishes giving a bribe to a third party for the purpose of bribing a foreign public official or receiving a bribe with knowledge of such purpose.[109]

Given this amendment, it is amply clear that where a bribe is paid through an intermediary to a foreign public official, with the full knowledge and intention of the original payer, such an act of bribery is punishable under the FBPA. The intermediary would also be punishable under the FBPA to the extent he or she knew about the original payer's unlawful intentions. In fact, criminal liability would attach at the moment

107) *Statistics & Analysis: Intermediaries*, Stan. L. Sch. Foreign Corrupt Practices Act Clearinghouse, http://fcpa.stanford.edu/statistics-analytics.html?tab=4 (last visited June 7, 2019).

108) Seoul Central Prosecutor's Office, *supra* note 63.

109) Foreign Bribery Prevention Act, art. 3(2).

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the original payer hands over the bribe to a third-party intermediary, without regard to whether that intermediary ends up delivering the bribe to a foreign public official.[110)]

One complicating factor in this scenario, though, is the original payer's level of knowledge regarding the role of the third-party intermediary. Article 3(2) of the FBPA punishes the original briber when he or she gives a bribe to a third party *for the purpose of* bribing a foreign public official. Therefore, bribery of a foreign public official through a third-party intermediary requires a showing that the original payer acted with the *purpose* of ultimately bribing a foreign public official.[111)] When an original briber directs the third-party intermediary to deliver the bribe to a foreign public official or at least has actual knowledge that the third-party intermediary will do so, the purpose test is easily met. However, in the event that the original payer does not have actual knowledge that the third-party intermediary will engage in bribery but sees some signals and hints that the intermediary may bribe a foreign public official with funds from the original payer, whether the purpose test is met is more difficult to ascertain. A typical scenario would be a multinational corporation that hires a shady "consultant" in a foreign country who charges an unusually large consulting fee to facilitate the corporation's business and relationship with the local public officials. Based on the consultant's reputation and/or the unusual amount of the consulting fee, the corporation may suspect that the consultant would redirect some of the consulting fee to public officials as bribes, but such suspicion would fall below actual knowledge.

With respect to crimes that require a particular "purpose," Korean case law does not require actual, determinate purpose, but instead, courts have interpreted "purpose" broadly and held that recklessness suffices.[112)] Under this expansive interpretation, acting with the purpose of bringing about a particular result means either actually desiring that result (actual,

110) Shin, *supra* note 95, at 1434.

111) Jeong Weon Lee, *Jesamja jeungroemool jeondaljoe-eui goojowa moonjejeom [Structure and Problem of Third-Party Intermediary Bribery]*, 40 Chung-Ang J. Legal Stud. 133, 148 (2016).

112) Supreme Court [S. Ct.], 80Do306, May 20, 1980 (S. Kor.); Supreme Court [S. Ct.], 2004Do3212, Aug. 30, 2004 (S. Kor.); Supreme Court [S. Ct.], 2012Do2468, Mar. 13, 2014 (S. Kor.).

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determinate purpose) or knowing that the act may bring about that result and nevertheless engaging in that act (recklessness). For example, with respect to Article 156 of the Criminal Act, which punishes "reporting a false information to a public office or a public official for the purpose of having a criminal or disciplinary punishment imposed upon another," Korea's Supreme Court held that such purpose is found when the actor knew that another person would receive criminal or disciplinary punishment as a result of that false information.[113] Likewise, with respect to exporting or importing counterfeit stamps for the purpose of exercising them (punishable under Article 218(2) of the Criminal Act), the Supreme Court held that the "purpose of exercising a counterfeit stamp" includes transferring a counterfeit stamp with the knowledge that the transferee would use that stamp.[114] While in these cases, the Supreme Court used the language "would," implying that the knowledge of firm or very likely occurrence of a result is required, scholars commenting on the purpose element in Korean criminal law have interpreted the court's holdings to mean that knowledge of *possible* occurrence of a result satisfies the purpose element.[115]

Based on these precedents, it appears that where a client knows that a third-party intermediary may redirect some of that client's funds to a foreign public official as a bribe, the client can be found liable under the FBPA, even if the client does not direct the act of bribery or has actual knowledge of the third-party intermediary's unlawful plan. Perceptible indications or signals that the third-party intermediary would engage in bribery of a foreign public official, such as excessive consulting fee or suspicious reputation, would be key factors in determining whether the

113) Supreme Court [S. Ct.], 2005Do2712, Sept. 30, 2005 (S. Kor.); Supreme Court [S. Ct.], 2012Do2468, Mar. 13, 2014 (S. Kor.).

114) Supreme Court [S. Ct.], 88Do1105, Apr. 11, 1989 (S. Kor.).

115) KyungLyul Lee, *A Question on Admittance of Purpose of 'Exercise of Purpose': A Comparison of Supreme Court Judgment 2004Do788, 2012Do2468 and 88Do1105*, 29 J. CRIM. L. 363, 368 (2017); Im Chool Park, *The Transaction to Change the Market Price and the Purpose of Inducing Others to Trade as a Requirement of Manipulation*, 12 KOR. J. SEC. L. 211, 238 (2011). However, this expansive interpretation has been under criticism in the academic circle as well. Young-Il Chung, *Mokjeokbeom-e Gwanhan Pallyeyeongoo [Case Study of Purpose-Based Crime]*, 9 KOR. J. CRIM. CASE STUD. 235, 254-55 (2001).

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bribery purpose should be imputed to the client. On the other hand, if the client conducted due diligence but the third-party intermediary nevertheless redirected funds from the client to a foreign public official, it would be difficult to argue that the client had sufficient knowledge of possible bribery to be criminally liable.

Additionally, where a third-party intermediary's client is a legal entity, Article 4 of the FBPA can be applied to prosecute bribery of a foreign public official through a third party. When a legal entity's officer, agent, or employee violates the FBPA's anti-bribery provision with respect to the legal entity's business, Article 4 of the FBPA imposes a fine on the legal entity as well, unless the legal entity took due care and diligence to prevent the violation.[116] Depending on the relationship between a legal entity and the third-party intermediary it has retained, that third-party intermediary may be considered an agent of the legal entity, and in such a case, when the intermediary violates the FBPA, the legal entity would be liable under Article 4 of the FBPA as well, unless it took necessary measures to prevent said intermediary's bribery.[117] Taking together the application of Article 3(2) of the FBPA, Korean courts' interpretation of "purpose" in criminal law, and legal entity liability under the FBPA for violations by its agents, we believe that the current formulation of the FBPA can sufficiently guard against most forms of bribery of foreign public officials through an intermediary.

The second type of bribery involving a third party concerns a scenario in which a third party is not the intermediary but the final intended recipient of a bribe. In contrast to the "third-party intermediary" situation analyzed above, this would be a "third-party beneficiary" situation. A foreign public official, instead of receiving the bribe himself/herself, can direct the bribe to a family member, a business associate, or a favored organization. For example, a recent high-profile FCPA case in the United States involved the preferential hiring of family members of powerful Chinese officials by major American and European banks as a *quid pro quo*

116) Foreign Bribery Prevention Act, art. 4.

117) In defining an "agent," the most important factor would be whether the "agent" was acting for a principal with certain delegated authority. Dae-Hwi Kim, *Yangbeol gyujeong-eui haeseok [Interpretation of Vicarious Criminal Liability]*, 10 Kor. J. Crim. Case Stud. 15, 36 (2002).

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for business deals with Chinese SOEs (the so-called "princeling" case).[118] Because the family members hired reaped the direct benefits of preferential hiring, the foreign public official concerned was not the ultimate beneficiary. Therefore, a law that only prohibits giving a bribe to a foreign public official, without reference to a third-party beneficiary, may not cover this type of arrangement.[119]

In the Korean context, the FBPA's main anti-bribery provision appears to cover only promising, giving, or expressing intention to give a bribe to a foreign public official.[120] There is no mention of a third-party beneficiary in Article 3(1) of the FBPA. However, some have argued that case law regarding domestic bribery can be applied to the FBPA to expand the scope of the anti-bribery provision to third-party beneficiaries and that the newly enacted Article 3(2) of the FBPA concerning payment of bribes to a third party further prevents foreign bribery with a third-party beneficiary.[121]

We question that view. It is indeed true that in the domestic bribery context, the Korean Criminal Act's anti-bribery provisions cover third-party beneficiaries as well. Article 129 of the Criminal Act punishes a public official who receives or demands a bribe, while Article 130 punishes a public official who causes a bribe to be given to a third party.[122] In turn, the main provision governing punishment of bribe payers, Article 133(1), covers "a person who promises, delivers or manifests a will to deliver a bribe as stated in Articles 129 through 132."[123] Reading Articles 130 and

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118) Beverley Earle & Anita Cava, *Examining the JPMorgan "Princeling" Settlement: Insight into Current Foreign Corrupt Practices Act (FCPA) Interpretation and Enforcement*, 17 WASH. U. GLOBAL STUD. L. REV. 365, 373-79 (2018). JPMorgan paid $264 million to resolve the FCPA charge, and Credit Suisse paid $77 million. A number of other banks, such as Citigroup, Barclays, and Goldman Sachs, have disclosed ongoing investigations. Richard L. Cassin, *Hong Kong Charges Ex-JPMorgan Banker in 'Princeling' Bribery Case*, FCPA BLOG (May 16, 2019), http://www.fcpablog.com/blog/2019/5/16/hong-kong-charges-ex-jpmorgan-banker-in-princeling-bribery-c.html.

119) The framers of the OECD Anti-Bribery Convention were aware of this scenario as well and included the language "for that official or for a third party" in defining bribery of a foreign public official. OECD Anti-Bribery Convention, *supra* note 43, art. 1, para. 1.

120) Foreign Bribery Prevention Act, art. 3(1).

121) ORG. FOR ECON. CO-OPERATION & DEV., IMPLEMENTING THE OECD ANTI BRIBERY CONVENTION – PHASE 4 REPORT: KOREA 29 (2018) [hereinafter KOREA PHASE 4 REPORT]

122) Criminal Act, art. 130.

123) *Id*. art. 133(1).

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133(1) together, it is clear that giving a bribe to a third-party beneficiary as a *quid pro quo* with a public official is a punishable offense under the Criminal Act's anti-bribery provisions.

In contrast, the FBPA is structured differently. Unlike Article 133(1) of the Criminal Act, Article 3(1) of the FBPA is a standalone provision and only makes a reference to bribes to foreign public officials. There is no provision under the FBPA governing payment of a bribe to a third-party beneficiary to obtain favors from a foreign public official.

One could argue that Articles 3(1) and 3(2) of the FBPA, read together, cover bribery with a third-party beneficiary, as Article 3(2) of the FBPA prohibits giving a bribe to a third party for the purpose of bribing a foreign public official. This appears to be consistent with the legislative intent of the 2018 FBPA amendment that added Article 3(2); the official stated reason for the amendment notes that providing a bribe to a third party is not punishable under the current, pre-amendment statute and that the instant amendment is intended to provide a legal basis to punish giving a bribe to a third party.[124] In addition, the OECD examiners for Korea's Phase 4 implementation review were satisfied that the amendment covers bribery involving a third-party beneficiary as well.[125]

However, there is a disconnect between the language of Article 3(2) and the legislative intent. Strictly speaking, Article 3(2) of the FBPA only punishes giving a bribe to a third party "for the purpose of applying it to an act specified in Article 3(1)."[126] Therefore, the statutory language requires at least contemplation of a second-step bribery of a foreign public official.[127] Where the bribe's ultimate recipient is a third party, not a foreign public official, there is no such second step (and no contemplation thereof). Where giving a bribe to a third-party beneficiary is a standalone act that completes the bribery scheme, even if the intent is to obtain favorable treatment from

124) Gookje sanggeore-e iteoseo oegook gongmoowon-e daehan noemool bangjibeop gaejeong eeyoo [Reason for Amendment of the Act on Combating Bribery of Foreign Public Officials in International Business Transactions], Act No. 5588, Dec. 28, 1998, *amended by* Act No. 15972, Dec. 18, 2018 (S. Kor.).

125) Korea Phase 4 Report, *supra* note 121, at 29.

126) Foreign Bribery Prevention Act, art. 3(2).

127) As to what level of contemplation is required to satisfy the purpose prong, see the discussion above.

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a foreign public official, there is no "purpose of applying [the bribe] to an act specified in Article 3(1)," since the bribe is not passed on (and not intended to be passed on) to a foreign public official. Based on the plain reading of the statutory language, the FBPA covers bribery with a third-party *intermediary* but not bribery with a third-party *beneficiary*.

Of course, since the legislative intent is clear, reading the FBPA to encompass only bribery with a third-party intermediary appears unreasonable. We acknowledge that the narrow scope of FBPA's Article 3(2) is very likely a legislative oversight. But the established Korean principle on the interpretation of criminal statutes is that criminal law cannot be construed beyond the range of possible meaning of the statutory text when such an expansive construction would be unfavorable to the defendant.[128] Even when there appears to be a defect in the statutory text, a reading beyond the possible meaning of the statutory language is not permitted.[129] The language of Article 3(2) of the FBPA is clear in requiring a purpose of applying a bribe to an act specified in Article 3(1) (bribery of foreign public official), and ignoring the purpose element because it is inconsistent with the legislative intent would be an impermissible redesign of the statute.

In interpreting Article 3 of the FBPA, one could also point to case law (in the domestic bribery context) that in some cases, a public official is deemed to have received a bribe, even when a third party is the actual, physical beneficiary. The Korean Supreme Court has held that where a third party's receiving a bribe can be considered equivalent to a public official's receiving a bribe directly, said public official can be convicted under Article 129 of the Criminal Act (punishing a public official for receiving a bribe) instead of Article 130 (punishing a public official who causes a bribe to be

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128) Supreme Court [S. Ct.], 94Mo32, Dec. 20, 1994 (S. Kor.); Supreme Court [S. Ct.], 96Do1167, Mar. 20, 1997 (S. Kor.) (both holding that in interpreting criminal statutes, a reading beyond the possible meaning of the statutory text violates the principle of *nullum crimen sine lege*, or no crime without law); Yong-Sik Lee, *Hyongbeop haeseok-eui bangbeop [Methods of Criminal Law Interpretation]*, 46 SEOUL L.J. 36, 43 (2005) (noting the traditional view that "possible meaning of the text" sets the outer boundary to interpretation of criminal law).

129) Kwang Soo Lee, *The Range and Limits in the Analysis of the Criminal Law by the Judge*, 360 HUM. RT. & JUSTICE 64, 77 (2006); Mo-Yeong Gu, *Pallye pyeongseok: Hyongbeop haeseok-eui hangye-e gwanhan bangbeopjeok seongchal [Case Analysis: Method-Based Examination of Limits to Interpretation of Criminal Law]*, 4 KOR. J. COMP. CRIM. L. 353, 368 (2002).

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given to a third party).[130] Such an equivalence may be found, *inter alia*, when the public official typically covers the beneficiary's expenses and the bribe therefore reduces the expenses the public official must cover or when the public official is indebted to the beneficiary and the public official's repayment is reduced as a result of the bribe to the beneficiary.[131] As a corollary, when such an equivalence is found, someone paying a bribe to a third-party beneficiary would be punishable *as if* that person had bribed a public official directly.

The Korean Supreme Court has found the equivalence when a company dominated by a quasi-public official received a bribe,[132] when a bribe payer invested funds in an enterprise in which a public official was already an investor and the bribe payer's funds were accounted as the public official's investment,[133] and when the brother of a quasi-public official received a bribe on behalf of the official.[134] In contrast, the Korean Supreme Court denied such equivalence when the beneficiary and the public official were close associates (with allegations that they were romantically involved),[135] when a public official was an advisor to a nonprofit organization that received a bribe,[136] and when a company in which a quasi-public official

130) Supreme Court [S. Ct.], 2003Do8077, Mar. 26, 2004 (S. Kor.); Sun-Kuk Kim, *Discussion About the Criteria of Distinction Between Third Party Bribery Charge (Article 130 of Criminal Law) and Simple Bribery Charge (Article 129, Clause 1 of Criminal Law)*, 53 Kyung Hee L.J. 131, 145 (2018). Articles 129(1) and 130 of the Criminal Act have another key difference in that Article 130 requires that there be "an unjust solicitation in connection with [a public official's] duties" while Article 129(1) only requires that a bribe be "in connection with [a public official's] duties." Criminal Act, arts. 129(1), 130. As a result, where a payment scheme can be considered both a payment to a third party and a payment to a public official, it is easier to convict under Article 129(1), since there is no need to prove the existence of an unjust solicitation. Since the FBPA has a purpose element ("in relation to any international business transaction with intent to obtain any improper advantage for such transaction") different from both Articles 129(1) and 130 of the Criminal Act, that distinction between Articles 129(1) and 130 is not relevant to the discussion in this Article.

131) Supreme Court [S. Ct.], 2003Do8077, Mar. 26, 2004 (S. Kor.).

132) Supreme Court [S. Ct.], 2011Do9585, Nov. 24, 2011 (S. Kor.).

133) Supreme Court [S. Ct.], 2009Do6422, Oct. 15, 2009 (S. Kor.).

134) Supreme Court [S. Ct.], 2012Do3643, June 28, 2012 (S. Kor.).

135) Supreme Court [S. Ct.], 98Do1234, Sept. 22, 1998 (S. Kor.).

136) Supreme Court [S. Ct.], 2001Do7056, Apr. 9, 2002 (S. Kor.).

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served as an officer received a bribe.[137] These cases suggest that there must be a close economic relationship between the beneficiary and the public official for a bribe to a third-party beneficiary to be deemed equivalent to a bribe to a public official. With regard to the third-party beneficiary scenarios outlined above—the preferential hiring of adult family members, donations to favored charity or to a foreign public official's political party—while a foreign public official can derive some indirect benefit out of the bribery scheme with a third-party beneficiary, there does not appear to be such a close economic relationship between the foreign public official and the third-party beneficiary.[138] Therefore, in many situations, the case law concerning "deemed" bribery of a public official would not apply to bribery of a third-party beneficiary.

Taking the above discussion together, we thus conclude that the FBPA adequately guards against bribery with a third-party *intermediary* but does not cover bribery with a third-party *beneficiary*. Exclusion of the latter from the FBPA's scope appears to be a legislative error, but under principles of criminal law construction, the judiciary cannot reshape the statute beyond its text. Filling this gap would require further legislative action, such as amending Article 3(2)'s purpose prong from "for the purpose of applying it to an act specified in Article 3(1)" to "for the purpose of obtaining improper advantage in conducting international business transactions in relation to a foreign public official's business."

3. Achieving Effective Deterrence of Foreign Bribery

The discussion in Parts III.1 and III.2 focused on defining what constitutes the crime of bribery of a foreign public official. Preventing foreign bribery, however, requires not only defining the scope of anti-bribery provision correctly but also imposing appropriate deterrence and

137) Supreme Court [S. Ct.], 2008Do2590, Sept. 25, 2008 (S. Kor.).

138) For example, in *quid pro quo* preferential hiring cases, unless the person hired and the relevant public official are deemed to be in an economic union, Korean prosecutors typically pursue charges under Article 130 of the Criminal Act (causing a bribe to be paid to a third party) than under Article 129 (directly receiving a bribe). Sunmi Kim, *"Woori-ae ipsa jom sikyeojwo" Yojeum insa teukhyeneun noemool ["Please Hire My Child": Recent Preferential Hiring is a Bribe]*, JoongAng Daily, Oct. 3, 2017, https://news.joins.com/article/21989491.

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punishment measures. As such, this Part III.C discusses whether the punishments imposed by the FBPA are sufficient to deter foreign bribery.

For its violations, the FBPA authorizes maximum prison sentence of five years and maximum fine of twenty million won (approximately $17,000).[139] If the profit from the bribery scheme exceeds ten million won ($8,500), the maximum fine is then increased to twice the amount of the profit. In addition, any legal entity whose officer, agent, or employee violated the FBPA's anti-bribery provision is subject to a fine of up to one billion won ($850,000), with the maximum fine increased to twice the amount of the profit if the profit from the bribery scheme exceeds 500 million won ($420,000).[140]

In fact, these maximum punishments are at least equal to—and in some cases heavier than—the punishments authorized for domestic bribery. Under Article 133 of the Criminal Act, giving a bribe to a public official in the domestic context is punishable by imprisonment for up to five years *or* a fine of up to twenty million won ($17,000).[141] The imprisonment and the fine authorized are the same as the FBPA, but there is no provision permitting imposition of both the imprisonment and the fine (unlike the FBPA). Moreover, while the FBPA increases the maximum fine if the profit from the bribery scheme exceeds a certain amount, the Criminal Act does not, and there is no provision for punishing a legal entity whose officer, agent, or employee engaged in bribery.

The OECD, however, has raised concern that the sentences imposed are inadequate to deter foreign bribery.[142] In many cases, convictions result in either a fine and/or a suspended sentence, and the fine is typically well below the statutory maximum and often lower than even the amount of the bribe.[143] The provision increasing the maximum fine where there are large

139) Foreign Bribery Prevention Act, art. 3(1).

140) *Id.* art. 4.

141) Criminal Act, art. 133.

142) Korea Phase 4 Report, *supra* note 121, at 48 ("The adequacy of sanctions applied in practice raises concern. . . . During the on-site visit, civil society and private sector lawyers echoed concerns expressed by the Working Group: penalties available under the FBPA and imposed in practice are insufficient to mobilise law enforcement agencies to enforce the foreign bribery offence, and to deter commission of the offence.").

143) *Id.* at 49.

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profits from the bribery scheme has never been applied.[144)]

There are two elements to the punishment imposed in practice to violators of the FBPA. The first is the sentence authorized under the statute; the second is the sentence imposed *in comparison* to the maximum authorized sentence. Given that the punishment imposed under the FBPA is typically below the statutory maximum, the statutorily authorized punishment is not a limiting factor. Moreover, raising the statutory maximum sentence in the FBPA may result in a significant imbalance between the maximum sentence in the foreign bribery context and in the domestic bribery context. Regarding the actual sentence imposed, it appears that the ostensibly inadequate punishments handed down to defendants in foreign bribery is largely due to Korean courts' relatively lenient attitude toward bribe payers (as opposed to bribe recipients) generally. Under the Korean Supreme Court's sentencing guidelines, a public official who receives a bribe between 50 million won ($42,000) and 100 million won ($85,000) is subject to recommended sentence of five to ten years of imprisonment, while a bribe payer who gives the same amount is subject to recommended sentence of 1.5 to 2.5 years of imprisonment.[145)] In addition, in the domestic bribery context as well, a vast majority of convictions for bribe payment result solely in fines or suspended sentences, usually well below the statutory maximum.[146)] Thus, whether punishments imposed under the FBPA are inadequate is not a problem limited to the foreign bribery context and depends on whether punishments imposed for bribery in general in Korea are inadequate.

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144) *Id.* at 50.

145) *Noemool beomjoe yanghyung gijoon [Sentencing Guidelines for Bribery Crime]*, SUPREME COURT SENTENCING COMM'N (July 1, 2009), https://sc.scourt.go.kr/sc/krsc/criterion/criterion_02/bribe_01.jsp.

146) Between the latter half of 2009 and 2010, of 189 convictions for bribe payment, 89 resulted in sentence of imprisonment, 99 resulted in fines, and 1 resulted in suspended imposition of sentence (which differs from suspended execution of sentence; the latter is typically known as suspended sentence). Of the 89 convictions resulting in sentence of imprisonment, 79 received a suspended sentence, with only 10 resulting in actual prison time. Of the 99 convictions resulting in fines, only 3 received the statutory maximum fine. YOUNG KEUN OH, YOOKEUN KIM, MAN SEONG HWANG & TAE JEONG HWANG, YANGHYUNG GWANRYUN PALLYE PYEONGSEOK EUL TONGHAN YANGHYUNG GIJOON GAESEON BANGAN YEONGU [STUDY ON IMPROVING THE SENTENCING GUIDELINE THROUGH CASE ANALYSIS RELATED TO SENTENCING] 75-78 (2011).

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Then there is the more fundamental question of whether fines (especially for legal entities) are adequate deterrents against criminal behavior. For some, the answer to this question is obvious. Like other punishments, all else being equal, a fine increases the potential loss a criminal must suffer if the crime is discovered and results in a conviction, lowering crime's expected payoff.[147)] Human beings respond to incentives, and a fine is a negative incentive. But a fine can also create a dynamic in which a certain behavior is "priced" rather than "discouraged" or "prohibited."[148)] Particularly in the corporate context, a fine may become a "cost of doing business," not a punishment for a prohibited and morally frowned-upon behavior.[149)] A legal entity may be fined under the FBPA for bribery of a foreign public official by its officer, agent, or employee, but that fine simply becomes a cost of doing business abroad, creating a "pay-to-bribe" situation.[150)] Moreover, a fine is regressive in that its deterrent effect decreases for larger companies that can afford them.[151)]

In response, some have advocated for alternative methods of punishing criminal behavior, such as stigma. Along that line, one additional option to punishing those who engage in foreign bribery is debarment, or a ban from receiving public contracts. Debarment can leave a stigma that goes above

147) *See*, *e.g.*, Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968); Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. Econ. Perspectives 43 (1996).

148) Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. Chi. L. Rev. 591, 621 (1996); Darlene R. Wong, *Stigma: A More Efficient Alternative to Fines in Deterring Corporate Conduct*, 3 Cal. Crim. L. Rev. 3, ¶ 2 (2000); Peter J. Henning, *Guilty Pleas and Heavy Fines Seem to Be Cost of Doing Business for Wall St.*, N.Y. Times DealBook (May 20, 2015), https://www.nytimes.com/2015/05/21/business/dealbook/guilty-pleas-and-heavy-fines-seem-to-be-cost-of-business-for-wall-st.html.

149) For an example of this dynamic, see Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. Legal Stud. 1 (2000) (finding that when a fine was introduced to parents who were late in collecting their children from daycare, late-arriving parents actually increased, since the fine just became a price for coming late).

150) Of course, if the fine were large enough, it may have a deterrent effect, even as a price, but as the OECD noted, the fines actually handed down appear insufficient to achieve that result.

151) Jeff Macke, *$11 Billion Fine? Just a Cost of Doing Business for JPMorgan: Ritholtz*, Yahoo Finance (Sept. 27, 2013), https://finance.yahoo.com/blogs/breakout/11-billion-fine-just-cost-doing-business-jpmorgan-175948500.html.

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and beyond a fine and can be economically costly for businesses that rely heavily on government contracts. Additionally, firms that engaged in criminal behavior in the past may be more likely to engage in such behavior in the future and disrupt the fair transaction of government business, justifying their exclusion from the government contracting process.[152)]

In Korea, debarment for bribery of a public official is already enshrined in statute. Under paragraph 7 of Article 27(1) of the Act on Contracts to Which the State is a Party (State Contract Act), a person who bribes a relevant public official in the tendering process is subject to debarment for up to two years.[153)] The applicable central government agency must also notify other central government agencies of the debarment, so that other agencies can restrict participation by the debarred individual/entity as well.[154)] But since the language of the statute only covers bribery of a relevant public official in the Korean government contracting process, there is no statutory authorization to debar an individual or an entity based on bribery of a foreign public official. Thus, in order to impose debarment on those who engaged in foreign bribery, the scope of paragraph 7 of Article 27(1) of the State Contract Act could be expanded to include bribery of foreign public officials in tendering process.[155)] This expansion of the debarment sanction to foreign bribery would strengthen the deterrent effect of an FBPA conviction.

One may object to the application of the debarment penalty to foreign bribery based on the attenuated relationship between a case of foreign bribery and the Korean government contracting process. However, that relationship is not as attenuated as it first appears. In the domestic bribery context, bribery of a public official of one agency already subjects the bribe-

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152) Jeong Hoon Park, *Boojeongdang eopja-eui ipchal chamga jagyuk jehan-eui beopjeok jemoonje [Legal Problems with Restriction on Bidding for Government Contracts for Debarred Person]*, 46 Seoul L.J. 282 (2005).

153) Gookga-reul dangsajaro haneun gyeyak-e gwanhan beopryul [Act on Contracts to Which the State is a Party], Act No. 4868, Jan. 5, 1995, *amended by* Act. No. 15219, Dec. 19, 2017, art. 27(1) (S. Kor.) [hereinafter State Contract Act].

154) *Id.*

155) In such a case, there is no "applicable central government agency" domestically that initiates the debarment process, but perhaps the Ministry of Justice can initiate that process.

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payer to debarment by other central government agencies as well.[156] Furthermore, it can be argued that a firm that engaged in bribery of a foreign public official in the government contracting process is more likely to engage in that same act in the domestic context, and the debarment penalty protects the integrity of the domestic government contracting process.[157]

Of course, the debarment sanction is not a perfect remedy either. Some have criticized the debarment penalty because firms can obtain a stay of enforcement while the administrative litigation to overturn the debarment decision is pending (and win additional government contracts in the interim),[158] because legal entities can engage in merger, acquisition, or other reorganization transactions to avoid debarment,[159] or because in some cases, debarment of major contractors can hurt competition in government contracting (the "too-big-to-debar" argument).[160] Given the insufficiency of the current FBPA penalty regime, however, it is a step in the right direction to enhance the deterrent effect of the FBPA and to protect the integrity of the domestic government contracting process.

Conclusion

In light of the importance of international business transactions to an export-oriented country like Korea, this Article has examined three major ways in which Korea's legal regime against foreign bribery can be strengthened. As a threshold question, a prohibition against the bribery of a foreign public official must define who constitutes a foreign public official, and the current definition, particularly for state-owned enterprises, can be unpredictable. Moreover, despite legislative intent to the contrary, the text

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156) State Contract Act, art. 27(1).

157) Park, *supra* note 152.

158) Nat'l Assembly Res. Serv., Gonggongjodal boojeongdang eopja jejaejedo-eui jooyo jaengjeomgwa gaeseonbangan [Major Issues in and Improvement to Debarment in Public Procurement] 14 (2015).

159) *Id.* at 15.

160) Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 Fordham L. Rev. 775 (2011).

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of the FBPA does not cover foreign bribery with a third-party *beneficiary*, a gap that is particularly important given recent cases. Lastly, the fines imposed under the FBPA can lead to a "pay-to-bribe" situation in which the monetary penalty becomes a mere cost of doing business. In order to address these issues, this Article proposes a more workable definition of a "foreign public official," a legislative fix to prevent bribery with a third-party beneficiary, and debarment as another penalty option for those that engage in foreign bribery.

As discussed in this Article, foreign bribery is not just "someone else's problem." The perverse effects of foreign bribery not only undermine fair and impartial exercise of government function in that foreign country but also feed back to the home country in various ways. A strong legal effort to prevent foreign bribery can therefore pay dividends by improving business climate abroad (so that the home country's businesses investing abroad benefit), ensuring a better equilibrium outcome among countries, helping companies resist bribery demands abroad, and fostering an ethical corporate culture.

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