Acts Sanctioning Foreign Corrupt Practice as a Legal Instrument for the Control of Corruption:
An analysis of the policy implementation process of the OECD Anti-bribery Convention in Japan

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Abstract: This paper concerns the lagging implementation of OECD Anti-Bribery Convention in Japan, the first international convention that provides prohibition of foreign corruption as a necessary equipment to control corruption.

Currently, there are three approaches to reinforce the implementation and enforcement of OECD Anti-Bribery Convention; a top-down approach, a bottom-up approach, and a voluntary approach. The analysis of the Japanese case of lagging implementation of OECD Anti-Bribery Convention in contrast with United States tells the lessons of limitation of these three approaches. Also, the analysis of socio-economic and political background of Japan shows another reason for lagging implementation.

This paper draws two recommendations to move its lagging legs forward: strengthened whistleblower protection and encouragement of domestic NGOs.

Table of Contents

List of Abbreviations

CSR	Corporate Social Responsibility
DOJ	Department of Justice in United States
FCPA	Foreign Corrupt Practices Act
JICA	Japanese International Cooperation Agency
METI	Ministry of Economy, Trade and Industry in Japan
MNEs	Multinational Enterprises
MOFA	Ministry of Foreign Affairs in Japan
NGOs	Non-Governmental Organizations
ODA	Official Development Assistance
OECD	Organization for Economic Co-operation and Development
OECD Convention	OECD Anti-Bribery Convention
SEC	Securities and Exchange Commission
SMEs	Small and Medium Entities
TI	Transparency International
UCPL	Unfair Competition Prevention Law
UK	United Kingdom
US	United States

1 Introduction[1]

This paper concerns the lagging implementation of OECD Anti-Bribery Convention in Japan.[2] Even though Japan is a developed country with relatively sufficient capacity to implement OECD Anti-Bribery Convention, its implementation is rather lagging compared to other countries, such as the United States.[3] This paper aims to analyze the causes of this lagging implementation of OECD Conventions in Japan, and to offer recommendations.

OECD Convention is the first international convention that prohibits foreign corruption promulgated in 1996. It deals with issues such as agents of multinational companies that pay bribery to foreign officials to win business licenses or contracts. As traditional domestic regulation cannot effectively prohibit this kind of conduct, with the initiative of the United States, international society implemented this convention. As one of the leading cases of international convention and global regulations, OECD Convention is worth exploring not only as study of corruption, but also as study of global governance.

This paper defines corruption as "exploitation of trusted position to realize private gains beyond what the position holder is entitled to"[4]. Curbing corruption is now a necessary policy to achieve an inclusive development in developing countries.[5] Scholars discuss causes of corruption as well as ways to

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1) The preliminary idea of this paper was presented at a conference on February 1-2, 2014 in Japan: "Institution Design for Conflict Resolution and Negotiation ---Theory and Praxis---, sponsored by: the "Leading Graduate Schools" Program and Excellent Graduate School Program at the Graduate School of Law, Nagoya University. Thanks to Yasutomo Morigiwa, Tina Søreide and Satoshi Miura for useful comments in a process to develop the idea of this paper.
2) There are few sources written in Japanese that deal with this issue. One exception is Umeda, *Combating Bribery of Foreign Public Officials in International Business Transactions;* As a study arguing the issue of lagging implementation of OECD Anti-Bribery Convention in Japan, see Heifetz, "Japan's Implementation of the OECD Anti-Bribery Convention."
3) See section 3 for a comparison.
4) Defining corruption is as itself a complex task. As an overview of discussions, see Wedel, "Rethinking Corruption in an Age of Ambiguity."
5) Regarding the impact of corruption on development, see Mauro, "Corruption and Growth."

fight with them,[6] after the World Bank first set an agenda to fight corruption calling it "a cancer" in 1996.[7] From both practice and theory, international society has tried to identify possible measures to curb corruption.[8]

The perspective of this paper is that establishment of legal provision sets the baseline of fighting against corruption. Criminalizing illicit payments and convicting corruption criminals constitute an inevitable part of whole movement of anti-corruption. There are many possible ways of corruption control, such as traditional regulation, industry self-regulation and co-regulation, and multi-stakeholder regulation or civil regulation.[9] This paper takes a position that hard law, such as domestic criminal act ratifying OECD Anti-Bribery Convention, is a first building block that supports these various forms of regulation. Therefore, the analysis of lagging implementation of OECD Convention is beneficial to international efforts to set an effective regulatory mechanism against corruption into place.

This paper concludes with the recommendations that Japan might need strengthened whistleblower protection and encouragement of domestic NGOs to improve the situation of lagging implementation. This paper is based on secondary sources. The information of implementation of OECD Convention has been obtained from reports or surveys given by the Japanese and United States' government, as well as international organizations and NGOs, including OECD and Transparency International.

Section 2 of this paper provides background of analysis on OECD Anti-Bribery Convention. Then section 3 gives a comparative analysis of the implementation phase in the US and Japan, proving that Japanese implementation of OECD Convention is relatively lagging even with sufficient regulatory capacity. Section 4 analyzes the causes of this lagging implementation.

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6)   As a recent overview of previous study on corruption, see Rose-Ackerman and Truex, "Corruption and Policy Reform."

7)   World Bank President, James D. Wolfensohn, made a path breaking speech on the "cancer of corruption" to all the World Bank's shareholders at the 1996 Annual Meetings, placing the issue squarely on the development agenda for the first time as a multilateral institution.

8)   For example, see Johnston, "Why Do So Many Anti-Corruption Efforts Fail."

9)   Hansen and Stachowicz-Stanusch, "Varieties of Corruption Control."

Section 5 concludes.

2 Background of analysis on OECD Anti-Bribery Convention

This section provides background of analysis on OECD Anti-Bribery Convention. Firstly, it reviews the history of promulgation of OECD Convention, originated in 1970s. Second, globalization and its characteristics are visited to grasp the nature of OECD Convention as a component of global governance. Lastly, it presents three approaches to reinforce implementation that currently exist.

2.1 Historical background of OECD Anti-Bribery Convention

Along with globalization, a development of borderless economy creates more opportunity for corruption. To sketch it simply, the multinational companies might play an actor in corrupt dealings, by for example paying bribe to foreign officials to acquire a business opportunity. Faced with this challenge, a criminalization of foreign corruption became inevitable. "The US was the first nation to legislate against international bribery: the Foreign Corrupt Practices Act (15 U.S.C. § 78dd-1, et seq.) of 1977 (FCPA) uses accounting requirements for firms listed on American stock exchange to ban bribery of foreign officials."[10]

FCPA has played an important role to trigger a global norm creation to prohibit an export of corruption.[11] With the leadership of Professor Mark Pieth of Switzerland, the world has observed the adoption of the OECD Anti-Bribery Convention (OECD Convention) in December 1997. The OECD Anti-Bribery Convention establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption instrument focused on the 'supply side' of the bribery transaction. The 34 OECD member countries and six non-member

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10）Johnston, *Corruption, Contention and Reform*, 369.
11）Ibid.

countries - Argentina, Brazil, Bulgaria, Colombia, Russia, and South Africa - have adopted this Convention.[12] The Convention is a key instrument for curbing the export of corruption globally because the 40 signatory countries are responsible for approximately two-thirds of world exports and almost 90 per cent of total foreign direct investment outflows.[13] Germany, the United Kingdom and the United States have the most active enforcement.[14]

2.2 Responsibility of multinational enterprises

A strong argument from the US has of course triggered a conclusion of OECD Convention. Coupled with that, there is a global trend to raise awareness towards the responsibility of multinational enterprises (MNEs)[15], which is another constituent of OECD Convention.

Globalization is defined as "a process of intensification of cross-border social interactions due to declining costs of connecting distant locations through communication and the transfer of capital, goods, and people."[16] Globalization has many characteristics. Habermas mentions the decline of a nation-state authority, pointing out that there are two characteristics; the failure of democratic regulatory mechanisms and the rule of law, and the growing heterogeneity of national cultures and the pluralistic values and lifestyles.[17] These two characteristics of globalization are helpful to better understand the virtue of OECD Convention.

First, OECD Convention is an international convention. This is prepared when being faced with a so-called 'governance gap' between jurisdictions after globalization. Traditional regulatory mechanism tends to fail in controlling

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12) See the website of OECD, visited 18 July 2014, at http://www.oecd.org/corruption/oecdantibriberyconvention.htm
13) Transparency International, "Exporting Corruption," 3.
14) Ibid.
15) As an overview, see Scherer and Palazzo, "The New Political Role of Business in a Globalized World."
16) Scherer and Palazzo, "The New Political Role of Business in a Globalized World," 901.
17) Habermas, *The Postnational Constellation;* Scherer and Palazzo, "The New Political Role of Business in a Globalized World," 902.

operations of MNCs.[18] MNCs sometimes operate in jurisdictions where democratic regulatory mechanism or rule of law does not sufficiently exist.[19] Second, OECD Convention is regarded as an endeavor to pursue unified goal in the era of pluralistic cultures and values. With the understanding that corruption is a 'global' public enemy, OECD Convention was an innovative step to global regulation of corruption free competition.[20]

Discussions on ethical obligations of MNCs not to be involved in corrupt deal have also emerged.[21] This trend materialized with an inception of soft-law approach, which puts an implied obligation to firms through Corporate Social Responsibility or other measures.[22] For example, United Nations Global Compact provides that companies should operate in corruption free manners, and with a concrete approach open to firms' decision.[23] In sum, there are both hard and soft law measures emerging in the field of anti-corruption in the setting of global market, and OECD Convention should be regarded and considered within the context of global governance of anti-corruption.

2.3 Efforts to reinforce implementation of OECD Anti-Bribery Convention

This paper identifies three approaches to reinforce implementation of OECD Anti-Bribery Convention. They include top-down approach, bottom-up approach, and voluntary approach. The top-down approach here refers to the check and pressure from the international organization, OECD. The bottom-up approach is various pressures from NGOs, civil societies, and academia. Voluntary approach includes pressure through the notion of Corporate Social Responsibility.

OECD shows a top-down approach to reinforce implementation. With regard to the enforcement status of the signatory countries of the OECD Convention, the OECD Working Group on Bribery, which represents the 40 Parties to the

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18） Doh, "Offshore Outsourcing."
19） Ibid.
20） Corr and Lawler, "Damned If You Do, Damned If You Don't--The OECD Convention and the Globalization of Anti-Bribery Measures."
21） Rose-Ackerman, "'Grand' Corruption and the Ethics of Global Business."
22） Branco and Delgado, "Business, Social Responsibility, and Corruption."
23） Williams, "The UN Global Compact."

Convention, conducts a follow-up monitoring program under which 9-10 countries are reviewed each year. The OECD Working Group on Bribery publishes data on enforcement by the Parties in its annual reports. According to Umeda, OECD Convention is an exceptional international convention in a sense that it has a comprehensive follow-up system of implementation by OECD itself.[24] Umeda argues that it has been possible because OECD Convention is not a universal convention, but confined within OECD countries, where values and interests are not as pluralistic as truly international context.[25]

Transparency International (TI) is a notable example of bottom-up approach. TI annually publishes progress reports, of which the latest ninth report was published on October 7 2013.[26] TI's annual report on foreign bribery enforcement gives an independent assessment on the enforcement quality in all of the 40 Parties to the Convention.[27] TI's survey on implementation status works as a third party check. So far, results of the OECD and TI reports are basically similar – both indicate that in half of the countries there is little or no enforcement against foreign bribery and show that Germany, the United Kingdom and the United States have the most active enforcement.[28] TI also has many country chapters, which is working in the field of promoting integrity and advocating anti-corruption in each jurisdiction. Additionally, TI conducts various kinds of research projects, which stimulate further scholarly inquiry.

Regarding voluntary approach, Hess introduces the idea to enhance the effectiveness of FCPA through Corporate Social Responsibility.[29] Even though Hess is not arguing specifically on how to reinforce the implementation of OECD Convention, this paper borrows his idea with the understanding that his implication toward anti-bribery act also helps to consider necessary reforms to

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24) Umeda, *Combating Bribery of Foreign Public Officials in International Business Transactions*, 83.
25) Ibid.
26) See the website of Transparency International, visited 18 July 2014, at http://www.transparency.org/whatwedo/pub/exporting_corruption_progress_report_2013_assessing_enforcement_of_the_oecd
27) Transparency International, "Exporting Corruption," 3.
28) Ibid.
29) Hess, "Enhancing the Effectiveness of the Foreign Corrupt Practices Act through Corporate Social Responsibility."

implementation phase of OECD Convention. CSR is defined as "the responsibility of enterprises for their impacts on society". The importance of CSR is acknowledged as the potential of voluntary initiatives of companies becomes apparent after globalization.[30] Hess points out the consideration of relationship between CSR initiatives and the enforcement of anti-bribery law is missing in this field of study.[31] He argues that the perspective of CSR should be incorporated into the consideration of anti-bribery act.[32] He views CSR as a process of disclosure, dialogue, and development.[33] He argues anti-bribery act should be formulated in a way that that act stimulates voluntary initiatives of corporations or functions complementally.

These three approaches explained here, will be revisited in section 4 again to discuss the future path of Japan. Before that, section 3 presents a comparative study of Japan and the United States to show the lagging implementation of OECD Convention in Japan in clear manners.

3 Comparative analysis: different level of implementation in United States and Japan

This section compares United States and Japan in terms of their implementation of OECD Convention. United States, a leading country in this field with the initiative of FCPA, gives one example of the ideal implementation plans. In contrast, Japan statistically shows its lagging implementation. This section provides a basis for analysis of causes of the insufficient implementation in section 4.

30） Scherer and Palazzo, "The New Political Role of Business in a Globalized World."
31） Hess, "Enhancing the Effectiveness of the Foreign Corrupt Practices Act through Corporate Social Responsibility," 1122; As an article with the same perspective, see Carr and Outhwaite, "Role of Non-Governmental Organizations (NGOs) in Combating Corruption."
32） In this particular paper, Hess is dicsussing on debate on the compliance defence for FCPA. See Hess, "Enhancing the Effectiveness of the Foreign Corrupt Practices Act through Corporate Social Responsibility," 1137–1143.
33） Ibid., 1132.

3.1 United States: an origin of the prohibition of foreign corruption and current discussions

US have the biggest portion in the world's amount of exporting, and, as with FCPA, it has relatively a long history to fight against international corruption. FCPA has a mandate "to prevent corrupt practices, protect investors, and provide a fair playing field for those honest companies trying to win business based on quality and price rather than bribes." As mentioned above, the US provided much of the impetus behind the treaty.[34] It has been in part because of complaints from its corporations that they faced limitations their competitors did not.[35] According to TI annual report, US are classified as Active Enforcement, the most active classification out of four categories.[36]

Department of Justice (DOJ) is deciding the directions of the policy of FCPA implementation, while Securities and Exchange Commission (SEC), an administrative branch operating with the mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation, is taking the role of investigations of international corruptions.[37] In 2012, DOJ and SEC have published "A Resource Guide to the U.S. Foreign Corrupt Practices Act" (the Guide). When there are still small numbers of case, which apply FCPA, this guideline is valuable for multinational companies that have to make decisions on edge. For example, there is an explanation on facilitating or expediting payment, which is stipulated as lawful.

Facilitation payment represents one of the limitations. The prohibition of facilitation payment might well be effective in eliminating corruption in developing countries. However, multinational companies cannot adhere to too strict rules, in order to operate their business in a sustainable way. "Although true facilitating payments are not illegal under the FCPA, they may still violate local law in the countries where the company is operating, and the OECD's

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34) Johnston, *Corruption, Contention and Reform*, 370.
35) Ibid.
36) Transparency International, "Exporting Corruption," 4. Other countries in the same category include Germany, United Kingdom, and Switzerland.
37) See the website of SEC, visited 18 July 2014, at http://www.sec.gov/about/whatwedo.shtml

Working Group on Bribery recommends that all countries encourage companies to prohibit or discourage facilitating payments." As political scientists suggest, the fair treatment from governmental body is a key to establish a clean public organ. In contrast, in the UK, the new anti-bribery act does not contain the exception of facilitation payment. Regarding the triggers of detection, chapter 5 of the Guide provides the guideline for the enforcement policy of FCPA. "There are various ways that potential FCPA violations come to the attention of SEC staff, including: tips from informants or whistleblowers; information developed in other investigations; self-reports or public disclosures by companies; referrals from other offices or agencies; public sources, such as media reports and trade publications; and proactive investigative techniques, including risk-based initiatives." It can be a useful guide for the other countries, which are experiencing the lagging enforcement because of the small number of precedents.

In sum, US can be regarded as one of the most successful cases to implement OECD convention. However, there are still many countries which lagging their legs to implement OECD convention. In the followings, this paper deals with the case of Japan as an example of the reluctance to implement OECD convention. The objective of the case study is to give recommendations for Japan to overcome the issue. The expected impact is to give the basis of the future analysis of the policy process in the other countries, to investigate each country's challenge and find ways of improvement.

3.2 Japanese case of lagging implementation

In contrast, Japan is evaluated to have only a limited enforcement status. Out of four categories by TI, Japan is classified as a Little or No Enforcement, the least active category.[38] Ministry of Economy, Trade and Industry (METI) are a Japanese correspondence to deal with this issue.[39] It is in contrast with US

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38) Transparency International, "Exporting Corruption," 4., 4. Other countries in the same category include Netherlands, Korea (South), Russia, Spain, Belgium, Mexico, Brazil, Ireland, Poland, Turkey, Czech Republic, Luxembourg, Chile, Israel, Slovak Republic, Greece, Slovenia, New Zealand and Estonia.
39) See the website of METI, visited 18 July 2014, at http://www.meti.go.jp/policy/

where DOJ is taking a role. Japan has amended its Unfair Competition Prevention Law (UCPL) on 1999 to ratify the convention. Also, to proactively prevent the problem, METI has set Guidelines to Prevent Bribery of Foreign Public Officials.[40] In 2011, METI has outsourced a research on practice of other countries, where cross-country survey of US, UK and China and interviews to Japanese companies has been conducted. In the report also, three cases of conviction of Japanese countries under FCPA have been introduced.[41]

Which ministry in the government should deal with the issue is another problem. In case of Japan, METI is taking a role because the prohibition of foreign bribery has been included into the UCPL. METI is a competent authority of UCPL. OECD has issued a recommendation that Japan should move the prohibition of foreign corruption from UCPL to its Penal Code, because OECD "wondered whether placement of the offence in the UCPL was impeding the level of awareness in Japan of the foreign bribery offence, and the level of priority given to foreign bribery investigations and prosecutions."[42] So far, Japanese authority does not follow this recommendation, with two core objections. The one is "inclusion of the offence in the UCPL is consistent with the fundamental principles of Japan's legal system, which only foresees inclusion of core criminal offences in the Penal Code."[43] And the other is that "the private sector is more likely to consult with METI than other ministries on the application of the foreign bribery offence, so that it makes sense that the offence is in the UCPL and thus under the overall responsibility of METI."[44]

Until now, Japan has solely two cases of conviction of foreign corrupt payment. "The Group notes that Japan has obtained convictions for foreign bribery in two cases since the foreign bribery offence came into force in Japan

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external_economy/zouwai/index.html
40) See the website of METI, visited 18 July 2014, at http://www.meti.go.jp/policy/ external_economy/zouwai/shishin.html
41) See the website of METI, visited 18 July 2014, at http://www.meti.go.jp/policy/ external_economy/zouwai/houkokusho.html
42) OECD Working Group on Bribery, "Phase 3 Report on Implementing the Oecd Anti-Bribery Convention in Japan," 15.
43) Ibid.
44) Ibid.

in 1999. Of particular note is the second case, which involved substantial bribe payments in relation to a major infrastructure project financed in part by Official Development Assistance (ODA) from Japan. This case resulted in convictions of four natural persons, including the representative of a foreign subsidiary, and the company itself, which was also delisted for two years from ODA-funded contracting. Nevertheless, prosecutions in two foreign bribery cases in 12 years appears very low in view of the size of the Japanese economy, and the Working Group continues to have serious concerns that Jap an still does not appear to be actively enforcing its foreign bribery offence."

The difficulty is that the concept of the prohibition of foreign corrupt act is not well articulated in Japan. The number of study is quite small, as search on National Diet Library of Japan website only yields the result of fourteen materials.[45] Because Japan has not accumulated cases of conviction, there has been almost no attention from the international academia. There is a comparative study of Japan and US situation in terms of the implementation of OECD convention in 2002,[46] and as far as the author acknowledges it is the latest publication, which deals with Japanese situation as a main topic. In that publication, Japan has been criticized that "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."[47]

Umeda is one of few scholars from Japan who deal with this issue.[48] In his monograph published in 2010, he covers general issues of history and practice of OCED Anti-Bribery Convention and its implementation, actual case studies in Japan and United States, and facilitation payments. Not only he leads

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45） The researcher has used the term of "Gaikoku komuin zouwai boushi", which is an official naming of the issue by METI.
46） Heifetz, "Japan's Implementation of the OECD Anti-Bribery Convention."
47） Ibid.
48） Umeda, *Combating Bribery of Foreign Public Officials in International Business Transactions*.

academic inquiry on this topic in Japan, but also his comparative study on facilitation payment in South East Asian countries[49], should be internationally rare.[50] Even though, it is fair to say that discussions on this issue from Japanese academia is not very active so far.

METI has published Guidelines to Prevent Bribery of Foreign Public Officials, firstly on May 26, 2004 and revised it two times on January 29, 2007 and September 21, 2010. The objective of the report is "to support voluntary and precautionary approaches by companies involved in international business transactions."[51] The guideline covers background, desirable internal control by business, scope of punishment, and trends in Japan and other foreign countries. However, the comprehensiveness of the guideline is way behind the US one. So far, there were two detected cases under UCPL. One case was detected in the course of investigating another alleged offence involving the company, and the other was detected by whistleblower.[52] Given that we need to increase the number of the cases detections, the detection process is worth looking. Based on the recommendation by OECD, METI has put a reporting desk in its website. However, OECD still recommends making it more transparent and accessible, as the reporting desk is put under the section of 'Intellectual Property Protection', which is not appropriate.[53] Overall, Japan is lagging in effectuating the implementation of foreign bribery prohibition.

International donor organizations and NGOs, notably OECD and TI and others, have given its efforts to standardize the practice of the prohibition of foreign corruption in each country. However, as observed in the Japanese case, the domestic effort is still necessary. As the world does not have sufficient global body to detect and convict foreign corruption, the states' role is still

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49） Ibid., 224–251.
50） Umeda points out that there are barely empirical study on actual practice of facilitation payment in developing countries. See ibid., 224; A rare exception, as Umeda argues, is an empirical study given by Olken and Barron. See Olken and Barron, *The Simple Economics of Extortion*.
51） Guidelines to Prevent Bribery of Foreign Public Officials, 5
52） OECD Working Group on Bribery, "Phase 3 Report on Implementing the Oecd Anti-Bribery Convention in Japan," 10, 11.
53） Ibid., 16.

crucial. OECD and TI make analysis for the enforcement status of the member countries of OECD conventions, through which they give policy recommendations. However, Japan has been rejecting to follow them such as inclusion of foreign bribery prohibition in a different act from UCPL.

4 Analyzing causes of lagging implementation

This section analyzes the issue of lagging implementation of OECD Convention in Japan from various perspectives. First, it revisits three approaches explored in section 2.3 to assess how effective they are or could be in the context of Japan. Second, to investigate a possibility of policy changes, this paper approaches to the issue with socio-economic and political background of Japan. Based on these analyses, it presents its policy recommendations.

4.1 Limitations and possibilities of three existing approaches

Section 2.3 of this paper has identified three approaches that currently used in trying to implement OECD Convention effectively; a top-down approach, a bottom-up approach, and a voluntary approach. This section reviews these approaches with Japanese context.

Concerning a top-down approach, as shown in section 3, Japan is not implementing every recommendation given by OECD Convention. The assumption is that to follow OECD Convention has a high possibility to improve the situation of enforcement of foreign bribery prohibition, because OECD provides such recommendations based on cross-country empirical study. It is not to say that Japan is rejecting all the recommendations by OECD. As a matter of fact, Japan has followed many recommendations given by OECD in previous years.[54] Umeda emphasizes on the effectiveness of follow-up process in improving legislation in Japan.[55] However, as shown above, this paper

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54）Umeda, *Combating Bribery of Foreign Public Officials in International Business Transactions*, 108.
55）Ibid.

concerns that Japan does not follow some recommendations, such as a replacement of prohibition act from UPCL to other specific anti-bribery act. This limitation shows a difficulty to fill governance gap due to the principle of non-intervention in nation-state sovereignty, or lack of enforcement mechanisms in international organizations.[56] What OECD could do in terms of this Japanese rejection to follow recommendation was to alert it in its own website.

Turning to a bottom-up approach, it depends deeply on each jurisdiction's situation. As given in section 3, the issue of foreign bribery act is not an issue that vigorously discussed in NGOs, CSOs, or academia in Japan. The level of awareness to this issue is relatively low in Japan. This paper hopes to contribute in stimulating more discussions within Japan, or discussions concerning Japan in foreign countries.

Regarding a voluntary approach, it has a possibility to direct the policy debate in Japan. However, this approach has not been observed so far. Policy makers would also need to be aware about the fact that corruption is one of the most difficult areas to invoke voluntary initiatives, because corruption is basically a hidden activity. As Hess argues, CSR approaches in terms of corruption begin with disclosure policies, which will open a pathway to dialogue and development. The information disclosure legislation and policy are worth revisiting from this perspective.

4.2 Analyzing contextual causes of struggle

This section analyzes contextual reasons of lagging implementation of OECD convention in Japan, by focusing on stakeholders, incentives of stakeholders, and socio-economic conditions. The policy sphere of foreign corruption sector is constituted mainly by industry and economic sector, and as a public entity, METI has a decisive authority. In addition, the lawyers association and

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56) Scherer and Palazzo, "The New Political Role of Business in a Globalized World," 902; Scherer and Smid, *The Downward Spiral and the U.S. Model Business Principles - Why MNEs Should Take Responsibility for the Improvement of World-Wide Social and Environmental Conditions*.

accounting companies are concerned with the issue. As one previous case of the application has been a part of ODA project, Ministry of Foreign Affairs (MOFA) and Japanese International Cooperation Agency (JICA) are also taking a role, with the effort to make ODA projects accountable and transparent.[57] Finally but not least, judiciary and prosecutors office are responsible for case handlings.

Turning to the socio-economic condition, Japan is experiencing the continuing deflation in its economy, and the economic stimulus is regarded as in its highest priority.[58] As the current governmental policy is implementing policy of deregulation, those measures that go against deregulation is difficult to implement. Also, as a social culture, people do not have deep knowledge in the field of foreign corruption when compared to the domestic one. According to the report, among SMEs, which are operating in part in foreign countries and facing the risk to conduct foreign corruption, only around 5% of them knows about the issue.[59]

Arguably, there are two unbalanced coalitions in the current field. Quite similarly to US[60], there are conflicts between those who ensure the social justice, such as lawyers association, and those who need free market, like economic organizations. The industry and economic side is reinforcing the operation is pushing for less and clear enforcement, in order to make their activities in foreign countries easy. Since the competent organ is METI and its main business is to stimuli and support the industry and economics, any policies go against it have less possibility to be implemented and enforced. On the other hand, lawyers and judges can be the coalition of the other side, which is pushing for the fair competition and active enforcement of foreign bribery.

57）See the Guidelines to Prevent Bribery of Foreign Public Officials, visited 18 July 2014, at http://www.meti.go.jp/policy/external_economy/zouwai/shishin.html

58）The current government of Japan is famous and popular for its "Three arrows" agenda for economic revival. See Harner, "The Abe/Aso Government 'Three Arrows' Agenda for Economic Revival."

59）The report was outsourced by METI and prepared by the research and consulting company in Japan. See the website, visited 18 July 2014, at http://www.meti.go.jp/policy/external_economy/zouwai/pdf/chousa_houkokusho.pdf, (Only in Japanese)

60）Corr and Lawler, "Damned If You Do, Damned If You Don't--The OECD Convention and the Globalization of Anti-Bribery Measures."

While in US the adverse effects of corruption are studied and academia has a certain level of voice, in Japan academia does not seem to be giving a strong voice on this regard.

There are few prospective possibilities of policy changes. First of all, as we have observed only two cases of conviction with the UCPL, knowledge on foreign bribery prohibition act is scarce. As US example show, the accumulation of cases are key to establish clear guidelines of the act. METI keeps preparing its guideline, but such an effort is way behind the US practice. Also, OECD is giving external shocks through its mandatory process of checks and recommendations. These recommendations function as the policy learning process, as they are advices based on the experience of foreign countries. However, Japanese government is reluctant to follow it. The convictions of Japanese companies under FCPA, which stimulating the preventive actions by companies, do not seem to give effects to the policy ecosystem in Japan. As there is small number of cases and less accumulated academic discussions, the public awareness of this issue is significantly low. Once there would be a sensational case of conviction, it might raise the voice of people in way of social movement. However, being different from domestic corruption, it seems to be relatively difficult to understand why foreign corruption should be prevented. Partly because most of the information in the field of foreign corruption is disseminated in English, the understanding level of people has not raised so far. In conclusion, these three elements of policy changes, after the analysis of socio-economic situation of Japan, do not seem to perform well in a near future.

4.3 Recommendations

Based on the analysis, this paper draws two preliminary recommendations to move its lagging legs forward: strengthened whistleblower protection and encouragement of domestic NGOs. Those two measures should be taken in order to invoke the internal shocks, as so far, there have been external shocks in this field but they have not produced tangible results. In order to raise the number of cases, Japan should learn from US practice as written in section 2.

Out of various possible sources of detection given there, Japan can utilize more the whistleblower protection, as it has already got the legislation. OECD should strengthen not simply the legislation based on the recommendations[61], but the reporting desk should become more accessible. The purpose of it is to raise the number of detections, which can be a trigger of every following policy effort.

Secondly, there should be more active NGOs' activities in Japan. NGOs are usually taking role to communicate complex and specific issues to the population by various ways, and also give a pressure to the politicians and policy makers. In Japan, for example, the activity of the Japanese chapter of Transparency International is not as active as most of other countries. Because of the low level of public awareness, it is faced with the difficulty to gather the resource enough to operate. To get out of this vicious cycle, the Japanese chapter of International NGOs, such as TI, should take a lead utilizing the support from the international body.

5 Conclusion

This paper has questioned why Japan, with a relatively strong body of law enforcement, is lagging in its implementation of OECD Anti-Bribery Convention. This paper finds that Japan's enforcement of OECD Convention is weak because of lack of incentives or motivations. METI, implementing authority in Japan, has its mandate in stimulating economy, not drawing its legs. Ideally, like in US, this issue needs to be driven by Ministry of Justice. OECD also suggests this. However, once settled that as METI governs this issue, it is difficult to make divisional change happens. From other perspective, this static nature of Japanese governments is proved by the fact that even OECD, one of the notable and influential international organizations, puts the pressure for a policy change, Japan still has a position to keep refusing it. This shows a limitation and difficulty of international law. The implementation and enforcement of which, after all, depend on each country's discretion.

61） "Phase 3 Report on Implementing the Oecd Anti-Bribery Convention in Japan," 38, 39.

This paper agrees with Hess when he argues that companies' voluntary initiatives should be incorporated into the strategy of prohibition of foreign bribery. The issue of exporting corruption is damaging not the country that companies originate, but foreign countries where companies operate. Then, it is not easy to require MNCs to deal with this issue of social justice when they also face with harsh competition in those companies. More studies are necessary in defining how to let companies face with those issues of social justice. Corporate Social Activity, as a policy of companies to interact with society, can be a good place to initiate discussions.

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