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# How South Korea's Improper Solicitation and Graft Act (Kim Young-ran Act) Can Help Protect US Trade Secrets

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HOW SOUTH KOREA’S IMPROPER SOLICITATION AND GRAFT ACT (KIM YOUNG-RAN ACT) CAN  
HELP PROTECT US TRADE SECRETS

BY LANA RASK.<sup>1</sup>

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## I. INTRODUCTION

Trade secrets are the lifeblood of many companies. Some of the best kept trade secrets in the United States are the recipe for Coca-Cola, Colonel Sanders' spice blend for KFC chicken, and the formula for WD-40.<sup>2</sup> A law article published in the *New York Law Journal* states that "Theft of trade secrets is likely the most pressing threat to the security of sensitive information maintained by U.S. companies."<sup>3</sup> In fact, according to the Commission on the Theft of American Intellectual Property, "[t]he annual losses are likely to be comparable to the current annual level of U.S exports to Asia—over \$300 billion."<sup>4</sup> Congress has passed and amended laws aimed at protecting businesses' trade secrets. One of the most recent examples is an added amendment to the Economic Espionage Act.<sup>5</sup>

"On December 28, 2012, President Obama signed into law the Theft of Trade Secrets Clarification Act, which amends and expands the Economic Espionage Act (EEA)."<sup>6</sup> This amendment, which received overwhelming support from both the Senate and the House of Representatives, "amends the EEA so that it now covers trade secret 'related to a product or service used in or intended for use in' commerce."<sup>7</sup> The United States is not the only country that has made increased efforts to protect trade secrets.<sup>8</sup> One of the ways that individuals or businesses try to gain trade secrets is through bribery. Kolon Industries, a South Korean company, used just such tactics to attempt to steal trade secrets from DuPont Inc., an American corporation.<sup>9</sup> In response to growing criticism and concern over the use of bribery, South Korea on September 28, 2016, passed the Improper Solicitation and Graft Act, also known as the Kim Young-Ran Act, to combat bribery.<sup>10</sup>

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<sup>2</sup> R. Mark Halligan & David A. Haas, *The Secret of Trade Secret Success*, Forbes (Feb. 19, 2010), <http://www.forbes.com/2010/02/19/protecting-trade-secrets-leadership-managing-halligan-haas.html>.

<sup>3</sup> Daniel A. Schnapp, *Trade Secret Theft and the Rise of the Private Right of Action*, New York Law Journal (Apr. 6, 2015), <http://www.foxrothschild.com/publications/trade-secret-theft-and-the-rise-of-the-private-right-of-action/>.

<sup>4</sup> THE COMMISSION ON THE THEFT OF AMERICAN INTELLECTUAL PROPERTY: THE IP COMMISSION REPORT (2012), [http://www.ipcommission.org/report/IP\\_Commission\\_Report\\_052213.pdf](http://www.ipcommission.org/report/IP_Commission_Report_052213.pdf).

<sup>5</sup> Theft of Trade Secrets Clarification Act of 2012, Pub. L. No. 112-236, 126 Stat. 1627.

<sup>6</sup> David E. Dubberly, *New Federal Law Increases Trade Secret Protection*, Nexsen Pruet (Jan. 22, 2013), <http://www.nexsenpruet.com/insights/new-federal-law-increases-trade-secret-protection>.

<sup>7</sup> *Id.* "The Economic Espionage Act (EEA) was enacted in 1996." In *United States v. Aleynikov*, 737 F. Supp. 2d 173 "the Second Circuit found that Aleynikov had not violated the Economic Espionage Act. The Second Circuit 'interpreted the EEA narrowly to apply only where a trade secret relates to products a company sells, not where it relates to products a company uses internally.' After this case was decided, 'Congress passed the Theft of Trade Secrets Clarification Act. . . . by unanimous consent in the Senate and be a vote of 388-4 in the House.'"

<sup>8</sup> See, e.g., David Vance Lucas, *International Harmonization of Trade Secret Rights and Remedies*, Bradley (Dec. 13, 2016), <https://www.bradley.com/insights/publications/2016/12/international-harmonization-of-trade-secret-rights-and-remedies> (EU 943, passed on June 8, 2016, "creates the first private common trade secret action applicable in all EU member states").

<sup>9</sup> *United States v. Aleynikov*, 737 F. Supp. 2d 173 (S.D.N.Y. 2010).

<sup>10</sup> *Legal Update: A Brief Overview of the Anti-Corruption and Bribery Prohibition Act*, Jipyong, (Apr. 6, 2015), [http://www.jipyong.com/newsletter\\_alert/150406/Legal\\_update.pdf](http://www.jipyong.com/newsletter_alert/150406/Legal_update.pdf).

This article will explore how the United States compares to South Korea in terms of corruption, including bribery. Next will be a discussion of how the United States defines trade secrets versus how South Korea defines trades secrets. After the discussion of trade secrets, the controlling laws between South Korea and the United States will be examined. Then, this paper shall explore corporate espionage. This section will include an examination of *DuPont Inc. v. Kolon USA Inc.* Finally, this paper will explore the Improper Solicitation and Graft Act of Korea, also known as the Kim Young-Ran Law, recently passed by South Korea and how this law may affect United States' business relations with South Korea.

## II. UNITED STATES CORRUPTION RANKING VERSUS SOUTH KOREAN CORRUPTION RANKING

### A. *Corruption*

Transparency International defines corruption as “the abuse of entrusted power for private gain.’ Corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs.”<sup>11</sup> Corruption can be found across the globe. “Transparency International states “Sixty-eight percent of countries worldwide have a serious problem. Half of the G20 are among them.”<sup>12</sup> Transparency International uses various corruption measurement tools to determine how countries fall on different facets of corruption: the Corruption Perceptions Index, a country’s control of corruption, the Global Corruption Barometer, the enforcement of OECD Anti-Bribery Convention, and the Bribe Payers Index.<sup>13</sup>

#### 1. *Corruption Perceptions Index*

Transparency International uses a Corruption Perceptions Index to measure the corruption found in surveyed countries.<sup>14</sup> Of the 168 countries that Transparency International has gathered data on and ranked, the United States ranks sixteenth along with Austria.<sup>15</sup> The United States received a score of 76/100 on Transparency International’s Corruption Perceptions Index.<sup>16</sup> South Korea on the other hand ranks thirty-seventh.<sup>17</sup> South Korea received a score of 56/100 on the Corruption Perceptions Index.<sup>18</sup>

<sup>11</sup> WHAT IS CORRUPTION, <http://www.transparency.org/what-is-corruption/#define> (last visited Nov. 8, 2016). “Transparency International was created in 1993. Their vision is ‘a world in which government, business, civil society and the daily lives of people are free of corruption.’ Transparency International has ‘more than 100 national chapters worldwide and an international secretariat in Berlin.’”

<sup>12</sup> CORRUPTION PERCEPTIONS INDEX 2015, <https://www.transparency.org/cpi2015/> (last visited Nov. 8, 2016).

<sup>13</sup> CORRUPTION BY TERRITORY/COUNTRY, <https://www.transparency.org/country/KOR> (last visited Nov. 9, 2016).

<sup>14</sup> *Id.* “The Corruption Perceptions Index ranks countries/territories based on how corrupt a country’s public sector is perceived to be. It is a composite index drawing on corruption-related data from expert and business surveys carried out by a variety of independent and reputable institutions. Scores range from 0 (highly corrupt) to 100 (very clean).”

<sup>15</sup> CORRUPTION BY TERRITORY/COUNTRY, <https://www.transparency.org/country/USA> (last visited Nov. 9, 2016).

<sup>16</sup> *Id.*

<sup>17</sup> <https://www.transparency.org/country/KOR> (last visited Nov. 8, 2016).

<sup>18</sup> *Id.*

## 2. *Control of Corruption*

Transparency International also looks at how well a country is perceived to control corruption.<sup>19</sup> From a survey taken in 2010, the United States is in the 86<sup>th</sup> percentile with a score of 1.232890271 whereas South Korea is in the 69<sup>th</sup> percentile with a score of 0.422983221.<sup>20</sup>

## 3. *Global Corruption Barometer*

Transparency International uses a global corruption barometer (GCB) to show how corruption is viewed on a national level for each country.<sup>21</sup> The 2013 GCB report shows that 53% of respondents in the United States felt that businesses were corrupt or extremely corrupt.<sup>22</sup> Furthermore, 36% of respondents felt that since 2011, the level of corruption in the United States had increased a lot.<sup>23</sup> In South Korea on the other hand, only 33% of respondents felt that businesses were corrupt or extremely corrupt.<sup>24</sup> Only 13% of South Korean respondents felt that the level of corruption in South Korea has increased a lot since 2011.<sup>25</sup>

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<sup>19</sup> <http://www.transparency.org/cpi2010/results> (last visited Nov. 9, 2016).

“Control of corruption reflects perceptions of the extent to which public power is exercised for private gain. This includes both petty and grand forms of corruption, as well as ‘capture’ of the state by elites and private interests. Control of corruption is one of the six dimensions of the Worldwide Governance Indicators. For the given scores, point estimates range from about -2.5 to 2.5. Higher values correspond to better governance outcomes.”

<sup>20</sup> *Id.* (last visited Nov. 9, 2016).

<sup>21</sup> <https://www.transparency.org/country/USA> (last visited Nov. 9, 2016).

“The Global Corruption Barometer is the only worldwide public opinion survey on views and experiences of corruption. It captures how corruption is views at the national level. It also provides a measure of people’s experience of corruption for a specified year.”

<sup>22</sup> *Global Corruption Barometer: United States*, TRANSPARENCY INTERNATIONAL, [https://www.transparency.org/gcb2013/country/?country=united\\_states](https://www.transparency.org/gcb2013/country/?country=united_states) (last visited Apr. 6, 2017).

<sup>23</sup> *Id.*

<sup>24</sup> *Global Corruption Barometer: South Korea*, TRANSPARENCY INTERNATIONAL, [https://www.transparency.org/gcb2013/country/?country=korea\\_\(south\)](https://www.transparency.org/gcb2013/country/?country=korea_(south)) (last visited Apr. 6, 2017).

<sup>25</sup> *Id.*

#### 4. *OECD Anti-Bribery Convention*

Both the United States and South Korea are signatories to the Organizations for Economic Co-operation and Development (OECD) Anti-Bribery Convention.<sup>26</sup> Transparency International uses data from OECD to rank countries on their enforcement of the OECD Anti-Bribery Convention held in 2011.<sup>27</sup> South Korea falls into the moderate category in terms of enforcement<sup>28</sup> whereas the United States falls into the active category for enforcement.<sup>29</sup>

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<sup>26</sup> *Our Mission*, THE ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), <http://www.oecd.org/about/> (last visited Apr. 6, 2017). The OECD was established in 1961 and currently 35 countries are members. According to OECD's website, their mission "is to promote policies that will improve the economic and social well-being of people around the world. The OECD provides a forum in which governments can work together to share experiences and seek solutions to common problems. [They] work with governments to understand what drives economic, social and environmental change. [They also] measure productivity and global flows of trade and investment. [They] analyze and compare data to predict future trends. [They] set international standards on a wide range of things, from agriculture and tax to the safety of chemicals."

<sup>27</sup> <https://www.transparency.org/country/KOR> (last visited Nov. 9, 2016).

"The country review is based on the progress of the Organization for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, requiring each party to make foreign bribery a crime. Countries are evaluated and classified into four categories: active enforcement, moderate enforcement, little enforcement, or no enforcement."

<sup>28</sup> *Id.*

<sup>29</sup> <https://www.transparency.org/country/USA> (last visited Nov. 9, 2016).

### 5. Defining Bribery

Looking around the globe, acts of bribery can be found in all if not most countries.<sup>30</sup> Bribery in its simplest form can be defined as “the act or practice of giving or taking a bribe.”<sup>31</sup> A bribe is defined as “money or favor given or promised in order to influence the judgment or conduct of a person in a position of trust.”<sup>32</sup> Transparency International offers a more in depth definition of bribery.

It defines bribery as, “the offering, promising, giving, accepting or soliciting of an advantage as an inducement for an action which is illegal, unethical or a breach of trust.”<sup>33</sup> Transparency International uses the Bribe Payers Index (2011) to measure a country’s firms’ likelihood to bribe abroad.<sup>34</sup> The United States ranks 10/28 with a score of 8.1<sup>35</sup> on the Bribe Payers Index whereas South Korea ranks 13/28 with a score of 7.9/10 on the Bribe Payers Index.<sup>36</sup>

## III. TRADE SECRET

### A. Definition

The general definition given for trade secret from Merriam Webster is: “something (as a formula) which has economic value to a business because it is not generally known or easily discoverable by observation and for which efforts have been made to maintain secrecy.”<sup>37</sup> While you can garner the general idea of what a trade secret is from a dictionary definition, one must look to a country’s individual trade secret law to see how a trade secret is not only defined but what use a trade secret has for companies.

<sup>30</sup> See generally TRANSPARENCY INTERNATIONAL, <http://www.transparency.org/> (last visited Apr. 6, 2017).

<sup>31</sup> *Bribery*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/bribery> (last visited Apr. 6, 2017).

<sup>32</sup> *Bribe*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/bribe> (last visited Apr. 6, 2017).

<sup>33</sup> *Anti-Corruption Glossary*, TRANSPARENCY INTERNATIONAL, <https://www.transparency.org/glossary/term/bribery> (last visited Apr. 6, 2017).

<sup>34</sup> *Bribe Payers Index*, Transparency International, <http://www.transparency.org/bpi2011/results> (last visited Apr. 16, 2017). “The Bribe Payers Index ranks the world’s wealthiest and most economically influential countries according to the likelihood of their firms to bribe abroad. Scores range from 0 to 10, indicating the likelihood of firms headquartered in these countries to bribe when operating abroad. The higher the score for the country, the lower the likelihood of companies from this country to engage in bribery when doing business abroad.”

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Trade Secret*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriamwebster.com/dictionary/trade%20secret> (last visited Dec. 27, 2016).

## B. Importance of trade secrets

Trade secrets are the lifeblood of many companies. They can be found in companies that produce food and beverages to companies that produce a substance to dull the surface of new baseballs to even a company that puts out a best-seller list.<sup>38</sup> Without the protection of trade secrets, many companies would not have an advantage over other competitors with similar products. A trade secret can be all that holds a company's existence together.

## IV. TRADE SECRETS IN THE UNITED STATES

“Trade Secret law in the United States emerged in the middle of the 19th Century.”<sup>39</sup> “The development of trade secret principles arose from cases that were brought to resolve disputes between competitors.”<sup>40</sup> Today, we look to the Uniform Trade Secrets Act (UTSA) to define trade secrets in the United States.

### A. How the US defines trade secrets

#### 1. The Uniform Trade Secrets Act (UTSA)

The Uniform Trade Secrets Act (UTSA) defines a trade secret as:

information, including a formula, pattern, compilation, program, device, method, technique, or process, that derives independent economic value, actual or potential, from not being generally known to or readily ascertainable through appropriate means by other persons who might obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>41</sup>

As of May 2013, Massachusetts, North Carolina, and New York are the only states that still have not adopted the Uniform Trade Agreement Act.<sup>42</sup> Massachusetts, North Carolina, and New York have individual state statutes for the protection of trade secrets.

<sup>38</sup> Melanie Radzicki McManus, “10 Trade Secrets We Wish We Knew, HOW STUFF WORKS: MONEY (Nov. 15, 2011), <http://money.howstuffworks.com/10-trade-secrets3.htm>.

<sup>39</sup> SHARON K. SANDEEN AND ELIZABETH ROWE, TRADE SECRET LAW IN A NUTSHELL 1 (2013).

<sup>40</sup> *Id.*

<sup>41</sup> *Trade Secret*, CORNELL UNIVERSITY LAW SCHOOL: LEGAL INFORMATION INSTITUTE, [https://www.law.cornell.edu/wex/trade\\_secret](https://www.law.cornell.edu/wex/trade_secret) (last visited Jan. 6, 2017).

<sup>42</sup> *Trade Secrets Act*, UNIFORM LAW COMMISSION: ACTS, <http://www.uniformlaws.org/Act.aspx?title=Trade+Secrets+Act> (last visited Jan. 6, 2017).

## V. TRADE SECRETS IN SOUTH KOREA

South Korea first instituted protection of trade secrets in 1961.<sup>43</sup> The Unfair Competition Prevention and Trade Secret Protection Act (UCPA), passed on December 30, 1961,<sup>44</sup> has since been expanded through amendments as trade secrets have become more defined and South Korea has not only participated in trade across the globe but also as Korean businesses have grown.

### A. *How South Korea defines trade secrets*

#### 1. *Unfair Competition Prevention and Trade Secrets Protection Act (UCPA)*

Article 2.2 of UCPA states “The term ‘trade secret’ means information, including a production method, sale method, useful technical or business information for business activities, that is not known publicly, is the subject of reasonable efforts to maintain its secrecy, and has independent economic value.”<sup>45</sup> The act further goes on to define the term infringement of trade secrets.

Infringement of trade secrets can mean any of the following acts: (a) An act of acquiring trade secrets by theft, deception, coercion, or other improper means (hereinafter referred to as “act of improper acquisition”), or subsequently using or disclosing the trade secrets improperly acquired (including informing any specific person of the trade secret while under a duty to maintain secrecy; hereinafter the same shall apply);

(b) An act of acquiring trade secrets or using or disclosing the trade secrets improperly acquired, with knowledge of the fact that an act of improper acquisition of the trade secrets has occurred or without such knowledge due to gross negligence;

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<sup>43</sup> *Unfair Competition Prevention and Trade Secret Protection Act*, WORLD INTELLECTUAL PROPERTY ORGANIZATION: REPUBLIC OF KOREA, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=188269#LinkTarget\\_471](http://www.wipo.int/wipolex/en/text.jsp?file_id=188269#LinkTarget_471) (last visited Jan. 6, 2017). According to The World Intellectual Property website, “The World Intellectual Property Organization (WIPO) is a global forum for intellectual services, policy, information and cooperation.”

<sup>44</sup> *Id.*

<sup>45</sup> *Unfair Competition Prevention and Trade Secret Protection Act*, Act No. 5621, Dec. 31, 1998, amended by Act No. 14033, Feb. 29, 2016, art. 2 (S. Kor.), translated in Korea Legislation Research Institute online database [http://elaw.klri.re.kr/eng\\_mobile/viewer.do?hseq=39690&type=lawname&key=unfair%20competition](http://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=39690&type=lawname&key=unfair%20competition) (last visited Jan. 6, 2017).

(c) An act of using or disclosing trade secrets after acquiring them, with knowledge of the fact that an act of improper acquisition of the trade secrets has occurred or without such knowledge due to gross negligence;

(d) An act of using or disclosing trade secrets to obtain improper benefits or to damage the owner of the trade secrets while under a contractual or other duty to maintain secrecy of the trade secrets;

(e) An act of acquiring trade secrets, or using or disclosing them with the knowledge of the fact that they have been disclosed in the manner provided in item (d) or that such disclosure has been involved, or without such knowledge due to gross negligence;

(f) An act of using or disclosing trade secrets after acquiring them, with the knowledge of the fact that they have been disclosed in a manner provided in item (d) or that such disclosure has been involved, or without such knowledge due to gross negligence.<sup>46</sup>

## 2. *Act on Prevention of Divulgence and Protection of Industrial Technology (Industrial Technology Act)*

“The Industrial Technology Act was created to address the perceived lack of protection of national core technologies, since the UPCA only protects the trade secrets of private companies.”<sup>47</sup> Article 14 of the Industrial Technology Act prohibits:

(1) Acquiring the industrial technology of any institution possessing industrial technology obtained by means of theft, deception, threat, or other unjust means or using or publicizing such industrial technology (including providing information to a specific person in secret; hereinafter the same shall apply);[ . . .] (6) Acquiring, merging, etc. industrial technology overseas and failing to report under Article 11-2 (1) and (2) or falsely reporting for the purpose of using national core technology or using it overseas.<sup>48</sup>

<sup>46</sup> *Id.*

<sup>47</sup> Peter K. Paik and Kyu-Bin Lim, *Trade Secret Protection in South Korea*, WORLD INTELLECTUAL PROPERTY REVIEW DIGEST (2010). [HTTP://WWW.KIMCHANG.COM/USERFILES/FILES/TRADESECRETPROTECTIONINSOUTHKOREA-WORLDIPREVIEW.PDF](http://www.kimchang.com/userfiles/files/tradesecretprotectioninsouthkorea-worldipreview.pdf).

<sup>48</sup> Sogwanbuchoe, [Act on Prevention of Divulgence and Protection of Industrial Technology], Act No. 14108, Mar. 29, 2016, [http://elaw.klri.re.kr/kor\\_service/lawView.do?hseq=38483&lang=ENG](http://elaw.klri.re.kr/kor_service/lawView.do?hseq=38483&lang=ENG).

### 3. *Impact on United States Businesses*

With amendments to both the UCPA and the Industrial Technology Act, the South Korean government is attempting to enforce trade secret laws. With the increase in vigilance by the South Korean government, foreign technology companies doing business in Korea should enhance their internal risk assessment programs.<sup>49</sup> Companies should make plans to guard against any legal consequences that could possibly come—if accused of trade secret theft claims or be involved in an investigation by the Korean government.<sup>50</sup>

#### B. *Controlling law between the United States and South Korea*

##### 1. *United States—Korea Free Trade Agreement (KORUS)*

The United States—Korea Free Trade Agreement (KORUS)—was enacted on March 15, 2012.<sup>51</sup> This trade agreement with South Korea was “an integral part of President Obama’s efforts to increase opportunities for U.S. businesses, farmers and workers through improved access for their products and services in foreign markets.”<sup>52</sup> KORUS reaffirms both countries will uphold the existing rights and obligations they have under the TRIPS Agreement.<sup>53</sup>

KORUS also called for both the United States and South Korea to ratify or accede to other Agreements.<sup>54</sup> This Agreement also gives both countries room to use existing laws in place for protection of intellectual property, but also allows for growth and new laws to be used not included in this Agreement. Section 5 states, “A Party may provide more extensive protection for, and enforcement of, intellectual property rights under its law than this Chapter requires, provided that the more extensive protection does not contravene this Chapter.”<sup>55</sup> Section five (5) is important, because KORUS does not specifically mention or define trade secrets.

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<sup>49</sup> *Supra* n. 45, p. 116.

<sup>50</sup> *Id.*

<sup>51</sup> The U.S. —Korea Free Trade Agreement (KORUS), EXPORT.GOV: FREE TRADE AGREEMENTS KOREA, <http://2016.export.gov/FTA/korea/index.asp> (last visited Jan. 7, 2016) (“On the day of implementation, almost 80 percent of U.S. industrial goods exports to Korea are duty-free including aerospace equipment, agricultural equipment, auto parts, building products, chemicals, consumer goods, electrical equipment, environment goods, travel goods, paper products, scientific equipment and shipping and transportation equipment.”).

<sup>52</sup> Why a U.S.-Korea Trade Agreement?, INTERNATIONAL TRADE ADMINISTRATION, <http://trade.gov/fta/korea/> (last visited Jan. 7, 2016).

<sup>53</sup> FREE TRADE AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF KOREA, S.Kor.-U.S., March 15, 2012, Chapter Eighteen: Intellectual Property Rights, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE: TRADE AGREEMENTS [https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file273\\_12717.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file273_12717.pdf).

NOTE: Chapter 18, 18.1(2).

<sup>54</sup> *Id.* Paris Convention for the Protection of Industrial Property (1967), the World Intellectual Property Organization (WIPO) Copyright Treaty (1996), and the Trademark Law Treaty (1994).

<sup>55</sup> *Id.*

## 2. *Trade-Related Aspects of Intellectual Property (TRIPS) Agreement*

The Uniform Trade Secret Act, along with each state's regulations on trade secrets, is not the only protection that United States businesses have. The United States as a member of the World Trade Organization (WTO) is also subject to the Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS). South Korea, as a member of the WTO is also subject to the TRIPS Agreement. "The TRIPS Agreement, which came into effect on January 1, 1995, is to date the most comprehensive multilateral agreement on intellectual property."<sup>56</sup> Copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits, and undisclosed information are the areas of intellectual property that TRIPS covers.<sup>57</sup>

Trade secrets by definition are undisclosed information. Undisclosed information is required to benefit from protection under the TRIPS Agreement.<sup>58</sup> Article 39.2 states "the protection must apply to information that is secret, that has commercial value because it is secret and that has been subject to reasonable steps to keep it secret."<sup>59</sup> This agreement allows for civil and administrative procedures and remedies.<sup>60</sup> Both injunctions and damages are available as options to parties seeking relief.<sup>61</sup>

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<sup>56</sup> Overview: the TRIPS Agreement, WORLD TRADE ORGANIZATION: TRIPS: A MORE DETAILED OVERVIEW OF THE TRIPS AGREEMENT, [https://www.wto.org/english/tratop\\_e/trips\\_e/intel2\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm) (last visited Jan. 6, 2017) ("The World Trade Organization (WTO) deals with global rules of trade between nations. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.").

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Enforcement of Intellectual Property Rights, WORLD TRADE ORGANIZATION: OVERVIEW: THE TRIPS AGREEMENT, [https://www.wto.org/english/tratop\\_e/trips\\_e/intel2b\\_e.htm#civiland](https://www.wto.org/english/tratop_e/trips_e/intel2b_e.htm#civiland) (last visited Jan. 6, 2017). Note: Could for use for information of what kind of remedies and procedures are available. Pretty extensive section under the heading on the website.

<sup>61</sup> *Id.*

## VI. CORPORATE ESPIONAGE

A. *Corporate Espionage*

Corporate espionage, also known as industrial espionage, can be defined as: “attempting to obtain trade secrets by dishonest means, as by telephone or computer-tapping, infiltration of a competitor’s workforce, etc.”<sup>62</sup> Corporate espionage occurs both domestically and internationally with companies trying to obtain competitor’s trade secrets. In 2015, the FBI stated that just in the past year there has been a 53% increase “in economic espionage cases, or the theft of trade secrets leading to the loss of hundreds of billions of dollars.”<sup>63</sup>

Infiltration of businesses to steal trade secrets is not a new concept but one that has evolved over time. Corporate espionage can take on many different forms and can include anything from smuggling, using spies to infiltrate a business, stealing employees, or hacking into corporate networks. One of the more famous cases of corporate espionage can be found dating all the way back to the early 1700s. Pere d’Entrecolles was a French Jesuit missionary and while in China “he learned the secret techniques for manufacturing [porcelain].”<sup>64</sup> He accomplished this by “gaining access to the kilns, studying Chinese books,” and gaining intelligence from those who made porcelain.<sup>65</sup> He sent these stolen secrets to France through letters.<sup>66</sup> This theft of trade secrets was borne out of D’Entrecolles curiosity and not because he was paid by France or a corporation.<sup>67</sup>

While D’Entrecolles did not set out to become an industrial spy, employees from many companies have either turned rogue or been bought to reveal competitor’s trade secrets. For example, “in 1993 General Motors (GM) accused Volkswagen of industrial espionage.”<sup>68</sup> General Motors claimed its corporate secrets were used at Volkswagen after Jose Ignacio Lopez, General Motors Opel division chief of production, and seven other executives left and went to work for Volkswagen.<sup>69</sup> General Motors and Volkswagen eventually reached a settlement, with General Motors agreeing to drop its lawsuit in exchange for Volkswagen’s pledge to buy one billion dollars’ worth of General Motors parts over seven years in an addition to paying General Motors 100 million dollars.<sup>70</sup>

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<sup>62</sup> *Industrial Espionage*, The Free Dictionary, <http://www.thefreedictionary.com/Corporate+espionage> (last visited Jan. 8, 2017).

<sup>63</sup> Carolyn Schrader, *Cyber Economic Espionage Impacts Businesses*, CYBER EXPERTS BLOG AT NATIONAL CYBERSECURITY INSTITUTE (Aug. 3, 2015) <http://www.nationalcybersecurityinstitute.org/general-public-interests/cyber-economic-espionage-impacts-businesses/>.

<sup>64</sup> Famous Cases of Corporate Espionage, BLOOMBERG, <https://www.bloomberg.com/news/photos-essays/2011-09-20/famous-cases-of-corporate-espionage> (last visited Jan. 8, 2017).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Famous Cases of Corporate Espionage, BLOOMBERG, <https://www.bloomberg.com/news/photos-essays/2011-09-20/famous-cases-of-corporate-espionage> (last visited Jan. 8, 2017).

Some of the latest attacks on corporations have been done remotely through computer hacking. In January 2010, Google disclosed that a cyberattack originating from China occurred resulting in the theft of Google's intellectual property.<sup>71</sup> Google was not the only company targeted through this cyberattack. Other companies operating in the areas of finance, technology, media, and chemical industries were also under cyberattack.<sup>72</sup>

The United States is repeatedly targeted for the theft of trade secrets. From 1998 to 2003, Silicon Valley alone has been targeted by at least 20 foreign nations for theft of trade secrets.<sup>73</sup> South Korea is not an exception when it comes to corporate espionage aimed at the United States.

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Edward Iwata, *More U.S. Trade Secrets Walk Out the Door with Foreign Spies*, USA TODAY (Feb. 13, 2003, 10:07 AM), [http://usatoday30.usatoday.com/tech/news/2003-02-12-espionage\\_x.htm](http://usatoday30.usatoday.com/tech/news/2003-02-12-espionage_x.htm).

1. *Corporate espionage cases involving trade secrets between the United States and South Korea*

The most recent known act of corporate espionage between the United States and South Korea was uncovered in 2009. In 2009, DuPont,<sup>74</sup> a United States corporation, filed a civil trade secrets case against South Korean corporation, Kolon Industries Inc.,<sup>75</sup> for theft of its' trade secrets. Dupont Inc. has been around in one form or another for over two centuries<sup>76</sup> whereas Kolon Industries Inc. in its current capacity has only been around since 2010.<sup>77</sup>

In February of 2009, DuPont became aware that Kolon Industries had obtained DuPont's trade secrets and confidential information relating to DuPont's Kevlar aramid fiber.<sup>78</sup> "After two years of litigation, a September 2011 jury issued a verdict in favor of DuPont, finding Kolon liable for misappropriation of trade secrets."<sup>79</sup> On August 30, 2012, Justice Payne awarded "\$919M in compensatory damages against Kolon, added an additional \$350,000 in punitive damages, and enjoined Kolon from selling para-amid fiber products in the U.S. for twenty years."<sup>80</sup>

"The District Court also issued a permanent injunction against any further use or disclosure of DuPont trade secrets used in their Kevlar product.<sup>81</sup> Kolon filed an emergency motion to stay the injunction."<sup>82</sup> The Fourth Circuit granted the injunction.<sup>83</sup>

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<sup>74</sup> According to DuPont's corporate website, E.I du Pont first established his business on July 19, 1802. He had studied advanced explosive techniques and used his knowledge and interest in these and other scientific exploration to produce product quality and manufacturing sophistication and efficiency. Today, DuPont has grown in to an industry that has a foothold in everything from agricultural products, food and personal care, high performance materials, industrial biotechnology, people and process safety, to finally polymers and fibers. DuPont might be best known more its Kevlar® fiber that goes into creating body armor. <http://www.dupont.com/> (last visited Jan. 7, 2017).

<sup>75</sup> According to the Kolon Industries corporate website, Kolon Industries, Inc. first began operations in South Korea in 1957. Kolon Industries separated from the manufacturing department of Kolon Corporation and is now today its own separate independent company. Today, Kolon focuses on four major business divisions. These divisions are industrial materials, chemical, films/electronic materials, and fashion. Kolon has many overseas subsidiaries including two located in the United States with one being in Fairfield, New Jersey and the other being in Los Angeles, California. Overview, KOLON INDUSTRIES: COMPANY, [http://www.kolonindustries.com/Eng//Company/company01\\_01.asp](http://www.kolonindustries.com/Eng//Company/company01_01.asp) (last visited Jan. 7, 2017).

<sup>76</sup> DUPONT: OUR COMPANY, <http://www.dupont.com/corporate-functions/our-company/dupont-history.html> (last visited Jan. 7, 2017).

<sup>77</sup> KOLON INDUSTRIES, <http://www.kolonindustries.com/Eng/index.asp> (last visited Jan. 7, 2017).

<sup>78</sup> E.I. Dupont De Nemours & Co. v. Kolon Indus., 688 F. Supp. 2d 443, 447-448 (E.D. Va. 2009).

<sup>79</sup> *DuPont Inc. v. Kolon USA Inc*, BROOKLYN LAW SCHOOL: TRADE SECRETS INSTITUTE, <http://tsi.brooklaw.edu/cases/dupont-inc-v-kolon-usa-inc>, (last visited Feb. 11, 2017).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> E.I. DuPont de Nemours & Co. v. Kolon Indus., 871 F. Supp. 2d 513 (E.D. Va. 2012).

Ultimately, the Fourth Circuit on April 3, 2014, overturned the jury verdict awarding DuPont significant damages.<sup>84</sup> The court stated that, “the district court abused its discretion, to Kolon’s prejudice, when it granted one of DuPont’s pre-trial motions in limine and thereby excluded evidence material to Kolon’s defense.”<sup>85</sup> “Kolon Industries Inc. eventually admitted to “conspiring to steal DuPont Co.’s Kevlar trade secrets as a U.S. judge signed off on its plea agreement and \$360 million penalty. Kolon’s penalty in the criminal case includes an \$85 million fine and \$275 million in restitution to DuPont.”<sup>86</sup> Kolon also settled its related civil lawsuit in federal court where terms of that agreement were not disclosed.

In the aftermath of *DuPont Inc. v. Kolon USA Inc.*, many companies have pushed for tougher legislation to defend trade secrets. In response to cases of industrial espionage and outcries from many in the business world, Congress passed the Defend Trade Secrets Act of 2016.<sup>87</sup> This Act became public law on May 11, 2016.<sup>88</sup> “The Defend Trade Secrets Act of 2016 adds a civil component to the federal law making it a crime to steal intellectual property.”<sup>89</sup> “The prosecution of Kolon was among at least 20 economic espionage and trade-secret cases the Justice Department brought against individuals and companies from 2009 to 2012.”<sup>90</sup>

## VII. IMPROPER SOLICITATION AND GRAFT ACT

### A. *Background to the Improper Solicitation and Graft Act*

Many experiments have been done around the world to gauge honesty and integrity of different cultures. For example, “researchers at the University of East Anglia in the UK devised an experiment to test personal honesty in 15 countries.”<sup>91</sup> The experiment was simple. Individuals were given a coin to toss privately and then reported the result.<sup>92</sup> “Participants were told they would get more money if heads came up more times than tails.” The results of this experiment showed that South Korea came out low on the honesty scale.<sup>93</sup> Bribes are just one of many ways of being dishonest.

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<sup>84</sup> E.I. Dupont De Nemours & Co. v. Kolon Indus., 564 F. App’x 710 (4th Cir. 2014).

<sup>85</sup> *Id.* at 710, 711.

<sup>86</sup> Andrew Zajac, *Kolon Guilty in Kevlar Secrets Case, Settles with DuPont*, BLOOMBERG TECHNOLOGY (Apr. 30, 2015 11:12 AM), <https://www.bloomberg.com/news/articles/2015-04-30/kolon-pleads-guilty-in-360-million-deal-as-dupont-suit-settled>.

<sup>87</sup> Defend Trade Secrets Act, 18 U.S.C. § 1 (2016).  
<https://www.congress.gov/114/plaws/publ153/PLAW-114publ153.pdf>.

<sup>88</sup> *Id.*

<sup>89</sup> Gregory Korte, *Obama Signs Trade Secrets Bill, Allowing Companies to Sue*, USA Today (May 11, 2016, 4:29 PM), <http://www.usatoday.com/story/news/politics/2016/05/11/obama-signs-trade-secrets-bill-allowing-companies-sue/84244258/>.

<sup>90</sup> Andrew Zajac, *Kolon Guilty in Kevlar Secrets Case, Settles with DuPont*, BLOOMBERG TECHNOLOGY (Apr. 30, 2015 11:12 AM), <https://www.bloomberg.com/news/articles/2015-04-30/kolon-pleads-guilty-in-360-million-deal-as-dupont-suit-settled>.

<sup>91</sup> *Why South Korea’s Corruption Scandal is Nothing New*, BBC NEWS: ASIA, (Nov. 24, 2016), <http://www.bbc.com/news/world-asia-38078039>.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

## 1. Bribery

Bribes are viewed differently across cultures. Western culture and East Asian culture view bribes differently. Many Asian cultures use gift giving in ways that Western cultures would view as bribes. In Asian cultures, “[g]ift-giving is seen as an act of reciprocity and often misconstrued as bribery by Westerners, yet it appears to be an important constituent of the Asian culture and can be seen as a form of relationship investment, that if cultivated well, can uplift interactions between businesses.”<sup>94</sup> When it comes to gift giving customs and the significance placed on them in Asia, South Korea ranks second.<sup>95</sup>

“South Korea is a gift-giving society where tokens are constantly exchanged as signs of respect, appreciation or friendship.”<sup>96</sup> Paying for meals, giving gifts, and gifting money are just some of the ways in which Koreans express themselves in their gift-giving society. However, “because cash and material objects are so generously given and routinely expected, too often the boundaries of gift-giving and bribery-giving become unclear.”<sup>97</sup> Due to this culture, South Korea has previously enacted several pieces of legislation aimed at fighting bribery.

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<sup>94</sup> Clare D’ Souza, *An inference of gift-giving within Asian business culture*, Asia Pacific Journal of Marketing and Logistics, Vol 15 Iss ½ pp. 27-28 (2003). <http://www.emeraldinsight.com/doi/abs/10.1108/13555850310765051>. According to their website, the Asia Pacific Journal of Marketing and Logistics (APJML) provides a unique focus on marketing and logistics in the Asia Pacific region. *Id.* The journal publishes research which focuses on marketing and logistics problems, new procedures and practical approaches, systematic and critical reviews of changes in marketing and logistics and cross-national and cross-cultural comparisons of theory into practice. *Id.* Dr. Clare D’Souza is an associate professor in the college of Arts, Social Sciences and Commerce at the La Trobe Business School in Melbourne. *Id.* According to La Trobe Business School’s staff website, Dr. D’Souza comes from a multi-disciplinary background and has been an academic for over ten years. <http://www.latrobe.edu.au/law/staff/profile?uname=cmdsouza>. She has taught a range of subjects from Entrepreneurship to Consumer Behavior to International Marketing. *Id.* Dr. D’Souza has taught in several countries of Asia and Europe. *Id.* She has also served as a strategic consultant for many international organization and has advised private and government agencies in both Australia and overseas. *Id.*

<sup>95</sup> David James, *Gift Giving Customs in Asia*, BSI CORPORATION, <http://www.bsicorp.net/articles/keys-to-success/gift-giving-customs-asia> (last visited Jan. 22, 2017). According to its website, Business Strategies International (BSI) is a San-Francisco based consulting and venture development firm that helps businesses (Asian or Western) successfully find markets and investments, select partners and representatives, establish joint ventures and strategic alliances, and set up operations in the United States and Asia-Pacific countries. <http://www.bsicorp.net/>. David James is president of Business Strategies International. *Id.* He has served as an executive of three international corporations: Dillingham Corporation, Crown Zellerbach Corporation, and Texasgulf Inc. *Id.* He graduated from Harvard University, the University of Chicago Law School, and Stanford Business School’s Executive Program. *Id.*

<sup>96</sup> David I. Steinberg, *Gift Giving and Politics in South Korea*, THE WALL STREET JOURNAL, (Sept. 12, 1996, 12:01 AM), <http://www.wsj.com/articles/SB842462563700193500>.

<sup>97</sup> Jon Huer, *Gift-Giving and Bribery Culture in Korea*, THE KOREA TIMES, (Aug 23, 2009, 10:54 PM), [http://www.koreatimes.co.kr/www/news/opinion/2010/03/137\\_50572.html](http://www.koreatimes.co.kr/www/news/opinion/2010/03/137_50572.html).

In 1998, South Korea passed the Act on Combating Bribery of Foreign Public Officials in International Business Transaction or more commonly known as the Foreign Bribery Prevention Act (FBPA) which “was passed to implement the Organization for Economic Cooperation and Development’s (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.”<sup>98</sup> Under the Foreign Bribery Prevention Act (the FBPA), “anyone who promises, gives or offers a bribe to a foreign public official in relation to his/her official business to obtain an improper advantage in international business transaction is subject to up to 5 years imprisonment or a fine up to KRW 20 million<sup>99</sup>.”<sup>100</sup>

When it comes to bribery, “the text of the FBPA only requires the bribe to be done for the purpose of obtaining an improper advantage in international business transactions.”<sup>101</sup> Even with the implementation of laws such as the Foreign Bribery Prevention Act, many scandals have occurred both domestically and internationally. In fact, many scandals that occur in South Korea are related to bribes.

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<sup>98</sup> Mark S. Cohen, Jonathan S. Abernethy, and Soeun Nikole Lee, *Anti-Corruption Enforcement in Korea: IS an Old Law Coming of Age?*, NEW YORK LAW JOURNAL, (Nov. 4, 2013), [https://www.cohengresser.com/assets/publications/11-4-2013\\_Anti-Corruption\\_Enforcement\\_in\\_Korea.pdf](https://www.cohengresser.com/assets/publications/11-4-2013_Anti-Corruption_Enforcement_in_Korea.pdf).

<sup>99</sup> 20 million KRW is approximately \$17,893.73 USD  
<http://www.xe.com/currencyconverter/convert/?Amount=20%2C000%2C000&From=KRW&To=USD>  
(last visited April. 1, 2017).

<sup>100</sup> Kurt Gerstner and Hyunah Kim, *The FBPA: South Korea's Act to prevent bribery of foreign officials*, LEE INTERNATIONAL, (2010), [http://www.inhousecommunity.com/wp-content/uploads/2016/07/v11i10\\_jur\\_SK.pdf](http://www.inhousecommunity.com/wp-content/uploads/2016/07/v11i10_jur_SK.pdf).

<sup>101</sup> Mark S. Cohen, Jonathan S. Abernethy, and Soeun Nikole Lee, *Anti-Corruption Enforcement in Korea: IS an Old Law Coming of Age?*, NEW YORK LAW JOURNAL, (Nov. 4, 2013), [https://www.cohengresser.com/assets/publications/11-4-2013\\_Anti-Corruption\\_Enforcement\\_in\\_Korea.pdf](https://www.cohengresser.com/assets/publications/11-4-2013_Anti-Corruption_Enforcement_in_Korea.pdf).

South Korea has continuously been in the news over the past decade for scandals occurring everywhere from the business sector to the government. Some of the scandals that the international community has picked up on include scandals involving Korean Airlines<sup>102</sup>, Hyundai<sup>103</sup>, Samsung<sup>104</sup>, Hanjin Shipping<sup>105</sup>, Lotte Duty Free<sup>106</sup>, the Sewol ferry accident<sup>107</sup>, and the ongoing impeachment of the current South Korean President Park

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<sup>102</sup> In December of 2014, Heather Cho made international headlines after she ordered a plane to be turned back to the gate at JFK airport in New York. CNN reported that Cho ordered the plane to be turned back to relieve a flight attendant of duty after she was served nuts in a bag instead of on a plate. Laura Smith-Spark, *Korean Air Executive Resigns Over Nuts on a Plate Row*, CNN (Dec. 9, 2014, 9:45 AM), <http://www.cnn.com/2014/12/09/world/asia/korean-air-nuts-scandal/index.html>. Cho at the time was not only the vice president of Korean Air but also the eldest daughter to Korean Air's chairman. *Id.* She was not serving in an official capacity on that flight. *Id.*

<sup>103</sup> In 2006, South Korea indicted Chung Mong-koo, chairman of Hyundai Motor Company. Chung was at the time suspected of embezzling company funds to create a slush fund. According to Fox News, prosecutors at the time suspected Chung of embezzling around \$106 million dollars of company money to create a slush fund. Associated Press, *Hyundai Motor Chairman Arrested in Scandal*, FOX NEWS (Apr. 28, 2006), <http://www.foxnews.com/story/2006/04/28/hyundai-motor-chairman-arrested-in-scandal.html>.

<sup>104</sup> In connection with the impeachment of South Korea's President Park Geun-Hye, an arrest warrant was issued Monday, January 16, 2017, for Lee Jae-Yong, Samsung Electronics vice chairman. Associated Press, *South Korea Seeks Arrest of Samsung Heir as Bribery Suspect in Political Scandal*, FOX NEWS, (Jan. 16, 2017), <http://www.foxnews.com/world/2017/01/16/south-korea-seeks-arrest-samsung-heir-as-bribery-suspect-in-political-scandal.html>. The vice chairman is facing allegations of both embezzlement and lying under oath as well as offering bribes. *Id.* Lee is suspected of giving 43 billion won, around 36 million in U.S. dollars, to Choi Soon-sil in an attempt to have the government help him with a leadership succession within Samsung. *Id.*

<sup>105</sup> Hanjin Shipping is not only South Korea's largest shipping group, but it is the world's seventh largest. Hanjin has encountered financial difficulties and is close to filing for bankruptcy. Prosecutors in South Korea are investigating Choi Eun-Young, the former chairwoman of Hanjin Shipping, for selling off shares in the company the day before Hanjin's prices crashed and news was published concerning Hanjin's financial difficulties. Stephen Evans, *Hanjin Bankruptcy: Are South Korea's 'Chaebols' in Crisis?*, BBC NEWS, (Sept. 8, 2016), <http://www.bbc.com/news/business-37295185>.

<sup>106</sup> Lotte Duty Free is a leader in duty free shopping. In 2015, they were ranked third in the world among duty free stores. LOTTE DUTY FREE, <http://en.lottedfs.com/about/lottedfs>. The vice chairman was found dead in late August of 2016 after committing suicide hours before he was supposed to be questioned by prosecutors. The prosecution team had raided Lotte offices back in June 2016 looking for a slush fund as well as for a breach of trust involving transactions among the group's companies. Business News, *Lotte Vice Chairman Found Dead Amid Probe; Suicide Suspected*, REUTERS, (Aug. 26, 2016, 8:30 AM), <http://www.reuters.com/article/us-lottegroup-executive-idUSKCN11102Z>.

<sup>107</sup> On April 16, 2014, the Sewol ferry carrying hundreds of high school students sank. Madison Park and Paula Hancocks, *Sewol ferry disaster: One year on, grieving families demand answers*, CNN (Apr. 16, 2015, 12:38 AM), <http://www.cnn.com/2015/04/15/asia/sewol-ferry-korea-anniversary/>. The crew instructed passengers to remain in place. *Id.* The ferry was carrying 476 people, and resulted in the loss of 304 lives, 250 of whom were high school students. Daniel Peters, *The classroom frozen in time: Eerie pictures of student desks untouched since they drowned in South Korean ferry disaster two years ago*, DAILY MAIL: News, (May 24, 2016, 12:48 AM), <http://www.dailymail.co.uk/news/article-3605976/Eerie-pictures-untouched-classroom-belonging-students-teachers-killed-Sewol-ferry-disaster-South-Korea.html>. Sewol's captain, Lee Joon-seok, who was widely derided for jumping to safety, was sentenced to 36 years in prison for abandonment causing death and injury, and violating sea laws. Madison Park and Paula Hancocks, *Sewol ferry disaster: One year on, grieving families demand answers*, CNN (Apr. 16, 2015, 12:38 AM), <http://www.cnn.com/2015/04/15/asia/sewol-ferry-korea-anniversary/>.

Geun-hye.<sup>108</sup> These scandals and corruption,<sup>109</sup> along with South Korea's battle against bribes, has led to the passing of the Improper Solicitation and Graft Act, also known as the Kim Young-ran Act, "after the former head of the Anti-corruption and Civil Rights Commission who led the preparation of the original bill."<sup>110</sup>

## 2. *Kim Young-ran Act*

The Improper Solicitation and Graft Act officially took effect on September 28, 2016, after Korea's Constitutional Court ruled that all the clauses of the Improper Solicitation and Graft Act were constitutional.<sup>111</sup> "The bill passed the review 870 days after the Anti-Corruption and Civil Rights Commission pre-announced the bill in August 2012, when Kim Young-ran served as chairman of the commission."<sup>112</sup>

<sup>108</sup> On December 9, 2016, President Park Geun-hye was impeached following protests. *South Korea President Park Geun-hye Impeached over Corruption Scandal*, CBS NEWS, (Dec. 9, 2016, 2:39 AM), <http://www.cbsnews.com/news/south-korean-lawmakers-vote-to-impeach-president-park-geun-hye/>. Then, the South Korean National Assembly voted 236 to 56 to impeach President Park. *Id.* One of the issues of her impeachment comes from her friendship with Choi Soon-il, who is also President Park's informal adviser. James Griffiths, *South Korea Presidential Scandal: What you need to know*, CNN, (Dec. 9, 2016, 4:38 AM), <http://www.cnn.com/2016/11/02/asia/south-korea-president-scandal-explained/index.html>. South Korean prosecutors have taken Choi Soon-il into custody on charges of abuse of power and attempted fraud. *Id.* These come from allegations that she not only had access to secret government documents but also that she may have intervened in state affairs. *Id.*

<sup>109</sup> See Justin Fendos, *South Korea's Corruption Culture*, THE DIPLOMAT, (Nov. 17, 2016), <http://thediplomat.com/2016/11/south-koreas-corruption-culture/> (detailing South Korea's tendency toward corruption and how it has shifted in recent years).

<sup>110</sup> Latham & Watkins LLP, *Expansive Korean Anti-Corruption Law Comes into Force*, LEXOLOGY, (Sept. 8, 2016), <http://www.lexology.com/library/detail.aspx?g=5b8f7394-fa99-4db5-9dca-197314d36497>. According to its website, Latham & Watkins's administrative officers are located across the globe and manage the full spectrum of services and operations. *Administration*, LATHAM & WATKINS LLP, <https://www.lw.com/AboutUs/Administration> (last visited Apr. 15, 2017). Lathan & Watkins specializes in many different areas of practice such as Banking, Corporate Governance, Export Controls, Economic Sanctions & Customs, Greater China Practice, Mergers and Acquisitions, and Korea Practice. *Practices*, LATHAM & WATKINS, <https://www.lw.com/practices> (last visited Apr. 15, 2017).

<sup>111</sup> Ser Myo-Ja, *Constitutional Court upholds antigraft law*, KOREA JOONGANG DAILY (Jul. 7, 2016), <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3021918>.

<sup>112</sup> Yu Jeong-in & Bak Sun-bong, *The "Kim Young-ran Act," a Ban on Bribery and Solicitation: Lawmakers to Pass the Bill on January 12*, THE KYUNGHYANG SHINMUN (Sept. 1, 2015, 5:31 PM), [http://english.khan.co.kr/khan\\_art\\_view.html?artid=201501091731107&code=710100](http://english.khan.co.kr/khan_art_view.html?artid=201501091731107&code=710100). According to its website, the Kyunghyang Shinmun was founded in 1946 and the newspaper claims it is at the front line of investigating activities of the government and Chaebols (conglomerates). *About us*, KYUNGHYANG SHINMUN, <http://www.khan.co.kr/aboutkh/engkh.html> (last visited Apr. 15, 2017).

The purpose of the Act “is to ensure that public officials and relevant persons fulfill their duties uprightly and to secure public confidence in public institutions by forbidding improper solicitations to public officials and relevant persons and by prohibiting them from accepting financial or other advantages.”<sup>113</sup> A spokesperson of a new compliance team state that the Act “imposes fines on those individuals who make improper solicitation to public officials, executive and staff members of public service-related organizations, journalists and officials of private education institutions, as well as public officials who do not report such requests.”<sup>114</sup>

This law “also differs from any predecessor as it implements a principle of ‘dual punishment’, enabling authorities to penalise [sic] both the giver and receiver of bribes.”<sup>115</sup> The Act has 15 different categories of what would be considered improper solicitations of public officials.<sup>116</sup> One category makes it improper to exert[] influence on any “authorization, permission, license, patent, approval, inspection, examination, test, certification, verification” related to application submission.<sup>117</sup> Another category involves mitigating or remitting various administrative dispositions or punishments such as taxes, charges, fines for negligence, or penalties.<sup>118</sup> The implementation of this new Act has led to many concerns and reactions among both the national and international community.

### 3. Concerns about the Kim Young-ran Act

The Korean government has estimated that the number of those who will be subject to this anti-corruption act will be as many as 3 million.<sup>119</sup> Analysts and citizens of South Korea are concerned that the act “will have a negative impact on the economy.”<sup>120</sup> Many South Koreans fear that “the demand for luxury goods and services in department stores, upscale hotels, country clubs, and high-end restaurants” will take the brunt of the effects.<sup>121</sup>

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<sup>113</sup> The Improper Solicitation and Graft Act, Act No. 13278, Mar. 27, 2015, art. 1 (S. Kor.), translated in Reliable Ministry of Government Legislation National Law Information Center, <http://www.law.go.kr/eng/engLsSc.do?menuId=1&query=improper+solicitation+&x=24&y=29#liBgcoIor0> (click on “The Improper Solicitation and Graft Act”).

<sup>114</sup> Christ Thomson, *Corruption clampdown*, ASIAN LEGAL BUSINESS, <http://www.legalbusinessonline.com/features/corruption-clampdown/73173> (Sept. 16, 2016).

<sup>115</sup> *Id.*

<sup>116</sup> The Improper Solicitation and Graft Act, Act No. 13278, Mar. 27, 2015, art. 5 (S. Kor.), translated in Reliable Ministry of Government Legislation National Law Information Center, <http://www.law.go.kr/eng/engLsSc.do?menuId=1&query=improper+solicitation+&x=24&y=29#liBgcoIor0> (click on “The Improper Solicitation and Graft Act”).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Anti-corruption “Kim Young-ran Law” Passes the National Assembly*, KOREA IT TIMES (Mar. 5, 2015), <http://koreaitimes.com/story/45888/anti-corruption-kim-young-ran-law-passes-national-assembly>.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

“The Act is expected to significantly impact business activities in Korea involving national and local governments, quasi-government institutions, public and private educational institutions, and media companies.”<sup>122</sup> Specifically by:

- 1) expanding the definition of public officials and others subject to regulation; 2) prohibiting improper solicitations to public officials regardless of whether such improper solicitation is accomplished by an offer to pay or payment of money or a thing of value; 3) setting relatively low ceilings on gifts, entertainment or other valuables that can be provided to public officials, regardless of whether such payment was related to the public official’s duties; and 4) extending the prohibition relating to gifts, entertainment or other valuables to the spouses of public officials if offered or provided in connection with the public official’s duties.<sup>123</sup>

Civil servants<sup>124</sup> in Korea are also concerned about the enactment of the Kim Young-ran Act. Those who work as civil servants and accept more than one million won, which is approximately 900 US dollars are subject to punishment.<sup>125</sup> The Act specifically “forbids people from buying a meal worth more than 30,000 Korean won (\$27) . . . It also limits gifts to \$45, and donations to \$90.”<sup>126</sup> A violation of the Act “could result in up to three years of in prison and thousands of dollars in fine, and it is irrelevant whether the money was related to an official’s duties or positions, or whether favors were given in return.”<sup>127</sup>

Finally, small businesses have concerns. South Korea has a “traditional culture of giving gifts on anniversaries such as Teacher’s day and Chinese New Year as well as giving cash at life events such as funerals and weddings.”<sup>128</sup> South Korean traditional culture also includes “taking people in business relationships to meals.”<sup>129</sup> According to “a spokesman for South Korea’s Small Enterprise and Market Service reported CNN that estimated losses for small businesses, including small traders and business owners and those involved in agriculture and forestry amounts to \$2.6 billion and a loss of 1.26 million customers.” Overall, the publics’ reactions to the Act have been mixed.

<sup>122</sup> Catherine E. Palmer et al., *Expansive Korean Anti-Corruption Law Comes into Force*, LATHAM & WATKINS, (Sept. 12, 2016), <https://www.lw.com/thoughtLeadership/LW-korean-anti-corruption-law-comes-into-force>.

<sup>123</sup> *Id.*

<sup>124</sup> Civil servants include positions such as teachers, both public and private, lawmakers, individuals working in the field of journalism and even their spouses. Sou Hee Sophie Yang, *South Korea’s New Anti-corruption Law, Kim Young-ran Act, will Have a Significant Impact on Korean Economy*, COLUMBIA BUSINESS LAW REVIEW (Oct. 23, 2016, 4:11 PM) <http://cblr.columbia.edu/archives/13976>.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

#### 4. *Reactions to the Kim Young-ran Act*

A recent poll conducted by Gallop Korea<sup>130</sup> in South Korea showed that “of those who oppose the law, 21% cited that “it will negatively impact the economy and dampen consumer sentiment.”<sup>131</sup> Even though the law may have wide spread effects and 21% of the citizens oppose, “the same opinion poll found that 71% of South Koreans support a controversial new law that strictly controls the wining and dining of civil servants and public officials”.<sup>132</sup> The poll further showed that “many South Koreans think the law may have negative short term impact but will eventually help point society in the right direction.”<sup>133</sup>

After the National Assembly passed the Kim Young-ran Act, “the Korean Bar Association, the Journalists Association of Korea, representatives of Internet media, private schools and kindergartens filed petitions.”<sup>134</sup> Those who filed petitions were concerned over whether the law would apply to “journalists and private school workers since they are not civil servants.”<sup>135</sup> The Korean Supreme Court has “held the new act constitutional, rejecting all petitions challenging its scope and vagueness.”<sup>136</sup>

#### 5. *Future of US businesses working with South Korea*

With all of the corruption and scandals being revealed in South Korea, the Kim Young-ran Act adds another layer of protection for not only businesses in South Korea but businesses all over the world. Pressure from within South Korea may be key to transforming Korea’s culture of gift-giving and bribes. The Kim Young-ran Act takes a stab at the very heart of this traditional culture. With this law aimed at curbing corruption from the bottom up, all level of employees should be put on alert that corruption is going to be dealt with in a swift and harsh manner.

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<sup>130</sup> According to its website, Gallup Korea is a specialized research company with the greatest number of interviews, the highest brand awareness and them most frequently quoted by the press. GALLUP KOREA, <http://www.gallup.co.kr/english/social.asp> (last visited Aug. 15, 2017).

<sup>131</sup> Kenichi Yamada, *71% of South Koreans support anti-graft law*, NIKKEI: ASIAN REVIEW (Oct. 9, 2016, 2:00 AM), <http://asia.nikkei.com/Politics-Economy/Policy-Politics/71-of-South-Koreans-support-anti-graft-law>. According to Nikkei Asian Review’s website, it has 24 bureaus across Asia and 1,300 local and international reporters. The Nikkei Asian Review states it is the only global publication with a uniquely Asian perspective, and its information hub gives readers access to detailed information on over 300 of Asia’ leading companies. NIKKEI ASIAN REVIEW, <http://asia.nikkei.com/info/about> (last visited Aug. 15, 2017).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Constitutional Court upholds antigraft law*, KOREA JOONGANG DAILY (Jul. 7, 2016), <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3021918>.

<sup>135</sup> *Id.*

<sup>136</sup> Sou Hee Sophie Yang, *South Korea’s New Anti-corruption Law, Kim Young-ran Act, will Have a Significant Impact on Korean Economy*, COLUMBIA BUSINESS LAW REVIEW (Oct. 23, 2016, 4:11 PM) <http://cblr.columbia.edu/archives/13976>.

Businesses working with South Korea should be prepared to adapt to the Act. This can be done by assessing “compliance policies and programs to ensure conformity with the act.”<sup>137</sup> Also, businesses should be aware that “a violation of the Act, or an investigation into a possible violation of the Act, may trigger an FCPA<sup>138</sup> investigation.”<sup>139</sup> US businesses can add this Act to their arsenal to protect against theft of trade secrets. When working with Korean businesses or receiving Korean visitors, US businesses can keep this law in the back of their minds and use it to either sniff out potential spies or use it as a gentle reminder that they are aware of how the course of business should be conducted.

### VIII. CONCLUSION

After having lived abroad in Asia for more than three years, it is easy to see the many cultural differences between Western and Eastern cultures. One such difference is our perceptions of bribery. Bribes play a role when it comes to doing business in Eastern cultures. The United States has been at the forefront of pushing forward legislation both nationally and internationally in an effort to punish those in the business realm of accepting or giving bribes. Bribery has led to cases of industrial espionage. Scandals found in all corners of South Korea have led for a push to deal with corruption and bribery. The result was the implementation of the Improper Solicitation and Graft Act also known as the Kim Young-ran Act. This Act attempts to curb bribery and corruption from the bottom up. While many in South Korea fear the repercussions on the economy that this Act may bring, many South Koreans are hoping that stability will follow and that South Korea may soon move up in ranks on the bribery scale.

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<sup>137</sup> <https://www.lw.com/thoughtLeadership/LW-korean-anti-corruption-law-comes-into-force>, *supra* note 120.

<sup>138</sup> According to the U.S. Securities and Exchange Commission website, the Foreign Corrupt Practices Act (FCPA), which was enacted in 1977, generally prohibits the payment of bribes to foreign officials to assist in obtaining or retaining businesses. *Foreign Corrupt Practices Act*, U.S. SECURITIES AND EXCHANGE COMMISSION <https://www.sec.gov/spotlight/foreign-corrupt-practices-act.shtml> (last visited Aug. 15, 2017). The SEC website further explains that the FCPA can apply to prohibited conduct anywhere in the world and extends to publicly traded companies and their officers, directors, employees, stockholders, and agents. *Id.*

<sup>139</sup> <https://www.lw.com/thoughtLeadership/LW-korean-anti-corruption-law-comes-into-force>, *supra* note 120.

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