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A Comparative Study on the Foreign Corrupt Practices Act (FCPA) and Article 21.6 of the KORUS FTA

미국 해외부패방지법(FCPA)과 한미 FTA 제 21.6 조 비교연구

Sungho Bae
Professor, Dept. of Int'l Trade Hoseo University

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ABSTRACT

Numerous discussions on the KORUS FTA has been centered around issues on trade in goods, services, or dispute settlement mechanisms. On the other hand, little attention has been given to Chpater 21 of the KORUS FTA on transparency, especially Article 21.6 which states about anti-corruption. Article 21.6 and the Foreign Corrupt Practices Act shares the common purpose to prevent corruptive business practice, and they show similarities in many aspects. The FCPA enforcement has dramatically increased over the past ten years by the U.S. Department of Justice and Securities Exchange Commission stretching its jurisdiction to foreign nationals and companies. Korean business professionals and corporations are exposed to both Article 21.6 and the FCPA on corruption issues. Thus, it is imperative to understand Article 21.6 to be equipped with anti-corruption compliance programs. This paper examines the FCPA and Article 21.6 through comparative analysis and proposes appropriate measures for Korea to take.

Key Words : KORUS FTA, FCPA, Article 21.6, Anti-corruption, Anti-bribery

Ⅰ. Introduction

It has been a year since the ratification of the KORUS FTA (Free Trade Agreement between the Republic of Korea and United States of America). Partnering with the U.S., the second largest world economy, the KORUS FTA has given hopes and high expectations for the Republic of Korea (South Korea; hereafter "Korea"). Statistics by the Ministry of Strategy and Finance of Korea shows that Korea's export of the FTA beneficiary items to the U.S. had increased by 12.9 percent and 2.8 percent vice versa in 8 months since the ratification.[1] The KORUS FTA is expected to bring continuously positive outcomes in trade for both Parties in the coming years.

There has been multitudinous discussions about the issues of trade in goods, services, and dispute settlement chapters regarding the KORUS FTA. However, little attention has been given to the "transparency" issues although transparency, especially anti-corruption, is one of the most critical issues for business or trade practices in the FTA era.

Transparency appears in Chapter 21 of the KORUS FTA, and Article 21.6 within Chapter 21 specifically defines "anti-corruption." The purpose of the Chapter is to prevent individuals or corporations from giving bribes to public officials of Korea, the U.S., or other countries. The Parties agreed to exercise best endeavor to defeat bribery and corruption in international trade and investment by adopting or maintaining the appropriate legislative or other measures. In addition, they made it clear that such conducts will be defined as criminal offense which represents high degree of seriousness in corruption prevention under the KORUS FTA[2] In fact, criminal liabilities are stated only in selective chapters in the entire text of the KORUS FTA.[3]

Meanwhile, the U.S. Congress have already enacted and enforced a federal law, Foreign Corrupt Practices Act (FCPA) of 1977[4], in order to intensify transparency in domestic and international business activities. The FCPA is composed of anti-bribery provision and accounting provision. In other words, the FCPA seeks both the prevention of bribing pubic officials by a person or a corporation and the clarification of transparent corporate bookkeeping.

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1) www.uskoreaconnect.org/facts-figures/issues-answers/korus-trade-figures.html

2) Article 21.6(1) and 21.6(2), KORUS FTA

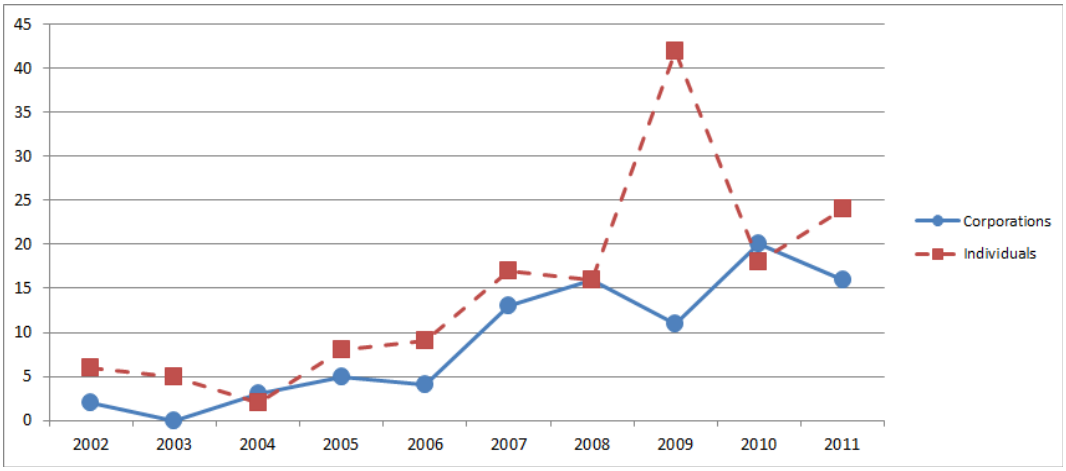
3) customs administration and trade facilitation (Article 7.9), copyright (Article 18.4(7)(a)(ii)(C)), encrypted program-carrying satellite and cable signals (Article 18.7(1)), intellectual property (Article 18.10(3)), environment (Article 20.4(4)(b)), and transparency (Article 21.6(2)), KORUS FTA

4) 15 U.S.C. § 78dd-1, et seq.

It is interesting that Chapter 21 of the KORUS FTA and the FCPA show similarities. First, the purpose of elimination of corruption in Article 21.6 of Chpater 21 of the KORUS FTA is identical to that of the FCPA. Second, the languages used in both texts are so similar that Article 21.6 looks like a mini version of the FCPA. Due to such similarities, legal interpretation of future Article 21.6 cases by the KORUS dispute settlement panel or courts of either jurisdiction would inevitably have to resemble the courts' interpretation in the FCPA cases. In other words, the FCPA and Article 21.6 are closely related.

Article 21.6 will play a significant role and raise various legal issues in the future trade for both Parties because the U.S. Department of Justice (hereafter "DOJ") and the U.S. Securities Exchange Commission (hereafter "SEC") have conducted extensive FCPA investigation. There has been a substantial increase in the number of FCPA investigation and charged cases by the DOJ and SEC over the past 10 years .

[Table 1] Number of Corporations Cases and Individuals Charged (FCPA)[5)]



In-depth discussions will follow below, but DOJ's unprecedented stretch of its jurisdiction has become an alert not only for the U.S. individuals and corporations, but also subsidiaries and affiliates of Korea-based U.S. companies and foreign nationals and corporations which have its principal place of business in the United States.

5) Shearman & Sterling LLP, "FCPA Digest", 2012, pp.1, 3

In most cases, the FCPA violation has strong correlation with corruption level of a country. A shameful result has come out in Corruption Perception Index 2012 by Transparency International.[6] According to the index, Korea was ranked 54th out of 174 whereas 20th for Chile and Uruguay, 30th for Botswana, 33rd for Bhutan, and 37th Slovenia. Japan and the U.S. were ranked 17th and 20th, respectively in the same year. Korea's corruption index has been turning worse since 2010. Korea was 39th in 2010 and 43rd in 2011. In 2 years, Korea's rank dropped by 15. This is a serious issue because Korea shows high tendency to face many corruption cases either under Article 21.6 or the FCPA.

Therefore, it is imperative to have solid understanding on both how Article 21.6 works and what kind of interpretation the courts might take. Since Article 21.6 is modeled after the FCPA, understanding the FCPA is the most effective way to understand Article 21.6.

This paper will examine the FCPA statute through analysis of each element followed by Article 21.6 analysis through comparing and contrasting with the FCPA and conclusion.

Ⅱ. FCPA

The FCPA is divided into two categories: anti-bribery provisions and accounting provisions. The former deals with cases involving bribes to foreign officials for business purposes, and the latter regulates issuers' report obligations with the SEC on record-keeping and internal accounting control.

1. Anti-Bribery Provision

1) Applicable Groups

(1) Issuers

Issuers include any company registered with the SEC and listed on the ADR (American Depositary Receipt) regardless of its nationality.[7] The FCPA guide issued by the DOJ explains

6) www.transparency.org
7) 15 U.S.C, §78dd-1

that “officers, directors, employees, agents, or stockholders acting on behalf of an issuer (whether U.S. or foreign nationals), and co-conspirators, also can be prosecuted under the FCPA.”[8] The following table shows the list of Korean ADRs trading on the U.S. markets.

[Table 2] Korean Companies Listed on the ADR[9]

No.	Company Name	Symbol	Sector
1	BNB SUNGWON CO LTD	SNGWY	Indust.Metals&Mining
2	G Learning Corp.	NRMWY	Tech.Hardware&Equip.
3	GRAVITY CO LTD	GRVY	Leisure Goods
4	INSPRIT INC	INSSY	Communications
5	KB FINANCIAL GROUP INC	KB	Finance
6	KOOKMIN BANK	KB	Finance
7	KOREA ELECTRIC POWER CORP	KEP	Utilities
8	KT CORP	KT	Communications
9	LG DISPLAY CO LTD	LPL	Distribution Services
10	MIRAE CORP	MRAEY	Electronic Technology
11	NARAEWIN CO	NRMWY	Electronic Technology
12	PIXELPLUS CO LTD	PXPLY	N/A
13	POSCO	PKX	Non-Energy Minerals
14	S-OIL CORP	SOOCY	Energy Minerals
15	SHINHAN FINANCIAL GROUP CO LTD	SHG	Finance
16	SK TELECOM CO LTD	SKM	Communications
17	WEBZEN INC	WZENY	Technology Services
18	WIDERTHAN CO. LTD	WTHN	N/A
19	WOORI FINANCE HOLDINGS CO LTD	WF	Finance

8) The U.S. Department of Justice, “A Resource to the U.S. Foreign Corrupt Practices Act”, *the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission*, 2012, pp.11

9) http://topforeignstocks.com/foreign-adrs-list/the-full-list-of-south-korean-adrs/

(2) Domestic Concerns

Domestic concerns are applicable category of the FCPA, as well.[10] Domestic concerns are divided into three categories. The first group of individual is any "citizen, national, or resident of the United States."[11] The second group is any form of business entity, such as "corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States and which is organized under the laws of the United States."[12] The third group is foreign nationals or business entities that are acting on behalf of a domestic concern.[13]

(3) Other than Issuers or Domestic Concerns

In 1998, Congress amended the FCPA of 1977 to "implement the Organization of Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions."[14] The amendment was of absolute significance because it granted enormous expansion of jurisdictional basis over certain foreign nationals. In other words, the FCPA application has become quasi-universal by including *non-U.S. residents and foreign business entities* that engage in any act "in furtherance" of not only a corrupt payment, but also an offer, promise to pay, or authorization to pay. Even though the phrase "while in the territory of the United States"[15] seems to require physical presence of the foreign nationals or foreign business entities and gives some leeway to those that are physically outside the United States, the DOJ liberally interprets the phrase because of the language "directly or indirectly" in §78dd-3 (a)(3).[16]

As a result, since officers, directors, employees, agents, and stockholders of above mentioned business entities whether foreign or the U.S. became specifically-targeted foreseeable defendants under the FCPA[17], the DOJ's territorial jurisdiction turned into a world-wide jurisdiction through the amendment.

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10) 15 U.S.C, §78dd-2
11) 15 U.S.C, §78dd-2(h)(1)(A)
12) 15 U.S.C, §78dd-2(h)(1)(B)
13) 15 U.S.C, §78dd-2(h)(1)(B)(2)
14) Michael V. Seitzinger, "Foreign Corrupt Practices Act (FCPA): Congressional Interest and Executive Enforcement", 2012, pp.5
15) 15 U.S.C, §78dd-3(a)
16) 15 U.S.C, §78dd-3(a)
17) O'Melveny & Myers LLP, "Foreign Corrupt Practices Act, An O'Melveny Handbook", Sixth Edition, 2009, pp.10

2) Elements

(1) In Obtaining or Retaining Business

The scope of application of the FCPA statute is limited to "obtaining or retaining business." In most cases, the "business purpose test" is generally used. In *United States v. Kay*, the Fifth Circuit addressed the business purpose test and explained that the FCPA *could* apply to payments made to foreign officials to reduce customs duties and sales taxes on imports. The DOJ guide offers examples of the business purpose as "bribe payments made to secure favorable tax treatment, to reduce or eliminate customs duties, to obtain government action to prevent competitors from entering a market, or to circumvent a licensing or permit requirement." In other words, the DOJ's scope of the FCPA application has become expansive through the interpretation of the Kay court.[18)]

(2) Corruptly

Corrupt means intent to influence a foreign official leading to abuse his/her official authority given by the held position. In *United States v. Liebo*, the Eighth Circuit upheld a definition of "corruptly" within the meaning of the FCPA in following jury instruction by stating that "[T]he offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone else to do so… [A]n act is "corruptly" done if done voluntarily [a]nd intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means"[19)]

The intent exists even if the giver does not know the identity of the recipient foreign official or the bribe is never actually passed to the foreign official.

(3) Anything of Value

The DOJ guide explains that "anything of value" is broadly defined in most cases. The most obvious form would be cash or a cash equivalent. However, "anything of value" within the meaning of the FCPA also includes gifts, discounts, use of materials, facilities or equipment, entertainment, drinks, meals, transportation, lodging, insurance benefits, promise of future

18) U.S. v. David Kay and Douglas Murphy, H-01-914-S (S.D.Tex. 2004)
19) United States v. Liebo, 923 F.2d1308, 1312(8thCir.1991)

employment, property, stock, stock options, charitable contributions, or commissions. Since the FCPA does not have de minimis threshold relating with "anything of value" element, the interpretation of the value becomes context-specific. For instance, a small amount of cash in the U.S. may become an excessive amount of bribe in other countries.[20)]

Although the FCPA languages or precedents have not made it clear, interpretative efforts to clarify whether violation of "anything of value" element occurred have generally been done in conjunction with the purpose of giving. In other words, even generous charitable donations may turn into a violation of "anything in value" element if they were given as "reciprocal inducement" as presentation of some benefit with corruptive purpose.[21)] In *SEC v. Schering-Plough Corporation*[22)], Schering-Plough Poland donated $75,860 to the Chudow Castle Foundation, a Polish charitable organization from 1999 to 2002. The donation was given to induce the president of the Foundation. The president was also a government official employed under Polish Health Department who had authority to influence the purchase of Schering-Plough's pharmaceutical products by hospitals. Although it was true that the donation was made to a true charity, both the reciprocal inducement between the donation and the influence of the president. Moreover, Schering-Plough did not keep records of the donation resulting in its failure to prevent or spot the inappropriate payment by the company's accounting system. The inaccurate book keeping constituted the FCPA violation under the accounting provision. Schering-Plough ended up paying $500,000 as a civil penalty.

The statute also makes it clear that both direct and indirect passing of "anything of value" would satisfy the element. Consequently, using any intermediary for such a conduct would not grant the givers leeway.[23)] In addition, whether anything of value is actually passed to any foreign official would not exempt the giver from the FCPA liabilities. As long as the attempt to give was made by the giver, the FCPA would apply.

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20) Davis Wright Tremaine LLP, "An Overview of the DOJ's and SEC's Recent FCPA Guidance", 2013. This publication can be found at www.dwt.com/An-Overview-of-the-DOJs-and-SECs-Recent-FCPA-Guidance-01-08-2013/

21) Westbrook, A.D., "Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act", Georgia Law Review, Vol. 45, No.2, 2011, pp.540-541

22) SEC v. Schering-Plough Corp., No.04-0945,(D.D.C.2004)

23) Oh, T.R., supra, pp.70

(4) Foreign Official

The interpretation of the "foreign official" within the meaning of the FCPA statute is broad because of lack of position or level distinction in the terms itself. The DOJ guide explains that despite absence of distinction among foreign official, the horizontal range of foreign official includes "foreign political party or official thereof", and "candidate for foreign political office", and individuals who fall into the category of any of the three group all mean "foreign individual."[24] In addition, the vertical range of foreign official includes top to bottom rank whether in central or local government.

Foreign official further includes those who have been involved as a "channel" in the stream of the corruptive practices or conducts. However, drawing clear lines of scope invites controversies. The terms "agency" and "instrumentality", for example, creates much interpretative ambiguity. Amy Deen Westbrook argued that a majority-share-ownership test found in the Foreign Sovereign Immunities Act of 1976 is easy to apply to traditionally government owned agencies or instrumentalities, such as trading corporation, railways, or airlines.[25] On the other hand, non-traditional type of entities are harder to define but easier to fall within the meaning of foreign official because the DOJ tends to apply stricter test than the majority ownership test to the non-traditional entities. In other words, the DOJ interprets the non-traditional entities as foreign official as long as the entities are "highly controlled or influenced" by the foreign government in its ordinary business operation even if the government owns less than 50% share of the entities. As a result, degree of government control or influence matters more than mere percentage of government ownership in deciding the meaning of foreign official by the DOJ.

Depending on how the government organizes its structure, government "employees" become foreign official in some cases, but exempted in other cases. Westbrook offers an interesting example of a Chinese case to express her criticism of constant expansion of the meaning of the "employees" by the DOJ.[26] Socialization of medicine in China makes doctors, nurses, and lab technicians in most hospitals "government officials." Westbrook argues that such an expansive interpretation by the DOJ would result in flooding FCPA cases in China although endless business opportunities exist in the country.[27]

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24) The U.S. Department of Justice, supra, pp.19
25) Westbrook, *supra*, pp.532-533
26) Westbrook, *supra*, pp.534

3) Affirmative Defenses

(1) The Local Law Defense

The payment would not be illegal within the meaning of the FCPA if the payment, gift, offer, or promise to give anything of value that was made was lawful under the written laws and regulations of the foreign country.[28] In other words, there are two elements in the local law defense. First, the payment or the act of payment must be legal under the local law of the foreign country. Second, the recipient's local written law must state that such a payment or act of payment is legal. The second element of the local law defense is what makes the defense almost impossible to argue because no country would expressly and legally permit that such a bribe or act of bribe to its government officials.[29] Consequently, the local law defense would be useless in most FCPA cases.

(2) Reasonable and Bona Fide Expenditure Defense

Certain payment that are reasonable and bona fide would be permissible under the FCPA.[30] The DOJ guide explains that items of nominal value which are unlikely to influence or induce a government official in improper manner would probably not trigger the FCPA violation issue. Such payments as cab fare, reasonable hospitality expenses, travel expenses to visit company facilities or meetings, training expenses, or company promotional goods are generally accepted as methods to express gratitude or respect and would be considered reasonable and bona fide expenditures in business.[31]

2. Accounting Provision

Accounting provision consists of two parts: "books and records" provision and "internal controls" provision. Issuers will be held liable for the FCPA violation if they fail to comply with the accounting provision even when they meet all the requirements for anti-bribery provisions.[32]

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27) Westbrook, *supra*, pp.535
28) 15 U.S.C, §§78dd-1(c)(1), 78dd-2(c)(1), and 78dd-3(c)(1)
29) Fox, T., "I Can't Drive 55: The Uselessness of a 'Custom and Practice' Defense under the FCPA", JD Supra Law News, 2012, pp.2
30) 15 U.S.C, §§78dd-1(c)(2), 78dd-2(c)(2), and 78dd-3(c)(2)
31) The U.S. Department of Justice, supra, pp.15-16, 24

Thus, issuers have extra duty to meet not only all the elements of anti-bribery provisions, but also to satisfy the accounting provision to avoid the FCPA violation.

1) Applicable Group

(1) Issuers

Unlike the anti-bribery provision where there are three applicable groups (issuers, domestic concerns, and others than issuers or domestic concerns), accounting provision of the FCPA applies only to issuers. The accounting provision also applies to the United States or foreign business entities where the issuers own more than fifty percent of the firms' share. [33] In addition, the provision applies to consolidated subsidiaries and affiliates of the issuers.[34]

2) Books and Records Provision

Many business entities have mischaracterized bribes as commissions or royalties, consulting fees, sales and marketing expenses, rebates, discounts, or miscellaneous expenses in their books and records.[35] The purpose of the accounting provision is to prevent the following "general practice": First, simple failure to record inappropriate transactions; Second, falsification of deceived aspects of inappropriate transactions that could have been recorded correctly; Third, incorrect description of records in qualitative aspect of transactions despite accurate description of records in the quantitative aspect of the transactions.[36] The DOJ and SEC (U.S. Securities and Exchange Commission) incorporated such a practice into the FCPA through the "books and records" provision of the Exchange Act.[37]

(1) Elements

First, the FCPA statute requires the issuers to set forth each transaction "in reasonable detail." The statute explains the term "reasonable" as "such level of detail and degree of assurance as

32) The U.S. Department of Justice, supra, pp.39
33) 15 U.S.C, §78m(b)(6)
34) The U.S. Department of Justice, *supra*, pp.43
35) The U.S. Department of Justice, *supra*, pp.39
36) Oh, T.R., *supra*, pp.77
37) 15 U.S.C, §78m(b)(2)(A) requires issuers to 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.

would satisfy prudent officials in the conduct of their own affairs."[38] Second, criminal liability will be imposed on an issuer who "willfully and knowingly" fails to record improper transactions or material fact statements that are false or misleading.[39]

On the other hand, failure to perform simple duty or ommission would result in civil liability, but not criminal liability.[40]

3) Internal Controls Provision

Absence of comprehensive internal control mechanism often ends up becoming a channel that allows bribes to enter. Conversely, establishing an effective FCPA compliance program as a part of the internal control system is a preventive measure to block flow of bribes. Thus, the FCPA statute demands an internal control system that provides "reasonable assurance"[41] that: First, performed transactions are based on general or specific authorization of management; Second, recording of the transactions allows preparation of financial statement in accordance with generally accepted principles; Third, management's general or specific authorization is necessary for access to assets; Fourth, comparison between the recorded accountability for assets and the existing assets is done at reasonable intervals which allow appropriate action for any differences.[42]

Instead of stating particular list of controls which issuers must specify in their internal control system, the FCPA statute allows discretion to the issuers in formalities of the control system as long as the four types of reasonable assurance is provided.[43]

3. Penalties

The following table shows penalties for the FCPA violation.

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38) 15 U.S.C, §78m(b)(7)

39) 15 U.S.C, §78ff(a) imposes heavy criminal liability by stating that "shall upon conviction be fined not more than $5,000,000 or imprisoned not more than 20 years, or both" for individuals, and "a fine not exceeding $25,000,000" for business entities.

40) Oh, T.R., *supra*, pp.78

41) 15 U.S.C, §78m(b)(7) explains the term "reasonable assurances" as " such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs."

42) 15 U.S.C, §78m(b)(2)(B)

43) The U.S. Department of Justice, *supra*, pp.40

[Table 3] FCPA Penalty Summary[44]

Anti-bribery Provisions		Accounting Provisions	
Individual	Entities	Individual	Entities
Civil up to $10,000	Civil up to $10,000	Civil up to $100,000	Civil up to $500,000
Criminal up to $250,000 and or up to 5 year imprisonment	Criminal fine up to $2 million	Criminal up to $5 million or twice the gain or loss resulting from the violation, and or up to 20 year imprisonment	Criminal up to $25 million or twice the gain or loss resulting from the violation.
The fine may increase twice the gain or loss resulting from the corrupt payment under the Alternative Fines Act[45].		The individual must pay the fine himself without the company's direct or indirect assistant.	

Recent trend exhibits substantial increase in the amount of damage the DOJ and SEC impose. In 2000, the total damage including fine, penalty, and disgorgement from the FCPA cases was $300,000. In 2010, the total was $1.8 billion.[46]

In addition, 9 out of top 10 corporate defendants were non-U.S. companies in 2011. The DOJ and SEC are taking aggressive measures to apply the FCPA violations on foreign companies. The following table shows the top 10 FCPA violation corporations.

[Table 4] Top 10 FCPA Violation Companies[47]

Rank	Company	Nationality	Penalty	Year
1	Siemens	Germany	$800 million	2008
2	KBR / Halliburton	USA	$579 million	2009
3	BAE	UK	$400 million	2010
4	Snamprogetti Netherlands B.V. / ENI S.p.A	Holland / Italy	$365 million	2010
5	Technip S.A.	France	$338 million	2010

44) 15 U.S.C, §§78dd-2(g)(1)(A), 78dd-2(g)(2)(A), 78dd-3(e)(1)(A), 78dd-3(e)(2)(A), 78ff(c)(1)(A), 78ff(c)(2)(A), 78ff(a)

45) 18 U.S.C, §3571(d)

46) Oh, T.R., *supra*, pp.61

47) www.fcpablog.com/blog/2011/12/29/with-magyar-in-new-top-ten-its-90-non-us.html
The table's format was referred to Oh, T.R., supra, pp.61

Rank	Company	Nationality	Penalty	Year
6	JGC Corporation	Japan	$218.8 million	2011
7	Daimler AG	Germany	$185 million	2010
8	Alcatel-Lucent	France	$137 million	2010
9	Magyar Telekom / Deutsche Telekom	Hungary / Germany	$95 million	2011
10	Panalpina	Switzerland	81.8 million	2010

Ⅲ. Article 21.6 of the KORUS FTA

Article 21.6 of the KORUS FTA provides legal statements on anti-corruption. Compare to the FCPA, the length of the article is very short (slightly less than a page). In the opening clause of the Article, the Parties show mutual commitment to stand against corruption in international trade and investment. The word “reaffirm” in the clause shows the Parties’ significant degree of seriousness to the commitment.[48] The Parties further agree to systemize the corruption elimination effort by adopting and maintaining any necessary legislative or other measures which would make such corruptive practices a criminal offense.[49]

1. Elements

1) Applicable Groups

Unlike the FCPA provision where it divided and described specific applicable groups as issuers, domestic concerns, and other than issuers or domestic concerns, Article 21.6 used a more general term, “person.” The two applicable groups of “person” are a public official and a Korean or American national.

First, a public official is defined as “any official or employee of a Party at the central level of government, whether appointed or elected.”[50] Unlike the FCPA where it uses the term “foreign

48) Article 21.6(1), KORUS FTA
49) Article 21.6(2), KORUS FTA

official", Article 21.6 uses "public official." The distinction of the terms comes from the differences in jurisdictional basis between the FCPA and Aritcle 21.6. While the FCPA regulates bribery taking place in "foreign" countries, Article 21.6 focuses on corrupt practices in Korea or the United States. Thus, the word "public official" is limited to "a person who performs public functions for" Korea and the United States[51] and excludes foreign officials in countries other than Korea or the United States who would be covered under the FCPA. Despite the minimal differences between the two terms, "foreign official" in the FCPA and "public official" in Article 21.6 essentially mean the same.

Another difference is found in the scope of coverage between "foreign official" and "public official." As explained above, the foreign official in the FCPA cases include government officials or employees of central and local (horizontally) and from top to bottom level (vertically). On the other hand, Article 21.7 explains that the meanings public function and public official have to do with the central level of government of the Parties. It is not clear whether the term "central" includes local governments of Korean provinces and U.S. states or refers only to the central government of Korea and federal and state government of the U.S. The interpretation of the court will probably include local governments within the meaning of "central" government because doing otherwise would legalize intentional solicitation or reception of bribe by local government official which not only goes completely against the purpose of Article 21.6, but also conflicts with the FCPA.

Second, the Article applies to "any person." Although Article 21.6 does not subdivide "person" into specific categories like issuers, domestic concern, and other than issuers or domestic concerns in the FCPA statute[52], courts will probably interpret the word "person" in Article 21.6 as broadly as in the FCPA cases. In other words, Article 21.6 "person" would include not only natural person, but also corporate person and natural persons related with the corporate person's business operation because absolute prevention of corruptive business practice would not be possible without complete coverage of both natural person and corporate person within the meaning of "person." Thus, the meaning of applicable groups between the FCPA and Article 21.6 would not be different.

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50) Article 21.7(b), KORUS FTA

51) Article 21.6(a), KORUS FTA

52) 15 U.S.C, §78dd-1 explains what "issuer" is within the meaning of the FCPA. 15 U.S.C, §78dd-2 and 15 U.S.C, §78dd-3 lists the domestic concerns as any officer director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concerns.

2) Prohibited Conduct

There are four types of conduct prohibited by Article 21.6. First, it is prohibited for a public official of either central government to solicit bribe in any form in exchange of any benefit. Second, any natural person and corporation of Korea and the U.S. must not bribe public official of either countries in exchange of any benefit. Third, any natural person and corporation of Korea and the U.S. shall not bribe foreign official in exchange of any benefit. Fourth, any natural person or corporation shall not assist, participate or conspire the three conduct above.[53]

Like in the FCAP, Article 21.6 prohibit conduct (bribing) with corrupt intent to influence public official resulting in abuse of his/her authority for the giver's favor. Although there are minimal distinctions in the terms, such as difference in "any article of monetary value" in Article 21.6[54] and "anything of value" in the FCPA, the meaning of the languages are identical, and the KORUS will take similar interpretative approach as the DOJ. In addition, Article 21.6 and the FCPA prohibit both indirect as well as direct bribery.[55]

2. Penalties, Protection, and Affirmative Defense

1) Penalties

In contrast to the FCPA which explicitly states the amount of monetary or the length of prison sentence as punishment, Article 21.6 does not specify any amount related to punishment and goes no further than agreement to adopt or maintain "appropriate" criminal punishment by each government.[56] Since the FCPA penalties would be considered excessive compared to punishment in general against criminal offenses under Korean law, instant adoption or incorporation of the FCPA punishment into Korean law seems to be difficult. The "appropriateness" of Article 21.6 penalty would be different in its amount and degree from the FCPA.

53) Again, central government would probably include local governments of Korea and the U.S.
54) Article 21.6(2)(a) and 21.6(2)(b), KORUS FTA
55) Article 21.6(2)(a), 21.6(2)(b) and 21.6(2)(c), KORUS FTA
56) Article 21.6(3), KORUS FTA

2) Protection for Whistle-blower

One of the most distinctive aspects that Article 21.6 has compared to the FCPA is the whistle-blower provision. Article 21.6 makes it mandatory for the governments of each Party to adopt or maintain protectional measures for whistle-blowers.[57] In other words, the anti-corruption law of each Party must have some provisions stating whistle-blower protection. In contrast, the FCPA does not have whistle-blower provisions. In fact, the FCPA tend not to provide protection for whistle-blowers. Recently, an issue of whether Dodd-Frank Act's anti-retaliation provision[58] may apply to protect the FCPA whistle-blowers arose) in *Noller v. Southern Baptist Convention, Inc.*[59] and *Asadi v. G.E. Energy*[60]. In both cases, the courts decided that Dodd-Frank Act's anti-retaliation provisions were not applicable to the FCPA cases.[61] Thus, the whistle-blowers in the KORUS FTA anti-corruption cases are given more solid legal protection than the ones in the FCPA cases as long as the Parties adopts such protection measures.

3) Affirmative Defense

As discussed above, the FCPA provides two affirmative defenses for anti-bribery provision: local law defense and reasonable and bona fide expenditure defense. However, Article 21.6 is silent about such a defense. The only speculation is that courts hopefully apply the FCPA type of affirmative defenses to Article 21.6 cases.

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57) Article 21.6(4), KORUS FTA

58) Dodd-Frank Act, 15 U.S.C, §78u-6(h)(1)(A) prohibits employers from retaliating against a "whistleblower" for:
ⅰ. providing information to the Securities and Exchange Commission ("SEC" or "Commission");
ⅱ. initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
ⅲ. making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.) ("SOX"), [certain other securities laws], and any other law, rule, or regulation subject to the jurisdiction of the Commission.

59) *Nollner v. Southern Baptist Convention, Inc.*, No. 3:12-CV-00040 & 3:12-CV-00043, 2012 WL 1108923 (M.D. Tenn. April 3, 2012)

60) *Asadi v. G.E. Energy (USA), LLC*, No. 4:12-cv-345, 2012 U.S. Dist. LEXIS 89746 (S.D. Tex. June 28, 2012)

61) Clifford Chance US LLP, "Courts Struggle Over Whether FCPA Whistleblowers May Sue Under the Dodd-Frank Anti-Retaliation Provision", 2012, pp.1

Ⅳ. Conclusion

In conclusion, the FCPA and Article 21.6 share common objectives to prevent corruptive practices by business professionals and corporations in both domestic business and international trade. The FCPA and Article 21.6 shows similarities in applicable groups, prohibited conducts, and definition of terms although the FCPA is more detailed in the affirmative defenses, penalty amount, and additional coverage over the accounting provision. The number of the FCPA investigation and penalty level against foreign individuals and corporations have shown a substantial increase over the past years, and the trend will continue by the DOJ and the SEC. Moreover, inclusion of Article 21.6 in the KORUS FTA has given a dual legal basis for anti-corruption investigation for Korea and the United States. Due to the similarities between the FCPA and Article 21.6, more Korean individuals and corporations have become targeted groups under either laws.

Establishing internal FCPA compliance programs is not an optional choice to make for Korean corporations anymore. POSCO, a Korean ADR listed company, recently published an FCPA compliance guideline for internal use in 2011. The guideline contains 11 chapters thoroughly explaining the “Dos and Don’ts” under the FCPA. Despite the hopeful beginning of the compliance program by POSCO, very few Korean corporations are equipped with such a program to cope with the FCPA or Article 21.6 violation.

To make the matters worse, neither Korean Ministry of Foreign Affairs and Trade nor Ministry of Justice provides reasonably clear warnings or guidelines regarding anti-corruption under Article 21.6 or the FCPA. Typing key words like “FCPA” or “anti-corruption” in Korean or English in their websites do not show any search results. The Ministries need to be aware of lack of such information available for corporations and general public. Korean government agencies must make anti-corruption related information and publications available at least on their websites before the FCPA case or Article 21.6 violation occurs. In addition, Korean government must not only aggressively encourage Korean companies to have anti-corruption compliance programs like POSCO, but also enforce such a preventive measures against anti-corruption conforming to Artilce 21.6 of the KORUS FTA if necessary.

As discussed above, Korea was lowly ranked in the Corruption Perception Index 2012

considering the size of its economy, the level of development, and the degree of participation in international trade. Korea has ratified 8 FTAs including the KORUS and KOREU, concluded 2 FTAs, and been working on 15 FTAs.[62] As one of the leading FTA countries, Korea must take immediate steps to restore and enhance its national reputation on corruption and ensure transparent environment for intranational trade and investment through organized anti-corruption elimination mechanism.

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국문초록

미국 해외부패방지법(FCPA)과 한미 FTA 제 21.6 조 비교연구

배 성 호*

각 국가의 부패행위방지를 위한 제도적 혹은 법적인 노력은 국내차원을 넘어서 국제통상과 국제 비즈니스에서도 지속적으로 증가하고 있다. 그 대표적인 예가 미국의 연방법인 해외부패방지법(FCPA)이다. 지난 10년간 미 법무부는 해외부패방지법의 관할권을 끊임없이 확장하여 이제는 미국 증권거래소에 등록된 한국기업도 그 영역 안에 들어가게 되었다. 또 다른 예는 투명성을 다룬 한미 FTA 협정문 제 21 장중에서 특히 부패방지에 대한 조항인 제 21.6 조다. 한미 FTA로 인해 우리 기업의 대미수출뿐만 아니라 미국 내 법인설립 및 대미투자도 크게 증가할 것을 예상하면 앞으로 더 많은 한국 기업이 미국 해외부패방지법이나 한미 FTA 제 21.6 조의 관할권에 들어갈 것으로 전망된다. 미국 해외부패방지법과 한미 FTA 제 21.6 조는 부패방지라는 공통된 목적이 있으나 그 내용에 있어서 유사점과 차이점을 보인다. 따라서 본 연구는 두 가지 법을 비교분석하여 우리 기업의 부패행위방지를 위한 가이드라인의 초석 마련에 기여하는 것에 그 목적을 둔다.

주제어 : 한미 FTA, 해외부패방지법, 제 21.6 조, 부패방지, 뇌물방지

* 호서대학교 경제통상학부 교수