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# JAPAN'S IMPLEMENTATION OF THE OECD ANTI-BRIBERY CONVENTION: WEAKER AND LESS EFFECTIVE THAN THE U.S. FOREIGN CORRUPT PRACTICES ACT

David L. Heifetz

*Abstract:* In November 1997, the Organization for Economic Cooperation and Development ("OECD") adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"). The preamble of the OECD Convention states that "bribery is a widespread phenomenon in international business transactions, . . . which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions." All member countries signed the OECD Convention and thus were committed to implement it via the passage of domestic legislation by December 31, 1999. The Japanese promulgated new anti-bribery provisions to satisfy the mandates of the OECD Convention. However, when compared to the U.S. Foreign Corrupt Practices Act, the new Japanese provisions continue to put U.S. companies at a disadvantage when competing with Japanese companies in foreign markets. Additionally, the Japanese legislative efforts to date are not in keeping with the spirit of the OECD Convention and are probably insufficient to meet the Convention's standards.

## I. INTRODUCTION

When Congress passed the Foreign Corrupt Practices Act ("FCPA")<sup>1</sup> on December 19, 1977, the United States became the first country in the world to criminalize the bribing of foreign officials.<sup>2</sup> Prior to the passage of the FCPA, the practice of bribing foreign officials by American companies was widespread and commonplace. Just before the passage of the FCPA, a voluntary disclosure program initiated by the Securities and Exchange Commission showed that as many as 600 American firms had made payments to foreign officials.<sup>3</sup> These payments were substantial:<sup>4</sup> Lockheed alone had spent more than \$22 million.<sup>5</sup> American companies were not alone in this practice—it was the normal way international business was

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<sup>1</sup> 15 U.S.C.S. §§ 78dd-1, 78dd-2 (1999).

<sup>2</sup> Barbara Crutchfield George et al., *The 1998 OECD Convention: An Impetus For Worldwide Changes in Attitudes Toward Corruption in Business Transactions*, 37 AM. BUS. L.J. 485, 486 (2000).

<sup>3</sup> Agnieszka Klich, Note, *Bribery in Economies in Transition: The Foreign Corrupt Practices Act*, 32 STAN. J. INT'L L. 121, 123 (1996).

<sup>4</sup> Christopher F. Corr & Judd Lawler, *Damned If You Do, Damned If You Don't? The OECD Convention and the Globalization of Anti-Bribery Measures*, 32 VAND. J. TRANSNAT'L L. 1249, 1256 (1999).

<sup>5</sup> Klich, *supra* note 3, at 123.

conducted.<sup>6</sup> The passage of the FCPA put American companies at a significant disadvantage when competing with other companies from countries that allow, and in some cases encourage, bribery of foreign officials.<sup>7</sup>

In November 1997, the Organization for Economic Cooperation and Development ("OECD") adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention" or "Convention").<sup>8</sup> The preamble of the OECD Convention states that "bribery is a widespread phenomenon in international business transactions, . . . which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions."<sup>9</sup> All member countries<sup>10</sup> signed the OECD Convention and thus were committed to implement it via the passage of domestic legislation by December 31, 1999.<sup>11</sup> The resulting promulgation of domestic anti-bribery laws evidence some level of international support for the idea that bribery of foreign public officials is not acceptable.

This Comment examines the new Japanese anti-bribery provisions promulgated to satisfy the mandates of the OECD Convention from the perspective of the United States. Specifically, it appraises the OECD Convention's mandatory provisions, the U.S. Foreign Corrupt Practices Act ("FCPA"), and the September 1998 amendments to the Japanese Unfair Competition Prevention Law ("UCPL"). It then discusses whether Japanese and American companies will now be on equal footing when competing for business in other countries. This Comment argues that the new Japanese legislation is a weaker deterrent from bribery of foreign officials than the U.S. FCPA, and that it will likely prove insufficient to meet the requirements of the OECD Convention in its current form.

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<sup>6</sup> See *infra* Part IV.

<sup>7</sup> A number of European countries encouraged the bribing of foreigners by making such payments tax deductible as business expenses. While not required under the OECD Convention, the vast majority of countries have ceased this practice since its passage. See the OECD website for more information on this issue, at <http://www.oecd.org>.

<sup>8</sup> George, *supra* note 2, at 500.

<sup>9</sup> Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 1997, pmbl., <http://www.oecd.org/> [hereinafter OECD Convention].

<sup>10</sup> Current membership of the OECD (in alphabetical order, followed by date of membership): Australia (1971), Austria (1961), Belgium (1961), Canada (1961), Czech Republic (1995), Denmark (1961), Finland (1969), France (1961), Germany (1961), Greece (1961), Hungary (1996), Iceland (1961), Ireland (1961), Italy (1961), Japan (1964), Korea (1996), Luxembourg (1961), Mexico (1994), The Netherlands (1961), New Zealand (1973), Norway (1961), Poland (1996), Portugal (1961), Slovak Republic (2000), Spain (1961), Sweden (1961), Switzerland (1961), Turkey (1961), United Kingdom (1961), and United States (1961). OECD, <http://www.oecd.org> (last visited Jan. 15, 2001).

<sup>11</sup> George, *supra* note 2, at 500.

Part II provides general background of the OECD Convention. Part III examines the substance of the OECD Convention as adopted. Part IV explores the U.S. FCPA and contrasts it with the OECD Convention as adopted. Part V examines the recent amendments to the Japanese Unfair Competition Prevention Law, which includes the offense of bribing foreign public officials, and compares these provisions with the U.S. FCPA. Finally, Part VI concludes that not only are U.S. companies at a disadvantage when competing with Japanese companies in foreign markets, but also that the Japanese legislative efforts to date are not in keeping with the spirit of the OECD Convention and are probably insufficient to meet the Convention's standards.

## II. BACKGROUND

After a series of failed attempts to propagate international anti-bribery legislation in the United Nations and the OECD, the United States has achieved some measure of success with the November 1997 adoption of the OECD Convention.

### A. *A History of Failed Attempts at International Bribery Legislation*

The United States has been promoting international anti-bribery measures since 1979. On December 19, 1977, Congress passed the U.S. Foreign Corrupt Practices Act ("FCPA"), criminalizing payments to foreign government officials by any U.S. corporation, U.S. citizen, or other entity within Congress' federal jurisdiction.<sup>12</sup> While most countries criminalize the bribing of their own officials, the FCPA has, until quite recently, been the only legislation in the world to criminalize the bribing of foreign officials.<sup>13</sup> The United States has repeatedly tried to bring about comprehensive international anti-bribery legislation in an attempt to keep American companies from being disadvantaged in international business.<sup>14</sup> The first significant attempt at comprehensive international anti-bribery legislation was in the United Nations ("U.N."),<sup>15</sup> when a draft U.N. agreement entitled "International Agreement on Illicit Payments" was

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<sup>12</sup> Foreign Corrupt Practices Act, 15 U.S.C.S. §§ 78dd-1, 78dd-2 (1999) [hereinafter FCPA].

<sup>13</sup> George, *supra* note 2, at 486.

<sup>14</sup> Timothy Martin, *Corruption And Improper Payments: Global Trends And Applicable Laws*, 36 ALBERTA L. REV. 416, 428-29 (1998).

<sup>15</sup> *Id.* at 429.

forwarded to the Council of the General Assembly in 1979.<sup>16</sup> This attempt failed because of disagreements over the definition of an illicit payment,<sup>17</sup> and no action was ever taken in the General Assembly to conclude and formalize the draft agreement.<sup>18</sup> In 1981, the U.S. delegation petitioned the OECD<sup>19</sup> to implement an international illicit payments agreement; however, this effort also failed.<sup>20</sup>

### B. *The Structure of the OECD*

The OECD is an organization of thirty member countries<sup>21</sup> "which provides governments a setting in which to discuss, develop and perfect economic and social policy."<sup>22</sup> The OECD's basic configuration consists of committees of delegates and professional research activities, which are coordinated by a Secretariat.<sup>23</sup> The committees are made up of delegates from member countries, and they focus on committee specific policy issues.<sup>24</sup> Committees are supported by "directorates," which are groups of OECD staff comprised mostly of economists and lawyers with corresponding academic specialties.<sup>25</sup> The OECD is supported by annual contributions of member countries, with each member paying a share proportionate to the size of its economy.<sup>26</sup>

The governing body of OECD is the Council. The Council, composed of one representative from each member country, determines the size of the annual budget and OECD priorities.<sup>27</sup> All actions of the Council must receive a unanimous vote by representatives of the member states.<sup>28</sup> The OECD working group that generated a convention or agreement will generally monitor it.

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

<sup>17</sup> Jong Bum Kim, *Korean Implementation of the OECD Bribery Convention: Implications For Global Efforts To Fight Corruption*, 17 UCLA PAC. BASIN L.J. 245, 254-55 (2000).

<sup>18</sup> Martin, *supra* note 14, at 429.

<sup>19</sup> See *infra* Part II.B for a description of the OECD.

<sup>20</sup> Martin, *supra* note 14, at 429.

<sup>21</sup> For a brief history of the OECD, see George, *supra* note 2, at 487-89. For current membership of the OECD, see *supra* note 10.

<sup>22</sup> OECD, ABOUT THE OECD, <http://www.oecd.org> (last visited Jan. 15, 2001).

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

<sup>24</sup> *Id.*

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

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> George, *supra* note 2, at 490.

C. *The Convention on Combating Bribery of Foreign Public Officials in International Business*

The United States achieved its goal of propagating international anti-bribery legislation with the adoption of the OECD Convention in 1997. The impetus behind the OECD Convention can be found in Congress' 1988 amendments to the FCPA, which included language directing the President to pursue international anti-bribery measures within the OECD.<sup>29</sup> In 1989, the U.S. representatives to the OECD attempted to initiate a multilateral agreement against bribery.<sup>30</sup> Germany, France, Japan, and Spain openly resisted this action.<sup>31</sup> In May 1994, due to international pressures<sup>32</sup> and politicking,<sup>33</sup> the majority of the OECD countries agreed to endorse a non-binding package of recommendations and "meaningful steps" entitled *OECD Recommendations on Bribery in International Business Transactions*.<sup>34</sup> In May 1997, the OECD Committee reconvened to review steps taken by member countries pursuant to the 1994 recommendations.<sup>35</sup> At this meeting, the United States delegation pressured the other members to adopt a binding agreement prohibiting bribery of foreign officials.<sup>36</sup> In November 1997, the OECD adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>37</sup> All the members signed the OECD Convention, thereby committing themselves to ratify and implement the OECD Convention in the form of domestic legislation by December 31, 1999.<sup>38</sup>

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<sup>29</sup> Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003(d), 102 Stat. 1107, 1424, provides:

(1) Negotiations. It is the sense of the Congress that the President should pursue the negotiation of an international agreement, among the members of the Organization of Economic Cooperation and Development, to govern persons from those countries concerning acts prohibited with respect to issuers and domestic concerns by the amendments made by this section. Such international agreement should include a process by which problems and conflicts associated with such acts could be resolved.

The President was then directed to make a detailed progress report within a year. FCPA, 15 U.S.C.S. § 78dd-1 (1999).

<sup>30</sup> George, *supra* note 2, at 495.

<sup>31</sup> Some think that France and Germany resisted in an attempt to protect domestic laws which made certain bribes tax deductible. *See id.* at 496.

<sup>32</sup> George, *supra* note 2, at 497.

<sup>33</sup> *Id.* at 496-97.

<sup>34</sup> Martin, *supra* note 14, at 429.

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

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

<sup>37</sup> George, *supra* note 2, at 500.

<sup>38</sup> *Id.*

### III. THE OECD CONVENTION

By adopting the OECD Convention, member countries committed themselves to promulgate domestic anti-bribery legislation according to the Convention's principles.<sup>39</sup> Thus the Convention is not a template for legislation, but rather a set of general guidelines that mandate broad outcomes.<sup>40</sup> The OECD Convention sets forth minimum standards for legislation, thus allowing each member country the flexibility to adopt measures compatible with its own existing legal principles.<sup>41</sup>

#### A. *The Mandates of the OECD Convention*

The OECD Convention sets forth minimum standards for legislation by member countries.<sup>42</sup> These mandates can be executed in a manner which is consistent with a given member country's existing legal principles.<sup>43</sup>

#### 1. *The Offense of Bribing a Foreign Public Official*

Parties to the Convention are required to promulgate laws that establish a criminal offense for bribing officials of foreign countries.<sup>44</sup> The act of bribery is portrayed as the offer, promise, or gift of any undue<sup>45</sup> thing of value to a foreign official for the purpose of influencing that official to act or refrain from acting in their official capacity in such a way that an improper business advantage is secured.<sup>46</sup> "Foreign public official" is defined as:

[A]ny person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country,

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<sup>39</sup> *Id.*

<sup>40</sup> OECD Convention, *supra* note 9, art. 5.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> OECD Convention, *supra* note 9, art. 1, § 1.

<sup>45</sup> Note that "undue" is not defined in the OECD Convention. See OECD Convention, *supra* note 9.

<sup>46</sup> The exact language used in the convention is "to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business." OECD Convention, *supra* note 9, art. 1, § 1.

including for a public agency or public enterprise; and any official or agent of a public international organization.<sup>47</sup>

The Convention further mandates that parties criminalize complicity,<sup>48</sup> attempt, and conspiracy<sup>49</sup> to commit such bribery.<sup>50</sup> Parties to the Convention are required to apply the anti-bribery provisions to legal as well as natural persons.<sup>51</sup>

Finally, parties to the Convention are directed to establish accounting standards<sup>52</sup> that would hinder the ability of persons engaging in the bribery of foreign officials from hiding such activities.<sup>53</sup> Members are charged with providing sanctions sufficient to deter accounting practices that violate these standards.<sup>54</sup>

## 2. *Required Sanctions*

The fundamental requirement for sanctions to be in compliance with the Convention is that they be "effective, proportionate and dissuasive."<sup>55</sup> Member countries are instructed to punish the bribery of foreign officials in a manner consistent with the punishment for the bribery of domestic officials.<sup>56</sup> Parties to the Convention are also directed to adopt measures that assure that the bribe and the proceeds of bribery are subject to confiscation,

<sup>47</sup> *Id.* art. 1, § 4(a).

<sup>48</sup> "Complicity" is defined to include: incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official. OECD Convention, *supra* note 9, art. 1, § 2.

<sup>49</sup> "Attempt" and "conspiracy" are not clearly defined in the OECD Convention. See OECD Convention, *supra* note 9. However, in the Annex member countries are directed to incorporate their relevant concepts of "attempt," "complicity," and "conspiracy": "The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting state are recognised as applicable to the offence of bribery of a foreign public official." *Id.* ann. § 2.

<sup>50</sup> OECD Convention, *supra* note 9, art. 1, § 2.

<sup>51</sup> *Id.* (generally seen as referring to corporations). It should be noted that some countries, including Japan, do not impose criminal liability on corporations. Corr & Lawler, *supra* note 4, at 1307. In light of this, Article 3 mandates imposition of fines and penalties on corporations in such instances so as to effectively sanction them as well. *Id.* at 1249, 1307.

<sup>52</sup> Discussion of the accounting provisions is outside the scope of this Comment.

<sup>53</sup> OECD Convention, *supra* note 9, art. 8, § 1.

<sup>54</sup> *Id.* art. 8, § 2.

<sup>55</sup> *Id.* art. 3, § 1.

<sup>56</sup> *Id.* The Annex directs member countries to provide:

Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe. . . . Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.

*Id.* ann. § 5.



or alternatively, are offset by a fine of equal or greater value.<sup>57</sup> Member countries that have made bribery of domestic officials a predicate offense in money laundering legislation are directed to extend such classification to include bribery of foreign officials.<sup>58</sup>

Enforcement of the new bribery offense may occur in a manner congruent with the normal methods and procedures of member countries.<sup>59</sup> However, it is required that such procedures "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."<sup>60</sup>

### 3. *Necessary Scope and Jurisdiction*

The OECD Convention mandates that member countries make provisions to ensure jurisdiction and provide mutual legal assistance. Parties to the Convention are directed to take measures to establish jurisdiction over the bribery of a foreign public official on its soil or by its nationals abroad.<sup>61</sup> Member countries are required to make bribery of a foreign public official an extraditable offense under their own laws and treaties,<sup>62</sup> and directed to take steps to assure that they can extradite their nationals in such cases.<sup>63</sup>

Member countries are instructed to consult with each other in cases of concurrent jurisdiction.<sup>64</sup> Parties to the Convention are also required, to the fullest extent possible under existing treaties, to provide legal assistance to other parties to the Convention in connection with investigations and proceedings related to the bribery of foreign officials.<sup>65</sup> Member countries are directed to make legal provisions for formal use of the Secretary-General of the OECD as liaison for the purpose of consultations, the rendering of legal assistance, and extradition proceedings.<sup>66</sup>

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<sup>57</sup> *Id.* art. 3, § 3.

<sup>58</sup> *Id.* art. 7.

<sup>59</sup> *Id.* art. 5. In other words, member countries are given the freedom to integrate this offense into their existing enforcement scheme.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* art. 4, §§ 1, 2.

<sup>62</sup> *Id.* art. 10, § 1.

<sup>63</sup> *Id.* art. 10, § 2.

<sup>64</sup> *Id.* art. 4, § 3.

<sup>65</sup> *Id.* art. 9, § 1.

<sup>66</sup> *Id.* art. 11.

#### 4. *Monitoring and Follow-up*

Parties to the Convention are required to "co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of [the] Convention."<sup>67</sup> This follow-up is to be done within the framework of the OECD Working Group on Bribery in International Business Transactions. The Working Group is composed of senior legal experts from all member countries.<sup>68</sup> In accordance with Article 12 of the OECD Convention, the Working Group has established systems of self and mutual evaluation to ensure the effectiveness of steps taken by member countries.<sup>69</sup>

#### B. *Analysis of the OECD Mandated Anti-Bribery Provisions*

While not perfect, the OECD Convention has the potential to address the major concerns of the United States regarding the bribery of foreign officials. The provisions of the OECD Convention are broad and sweeping, but still provide strict guidelines to member nations.<sup>70</sup> Although member countries are required to reach certain outcomes, "national authorities [are left with] with the choice of form and methods."<sup>71</sup>

However, the OECD Convention left certain key issues unresolved. For example, it does not address bribe-taking or bribe-soliciting by officials in non-member countries.<sup>72</sup> Bribe-taking and bribe-soliciting are seen as "demand-side" issues,<sup>73</sup> and the OECD deals with supply-side issues. Since these demand-side issues are outside the power of the OECD to address,<sup>74</sup> the Convention has in no way changed the culture of bribe-soliciting prevalent in non-member developing countries.<sup>75</sup> Indeed, in some countries, receipt of bribes is considered to be part of the salary of poorly paid civil servants.<sup>76</sup> These demand-side issues are critical. Despite the fact that the

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<sup>67</sup> *Id.* art. 12.

<sup>68</sup> George, *supra* note 2, at 504.

<sup>69</sup> *Id.* at 505.

<sup>70</sup> In some cases, the guidelines go beyond what is mandated by the U.S. FCPA. See *infra* Part IV.

<sup>71</sup> George, *supra* note 2, at 499.

<sup>72</sup> *Id.* at 519.

<sup>73</sup> For example, the soliciting and taking of a bribe is not covered in the OECD Convention.

<sup>74</sup> The OECD is, after all, a non-governmental organization. It has no power to demand that non-member sovereign states reformulate their laws.

<sup>75</sup> George, *supra* note 2, at 519.

<sup>76</sup> Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 277-79 (1997).

OECD provisions cover all of the world's major industrial powers,<sup>77</sup> the Convention creates a gap between the major industrial powers, whose companies are now prohibited from making bribes, and lesser-developed non-member countries, whose officials will likely still demand them.

Further, the Convention does not mandate the criminalization of "grease payments," which are described by the OECD as "facilitation payments made to induce public officials to perform functions part of their routine duties."<sup>78</sup> Instead, such expenditures are carefully excluded from the definition of illicit payment in the OECD Convention,<sup>79</sup> and thus left outside of the scope of the Convention.<sup>80</sup>

Possibly the most significant shortcoming in the OECD Convention, however, is its failure to mandate the criminalization of bribery of foreign political parties and candidates for foreign political office.<sup>81</sup> Foreign business interference in party politics and elections is a serious issue, but officers of political parties and candidates for office are not included in the current definition of "foreign public official."<sup>82</sup> This issue was to be resolved by the OECD Committee in an expedited manner, but as of yet has not been addressed.<sup>83</sup>

These criticisms are perhaps premature, considering the scope and intent of the Convention. Furthermore, the OECD activity in this area is not likely to taper off any time soon. It may be more appropriate to look at the 1997 Convention as being the foundation for international accord regarding the bribing of foreign officials, and consequently making further refinement possible. Thus, the OECD Convention would, if implemented properly by member countries, seem to accomplish the major goals of the United States regarding the bribery of foreign officials.

#### IV. AMERICAN RESPONSES TO INTERNATIONAL BRIBERY: THE U.S. FOREIGN CORRUPT PRACTICES ACT

The U.S. codification of laws criminalizing bribery of foreign officials is found in the FCPA. The FCPA was first promulgated on December 19,

<sup>77</sup> George, *supra* note 2, at 519.

<sup>78</sup> OECD, ANTI-CORRUPTION FREQUENTLY ASKED QUESTIONS, <http://www.oecd.org> (last visited Jan. 5, 2001).

<sup>79</sup> Kim, *supra* note 17, at 261.

<sup>80</sup> It should be noted that the U.S. FCPA also carefully excludes the making of grease payments. See *supra* Part IV.B.

<sup>81</sup> Corr & Lawler, *supra* note 4, at 1305. The FCPA does criminalize the bribery of foreign political parties and candidates for foreign political office. See *infra* Part IV.B.3.

<sup>82</sup> See generally OECD Convention, *supra* note 9.

<sup>83</sup> Corr & Lawler, *supra* note 4, at 1249, 1305.

1977, in response to media exposure of a number of high profile international bribery incidents.<sup>84</sup> These scandals acted as a catalyst for the creation and passage of the FCPA.<sup>85</sup> When it was passed, the United States became the first country in the world to criminalize the bribing of foreign officials.<sup>86</sup> The FCPA, as it pertains to the crime of bribing a foreign official,<sup>87</sup> is codified at 15 U.S.C. §§ 78dd-1 and 78dd-2, and has only been amended twice since its passage in 1977. In 1988, it was amended to provide two affirmative defenses.<sup>88</sup> In 1998, the FCPA was amended again, this time with the intent of bringing it into compliance with the OECD Convention.<sup>89</sup> Thus, the FCPA has been a stable and accepted part of American criminal law for over twenty years. As such, it is a useful tool for understanding the OECD Convention mandates, as well as for evaluating Japan's attempts at compliance.

## A. *The Provisions of the FCPA*

### 1. *The Offense of Bribing a Foreign Public Official*

The FCPA criminalizes the bribery of foreign public officials. The FCPA makes it a federal crime "for any U.S. person or entity to offer or to pay, either directly or through an intermediary, anything of value to a foreign government official in order to gain an improper commercial advantage in obtaining or retaining business."<sup>90</sup>

It is a federal offense for subject entities to make payments<sup>91</sup> to any of the following entities: 1) a foreign official,<sup>92</sup> 2) a foreign political party [or

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<sup>84</sup> These scandals included large payments by Exxon, Gulf, Mobil, and Lockheed to the officials of major trading partners. See Corr & Lawler, *supra* note 4, at 1256 (detailing scandals).

<sup>85</sup> *Id.*

<sup>86</sup> George, *supra* note 2, at 486.

<sup>87</sup> In addition to criminalizing the bribery of foreign officials, the FCPA set forth new accounting standards designed to make such practices harder to hide. Note that the FCPA's accounting provisions were modified and incorporated into the Securities and Exchange Act ("SEA") of 1934. Discussion of the accounting provisions are outside of the scope of this Comment, and thus reference to the FCPA in this Comment should be understood to refer only to the portion of the acts which criminalize the bribing of foreign officials.

<sup>88</sup> Corr & Lawler, *supra* note 4, at 1256. See *infra* Part IV.A.1.

<sup>89</sup> Corr & Lawler, *supra* note 4, at 1258.

<sup>90</sup> *Id.* at 1257.

<sup>91</sup> The language of the statute is as follows: "Make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value." FCPA, 15 U.S.C.S. § 78dd-1(a) (1999).

<sup>92</sup> 15 U.S.C.S. § 78dd-1(a)(1). "Foreign official" is defined to mean any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international

official thereof] or any candidate for foreign political office,<sup>93</sup> or 3) any person while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to an entity described in 1) or 2) above.<sup>94</sup> Such a payment, to be criminal, must be made by the issuer or its agent with the intent of:

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.<sup>95</sup>

The FCPA prohibitions do not apply to payments made to one of the above enumerated entities "which [are] to expedite or to secure the performance of a routine governmental action."<sup>96</sup> This would seem to encompass the making of grease payments to officials of foreign governments in order to motivate them to do their jobs.<sup>97</sup>

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organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization. 15 U.S.C.S. § 78dd-1(f)(1)(A).

<sup>93</sup> 15 U.S.C.S. § 78dd-1(a)(2).

<sup>94</sup> 15 U.S.C.S. § 78dd-1(a)(3).

<sup>95</sup> 15 U.S.C.S. §§ 78dd-1(a)(1), (a)(2), (a)(3).

<sup>96</sup> 15 U.S.C.S. § 78dd-1(b).

<sup>97</sup> "Routine governmental action" is defined to mean:

only an action which is ordinarily and commonly performed by a foreign official in:

- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- (ii) processing governmental papers, such as visas and work orders;
- (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or actions of a similar nature.

The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular

Additionally, the 1988 amendments created two affirmative defenses to charges of bribing foreign public officials. Section 78dd-1(c)(1) tolerates payments made in a manner lawful under the written laws of the country in question,<sup>98</sup> i.e., it is a valid defense to show compliance with foreign laws when making a payment. Section 78dd-1(c)(2) allows reasonable expenditures<sup>99</sup> directly related to the promotion of products and services, or the performance of a contract.<sup>100</sup>

## 2. *Sanctions*

Sanctions under the FCPA are formidable. Domestic concerns<sup>101</sup> that are not natural persons are subject to fines up to \$2,000,000, and civil penalties up to \$10,000.<sup>102</sup> Natural persons who are officers, directors, employees, agents, or stockholders acting on behalf of domestic concerns are subject to fines up to \$100,000, and civil penalties up to \$10,000.<sup>103</sup> Additionally, under other federal statutes, "any person" may be fined up to twice the pecuniary gain of the offense or twice the loss to a person other than the defendant.<sup>104</sup>

The FCPA authorizes the Attorney General to seek injunctions against covered entities currently engaged in or are about to engage in prohibited acts.<sup>105</sup> The section also makes provisions for the Attorney General to conduct discovery and go to trial.<sup>106</sup> The Attorney General is directed to issue guidelines, advisory opinions, and precautionary procedures to assist businesses to comply with the FCPA.<sup>107</sup>

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party, or any action taken by a foreign official involved in the decision making process to encourage a decision to award new business to or continue business with a particular party.

15 U.S.C.S. § 78dd-1(f)(3).

<sup>98</sup> FCPA, 15 U.S.C.S. § 78dd-1(c)(1).

<sup>99</sup> Examples given in the statute are travel and lodging expenses incurred to promote one's product or service. 15 U.S.C.S. § 78dd-1(c)(2).

<sup>100</sup> 15 U.S.C.S. §§ 78dd-1(c)(2)(A), (c)(2)(B).

<sup>101</sup> Defined *infra*, Part IV.A.3.

<sup>102</sup> 15 U.S.C.S. § 78dd-2(g)(1).

<sup>103</sup> 15 U.S.C.S. § 78dd-2(g)(2).

<sup>104</sup> OECD, UNITED STATES: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATIONS, <http://www.oecd.org> (last visited Jan. 5, 2001) [hereinafter U.S. Compliance].

<sup>105</sup> 15 U.S.C.S. § 78dd-2(d).

<sup>106</sup> 15 U.S.C.S. § 78dd-2(c).

<sup>107</sup> 15 U.S.C.S. § 78dd-1(d).

### 3. *Scope and Jurisdiction*

The FCPA attempts to regulate the vast majority of U.S. persons and entities. The crime of bribing a foreign official pertains to corporations who issue stock, and their employees,<sup>108</sup> and any "domestic concern" defined as:

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.<sup>109</sup>

The 1998 amendments added § 78dd-1(g), presumably to bring the FCPA into accord with the OECD Convention. The new section sets forth an offense similar to that described above, but without a jurisdictional hook requiring the use of the mails or interstate commerce. It is seen as acquiring jurisdiction over foreign nationals and foreign businesses when they enter the United States to take an action in furtherance of a bribe overseas, as the interstate commerce jurisdictional requirements are satisfied when such an entity enters the U.S.<sup>110</sup>

#### *B. Analysis—The Mandates of the OECD Convention and the FCPA*

The OECD Convention and the FCPA aim at, and generally achieve, very similar results: the systematic criminalization of the act of bribing foreign public officials. Only minor amendments were necessary to bring the United States into compliance with the Convention, and only two differences of any significance remain between the required outcomes of the Convention and the FCPA. The FCPA includes within the scope of criminal activity the bribery of political parties and candidates for office, while the OECD does not. This is a significant difference, but likely to be remedied in

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<sup>108</sup> 15 U.S.C.S. § 78dd-1(a).

<sup>109</sup> 15 U.S.C.S. § 78dd-2(h)(1)(B).

<sup>110</sup> U.S. Compliance, *supra* note 104. Other country specific compliance reports are also available at <http://www.oecd.org>.

the future.<sup>111</sup> The FCPA allows the affirmative defense of reasonable expenditure while the OECD does not. This may well not be an issue since “to date, no payment that the U.S. authorities have investigated has fallen within this exception.”<sup>112</sup>

## V. THE OECD CONVENTION AND JAPAN’S AMENDMENTS TO THE UNFAIR COMPETITION PREVENTION LAW

On September 18, 1998, Japan attempted to implement the OECD Convention by amending the Unfair Competition Prevention Law (“UCPL”) to include the offense of bribing a foreign public official.<sup>113</sup> As no official translation is available, this Comment references the unofficial translation provided to the OECD by the Japanese delegation.

### A. *The UCPL Amendments Adopted for OECD Compliance*

#### 1. *The Offense of Bribing a Foreign Public Official*

The UCPL criminalizes the completed act of bribing a foreign public official. The new UCPL provisions state, “No one may give, offer or promise any undue pecuniary or other advantage, to a foreign public official, in order that the official act or refrain from acting in relation to the performance of official duties . . . in order to obtain improper business advantage.”<sup>114</sup> It is critical to note that a crime has been committed only in cases of a completed bribe,<sup>115</sup> thus it is not a crime to conspire or attempt such action.

A public official is defined to include any person who: engages in public service for a national or a local government in a foreign country, works for a business owned or controlled by a foreign government, engages in public service for an international organization, or exercises a public function, which belongs to the authorized competence of a national or a local government in a foreign country.<sup>116</sup>

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<sup>111</sup> See *supra* Part III.C.

<sup>112</sup> U.S. Compliance, *supra* note 104.

<sup>113</sup> OECD, JAPAN: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION, <http://www.oecd.org> (last visited Jan. 5, 2001) [hereinafter Japan Compliance].

<sup>114</sup> Unfair Competition Prevention Law, Law No. 47 (1993) (Japan) [hereinafter UCPL No. 47].

<sup>115</sup> Japan Compliance, *supra* note 113.

<sup>116</sup> UCPL No. 47, *supra* note 114, art. 13.



## 2. *Sanctions*

Sanctions under the UCPL are moderate. Natural persons who violate the new law can be fined up to ¥ 3,000,000 (approximately \$24,400)<sup>117</sup> and imprisoned for up to three years.<sup>118</sup> Juridical persons<sup>119</sup> can be fined up to ¥300,000,000 (approximately \$2,440,000).<sup>120</sup> Confiscation of funds is limited to the bribe itself—the proceeds of active bribery are not subject to forfeiture.<sup>121</sup>

## 3. *Scope and Jurisdiction*

The UCPL prohibition against bribing foreign public officials is seen as extending to natural and juridical persons, but contains significant exceptions.<sup>122</sup> For example, Article 10 bis-(3) presents a significant exception to the new crime. Conduct otherwise amounting to an offense will not violate the UCPL when the main office of the entity giving the bribe is situated in the same country in which the foreign public official in question is employed in public service.<sup>123</sup> This exception would seem to apply regardless of where the act of bribery occurs.<sup>124</sup> Exactly what constitutes an entity's main office is not defined in the statute.<sup>125</sup> However, Japanese authorities believe that such determinations will probably follow decisions in relation to the definition of "head office" under the Commercial Code, wherein the "head office" is an office that acts as the center of management of the entity's business.<sup>126</sup> Thus:

In the case where a division of a Japanese corporation is located in a foreign country, the "main office" would usually be considered to be in Japan. [However,] the "main office" of a subsidiary of a Japanese

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<sup>117</sup> All currency conversions in this Comment were done on Nov. 4, 2001, at a rate of \$1 = ¥122.858. Currency was converted using xe.com's Universal Currency Converter, available at <http://www.xe.com/ucc/>.

<sup>118</sup> UCPL No. 47, *supra* note 114, art. 10. bis-(2).

<sup>119</sup> "Juridical person" is seen as referring to incorporated entities, i.e. corporations. Japan Compliance, *supra* note 113.

<sup>120</sup> UCPL No. 47, *supra* note 114, arts. 13, 14.

<sup>121</sup> Japan Compliance, *supra* note 113.

<sup>122</sup> *Id.* art. 10 bis-(3).

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

<sup>124</sup> *Id.*

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

<sup>126</sup> *Id.* § 4.1.

corporation located in a foreign country would usually be determined to be in the foreign country.<sup>127</sup>

As a result, a Japanese citizen living in Japan, but employed by a subsidiary of a Japanese company, which is determined to have a head office elsewhere, can bribe foreign officials on behalf of the subsidiary without running afoul of the law.<sup>128</sup>

*B. Analysis of the New Japanese Crime of the Bribery of a Foreign Public Official*

The newly adopted amendments to Japan's UCPL would seem to fall short of the spirit and the mandates of the OECD Convention on a number of critical issues. These shortcomings fall into three categories: 1) the scope of the anti-bribery crime, 2) the sanctions for the anti-bribery crime, and 3) the status/positioning of the new offense in relation to other crimes within the body of Japanese statutes.

*1. Issues of the Offense and Its Scope*

Japan's amendments to the UCPL fall short in its definition of the crime itself and in its exceptions. In Japan, the crime of bribing a foreign official does not include an attempt to bribe a foreign official.<sup>129</sup> The OECD mandates that "attempt and conspiracy to bribe a foreign public official shall be criminal offenses to the same extent as attempt and conspiracy to bribe a public official of that Party."<sup>130</sup> As Japan's penal code does not criminalize attempts to bribe domestic officials, the new legislation is technically within the accepted bounds of the OECD Convention. OECD reviewers present the following scenario to illustrate the gap this creates in the new crime: "Where a corporate executive authorizes his/her subordinate to pay a bribe and the subordinate neither pays, promises nor offers the advantage, neither the executive nor the subordinate could be punished."<sup>131</sup>

Also troubling is the "main office" exemption created by Article 10 bis-(3),<sup>132</sup> which exempts otherwise criminal acts when the main office of

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<sup>127</sup> Japan Compliance, *supra* note 113.

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

<sup>129</sup> See *supra* Part V.A.1.

<sup>130</sup> OECD Convention, *supra* note 9, art. 1, § 2.

<sup>131</sup> Japan Compliance, *supra* note 113.

<sup>132</sup> See *supra* Part V.A.3.

the entity giving the bribe is situated in the same country in which the foreign public official in question is employed in public service. According to the Working Group responsible for monitoring Japan's compliance with the OECD Convention: "the 'main office' exception contained in the UCPL is inconsistent with the standards of the Convention."<sup>133</sup>

## 2. *Issues of Sanction*

The sanctions provided in the UCPL amendments are probably too weak to effectively dissuade corporations from bribing foreign public officials.<sup>134</sup> The offense of bribing a foreign public official is punished primarily by fines, with the additional possibility of up to three years in prison if the offender is a natural person. Natural persons can be fined a maximum of ¥3,000,000 (approximately \$2440). Corporations can be fined a maximum of ¥300,000,000 (approximately \$2,440,000).<sup>135</sup> Seizure or confiscation of the proceeds of bribery is not available under the Japanese legislation. The OECD Working Group postulated that, given the financial stakes involved in international business deals, such a relatively small fine might well be considered just a cost of doing business by immensely wealthy Japanese corporations.<sup>136</sup> Consequently, a Japanese corporation could rest assured that the comparatively small penalty assessed would be the only cost of bribing a foreign public official—any gains from this activity would remain intact.<sup>137</sup>

The Japanese delegates to the OECD Convention contend that a criminal conviction for bribing a foreign public official would be a magnet for negative media attention that would do additional damage to an offending company.<sup>138</sup> While this may be true, the Working Group concluded: "The UCPL, which provides for limited criminal fines and does

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<sup>133</sup> Japan Compliance, *supra* note 113.

<sup>134</sup> *Id.* § 2.1. The language of the working group is straight-forward:

The Working Group does not consider the sanctions available for legal persons to be sufficiently effective, proportionate and dissuasive in view of the large size of many of its corporations, particularly since seizure and confiscation (as noted below) are not available under the Japanese legislation. It welcomes the opinion of the Japanese authorities that the stigma of a conviction would create significant losses for a corporation, but nevertheless recommends that Japan consider raising the maximum fine for legal persons.

*Id.*

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

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

not provide for confiscation of the proceeds of bribery, does not meet the standards of the Convention.”<sup>139</sup>

### 3. *Issues of Status within Japanese Law*

The amendments to the UCPL seem only to be concerned with the Japanese markets.<sup>140</sup> This significant shortcoming is demonstrated by the location of the amendments in the Japanese laws.<sup>141</sup> When codified, the new crime of bribing a foreign official was grafted into the Unfair Competition Prevention Law—not the Japanese Penal Code, which contains the domestic bribery offenses. The purpose of the UCPL is set forth in Article 1:

The purpose of this Law is, by providing for measures for the prevention of, and compensation for damages from unfair competition, etc. in order to ensure fair competition among entrepreneurs and the full implementation of international agreements related thereto, *and thereby to contribute to the wholesome development of the national economy* (emphasis added).<sup>142</sup>

Thus, the purpose of the UCPL is to prevent unfair competition in the *Japanese market*—no such concerns are expressed for the global market. Consequently, it is unclear whether bribery offenses affecting only foreign markets would be prosecuted.<sup>143</sup> This attitude is reflected in the “main office” exemption, which excuses otherwise criminal acts when the main office of the entity giving the bribe is situated in the same country in which the foreign public official in question is employed. This exception indicates a desire by the Japanese to ignore problems outside of their country, even in some cases where the actors are Japanese citizens.<sup>144</sup>

In sum, the new Japanese crime of bribing a foreign public official is notably weaker than what is mandated by the OECD Convention. It falls short both in terms of the scope of what activities are deemed criminal and the sanctions for those activities. However, most troubling is the possibility

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.* § A.

<sup>141</sup> *See id.*

<sup>142</sup> UCPL No. 47, *supra* note 114.

<sup>143</sup> Japan Compliance, *supra* note 113.

<sup>144</sup> Recall that a Japanese citizen living in Japan, but employed by a subsidiary of a Japanese company with a head office elsewhere can bribe foreign officials on behalf of the subsidiary without running afoul of the law. *See* Part V.A.3.

that instances of bribery of foreign public officials will go unpunished if they do not affect the Japanese market.

## VI. CONCLUSION

### A. *The Spirit of the OECD Convention—A Comparison Between the New Japanese Provisions and the U.S. FCPA*

The preamble of the OECD Convention makes a number of strong statements about the purposes and goals of the convention. Bribery is found to be a widespread and immoral activity that “undermines good governance and economic development.”<sup>145</sup> The parties state that “all countries share a responsibility to combat bribery in international business transactions.”<sup>146</sup> The U.S. Congress pursued substantially similar goals when it passed the FCPA in 1977, putting American companies at a competitive disadvantage during the intervening twenty-four years. The FCPA has a greater scope than mandated by the OECD Convention as it reaches bribery of foreign political parties and candidates for foreign office.<sup>147</sup> It also makes possible the assessment of enormous sanctions upon offenders—up to two times the delinquent’s pecuniary gain.

Japan’s recent efforts stand in stark contrast to the U.S. FCPA. The amendments to the UCPL are not in keeping with the spirit of the OECD Convention. Whereas the OECD Convention is intended to combat global bribery in business transactions, the Japanese statute seems only to be concerned with Japanese markets. Japan appears willing to allow bribery on its soil so long as its own markets are not affected. In addition, the sanctions for such activity are arguably too small to deter companies from bribing foreign officials when the stakes are high.

### B. *The New Competitive Position of American Interests vis-à-vis Japan—A Possible Scenario*

With the above analysis in place it is not hard to imagine a scenario as follows, if one assumes: 1) the corporations are rational, non-moral actors who look only to the letter of the law as boundaries to their actions, and 2) the corporations will take the action most likely to yield the highest profit. For example, two large automobile manufacturers, one American and one

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<sup>145</sup> OECD Convention, *supra* note 9, pmb1.

<sup>146</sup> *Id.*

<sup>147</sup> See *supra* Part IV.A.1.

Japanese, are competing for a contract to provide a large number of vehicles to the government of a developing country.<sup>148</sup> This is a large contract and both companies want it because of relatively slow domestic sales brought on by an economic recession. Key government officials of the developing country indicate receptivity to a little something under the table, and hint that it will strongly influence which company is awarded the contract.

The corporations, as profit-maximizing rational actors, would factor in the likelihood of actually being caught and punished as part of a cost-benefit analysis to determine whether or not to tender an illegal payment. Three issues would figure prominently: 1) the likelihood of getting caught, 2) the likelihood of being convicted, and 3) the consequences of conviction.

Let us further assume that the likelihood of discovery is quite high for a bribe of any substantial amount due to the accounting requirements of the OECD Convention.

The American company would look to the FCPA—a longstanding, stable part of the American criminal law—and the record of successful prosecutions for FCPA violations. Faced with the possibility of fines two times the amount of any pecuniary gain from bribery, a rational actor would not engage in bribery.

In contrast, the Japanese company would first ask if the expected profit from the contract exceeded ¥300,000,000, the maximum fine for conviction of bribing a foreign public official under the Japanese UCPL. If so, there would be no reason not to engage in bribery, except for the possibility of negative media attention in the event of a conviction for bribery. The company would at this point factor in the possibility of not being prosecuted at all because the bribery had no effect on the Japanese market. In the case of a lucrative contract, the only real danger to the Japanese company is negative press. A rational actor would only have to weigh how much the possibility of negative press was worth when compared to the guarantee of X amount of profit.

This scenario illustrates that on average, assuming the current level of legislation, Japanese companies have an advantage in international business: they have retained the ability to bribe foreign officials in a cost-effective manner, and thus increased their competitive position.

In conclusion, the FCPA is an established deterrent, effectively preventing the bribing of foreign officials by American companies. It complies fully with the mandates of the OECD Convention. In contrast, the UCPL is a questionable deterrent, which may not prevent the bribing of

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<sup>148</sup> This scenario falls clearly within the scope of the OECD Convention's intended reach.

foreign officials by Japanese companies. It probably does not comply with the OECD Convention. Due to this discrepancy, it would seem that American companies still suffer a potential disadvantage when competing with Japanese companies in international business.