



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

**JAPAN: PHASE *2bis***

**REPORT ON THE APPLICATION OF THE CONVENTION ON  
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN  
INTERNATIONAL BUSINESS TRANSACTIONS  
AND THE 1997 RECOMMENDATION ON COMBATING  
BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS**

*This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 15 June 2006.*

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## EXECUTIVE SUMMARY

In Phase 2 (January 2005) the Working Group on Bribery found that Japan had not demonstrated sufficient efforts to enforce the offence of bribing a foreign public official, and recommended a Phase *2bis* on-site visit to Japan within one year for the purpose of reviewing progress in this regard. The Phase *2bis* Report provides the assessment of the Working Group based on the findings of the team of experts from Italy and the United States that performed the Phase *2bis* on-site visit in February 2006. It describes important steps by Japan to strengthen its legislation for implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. However, the overall finding of the Working Group is that the Japanese law enforcement authorities have still not made adequate efforts to investigate and prosecute foreign bribery cases.

The Working Group finds that the Japanese authorities have not made a serious effort to act on its Phase 2 Recommendation to assess as a priority the legal and procedural impediments to the effective investigation and prosecution of the offence of bribing a foreign public official, despite the continued absence of formal investigations and prosecutions and even under the circumstances of an impending Phase *2bis* on-site visit. The Working Group therefore recommends that Japan urgently co-ordinate and undertake an assessment of such impediments, and present their findings in writing to the Working Group within six months of the Phase *2bis* examination. The Working Group also recommends that Japan actively pursue evidence of foreign bribery allegations, including through the use of mutual legal assistance to obtain information and evidence from foreign jurisdictions at the earliest possible stage.

The Working Group recommends further action to ensure full implementation of its Phase 2 Recommendations, including that the Japanese authorities (i) delete from the 2006 METI Guidelines the interpretation of “international business”, which refers to “business repeatedly and continuously” conducted for the “purpose of profit”; (ii) clarify in the METI Guidelines that Japanese law does not permit an exception for facilitation payments; and (iii) revisit the standard of “materiality” for the application of the offence of making a false statement under the Securities and Exchange Law, and ensure that Japanese law fully complies with Article 8 of the Convention. In addition, the Working Group has serious concerns that the placement of the foreign bribery offence in the Unfair Competition Prevention Law (UCPL) has contributed to the absence of formal investigations and prosecutions. The Working Group recommends that Japan enhance the visibility and enforcement of the foreign bribery offence as a matter of priority, notably by moving the foreign bribery to the Penal Code, along with other corruption-related offences.

In April 2006, an amendment to the Corporation Tax Law and the Income Tax Law came into force for the purpose of expressly denying the tax deductibility of bribes to foreign public officials. Japan also extended the statute of limitations for prosecuting natural persons and corporate bodies from three to five years. Moreover, the Phase *2bis* Report credits the Criminal Affairs Bureau of the Ministry of Justice for its significant effort to find an effective way to share information about non-filed foreign bribery investigations within the limits of Japanese laws on confidentiality. For this reason, the Working Group was able to adequately assess Japan’s enforcement of the offence.

The Working Group has several mechanisms to address inadequate enforcement of the Convention in Phase 2, including a Phase *2bis* review. The Working Group also systematically follows-up all Phase 2 examinations with an oral report, within one year of the Phase 2 examination, and a further written report within two years. Through the normal follow-up reporting mechanisms and the Phase *2bis* Recommendation that Japan report back to the Working Group within six months on its assessment of the impediments to the effective investigation and prosecution of the foreign bribery offence, the Working Group will monitor Japan’s progress in implementing its recommendations in Phase 2 and Phase *2bis*, as well as address any continued failures.

## I. BACKGROUND TO PHASE *2bis* EXAMINATION OF JAPAN

### A. INTRODUCTION

#### *1. Purpose and Structure of Phase 2bis Report*

1. The purpose of the Phase *2bis* Report is to report on the findings of the Working Group concerning the Phase *2bis* on-site visit to Japan, which took place from 21 to 23 February 2006. The Working Group recommended the Phase *2bis* on-site visit as a result of its findings in the Phase 2 examination of Japan.

2. The Phase *2bis* Report on Japan is divided into three Parts. Part I of the Report provides the background to the Phase *2bis* examination, including the reasons why the Working Group recommended a Phase *2bis* on-site visit, the goals and parameters of the visit, and the framework of the visit. Part II of the Report discusses the findings from the Phase *2bis* on-site visit, and provides commentaries by the lead examiners on further steps that need to be taken by Japan to adequately implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention). Part III provides a summary of the main findings of the Working Group, the recommendations of the Working Group to Japan on actions to be taken as a result of the findings in Part II, as well as recommendations for follow-up by the Working Group of Japan's practice in enforcing the offence of bribing a foreign public official in two specific areas.

#### *2. Reasons for Phase 2bis Examination*

3. In December 2004 and January 2005, the Phase 2 examination of Japan's implementation of the Convention took place in the Working Group.<sup>1</sup> In January 2005, the Working Group adopted the Phase 2 Report on Japan<sup>2</sup>, which includes a list of Phase 2 Recommendations (see Annex), as is the practice in Phase 2 examinations. The Phase 2 Recommendations provide that another on-site evaluation of approximately two to three days would need to take place in Japan in approximately one year, due to the finding of the Working Group that Japan had "not demonstrated sufficient efforts to enforce the offence of bribing a foreign public official".<sup>3</sup> This was the first and to date the only time that the Working Group recommended this extraordinary measure.

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<sup>1</sup> Phase 1 examinations assess whether Parties' laws for implementing the Convention meet the standards there under. (The Phase 1 examination of Japan took place in October 1999.) Phase 2 assesses the structures in place to enforce these laws and the degree to which they are effective. The Phase 2 monitoring process also more fully addresses non-criminal aspects of combating the bribery of foreign public officials, such as auditing requirements and the tax treatment of bribes to foreign public officials. Phase 2 examinations involve a Phase 2 on-site visit by a team of lead examiners (*i.e.* representatives from two other Parties to the Convention) and representatives of the OECD Secretariat to the Party under examination, for the purpose of holding panel interviews for four to five days with the relevant ministries and other government bodies, police, prosecutors, judicial representatives and representatives of the private sector and civil society. Following the Phase 2 on-site visit, a draft Phase 2 Report is prepared by the lead examiners, which provides the findings of the lead examiners and proposes recommendations. The draft Phase 2 Report is presented to and debated in the Working Group, and results in the adoption by the Working Group of a final Phase 2 Report, which includes recommendations to the Party examined to take action in certain areas, as well as areas that will be followed-up by the Working Group as practice develops.

<sup>2</sup> The Phase 2 Report on Japan can be found at: [www.oecd.org/dataoecd/34/7/34554382.pdf](http://www.oecd.org/dataoecd/34/7/34554382.pdf)

<sup>3</sup> See paragraphs 2-6 of the Phase 2 Recommendations of the Working Group in the Phase 2 Report on Japan (Annex).

4. The Phase 2 Report on Japan describes the areas in which Japan's implementation of the Convention was considered inadequate by the Working Group, but does not provide a recapitulation of the major deficiencies which led the Working Group to recommend a Phase 2*bis* on-site visit. Based on an analysis of the Phase 2 Report and the collective recollections of the lead examiners and the Secretariat, the following three major deficiencies in Japan's implementation of the Convention in Phase 2 have been identified:

- Unsatisfactory cooperation on the part of the Japanese Government in the Phase 2 examination, in particular inadequate disclosure of non-filed investigations to enable the Working Group to effectively monitor Japan's implementation of the Convention.
- The absence of even one formal investigation of the bribery of a foreign public official.
- A general low level of concern on the part of the Japanese Government concerning the reasons for the absence of formal investigations and prosecutions.

#### **a. Level of Cooperation during Phase 2**

5. The Phase 2 Report on Japan describes the difficulties faced by the examination team in obtaining satisfactory cooperation on the part of the Japanese authorities in Tokyo<sup>4</sup> concerning principally (i) the level of participation by the Japanese authorities in the on-site visit, and (ii) the quality of disclosure.

##### *Level of Participation in Phase 2 On-Site Visit*

6. Up until the day of departure by the lead examiners to perform the Phase 2 on-site visit, Japan sought significant changes to the agenda, and refused to provide access to public prosecutors. It was therefore necessary for the lead examiners to consult with the Working Group on the appropriate course of action. It was the opinion of the Working Group that Japan was taking an unduly and unjustifiably narrow view of the scope of the examination and the topics relevant to the Phase 2 examination. Following the decision of the Working Group, Japan finally agreed to provide access to four public prosecutors, one from each of the following offices: Supreme Public Prosecutors Office, Tokyo High Public Prosecutors Office, Tokyo District Public Prosecutors Office and Osaka District Public Prosecutors Office. The examination team was provided with access to the National Police Agency and the Tokyo Metropolitan Police Department.

##### *Quality of Disclosure in Phase 2*

7. During the Phase 2 on-site visit, the lead examiners were dissatisfied with the quality of disclosure by the Japanese authorities in the following three respects:

- The Japanese authorities did not provide even the most basic information about investigations of foreign bribery cases, including (i) the number of cases or allegations involving the foreign bribery offence that had come to their attention; (ii) whether a foreign bribery investigation had ever been opened on the basis of a media report; and (iii) whether competitors or company employees had brought foreign bribery offences to the attention of the law enforcement authorities. The Japanese authorities justified the non-disclosure of basic enforcement information on the basis of a secrecy

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<sup>4</sup> The lead examiners note that the Japanese Permanent Delegation to the OECD provided a high level of cooperation in Phase 2 and Phase 2*bis*.

obligation contained in legislation, which essentially states that Japanese officials shall not disclose the secrets that have come to their knowledge in the course of performing their duties.<sup>5</sup>

- The Japanese authorities also would not discuss techniques available to investigate domestic or foreign bribery cases on grounds of secrecy.
- The Ministry of Justice challenged the right of the lead examiners to ask certain questions on the basis of relevancy.

8. At the Phase 2 examination of Japan in the Working Group in December 2004, it was the finding of the Working Group that the Japanese authorities had failed to provide sufficient information to enable it to objectively assess Japan's implementation of the Convention, in particular because, due to the claim of secrecy, Japan did not disclose the existence or non-existence of any foreign bribery investigations. The Working Group thus recommended that within 30 days Japan provide non-identifying information about non-filed investigations of bribing foreign public officials (*i.e.*, the number of such investigations that had been opened and closed, the reasons for closing any such cases, and the legal, evidentiary, mutual assistance and other problems encountered in such investigations). Disclosure by Japan in response to this recommendation was to be reviewed at the next Working Group meeting in January 2005.

9. Limited non-identifying information, as described in the Phase 2 Report on Japan, was provided by the Japanese authorities for the January 2005 Working Group meeting. In summary, the Japanese authorities informed the Working Group of four non-filed<sup>6</sup> investigations of allegations of the bribery of foreign public officials, which were no longer in progress. Essentially, the information disclosed about these non-filed investigations at that time was that they were not continued mainly due to the absence of nationality jurisdiction for the foreign bribery offence and the lack of adequate evidence to establish that an offence of foreign bribery had taken place within Japanese territory. The Japanese authorities stated that since nationality jurisdiction over the foreign bribery offence came into force in January 2005, they would be able to pursue foreign bribery cases more aggressively after that date.

#### **b. Absence of Formal Investigations and Prosecutions by the time of Phase 2**

10. At the time of the Phase 2 examination of Japan, the offence of bribing a foreign public official in the Unfair Competition Prevention Law (UCPL) had been in force for almost five years (*i.e.*, since February 1999). However, during that time not one formal investigation of foreign bribery had been opened.

11. Given that Japan is the second largest economy in the world, and in view of its level of exports and outward foreign direct investment, including economic activity in certain countries believed to be at high risk for soliciting bribes, the Working Group was surprised about the absence of any formal investigations. Moreover, Japan is an important foreign aid donor, ranking second in the world behind the United States, which creates significant opportunities for public procurement contracting by Japanese companies in developing economies where the risk of bribe solicitation is particularly high. The concern of

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<sup>5</sup> Provisions in the National Public Service Law and the Local Public Service Law provide this rule. The Japanese authorities also cited a provision of the Code of Criminal Procedure which states that "no document relating to a trial shall be made public prior to the opening of a public trial, except when it is necessary in light of the public interest or other reasons deemed appropriate".

<sup>6</sup> The Japanese Code of Criminal Procedure does not differentiate between non-filed and filed investigations. In practice, the essential difference is that the filing of an investigation results in the assignment of a number to the case and a specific prosecutor to head the investigation.

the Working Group about the absence of formal investigations was heightened by various press allegations of foreign bribery involving Japanese companies.

### **c. Low Level of Concern in Phase 2 about Absence of Formal Investigations and Prosecutions**

12. Throughout the Phase 2 examination of Japan, the lead examiners felt that the Japanese authorities did not demonstrate concern about the absence of formal investigations. No indication was given that the Japanese Government had either formally or informally considered the reasons for the absence of such investigations. During the Phase 2 examination in the Working Group, the Japanese authorities suggested that there had not been any formal investigations of foreign bribery, because there had been no instances of foreign bribery by Japanese companies doing business abroad. The Working Group was not persuaded by this argument, and recommended that the Japanese authorities assess as a priority the impediments to effective investigations and prosecutions.

## **B. GOAL AND FRAMEWORK OF PHASE 2*bis* ON-SITE VISIT**

### ***1. Goal and Parameters of Phase 2*bis* Examination***

13. In view of the findings of the Working Group in the Phase 2 examination of Japan, the lead examiners conducting the Phase 2*bis* examination needed to address the deficiencies discussed in the Phase 2 Report that led to the recommendation for another on-site evaluation. According to the Phase 2 Recommendations, the Phase 2*bis* on-site visit was to include meetings with prosecutors, police officers and other persons and bodies deemed relevant by the lead examiners with respect to non-filed investigations reported at the January 2005 Working Group meeting as well as any new investigations.

14. Furthermore, for the purpose of the Phase 2*bis* on-site evaluation, the Phase 2 Recommendations state that Japan is expected to take the following steps:

- Assess as a priority the impediments to effective investigation and prosecution of the offence of bribing a foreign public official.
- Make use of mutual legal assistance (MLA) at the non-filed investigation stage, increase coordination of the law enforcement efforts between prosecutors and police, and address any difficulty encountered in establishing and enforcing territorial jurisdiction in order to enable Japan to advance non-filed investigations concerning foreign bribery offences.
- Assess if and how Japanese law prevents the disclosure of non-identifying information concerning the investigation and prosecution of foreign bribery cases.
- Disclose “concrete but non-identifying information” about the following: (i) the nature of any problems encountered in investigating and prosecuting foreign bribery cases; (ii) the application of the relevant laws, including those on territorial jurisdiction and the new provision on nationality jurisdiction; and (iii) filed as well as non-filed investigations and any new investigations. (Paragraph 4 of the Phase 2 Recommendations provides an inclusive list of the information Japan is expected to provide in relation to these investigations.)

## **2. Framework of Phase 2bis On-Site Visit**

15. The Phase *2bis* on-site visit to Japan was performed by an examination team from the Working Group, which was composed of lead examiners from Italy<sup>7</sup> and the United States<sup>8</sup> as well as representatives of the OECD Secretariat<sup>9</sup>.

16. Meetings, in the form of panel discussions, as well as introductory and concluding sessions and a session on the final day to re-visit any outstanding issues, were held with officials from several relevant ministries and other government bodies [Cabinet Office, Ministry of Foreign Affairs, Ministry of Justice, Ministry of Economy, Trade and Industry (METI), Ministry of Finance, National Tax Agency, Financial Services Agency, Japan Bank of International Cooperation (JBIC), and Sub-Committee on Corporate Affairs related to International Business Transactions, Trade and Economic Cooperation, Industrial Structure Council]; public prosecutors offices (Supreme Prosecutors Office, Tokyo High Public Prosecutors Office, Osaka High Public Prosecutors Office, Nagoya High Public Prosecutors Office, Tokyo District Public Prosecutors Office, Osaka District Public Prosecutors Office, Nagoya District Public Prosecutors Office, Hiroshima District Public Prosecutors Office, Fukuoka District Public Prosecutors Office, and Sapporo District Public Prosecutors Office); and police bodies (National Police Agency, Tokyo Metropolitan Police Department, Akita Prefectural Police Headquarters, and Osaka Prefectural Police Headquarters).

17. Out of a total of ten panel discussions, nine covered a variety of topics directly linked to the investigation and prosecution of the offence of bribing a foreign public official, including the following: (i) legal constraints on the disclosure of information related to foreign bribery investigations; (ii) the new provision on nationality jurisdiction; (iii) the non-filed investigations reported to the Working Group in January 2005; (iv) recent potential foreign bribery cases; (v) investigations and prosecutions of foreign bribery cases that arise in the future; (vi) the role of the police in foreign bribery investigations; and (vii) mutual legal assistance (MLA) in foreign bribery cases. In addition, one panel was held on recent investigations and prosecutions in relation to bid-rigging offences under the Anti-Monopoly Act as well as offences under the Securities and Exchange Act, in which the Japanese law enforcement authorities appeared to have been very effective. Through this panel, the lead examiners sought to understand whether there were any important differences between the way foreign bribery and certain other economic crimes are investigated in Japan.

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<sup>7</sup> Italy was represented by: Prof. Ugo Draetta, Professor of International Law at the Catholic University of Milan; and Lt. Col. Agostino Nuzzolo, Guardia di Finanza.

<sup>8</sup> The United States was represented by: Mr. Mark Mendelsohn, Deputy Chief, Fraud Section, U.S. Department of Justice; Mr. Richard Grime, Assistant Director, Division of Enforcement, U.S. Securities and Exchange Commission; and Ms. Deborah Gramiccioni, Assistant Chief, Fraud Section, U.S. Department of Justice.

<sup>9</sup> The OECD Secretariat was represented by: Mr. Patrick Moulette, Head, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs; and Ms. Christine Uriarte, Principal Administrator, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.



## II. FINDINGS FROM PHASE *2bis* ON-SITE VISIT

### A. OVERVIEW OF FINDINGS

18. The lead examiners are satisfied overall with the level of cooperation and disclosure provided by the Japanese authorities in the Phase *2bis* on-site visit, which, as discussed in Part I of this Report, was one of the major deficiencies in Phase 2. Indeed, due to the spirit of cooperation leading up to and during the on-site visit, including wide access to police departments and various public prosecutors' offices at different levels, as well as open discussions concerning the treatment of foreign bribery allegations by Japan's law enforcement authorities, the lead examiners were able to obtain sufficient information to adequately assess Japan's enforcement of the offence of bribing a foreign public official. In particular, the lead examiners were able to adequately assess developments regarding the other two major deficiencies identified in Phase 2—the absence of formal investigations of the bribery of foreign public officials, and the general low level of concern regarding the absence of such investigations and prosecutions.

19. Although progress has been made to some extent regarding the level of concern of the Japanese authorities, manifested by important improvements made to the legislative framework for addressing foreign bribery, the lead examiners find that there is still need for further progress in this regard. In addition, in light of the continued absence of formal investigations and prosecutions one year after the Phase 2 examination and seven years after the foreign bribery offence came into force in Japan, the lead examiners find that, despite progress made in certain other areas, Japan's actual enforcement of the foreign bribery offence remains unsatisfactory. The background and reasons for these findings are discussed in detail in Sections B, C and D of this Part of the report.

### B. COOPERATION

#### *1. Cooperation leading up to Phase 2bis On-Site Visit*

20. Preparation for the Phase *2bis* on-site visit to Japan began several weeks prior to the actual on-site visit. During the preparatory stage, the Japanese authorities made impressive efforts to accommodate the requests of the lead examiners regarding the proposed agenda for the on-site visit. The proposed agenda was demanding, providing for a comprehensive coverage of all the issues required to be dealt with in Phase *2bis*. In addition, the lead examiners requested the participation of various public prosecutors' offices from different parts of Japan and representing all the levels in the prosecutorial decision-making hierarchy. The lead examiners also requested wide participation from the police authorities. The purpose of these requests was to obtain as complete disclosure as possible about law enforcement activities across Japan regarding the offence of bribing a foreign public official.

21. Cooperation of the Japanese authorities also involved responding to a comprehensive Phase *2bis* Questionnaire and a follow-up Phase *2bis* Questionnaire, which were designed to obtain preliminary information to facilitate the discussions at the on-site visit. Moreover, Japan participated in two preliminary meetings with the lead examiners and the Secretariat in January 2006, in the margins of the Working Group meetings. For the purpose of these preliminary meetings, Japan sent three representatives from Tokyo to OECD Headquarters in Paris, one from the Ministry of Foreign Affairs and two from the Ministry of Justice. The objective of these meetings was to ensure that Japan would be prepared to provide effective disclosure during the on-site visit, as well as to discuss certain aspects of the agenda.

#### *2. Cooperation during the Phase 2bis On-Site Visit*

22. The Phase *2bis* on-site visit was characterised by extensive cooperation by the Japanese authorities, which had begun with thorough preparations to ensure the smooth-running of the meetings. The lead examiners recognise the extensive efforts of the Japanese authorities, including the participation

of public prosecutors' offices from important centres throughout Japan and representing all three prosecutorial levels (*i.e.* Supreme Prosecutors Office, High Public Prosecutors Offices, and District Public Prosecutors Offices), as well as police bodies from three important levels (*i.e.* National Police Agency, Tokyo Metropolitan Police Department and two Prefectural Police Headquarters).

23. Although the lead examiners were initially concerned that prosecutors directly involved in the investigations of the four previously reported non-filed investigations would not participate in the meetings, the lead examiners were, nonetheless, able to obtain much of the information that they sought on these cases, and, most importantly, obtained enough information to make an adequate assessment of Japan's enforcement of the foreign bribery offence.<sup>10</sup> The disclosure by the Criminal Affairs Bureau of the Ministry of Justice of non-identifying information regarding the previous non-filed investigations was made very effectively within the limits of the Japanese laws on confidentiality. The lead examiners acknowledge this significant effort to find an effective mechanism to convey the necessary information to the lead examiners, and ultimately to the Working Group. The Japanese authorities stressed that this kind of disclosure is extremely exceptional.

24. In addition, the lead examiners were able to hold open discussions regarding all the other issues on the agenda. Indeed, to the extent possible, the Japanese authorities discussed enforcement actions regarding cases under the Anti-Monopoly Act as well as cases under the Securities and Exchange Act. Moreover, through high level dialogues with the various ministries involved in the implementation of the Convention, including the Ministry of Foreign Affairs, Ministry of Justice, METI and Ministry of Finance, as well as prosecutors and police, the lead examiners were able to make an assessment of the potential legal and procedural impediments to investigations in Japan, which is the core task in any Phase 2 examination.

### **Commentary**

***25. The lead examiners are fully satisfied with Japan's efforts to cooperate in the Phase 2bis on-site visit, including through the level of participation and disclosure of relevant information, including disclosure, within the limits of Japanese laws on confidentiality, of non-identifying information regarding the non-filed investigations reported in January 2005. The on-site visit provided the lead examiners with adequate information to assess Japan's enforcement of the offence of bribing a foreign public official, including the identification of potential legal and procedural impediments to investigations in Japan.***

## **C. LEVEL OF CONCERN REGARDING ABSENCE OF FORMAL INVESTIGATIONS**

### ***1. Introduction***

26. Given that in Phase 2 one of the major deficiencies in Japan's implementation of the Convention was an apparent general low level of concern on the part of the Japanese authorities concerning the absence of formal investigations and prosecutions, the Phase 2bis on-site visit assessed whether improvements had occurred in this regard. For the purpose of this assessment, the lead examiners explored various means

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<sup>10</sup> Indeed, the one significant exception to the overall high level of cooperation was the decision by the Japanese authorities to not arrange meetings between the lead examiners and the prosecutors who handled the four non-filed investigations. The lead examiners had specifically requested, and the lead examiners understood that the Japanese authorities had agreed to such meetings in advance of the Phase 2bis on-site visit. No such meetings were permitted. The Japanese authorities stated that access to these prosecutors was denied due to the independency and neutrality of prosecutors, and because Ministry of Justice officials are responsible for explaining cases if necessary by gathering information from the public prosecutors office.

through which Japan could demonstrate an increased commitment to implementing the Convention, including: (i) progress in strengthening the legislative framework for fighting foreign bribery; (ii) measures taken to ensure that the new provision on nationality jurisdiction is applied effectively; and (iii) steps taken by the Japanese authorities to assess the impediments to effective investigations and prosecutions.

## **2. Progress in Strengthening Legislative Framework for Fighting Foreign Bribery**

### **a. Increase in Statute of Limitations for Foreign Bribery Offence**

27. Paragraph 12(d) of the Phase 2 Recommendations states that Japan is recommended to “take necessary steps” to extend the statute of limitations for the offence of bribing a foreign public official to an appropriate period to ensure the effective prosecution of the offence. At the time of the Phase 2 examination of Japan, the statute of limitations for the offence of bribing a foreign public official, which, pursuant to the Code of Criminal Procedure is measured according to the maximum sanctions for natural persons, was three years. In June 2005, the Diet passed an amendment extending the statute of limitations for natural persons to five years.

28. At the same time, and in order to facilitate the extension, the Diet passed an amendment that increased the sanctions for natural persons convicted of foreign bribery. The fine sanction was increased from a maximum of 3 million yen (EUR 20 900 or USD 26 900)<sup>11</sup> to 5 million yen (EUR 34 900 or USD 44 900), and the maximum sentence of imprisonment was increased from three to five years. In addition, natural persons can now be sentenced to both a fine and imprisonment, whereas previously only one or the other penalty was available. The increase in sanctions for natural persons is viewed as an important development, particularly in light of the Phase 2 Recommendation to follow-up whether the sanctions imposed pursuant to the UCPL for the foreign bribery offence as a whole are effective, proportionate and dissuasive.

29. At the time of the Phase 2*bis* on-site visit, the statute of limitations for legal persons remained at three years, but a bill for the purpose of extending it to five years was under discussion in the Diet. Since then, the Bill, which amends the UCPL by stating under a new sub-article 22(3) that the limitations period for legal persons is the same as for natural persons, was passed on 1 June 2006 and will come into force on 1 January 2007.

### **b. Bill to Amend the Tax Law**

30. A major issue for Japan in Phase 1 and Phase 2 was the tax treatment of bribe payments under the Special Taxation Measures Law (Tax Law). Although the Tax Law does not expressly deny the tax deductibility of bribes to foreign public officials, the Japanese authorities explained that bribes to foreign public officials fell under the rubric of “entertainment and social” expenses, and were thus non tax-deductible. In addition to the absence of clear supporting authority (*i.e.*, case law or tax guidelines) for including bribe payments under the heading of “entertainment and social” expenses, the Working Group identified the following two other problems in the Japanese approach: (i) “entertainment and social” expenses made by corporations to foreign public officials are tax deductible up to a certain limit for companies up to a certain size and consolidated groups up to a certain limit based on the size of the parent company; and (ii) there appears to be uncertainty about whether bribe payments made by individuals to foreign public officials are to be deductible without limit.

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<sup>11</sup> Throughout this document, the conversion from Japanese yen into Euros and U.S. dollars is based on the exchange rate on 24 May 2006.

31. Due to the longstanding issue regarding the tax treatment of bribe payments in Japan, the lead examiners viewed as extremely positive the announcement by the Japanese authorities that a Bill had been submitted to the Diet for the purpose of amending the Corporation Tax Law and Income Tax Law to expressly deny the tax deductibility of bribe payments to foreign public officials.<sup>12</sup> As well, the Bill does not provide a deduction for bribe payments under any circumstances. At the time of the Phase 2*bis* on-site visit, it was expected that the Bill would pass during March 2006 and be in force on 1 April 2006. Following the on-site visit, the Bill was passed by the Diet on 27 March 2006 and entered into force on 1 April 2006.

### **c. Amendments to METI Guidelines**

32. As discussed in detail in the Phase 2 Report, because of the placement of the foreign bribery offence in the Unfair Competition Prevention Law (UCPL), the responsible ministry is METI. In May 2004, METI issued a document entitled “Guidelines to Prevent Bribery of Foreign Public Officials” (METI Guidelines), which provides an official interpretation of the offence of bribing a foreign public official under the UCPL. The METI Guidelines were specifically intended for companies, but are also available to government officials, including prosecutors. In addition, they can be purchased by the public at large. The 2004 METI Guidelines are discussed throughout the Phase 2 Report on Japan, in particular because they provided unclear and potentially misleading information about the interpretation of the foreign bribery offence in three major respects.

33. First, despite the absence of a defence for facilitation payments under the UCPL, the METI Guidelines provided examples of “small payments” or “facilitation payments” which do not constitute “improper business advantage”. The Phase 2 Report points out that the descriptions of these payments are vague, and potentially cover payments that should not be considered as “facilitation payments” under the Convention. Second, despite an amendment to the UCPL following Phase 1 to remove the “main office exception”<sup>13</sup> and replace it with the language “in the conduct of international business”, an example in the METI Guidelines appeared to maintain the application of the exception in practice. Third, the METI Guidelines provided that “international business” constitutes “acts concerning business repeatedly and continuously conducted for the purpose of profit”.

34. In order to address the concerns of the Working Group about the issues raised by the METI Guidelines, the Phase 2 Recommendations recommend that Japan review the interpretation of “facilitation payments” and “international business transactions” in the METI Guidelines and all other relevant guidance issued by the Japanese authorities, to ensure that they conform to the Convention and Commentaries on the Convention and do not mislead companies about what acts are covered by the foreign bribery offence. Japan is also recommended to conduct this review in consultation with the

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<sup>12</sup> The amendments to the Corporation Tax Law and Income Tax Law state as follows: “The amount of bribes (as specified in the Criminal Law and Unfair Competition Prevention Law) paid by a company (an individual) to a domestic or foreign public official shall not be treated as deductible expenses when calculating that company’s (individual’s) taxable income”.

<sup>13</sup> The foreign bribery offence under the UCPL originally (*i.e.* in Phase 1) provided an exception, which became known as the “main office exception”. This provision, which was intended to interpret the language in Article 1.1 of the Convention “in the conduct of international business”, provided an exception where the “main office” of the person giving the bribe was located in the same country for which the foreign public official performed his/her duties. It was the opinion of the Working Group in Phase 1 that this exception created a major loophole in the implementation of the Convention, because no offence would be committed if a Japanese national employed by a foreign subsidiary of a Japanese parent corporation bribed a foreign public official in Japan in relation to the business of the subsidiary.

Ministry of Justice and other relevant ministries as well as with the prosecutorial authorities through the Ministry of Justice.

35. In view of the concerns of the Working Group in Phase 2 about the above interpretations in the METI Guidelines, the lead examiners viewed very positively the announcement by the Japanese authorities at the on-site visit that the METI Guidelines were under revision, with an expected completion date of April or May 2006, and that the Ministry of Justice and prosecutors would be consulted regarding them. In addition to making the METI Guidelines more readable, the Japanese authorities explained that the misleading example that raised the issue of the continued application of the “main office exception” would be clarified to remove any doubt that the exception continues to apply, and it would be clarified that there is no exception for “facilitation payments”.

36. However, it appeared that the interpretation of “international business” as constituting “acts concerning business repeatedly and continuously conducted for the purpose of profit” would remain in the METI Guidelines. The Japanese authorities do not believe that the METI Guidelines are unclear in this respect or that such an interpretation could lead to, for instance, the exclusion of the following cases from the application of the foreign bribery offence: (i) a company bribes a foreign public official to break into a new market, knowing that it will not make a profit on that particular transaction; or (ii) a company is set up for the purpose of transacting one business transaction (e.g. a major public works project in a foreign country), following which it is dismantled. The Japanese authorities explained that the former situation would be covered by the foreign bribery offence because the company would eventually expect to have additional business prospects. With respect to the latter situation, the response of Japan indicates that they might not fully appreciate the concerns of the lead examiners. In any case, the language of the METI Guidelines in this respect was vague.

37. Following the Phase 2*bis* on-site visit, the revised METI Guidelines were issued on 1 May 2006, and a translation was provided to the lead examiners. It can therefore be confirmed that as indicated at the Phase 2*bis* on-site visit, the misleading example in the 2004 version of the Guidelines that raised the issue of the continued application of the “main office exception” has been deleted. It is also confirmed that, as anticipated, the interpretation of “international business” has been retained, although the discussion about the requirement that business be “repeatedly and continuously conducted” has been moved to a footnote, while the discussion about the requirement that the business be “for the purpose of a profit” has been retained in the main text. With respect to the information about facilitation payments, the revisions failed to live up to expectations. It is confirmed that although it is no longer expressly stated that small facilitation payments are not an offence, the vague examples of what constitutes an improper business advantage have been retained, as well as the examples of facilitation payments under other Parties’ implementing legislation, in the absence of an explanatory note. In addition, new language has been inserted that heightens the ambiguity concerning the treatment of facilitation payments in Japan.<sup>14</sup>

#### **d. Amendments to the Security and Exchange Law and New Corporate Code**

38. Since the Phase 2 examination of Japan, two important legislative developments have occurred that directly relate to Japan’s implementation of Article 8 of the Convention on accounting. The first development, announced by the Financial Services Agency (FSA) during the Phase 2*bis* on-site visit,

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14. The following examples of such statements are provided: (i) “However, as to small facilitation payments it should be noted that facilitation payments are not being recommended...” (ii) The offence of bribery of foreign public officials under the UCPL is constituted with the prerequisite ‘to obtain or retain improper business advantage in the conduct of international business’, and therefore in case this prerequisite is not fulfilled in specific individual cases this will not be a crime. But this does not mean at all that a small facilitation payment directly leads to a lack of this prerequisite and is freed of punishments”.

involves an amendment to the Security and Exchange Law (SEL) that came into force in December 2005. Pursuant thereto, a new offence of making fraudulent statements in ongoing disclosure documents was established. The lead examiners had an opportunity at the on-site visit to discuss the new offence under the SEL with representatives of the FSA, and have been provided with a translation of the offence. The second development, announced following the on-site visit, involves the coming into force on 1 May 2006 of the new Corporate Code, which includes penalties for fraudulent statements in accounting records. Overall, these developments are positive, although certain concerns raised in Phase 2 do not necessarily seem to have been addressed by them. To fully understand the impact of these developments, it is necessary to first recall the background leading to the changes.

39. In Phase 2, the Japanese authorities relied on two provisions for the purpose of implementing Article 8 of the Convention. Japan mainly relied on article 197.1(1) of the SEL, which provides a penalty for the making of “untrue statements with respect to material matters” in registration documents. According to case summaries provided in Phase 2 on the interpretation of article 196.1(1) of the SEL, as well as the opinions of the Japanese authorities, the standard of materiality requires a misrepresentation in the accounts that has an impact on the financial statements of the company and thus on investors. This offence provides substantial penalties, including heavy fines for legal persons.<sup>15</sup> To a lesser extent Japan relied on article 498.1(19) of the Commercial Code, which provides a non-penal fine of 1 million yen (EUR 7 000 or USD 9 000) for the failure, by certain individuals, to enter or record any matter to be entered or recorded, or making an untrue entry or record in expressly mentioned documents, including accounting books. According to article 33.1(2), “transactions and any other matters that might have an impact on business assets” are required to be systematically and clearly entered into the accounting books. Interpretative case law was not available on this standard of materiality.

40. In Phase 2, the Working Group recommended that Japan ensure that all the fraudulent accounting activities listed under Article 8.1 of the Convention be prohibited. This recommendation resulted from the following concerns articulated in the Phase 2 Report: (i) the high level of materiality required to trigger the offence under the SEL; and (ii) the non-application of the offence under the SEL to non-publicly listed companies, which comprised the majority of companies in Japan. The penalties for fraudulent accounting under the Commercial Code applied to listed and non-listed companies, but in the absence of illustrative case law, and in light of the extremely low penalties, the Japanese authorities did not place much reliance on them for the purpose of implementing Article 8 of the Convention.

41. The new offence under article 172.2 of the SEL<sup>16</sup> applies to false statements made by certain individuals and legal persons in ongoing disclosure documents, including annual, semi-annual and current reports. The lead examiners view this development as a positive step, but note that although the new provision refers to disclosure documents instead of registration documents, it does not expressly refer to the types of documents required to be covered by Article 8.1 of the Convention—*i.e.* accounting records. The Japanese authorities state that, in practice, this is not an obstacle to the implementation of Article 8 of the Convention, because accounting records and disclosure documents are closely related, with the result that false statements in accounting records would ultimately lead to false statements in disclosure documents, thus triggering liability to a penalty. However, this may be an overly optimistic viewpoint, given that even if continuous disclosure is required of the auditor’s report on the annual financial statements, it is unlikely that a false statement in an accounting record would come to the attention of the

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<sup>15</sup> The penalties for natural persons under 197.1 of the SEL are imprisonment for up to five years or a fine of not more than 5 million yen (EUR 34 900 or USD 44 900). Legal persons are liable to a fine of up to 500 million yen (EUR 3.49 million or USD 4.49 million).

<sup>16</sup> The new offence under article 172.2 of the SEL provides for a sanction of 3 million yen (EUR 2.09 million or USD 2.69 million) or 3/100 000 of the total market value of the securities issued by the issuer, for false statements in annual reports, and half these amounts for false statements in semi-annual or current reports.

Securities and Exchange Surveillance Commission if it has not been identified in the auditor's report. Moreover, although there is some scope under article 26 of the SEL to obtain and inspect certain documents, including books and records, the authority to order access to such documents is within the discretion of the Prime Minister, and is strictly limited to cases where the Minister deems the information as "necessary and appropriate in the public interest or for the protection of investors".

42. Furthermore, the standard of liability under the SEL continues to be linked to "material matters", thus failing to address the concern of the Working Group in Phase 2 regarding the high level of materiality. The Japanese authorities state that concern about the issue of "materiality" based on the language in the SEL is unwarranted, because in Japan's view the materiality standard is referred to in the United States Generally Accepted Accounting Principles (GAAP) and the International Financial Reporting Standards (IFRS). However, in light of the information submitted in Phase 2 on the interpretation of the level of materiality required under the SEL, and in the absence of direct reference to International Accounting Standards in the new offence under the SEL, the concern raised in Phase 2 remains.

43. The new Corporate Code replaces the provisions of the Commercial Code related to incorporation, organisation and management of listed and unlisted companies. Pursuant to article 976(7) of the new Corporate Code, fraudulent statements in accounting records are subject to a civil fine of 1 million yen (EUR 7 000 or USD 9 000), and, the Corporate Code does not retain the requirement that only "transactions and any other matters that might have an impact on business assets" be systematically recorded in accounting books. Instead, under article 33.1(2), financial documents are to be prepared in accordance with the Generally Accepted Accounting Principles in Japan (Japanese GAAP), which the Japanese authorities explain require the recording of any matters that have changed a company's assets, liabilities, expenses, profits, etc. It is therefore the opinion of the Japanese authorities that the Japanese legislation as a whole can now be considered to meet the standard under Article 8.1 of the Convention. However, in addition to the extremely low penalty, the provision does not appear to apply to company employees. The lead examiners therefore do not consider this provision in compliance with Article 8.1 or 8.2 of the Convention.

44. Given that investigations into related offences, including accounting offences, are an important tool for detecting the offence of bribing a foreign public official, it is vital that the Japanese accounting offences capture in practice the kinds of accounting devices that would normally be used to bribe foreign public officials or hide such bribery, as required by Article 8.1 of the Convention. Due to the concerns about the new article 172.2 of the SEL, and in the absence of practical experience under the penalties provision in the new Corporate Code, there continues to be some concerns about the use of these provisions as tools for detecting foreign bribery in the books and records of companies subject to Japanese accounting rules.

#### **e. Cabinet Order stating Whistleblower Protection Act applies to Offences under UCPL**

45. In Phase 2, there was some question about whether the Whistleblower Protection Act, which came into force on April 2006, would apply to the reporting of the foreign bribery offence under the UCPL. The Act provides protections for private and public employees where whistle-blowing is in the public interest. The Japanese authorities were able to confirm at the Phase 2*bis* on-site visit that a Cabinet Order specifying that the Act applies to offences under the UCPL was issued in April 2005. In addition, it is noted that the Cabinet Office has publicised the new Act through the Internet and other measures. The lead examiners view these as generally positive steps, given the potential importance of whistle-blowing in detecting the bribery of foreign public officials.

### Commentary

46. *The lead examiners acknowledge that Japan has made progress in strengthening the legal framework for fighting the bribery of foreign public officials, in particular through legislative amendments to increase the statute of limitations in respect of natural persons for the foreign bribery offence, and the establishment of a false accounting offence under the Securities and Exchange Law. In addition, the lead examiners consider the passage of the Bill to amend the Corporation Tax Law and Income Tax Law to expressly deny tax deductions for bribe payments to foreign public officials in all circumstances, a significant step, in light of the longstanding concern of the Working Group about the previous tax treatment of bribe payments in the Special Taxation Measures Law. The lead examiners further acknowledge the importance of the ongoing revisions of the METI Guidelines to remove unclear and potentially misleading information about the foreign bribery offence, and the Cabinet Order specifying that the new Whistleblower Protection Act applies to offences under the UCPL.*

47. *In order to further strengthen the legislative framework for fighting foreign bribery and ensure full implementation of the relevant Phase 2 Recommendations, the lead examiners recommend that the Japanese authorities:*

- *Delete from the 2006 METI Guidelines the interpretation of “international business” as constituting acts concerning business “repeatedly and continuously conducted” for “the purpose of profit”, and make it absolutely clear that Japanese law does not permit an exception for facilitation payments.*
- *Revisit the issue identified in the Phase 2 Report regarding the standard of liability of materiality applicable to the offence of making a false statement in disclosure documents under the Securities and Exchange Law, and ensure that Japanese law fully complies with Article 8 of the Convention.*
- *Take appropriate measures to ensure that public and private employees are aware that the Whistleblower Protection Act applies, not only to internal acts of whistle-blowing, but to acts of whistle-blowing to police and prosecutors as well. .*

### **3. Establishment of Nationality Jurisdiction over Foreign Bribery Offence**

#### **a. Introduction**

48. In January 2005, an amendment to the UCPL came into force to extend nationality jurisdiction under article 3 of the Penal Code to the offence of bribing a foreign public official under the UCPL. The Japanese authorities explain that article 3 of the Penal Code does not require dual criminality, so that the briber is punishable even if the conduct is not criminalised in the foreign State where it occurred. They further explain that residency in Japan is not required for the application of article 3.

49. Since nationality jurisdiction was not in force when the four non-filed cases referred to in the Phase 2 Report occurred, the Japanese authorities stated in supplementary responses during the Phase 2 examination process that the new provision on nationality jurisdiction would enable them to pursue foreign bribery cases more aggressively. Given this statement, and because the Japanese authorities have indicated that one of the main reasons that three out of the four non-filed investigations did not progress was due to the absence of nationality jurisdiction, there was a heavy burden on Japan at the Phase 2*bis* on-site visit to demonstrate that the provision on nationality jurisdiction is being applied effectively. For the purpose of determining the effectiveness in practice of the new provision, the Japanese authorities were asked to provide information about (i) efforts taken to make all relevant authorities (e.g. police, prosecutors, tax



inspectors, and Official Development Assistance staff) aware of the new provision; and (ii) the application of the provision to the bribery of foreign public officials.

### **b. Awareness-Raising Efforts**

50. The Japanese authorities appear to have made satisfactory efforts to raise awareness of the new provision on nationality jurisdiction with police, prosecutors, the National Tax Agency and officials from the Ministry of Foreign Affairs involved in Official Development Assistance. Concerning the police, all prefectural police headquarters were officially informed of the provision in December 2004. In addition, meetings and training courses were given for police officers who head “intellectual criminal investigations”, and police supervisors responsible for instructing police officers on investigating intellectual crimes in each prefectural police headquarters. The National Police Agency also indicated that the police prefectures received notices informing them about the application of nationality jurisdiction in January 2005, and that in April 2005, a meeting was held with all the directors of the prefectural police responsible for economic crimes to discuss the foreign bribery offence, including the application of nationality jurisdiction.

51. With respect to prosecutors, reference material on nationality jurisdiction was distributed to prosecutors in August 2004, October 2004, January 2005 and February 2006. Furthermore, a training course on the foreign bribery offence, including the application of nationality jurisdiction, was held for prosecutors in November 2005 in Tokyo, and an article on the foreign bribery offence, which discusses nationality jurisdiction, was written by an attorney at the Criminal Affairs Bureau of the Ministry of Justice, and published in January 2006 in a journal widely read by prosecutors.<sup>17</sup>

52. In November 2004, the National Tax Agency distributed to staff a notification of the new provision on nationality jurisdiction. The content of the notification continues to be used in staff training sessions. Representatives from the Ministry of Foreign Affairs involved in Official Development Assistance indicated that a session on the foreign bribery offence was held in January 2005, in which the application of nationality jurisdiction was discussed.

### **c. Application of Nationality Jurisdiction to Legal Persons for the Foreign Bribery Offence**

53. Clarification was sought about the application of article 3 of the Penal Code on nationality jurisdiction to legal persons for the foreign bribery offence, as article 3 applies “to a Japanese national who commits” the foreign bribery offence under the UCPL. The Japanese authorities explain that article 3 applies to natural persons and not to legal persons. Indeed, it is a fundamental principle of the Japanese legal system that only natural persons can commit crimes. However, pursuant to article 22(1) of the UCPL, which provides a fine for legal persons where “any representative, agent, or employee of a legal person has committed the foreign bribery offence in relation to the business of the legal person”, the Japanese authorities note that nationality jurisdiction can be applied “vicariously” to the legal person where it applies to the natural person who actually committed the offence.<sup>18</sup>

54. The Japanese authorities state that application of nationality jurisdiction to legal persons for the foreign bribery offence is “theoretical”, due to the absence of a supporting legal precedent. In addition, the Japanese authorities are not aware of any examples of the application of nationality jurisdiction to legal

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<sup>17</sup> “Offence of Bribery of Foreign Public Officials” (Tetsuo Machida, Attorney at Criminal Affairs Bureau, Ministry of Justice of Japan, January 2006).

<sup>18</sup> The Japanese authorities elaborated that the natural person is punished for foreign bribery on the ground of committing the offence, and the legal person is punished on the ground that it is responsible for the natural person who committed the offence.

persons in general. Due to the untested nature of the Japanese theory, the lead examiners were not persuaded that it is certain that nationality jurisdiction will in practice apply successfully to legal persons for the foreign bribery offence. In addition, they note that the recent article about the foreign bribery offence by an attorney at the Criminal Affairs Bureau of the Ministry of Justice,<sup>19</sup> which includes a discussion on nationality jurisdiction, does not assert that such jurisdiction applies to legal persons.

### Commentary

55. *The lead examiners are satisfied that the Japanese authorities have made reasonable efforts to raise the awareness of the relevant authorities, including police and prosecutors, of the application of nationality jurisdiction to the foreign bribery offence under the UCPL, and believe that this is an important step to ensure that cases of foreign bribery perpetrated by Japanese nationals abroad will be investigated and prosecuted.*

56. *Otherwise, the lead examiners are not persuaded that Japan's legislative framework is adequate for applying nationality jurisdiction to legal persons for the foreign bribery offence. In view of the absence of certainty in this respect, the lead examiners recommend follow-up of this issue as practice develops.*

#### **d. Need for Japan to assess as Priority Impediments to Effective Investigation and Prosecution**

57. In order to put the absence of formal investigations of foreign bribery into perspective, a statistical comparison can be made with the number of formal investigations of domestic bribery cases, which amounted to 313<sup>20</sup> in 2004. Due to the absence of formal investigations at the time of the Phase 2 examination, as well as the sense of the lead examiners that they encountered a general low level of concern on the part of the Japanese Government about the reasons for the absence of formal investigations and prosecutions, the Working Group recommended in Phase 2 that the Japanese authorities assess as a priority the impediments to effective investigation and prosecution of the offence of bribing a foreign public official. Thus, one of the main focuses of the Phase 2*bis* on-site visit was to determine the extent to which the Japanese authorities had made such an assessment.

58. The Subcommittee on Corporate Affairs related to International Business Transactions, Trade and Economic Cooperation, Industrial Structure Council (Consultative Committee)<sup>21</sup> was created by METI in 2003 to advise it on matters related to the implementation of the Convention.<sup>22</sup> At the time of the Phase 2 examination, there was no indication that in its advisory role, the Consultative Committee had considered the reasons for the absence of formal investigations or prosecutions up until that time. Representatives of the Consultative Committee explained at the Phase 2*bis* on-site visit, that before the Phase 2 examination,

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<sup>19</sup> Ibid footnote 17.

<sup>20</sup> Of the 313 domestic bribery cases investigated in 2004, 232 were initially investigated by the police and then transferred to prosecutors, and 81 cases were initially investigated by prosecutors.

<sup>21</sup> The Consultative Committee is composed of representatives of the private sector and civil society, including industry leaders, academics, trade union representation, accounting and legal experts. METI and the Ministry of Justice act as observers.

<sup>22</sup> In February 2004, the Consultative Committee issued its "Report on Measures for Effective Prevention of Bribery of Foreign Public Officials", which contained several recommendations, including: (i) the introduction of nationality jurisdiction for the foreign bribery offence; (ii) the introduction of the authority to confiscate the proceeds of bribing foreign public officials; and (iii) improvements regarding companies' internal controls. The Report also recommended the establishment of guidelines to support a voluntary and precautionary approach by companies involved in international business transactions. These guidelines were issued in May 2004 and are referred to in this Report as the "METI Guidelines".

the principle role of the Consultative Committee was to review the relevant provisions of the UCPL and draft guidelines.

59. Following the Phase 2 examination, the Consultative Committee was re-activated in December 2005 for the purpose of revising the METI Guidelines in light of the Phase 2 Recommendations. Work on the revisions was in progress at the time of the Phase 2*bis* on-site visit. Representatives of the Consultative Committee explained that they were not examining the reasons for the absence of formal investigations and prosecutions. When questioned about the glaring disparity between the statistics for domestic bribery investigations and foreign bribery investigations, one representative stated that there should be more study on this issue. Another representative challenged whether it was appropriate for the Working Group to conduct the Phase 2*bis* examination through the lead examiners in a manner that affects the examined country's basic legal system.

60. Confusion was observed between METI and the Ministry of Justice concerning their respective responsibilities for the implementation of the Convention when they were questioned about whether any body in the Japanese Government had examined the reasons for the absence of formal investigations and prosecutions of foreign bribery. A METI representative stated that, in conformity with its relationship with the Ministry of Justice concerning responsibility for the Convention, the Ministry of Justice ordinarily requests METI to look at specific issues if necessary. On the other hand, a Ministry of Justice representative stated that he did not believe that the Ministry of Justice had ever received a formal request from METI to study this issue.

61. A Ministry of Justice representative indicated that, within the Ministry of Justice, the question why there have not been formal foreign bribery investigations has been informally discussed, and the conclusion was that there are no issues or problems within the current system. Notably, following the Phase 2*bis* on-site visit, the Ministry of Justice further indicated that there continues to be no formal investigations and prosecutions because there has not been any case with evidence enabling such action. The Ministry of Justice added that, in light of this, it would not be useful to discuss impediments to the effective investigation and prosecution with METI, which is not in charge of investigations.

### Commentary

62. *It is regrettable that, despite the continuing absence of formal investigations and prosecutions seven years after the foreign bribery offence came into force, Japan has not made a serious effort to act on the Phase 2 Recommendation of the Working Group to assess as a priority the impediments to the effective investigation and prosecution of the offence of bribing a foreign public official. It is particularly regrettable that the Japanese authorities were not motivated to do so under the circumstances of an impending Phase 2*bis* on-site visit. Given the foregoing and that neither METI nor the Ministry of Justice consider such an assessment their responsibility, as well as that the Ministry of Justice has informally concluded that there are no issues or problems to be resolved, serious doubts continue about the level of Japan's commitment to the effective implementation of the Convention.*

63. *The lead examiners therefore recommend that Japan urgently coordinate and undertake an objective assessment of the legal and procedural impediments to the effective investigation and prosecution of the offence of bribing a foreign public official in Japan, and present in writing the findings of the assessment to the Working Group within six months of the Phase 2*bis* examination in the Working Group. It is also recommended that Japan consult with appropriate members of civil society throughout the assessment process.*

64. *In making this assessment, the lead examiners recommend that the Japanese authorities assess possible impediments and give full consideration to the findings and recommendations in the Phase 2*

*and Phase 2bis reports on Japan. It is also recommended that the Japanese authorities pay particular attention to the impressions of the lead examiners regarding what could be the factors contributing to the absence of formal investigations of foreign bribery, discussed in Part D of this Report, including their findings that there is a need to: (i) actively investigate foreign bribery allegations; (ii) follow-up the use of confessions in foreign bribery investigations and prosecutions; (iii) increase communication between police and prosecutors about ongoing foreign bribery enquiries or investigations, and seriously consider involving the police in foreign bribery investigations; and (iv) broaden investigative measures for foreign bribery.*

## D. CONTRIBUTING FACTORS TO ABSENCE OF FORMAL INVESTIGATIONS

### *1. Introduction*

65. At the outset of the on-site visit, the lead examiners explained to the Japanese authorities that Japan's main task in Phase 2bis was to convince them that sufficient efforts were being made to enforce the offence of bribing a foreign public official. In order to persuade the lead examiners that sufficient efforts were being made, the Japanese authorities provided disclosure of non-identifying information about the previous non-filed investigations, within the limits of the Japanese laws on confidentiality. In addition, the Japanese authorities openly discussed concerns of the lead examiners about potential impediments to the effective enforcement of the foreign bribery offence in Japan, such as: (i) whether the law enforcement authorities are sufficiently pro-active in pursuing foreign bribery cases; (ii) whether strict evidentiary thresholds inhibit the detection and investigation of the foreign bribery offence; (iii) the role of the police in foreign bribery investigations; (iv) whether there is a need to broaden investigatory powers for foreign bribery investigations; and (v) whether the decision to place the foreign bribery offence in the UCPL rather than the Penal Code reduces the potential for foreign bribery investigations.

### *2. Level of Activeness in Investigations*

66. Concerns about the level of pro-activeness of the Japanese law enforcement authorities regarding foreign bribery cases arose in Phase 2 due to the absence of formal investigations and prosecutions and due to the comments of some of the participants in the Phase 2 on-site visit. For instance, at the Phase 2 on-site visit, a prosecutor from one of the regional offices stated that it is not "popular" for prosecutors to have knowledge of the methods for combating foreign bribery, and that by that time affirmative steps had not been taken by prosecutors to look for foreign bribery cases. Both district prosecutors who participated in the Phase 2bis on-site visit stated that Japanese law enforcement authorities are rarely pro-active in initiating investigations by themselves, normally relying on other sources of information such as reports from public officials, accusations filed by citizens and media reports.

67. Throughout the Phase 2bis on-site visit, the Japanese authorities seemed puzzled and alarmed that the lead examiners might have the impression that Japanese law enforcement authorities have not been sufficiently pro-active in detecting and investigating foreign bribery allegations, and on several occasions stated that this impression was inaccurate. Indeed, the National Police Agency stated that since nationality jurisdiction became applicable to the foreign bribery offence, all the police prefectures have made their best efforts to detect cases, but that these efforts had not yet yielded cases. The Ministry of Justice explained that within the limits of the Japanese criminal legal system, prosecutors had been acting maximally. A representative of the Consultative Committee (Subcommittee on Corporate Affairs related to International Business Transactions, Trade and Economic Cooperation, Industrial Structure Council) stated that it is not the impression of the Consultative Committee that prosecutors are taking a passive attitude to the foreign bribery offence. It was his opinion that once Japanese prosecutors collect sufficient evidence of

any offence, they will prosecute, and that prosecutors would treat foreign bribery cases the same as any other offence.

68. How could best efforts to detect and investigate foreign bribery cases have yielded no formal investigations or prosecutions in seven years? Such an outcome seems hardly feasible, in light of the nature of Japan's economy, the number of foreign bribery allegations involving Japanese nationals or companies that have appeared in the press over the relevant period, and the level of investigative activity in other major economies that are signatories to the Convention and members of the Working Group on Bribery in International Business Transactions.

69. Due to the confidential nature of the discussions that took place at the Phase 2*bis* on-site visit regarding the four non-filed investigations reported in Phase 2 (and no longer in progress at the time of Phase 2) and responses to questions of the lead examiners regarding other possible foreign bribery allegations, the contents of those discussions are not disclosed in this report. However, the lead examiners are at liberty to report their conclusions as well as an abstract distillation of the discussions. With respect to the question of whether Japan has been sufficiently pro-active in detecting and investigating foreign bribery cases, the lead examiners are convinced that Japan took a passive approach to foreign bribery allegations before the Phase 2 examination in January 2005. The discussions at the Phase 2*bis* on-site visit suggested the possibility that the Japanese authorities have been somewhat more active since the Phase 2 examination in January 2005 and the coming into force of nationality jurisdiction; in any event, however, not to a sufficient degree.

70. With respect to the four non-filed investigations reported in Phase 2, the lead examiners note that according to the Japanese authorities, two of those cases appear to have occurred before the coming into force of the foreign bribery offence under the UCPL. This could partly justify the absence of pro-active steps on the part of the Japanese authorities. However, the lead examiners believe that relying strictly on information passively obtained, in particular given that in one case it was clear that evidence could have been obtained from abroad, puts Japan's pre-January 2005 commitment to the implementation of the Convention in serious doubt. With respect to the third non-filed investigation, it was not apparently necessary to take pro-active steps specifically in relation to the foreign bribery suspicions because certain pro-active measures were taken concerning a related case.

71. Indications of a possible increase in active investigation since January 2005 relate to the fourth non-filed investigation reported in Phase 2, which, unlike the other three, has since been continued. The lead examiners note that the continuation of this non-filed investigation is due to the passive receipt of information. However, Japan has sought and obtained further information from another State. The Japanese authorities are under intense time pressure regarding this case due to the application of the previous statute of limitations of three years. In addition to the continuation of this non-filed investigation, the Japanese authorities have taken certain steps to obtain information concerning another allegation that was publicly reported after January 2005. This case has not yet progressed to the non-filed stage.

72. The Ministry of Justice reported to the lead examiners that other than the limited steps being taken since January 2005 regarding these two cases, no other foreign bribery cases were under investigation, including at the preliminary non-filed stage. The lead examiners are concerned that the limited enforcement action since January 2005, and the continued absence of formal investigations and prosecutions, particularly in view of further press allegations, indicates that the efforts of the Japanese authorities to detect and investigate foreign bribery continues to be inadequate. In one concrete example, the Japanese authorities were asked by the lead examiners about a publicly reported allegation of foreign bribery involving the foreign subsidiary of a Japanese company whose overseas offices were searched and records seized by a foreign law enforcement authority. The Japanese authorities advised that they had not and, typically, would not ask for mutual legal assistance from the foreign authorities in the absence of

information that shows the involvement of a Japanese national and information to indicate that some criminal activity occurred in the territory of Japan. Rather, they assumed that if there were any basis to believe that a Japanese national or company had engaged in foreign bribery, the foreign authorities would convey that information to Japan through a formal channel, such as mutual legal assistance. The Japanese authorities confirmed that this was their approach, notwithstanding the running of the statute of limitations period while Japan waited for any such information to arrive.

### **Commentary**

**73. Based on confidential discussions with the Japanese authorities concerning the non-filed investigations reported in Phase 2 and responses to questions of the lead examiners regarding other possible allegations, it is the finding of the lead examiners that before the Phase 2 examination in January 2005, the Japanese authorities took a passive approach to foreign bribery allegations, and since January 2005, efforts may have increased, but certainly not to a sufficient degree. The lead examiners therefore recommend that in assessing the legal and procedural impediments to the effective investigation and prosecution of the foreign bribery offence in Japan, as recommended in the previous Commentary, the Japanese authorities pay due attention to how the law enforcement authorities can reach an adequate level of pro-activeness.**

## **3. Effect of Strict Evidentiary Thresholds on Foreign Bribery Investigations**

### **a. Introduction**

74. An absence of pro-activeness in detecting and investigating cases of bribing foreign public officials might be symptomatic of one or more of the following problems: (i) an insufficient level of human and material resources for complicated and lengthy investigations frequently involving the need to obtain mutual legal assistance (MLA); (ii) low prioritisation of foreign bribery investigations; (iii) unworkable evidentiary thresholds for undertaking various investigative measures (e.g. requesting MLA) for foreign bribery offences; (iv) inadequate investigative powers for foreign bribery offences; or (v) difficulty in obtaining confessions in foreign bribery cases—confessions being an important source of evidence in the investigation of offences in Japan. The lead examiners evaluated each of these propositions at the Phase 2*bis* on-site visit. While the first proposition is not supported by the information obtained during the discussions, the lead examiners are not in a position to evaluate the second proposition, since the level of priority given to cases by prosecutors is largely subjective and thus not readily assessable. On the other hand, the last three propositions appeared to be supported, and hence are discussed below in this report.

### **b. Evidentiary Thresholds**

#### *i. Prosecutions*

75. The Japanese criminal justice process demands a very high level of proof in order to initiate a prosecution. This burden, which is not provided in the Criminal Procedure Code, has been described as “proof beyond a reasonable doubt”—the level of proof reserved in most other legal systems for a conviction.<sup>23</sup> During the Phase 2*bis* on-site visit, a representative described the burden as “a high probability that prosecution will lead to a conviction”. Although this burden seems high in comparison to other legal systems, certain other features of the Japanese legal system help to put it in context. For instance, the Japanese legal system employs the principle of “monopolisation of prosecution”, which means that public prosecutors have the exclusive power and responsibility to decide whether to prosecute a

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<sup>23</sup> See: “Criminal Justice in Japan” [United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI), 2005]

case. There is thus no layer of non-prosecutorial decision-making, such as a Grand Jury or a preliminary hearing, for the purpose of weighing the sufficiency of the evidence to order a trial. Thus, under the Japanese system, there is a heavier responsibility on prosecutors to ensure that a case is not prosecuted unless a conviction is almost certain. Indeed, at the Phase 2 on-site visit, a representative of the Japan Federation of Bar Associations stated that the failure to convict in Japan is perceived as very shameful. The following citation expands on this point:

*The cost of an acquittal weighs heavily in the calculus of Japanese prosecutors, for they are harshly criticised—by the public and by the organisation—for acquittals. Indeed, even partial acquittals in minor theft or assault cases generate media headlines and public fury about the procuracy’s “sloppy investigations”.*<sup>24</sup>

76. There are also other factors that might help to explain why the burden of proof for initiating prosecutions is in practice so high. For instance, since article 40 of the Japanese Constitution provides persons with the right to sue the State where they have been acquitted after being detained or confined, the investigative authorities might be unlikely to arrest a suspect unless practically certain of a conviction. Another deterrent might be the high rate of suicide amongst defendants in Japan. However, research on these propositions does not appear to have been undertaken, and thus they are entirely conjectural.

77. In any case, the ability of Japanese prosecutors to convict almost all offenders they charge has been credited as one of the primary reasons for Japan’s post-war crime control success.<sup>25</sup> This is a fundamental principle of the Japanese criminal legal system, and is part and parcel of the uniquely Japanese view of crime and punishment. In light of the principle of “functional equivalence” under the Convention, pursuant to which Parties must not be required to change fundamental principles of their legal systems, various ways for enhancing the effectiveness of the investigation of foreign bribery offences within the limits of the Japanese legal system were explored at the Phase 2*bis* on-site visit.

#### *ii. Use of Non-Compulsory Investigative Measures*

78. The Phase 2*bis* on-site visit examined the evidentiary thresholds necessary for the three following investigative steps: (i) search and seizure of financial and company records; (ii) interview of witnesses; and (iii) requesting MLA. With respect to MLA, the Working Group urged Japan in Phase 2 to make use of MLA at the non-filed investigation stage. As in most other legal systems, compulsory measures such as search and seizure or MLA requests for compulsory measures cannot be undertaken on the basis of rumour or an unsubstantiated media story. Before the advent of nationality jurisdiction in January 2005, in order to continue an investigation, including a non-filed investigation, the Japanese authorities needed concrete information that the foreign bribery offence had been committed in Japan. Since January 2005, concrete information that the foreign bribery offence took place abroad would also be sufficient.

79. Pursuant to article 199.2 of the Code of Criminal Procedure, an arrest warrant may be obtained from a judge where there are “sufficient reasons to suspect” that the suspect has committed an offence, and pursuant to 199.1 the warrant may be executed where there is “reason to believe that the suspect has committed the offence”. To obtain an arrest warrant, specific evidence must be presented to the judge. Pursuant to article 218, a warrant for the search and seizure of financial or company records is available where the court deems such information “necessary”. However, the Ministry of Justice explains that police or prosecutors are authorised to request voluntary disclosure of financial records pursuant to article 197.2, and theoretically the financial institution has to comply with the request. The Ministry of Justice explained

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<sup>24</sup> “The Japanese Way of Justice: Prosecuting Crime in Japan” (David T. Johnson, Oxford University Press, 2002)

<sup>25</sup> Ibid.

that sanctions are not applicable where the financial institution refuses to comply with such a request. With respect to interviewing witnesses, in Japan, subpoena power is not available during the investigation stage, and thus witnesses may only be interviewed voluntarily.

80. There are no specific rules on the evidentiary requirements that must be met in order to request MLA. Nonetheless, where compulsory measures such as the search and seizure of financial records are sought through MLA, in practice the Japanese authorities need to meet the threshold for obtaining such measures in the foreign country. The lead examiners concluded from confidential discussions with the Japanese authorities concerning the four non-filed investigations reported in Phase 2, that this is the juncture where foreign bribery investigations appear to break down in Japan.

81. As a result of discussions during the on-site visit, it was the impression of the lead examiners that Japanese prosecutors will not apply for MLA in foreign bribery cases to obtain non-compulsory investigative measures unless they can support the requests with the same level of proof that would be needed to obtain compulsory measures. Following the on-site visit, the Japanese authorities clarified that they would not base a request for MLA to obtain non-compulsory measures on the same level of evidence as for compulsory measures, but would support the request with a “certain” level of proof. They also stressed that they are reluctant to request non-compulsory measures without adequate proof because of the fear that evidence might be altered or destroyed. However, the lead examiners were not suggesting that Japan should try to obtain evidence abroad on the basis of less proof than is required by the foreign country for the investigative measure requested. Rather, they were suggesting that Japan needs to request non-compulsory measures through MLA early on in an investigation as they require a lower level of proof than for compulsory measures. Acting early on and pro-actively in this manner should reduce the risk that evidence will be altered or destroyed.

82. Meeting the level of proof required in practice in Japan to request MLA is much more difficult, if not impossible, where most of the evidence is located abroad, as is the case for foreign bribery. As a result, it will almost always be the case that Japanese prosecutors will not progress with foreign bribery cases unless they are fortunate enough to passively receive, through, for instance, a foreign MLA request, sufficient evidence to meet the level of proof that they require to request MLA themselves. The lead examiners also observed that Japanese prosecutors appear unwilling to apply non-compulsory measures domestically, such as voluntary witness interviews and requests for the voluntary disclosure of financial records in foreign bribery cases, even though there is nothing in the law preventing them from doing so, and, according to the Ministry of Justice, it is the general practice in connection with the investigations of other offences to obtain the voluntary disclosure of financial records.

83. It seems clear that in order to progress with foreign bribery cases, it is necessary to use non-compulsory investigative measures, such as voluntary witness interviews, requests for voluntary disclosure of financial records, and MLA requests for non-compulsory measures, to obtain sufficient concrete evidence to obtain further evidence through compulsory investigative measures, including abroad through MLA. In order for Japan to overcome the overriding evidentiary obstacle to the effective investigation of foreign bribery offences, the Japanese authorities need to take a more flexible approach, which addresses the unique challenge of investigating an offence where most of the evidence is located abroad.

#### **Commentary**

***84. The lead examiners recommend that Japanese prosecutors actively pursue evidence in foreign bribery cases by using non-compulsory investigative measures at the earliest possible stage, such as witness interviews and requests for the voluntary disclosure of financial records, in the absence of sufficient evidence to meet the burden of proof to obtain warrants for compulsory investigative measures. Furthermore, the lead examiners urge Japanese prosecutors to request MLA for non-***



***compulsory investigative measures in foreign bribery cases at the earliest possible stage, in the absence of sufficient evidence to meet the burden of proof to obtain compulsory investigative measures through MLA.***

*iii. Reliance on Confessions*

85. At the Phase 2 on-site visit, one district prosecutor stated that he would not prosecute a case of bribery where neither the briber nor the public official confesses. Another district prosecutor stated that he would “not necessarily decline” to prosecute a foreign bribery case without a confession. A representative of the Japanese Federation of Bar Associations explained that in order to convict, it is necessary to have a confession, wiretap evidence (note that the authority to wiretap is not available for the offence of foreign bribery) or hard proof contained, for instance, in an e-mail. Furthermore, an article written by a prosecutor from the Tokyo District Prosecutors Office<sup>26</sup>, states that in a bribery case, a confession obtained from a suspect constitutes “extremely important evidence”. He also points out that establishing the voluntary nature and credibility of a confession can be problematic, and that in bribery cases confessions obtained at the investigation stage are “often revoked by the accused, who denies the voluntary nature and credibility of the confession in court”.

86. At the Phase 2*bis* on-site visit, a representative of the Supreme Public Prosecutors Office confirmed that a confession is not necessary to prosecute foreign bribery cases as long as other hard proof is available. However, obtaining a confession is considered an important factor in building a case. A representative of the Ministry of Justice explained that prosecutors are very careful to ensure that confessions are voluntary, and that they make every effort to persuade the suspect to be truthful. He also explained that confessions are not routinely videotaped or tape recorded to ensure transparency, because there is a fear that suspects would not be as truthful if their confessions were recorded. The Japanese authorities indicated that there is disagreement concerning the need to record confessions.

87. The representative of the Supreme Public Prosecutors Office added that one of the central roles of obtaining a confession is to provide the suspect with an opportunity to be remorseful. An important feature of the Japanese criminal legal system is the focus on rehabilitating and reintegrating offenders into society. It is believed that if the offender does not confess and is not remorseful, rehabilitation and reintegration will not be successful. It is also felt that recording a confession might impede or discourage suspects from confessing and expressing remorse for their actions, because of, for instance, a fear of retaliation and of an invasion of privacy, as well as the sense of shame brought on by confessing. The Japanese authorities feel strongly that reducing the likelihood of a confession would create an impediment to effective investigations.

88. It is appreciated that the use of confessions is a fundamental feature of the Japanese legal system, and that it serves important criminal and social justice objectives in Japan. It is therefore not suggested that Japan should change this fundamental feature in relation to foreign bribery or any other offence. However, it is suggested that the effectiveness of confessions may not be uniform for different offences, and that, in the absence of filed investigations and prosecutions of foreign bribery offences in Japan, it is not clear whether relying on confessions inhibits or facilitates foreign bribery investigations and prosecutions.

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<sup>26</sup> See: “Investigation of Corruption in Japan” (Tamotsu Hasegawa, Public Prosecutor, Tokyo District Prosecutors Office, August 1999).

### Commentary

89. *The lead examiners recommend follow-up of the use of confessions in foreign bribery investigations and prosecutions, as well as whether there are any particular difficulties in establishing the voluntariness of confessions in foreign bribery cases at trial.*

#### **4. Role of Police in Foreign Bribery Investigations**

90. In Phase 2 the Working Group recommended that Japan increase coordination between the prosecutorial authorities and the police in the investigation of foreign bribery cases. This recommendation was made in response to the finding of the Working Group that the police were not involved or consulted in any of the four non-filed investigations reported in Phase 2. The situation in this respect had not changed by the time of the Phase 2*bis* on-site visit, which is notable considering that it is contrary to the general practice for other offences.

91. According to the Ministry of Justice, the majority of offences are detected and investigated by the police and referred to public prosecutors later. This rule also applies to domestic bribery cases. For instance, in 2004, of the 313 domestic bribery cases investigated, 232 were initially investigated by the police and later transferred to prosecutors, and 81 cases were initially investigated by prosecutors. Although public prosecutors have the authority to investigate offences other than those referred to them by the police, including economic crimes such as the bribery of foreign public officials, public prosecutors normally receive cases in a passive manner. When the police conduct an investigation which is later referred to prosecutors, the investigation is conducted collaboratively between the police and prosecutors. In addition, public prosecutors can involve the police in investigations initiated by prosecutors. A representative of a District Public Prosecutors Office stated that the police have much more manpower than the public prosecutors' offices for investigating offences and that prosecutors involve the police in investigations where appropriate.

92. Questions were therefore raised at the Phase 2*bis* on-site visit about why the police, especially given that they have much more manpower for investigating cases, were not involved in any of the four non-filed investigations. The Japanese authorities explained that generally speaking, there was no need to involve the police in the investigations, including for manpower reasons. However, in light of the need to obtain evidence as quickly as possible to meet the previous three-year statute of limitations, there does not appear to be any persuasive reason for not having involved the police. In addition, it did not appear that the National Police Agency (NPA) had been informed by the Ministry of Justice or prosecutors about proactive steps being taken by the Ministry of Justice to obtain evidence concerning another case that had been publicly reported, and regarding which it might have been assumed that the police were considering whether to investigate. This lack of coordination might be a procedural impediment to the effective investigation of foreign bribery cases.

93. Moreover, inadequate communication was also observed on the part of the NPA, which, it was learned at the Phase 2*bis* on-site visit, was aware of certain ongoing "preliminary enquiries" by police departments or prefectures, which "may lead to the filing of foreign bribery investigations". The police do not, as a rule, share information with public prosecutors, unless necessary once a certain level of evidence has been collected. Nevertheless, it seems indicative of a lack of coordination on foreign bribery cases that the NPA, in light of the well-known negative findings of the Working Group in Phase 2 about the level of enforcement activity in Japan regarding foreign bribery, did not at the very least inform the Ministry of Justice and relevant public prosecutors' offices about the existence of these preliminary enquiries.

### Commentary

94. *The lead examiners recommend that coordination and communication be increased between the public prosecutors' offices and the National Police Agency concerning the foreign bribery offence, for the purpose of ensuring an effective flow of information between police and prosecutors about ongoing and potential foreign bribery enquiries or investigations. In addition, it is recommended that the public prosecutors' offices give serious consideration to involving the police in foreign bribery investigations where the cases are not referred to prosecutors by the police, given that the police have much more manpower for investigating offences.*

#### **5. Need for Broader Investigative Measures**

##### **a. Generally**

95. In light of the very high level of proof in Japan to initiate a prosecution, the Phase 2*bis* on-site visit examined whether investigative powers for the offence of bribing a foreign public official are sufficiently broad. In particular, it was noted that wiretapping, granting immunity from prosecution for cooperating witnesses, and the power to subpoena witnesses during investigations, are not available for foreign bribery investigations, and, indeed, the latter two powers are not available for any offence in Japan. Although access to these powers might not be critical in criminal legal systems where the level of proof to prosecute is "probable cause", in Japan, where the burden of proof to prosecute is almost certainty of conviction, these powers could be extremely important for the purpose of securing enough hard evidence to prosecute. The Phase 2*bis* on-site visit devoted some time to discussing the potential use of wire-tapping and grants of immunity from prosecution in foreign bribery investigations. These discussions coincided with the Ministry of Justice's ongoing research on how to increase the effectiveness of investigative measures.

##### **b. Wire-Tapping**

96. The offence of bribing a foreign public official under the UCPL does not belong to the limited list of offences for which wire-tapping is available in Japan. This is largely due to the severe opposition in Japan to this form of privacy interference. The Ministry of Justice explained that the wire-tapping law, which was passed in 1999, took almost three years to pass in the Diet due to such opposition. In the end, the law that was passed was much narrower than what was initially proposed, covering essentially four types of crimes: murder, drug crimes, the illegal smuggling of firearms, and the smuggling of persons.

97. A prosecutor from a District Public Prosecutors Office questioned whether wire-tapping would be useful in bribery cases. He feels that due to the time that would normally have passed between the occurrence of the bribery transaction and the placement of the wiretap, use of this power would not necessarily be effective. However, this reasoning does not appear to take into account that bribery transactions usually involve several discrete steps, from the making of the offer or promise, to the actual transfer of the bribe. Negotiations over the bribe price, as well as the means of transferring it, would take place over time also. Furthermore, the payment of a bribe might occur in instalments, or further bribes might be paid regarding continuing business transactions.

### c. Grants of Immunity from Prosecution

98. At the Phase 2 on-site visit, two district prosecutors stated that it is difficult to obtain a confession in bribery cases due to the absence of immunity from prosecution for informants. Similarly, an academic paper issued by the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI),<sup>27</sup> states that since recently corruption investigations have tended to become more difficult (*i.e.* it is more difficult to obtain confessions), Japan should consider introducing new investigative techniques, such as the discretionary power to grant immunity under appropriate circumstances, for example in exchange for information permitting a prosecution of other parties. This opinion is echoed by the author of a book published in 2002 on the prosecution of crime in Japan, wherein it is stated that by prohibiting practices such as grants of immunity, Japanese law is highly disabling of prosecutors' interests.<sup>28</sup>

99. The Ministry of Justice explained that in Japan there is a division of opinion on whether it is ethical to grant immunity from prosecution in exchange for evidence. Any attempt to expand investigative powers in this direction has been opposed by certain groups.

#### Commentary

**100. *The lead examiners recommend that the ongoing research by the Ministry of Justice on how to increase the effectiveness of investigative measures, specifically include consideration of the foreign bribery offence, in particular regarding the potential use of wire-tapping and grants of immunity. The lead examiners further recommend that the Ministry of Justice bear in mind that because most of the evidence in foreign bribery cases is available abroad, it may be difficult to secure adequate evidence for prosecution in the absence of greater investigative powers.***

### 6. Effect of Placement of Foreign Bribery Offence in UCPL

101. The February 2004 report of the Consultative Committee (*i.e.* the Subcommittee on Corporate Activities related to International Business Transactions, Trade and Economic Cooperation Committee, Industrial Structure Council)<sup>29</sup> recommended a "continuous study" on the appropriateness of the placement of the foreign bribery offence in the UCPL, given that the offence would apply to bribes that do not affect the domestic market following the introduction of nationality jurisdiction in January 2005. The Working Group recommended follow-up of this study in Phase 2, and that Japan report the findings of the study to the Working Group. At the Phase 2*bis* on-site visit, the lead examiners followed-up on whether the Consultative Committee had progressed with the study. In addition, they explored a number of potential issues raised by the placement of the foreign bribery offence in the UCPL, and in particular whether these could have contributed to the absence of formal investigations and prosecutions.

102. The Consultative Committee has not undertaken the "continuous study" that it recommended in its February 2004 report, having decided since then that the purpose of the UCPL is broad enough to cover

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<sup>27</sup> "Investigation against Corruption by Public Prosecutors in Japan" (Prof. Yuichiro Tachi, 22-24 January 2003, ICAC-Interpol Conference).

<sup>28</sup> See: "The Japanese Way of Justice: Prosecuting Crime in Japan (David T. Johnson, 2002, Oxford University Press). The entire quote is: "For ordinary crimes like larceny and assault, the law is highly enabling of prosecutors' interests, but for corruption and other white-collar offences, the law disables prosecutors' interests by forbidding or restricting practices that prosecutors in other countries—especially the United States—consider essential. The most important of these practices are subpoenas, wiretaps, undercover operations and grants of immunity".

<sup>29</sup> "The Report of Measures for the Effective Prevention of Bribery of Foreign Public Officials".

the bribery of foreign public officials that affects the international market. Article 1 of the UCPL states that the purpose of the UCPL “is to contribute to the sound development of the national economy by providing measures, etc. for prevention of unfair competition and compensation for damage caused by unfair competition in order to ensure fair competition among enterprisers and accurate implementation of international agreements related thereto”. It is now the position of the Consultative Committee that the foreign bribery offence is appropriately placed in the UCPL because: (i) article 1 refers to the accurate implementation of international agreements; and (ii) the main purpose of establishing the foreign bribery offence is to ensure fair competition. However, despite the reference to international agreements, the language of article 1 of the UCPL puts overriding emphasis on combating unfair competition that would harm the Japanese market (*i.e.* the overriding purpose of the UCPL is to “contribute to the sound development of the national economy”).

103. The reference to international agreements in article 1 originally related to the Paris Convention and its special agreement, the Madrid Agreement, which establish the protection of industrial property through the use of registration marks.<sup>30</sup> Since then, another international agreement, in addition to the Convention, has been implemented through the UCPL--the TRIPS Agreement<sup>31</sup>--which concerns the protection of intellectual property rights. Thus out of the four international instruments implemented by the UCPL, the Convention stands out as the only one not directed at intellectual property protections.

104. Since the Japanese Penal Code contains virtually all the basic corruption-related offences,<sup>32</sup> it would appear to be more appropriate to provide the foreign bribery offence in the Penal Code. For instance, Japan relies to a large extent on case law on the domestic bribery offence as supporting authority for the interpretation of certain elements of the foreign bribery offence. In addition, it seems fair to assume that placement of the foreign bribery offence with other corruption-related offences in the Penal Code would give more prominence to the offence than placing it in the UCPL, where it seems buried amongst other offences dealing with intellectual property protections. The Ministry of Justice explained that, in its view, placement of the foreign bribery offence in the UCPL does not reduce its priority, and this opinion was shared by other participants at the on-site visit, including a representative of the Tokyo District Public Prosecutors Office. Nevertheless, although the intent of placing the foreign bribery offence might not have been to reduce its priority, it seems that the impact might be otherwise.

105. Another concern is the low level of law enforcement activity under the UCPL in general, which might have a negative effect on the enforcement of the foreign bribery offence. For instance, in Phase 2 the National Police Agency indicated that it had only coordinated two cases under the UCPL in the three years preceding the Phase 2 on-site visit. According to statistics on the number of UCPL violations prosecuted from 1980 to 2002, the number of prosecutions ranged from zero in 1997 and 1998 to 37 in 2002. The average number of prosecutions under the UCPL per year was 15 during this period. For the year 2004, the total number of cases investigated was 2.18 million, of which 1.27 million were Penal Code offences and 908 353 were special law offences (*i.e.* offences under statutes other than the Penal Code). Of the special law offences, only 47 were cases under the UCPL.

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<sup>30</sup> “Outline and Practices of Japanese Unfair Competition Prevention Law” (Masayasu Ishida, Japanese Patent Office, 1999).

<sup>31</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights.

<sup>32</sup> For example: article 193 (abuse of authority by police officer), article 194 (abuse of authority by special public officer), article 195 (violence and cruelty by special public officer), article 196 (aggravation of the above two articles), article 197 (acceptance of bribes, advance acceptance of bribes), article 197(2) (bribes to third persons), article 197(3) (bribery for dishonest acts, subsequent bribery), article 197(4) (receiving bribes for exertion of influence), article 197(5) (confiscation of bribes and collection of monetary equipment), and article 198 (giving bribes).

106. One of the consequences of placing the foreign bribery offence in the UCPL is that its implementation is mainly the responsibility of the Ministry of Economy, Trade and Industry (METI), as opposed to the Ministry of Justice, which has responsibility for the Penal Code. On the surface, this might appear counterintuitive, since the overall goal of METI is to promote trade and industry. But even digging deeper does not disclose a good rationale for placing the foreign bribery offence in the UCPL and thus under the responsibility of METI. In fact, METI has so far made minimal efforts to publicise its responsibility for the foreign bribery offence. For instance, the 18-page “Key Policies” document for METI in 2006<sup>33</sup> does not refer to METI’s role in fighting the bribery of foreign public officials. The English version of the METI Guidelines is available on the METI website. However, although implementation of the foreign bribery offence is under the direct responsibility of METI’s Intellectual Property Policy Office, a search under this heading on METI’s website does not yield any information about the foreign bribery offence. Following the on-site visit, the Japanese authorities indicated that work has commenced on providing information in Japanese about the foreign bribery offence on the METI website.

107. As the Ministry responsible for implementation of the Convention, METI has issued interpretive guidelines (METI Guidelines) on the foreign bribery offence, which, as discussed earlier in this Report, contain certain potentially misleading information. METI did not consult the Ministry of Justice or prosecutors concerning these interpretations. METI has undertaken to consult with the Ministry of Justice and prosecutors about ongoing revisions to the METI Guidelines, which are due to be completed in April or May of this year. However, given that the METI Guidelines provide interpretations of laws upon which companies will rely, and that relying on misleading information could potentially have a negative impact on the investigation and prosecution of the foreign bribery offence, it seems critical for the Ministry of Justice to be involved throughout this process. In any case, if the foreign bribery offence were established in the Penal Code, the need to consult with the Ministry of Justice would not be an issue.

108. The Japanese authorities indicate that METI is responsible for improving the anti-foreign bribery system by, for instance, revising the UCPL, and the Ministry of Justice is responsible for law enforcement aspects of the Convention, including receiving reports from police and prosecutors on investigations and prosecutions. Nevertheless, as mentioned earlier in this Report, neither ministry took responsibility for examining the reasons for the absence of investigations and prosecutions, both believing that it was the responsibility of the other ministry. It seems that this kind of confusion would be less likely to occur if the foreign bribery offence were placed in the Penal Code.

### **Commentary**

***109. The lead examiners have serious concerns that the placement of the offence of bribing a foreign public official in the UCPL as opposed to the Penal Code has in practice reduced its priority and contributed to the absence of formal investigations and prosecutions. The lead examiners therefore recommend that Japan enhance the visibility and enforcement of the foreign bribery offence as a matter of priority, notably by moving the foreign bribery offence to the Penal Code.***

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<sup>33</sup> “FY 2006 Economic and Industrial Policy: Key Points” (see METI website at: <http://www.meti.go.jp/English>)

### III. RECOMMENDATIONS OF WORKING GROUP

#### 1. Main Findings of the Working Group

Pursuant to the Phase 2 Recommendations of the Working Group, the purpose of the Phase *2bis* on-site visit to Japan in February 2006 was to review efforts that have been made to investigate and prosecute foreign bribery cases, due to the finding of the Working Group in Phase 2 (January 2005) that Japan had not demonstrated sufficient efforts to enforce the offence of bribing a foreign public official. In order to make the assessment mandated by the Phase 2 Recommendations, the Phase *2bis* examination of Japan focused on three main issues: (i) the level of Japan's co-operation in the Phase *2bis* examination; (ii) the level of concern by the Japanese authorities regarding the absence of formal investigations and prosecutions; and (iii) the factors contributing to the absence of formal investigations and prosecutions. The main findings of the Working Group are as follows:

1. Japan made fully satisfactory efforts to co-operate in the Phase *2bis* on-site visit, including through the level of participation and disclosure of relevant information, including disclosure, within the limits of Japanese laws on confidentiality, of non-identifying information regarding the non-filed investigations reported in January 2005.

2. Japan made progress in strengthening the legal framework for fighting the bribery of foreign public officials, in particular through legislative amendments to increase the statute of limitations in respect of natural and legal persons for the foreign bribery offence, and the establishment of an enhanced false accounting penalty under the Securities and Exchange Law. In addition, in light of the longstanding concern of the Working Group about the current tax treatment of bribe payments in the Special Taxation Measures Law, the passage of the Bill to amend the Corporation Tax Law and Income Tax Law to expressly deny tax deductions for bribe payments to foreign public officials in all circumstances is a significant step. Revisions of the Ministry of Economy, Trade and Industry (METI) Guidelines to remove certain unclear and potentially misleading information about the foreign bribery offence, and the Cabinet Order specifying that the new Whistleblower Protection Act applies to offences under the UCPL, are also important steps. However, the legislative framework for fighting foreign bribery requires further strengthening in order to ensure full compliance with the relevant Phase 2 Recommendations. In addition, the Working Group has serious concerns that the placement of the offence of bribing a foreign public official in the UCPL as opposed to the Penal Code has in practice reduced its priority and contributed to the absence of formal investigations and prosecutions.

3. The Japanese authorities made reasonable efforts to raise the awareness of the relevant authorities, including police and prosecutors, of the application, since January 2005, of nationality jurisdiction to the foreign bribery offence under the UCPL. Otherwise, the Working Group is not persuaded that Japan's legislative framework is adequate for applying nationality jurisdiction to legal persons for the foreign bribery offence, given that nationality jurisdiction does not expressly apply to legal persons for the offence and that there are no precedents for such an application in respect of any other offences.

4. Despite the continuing absence of formal investigations and prosecutions seven years after the foreign bribery offence came into force, Japan has not made a serious effort to act on the Phase 2 Recommendation of the Working Group to assess as a priority the impediments to the effective investigation and prosecution of the offence of bribing a foreign public official. It is particularly regrettable that the Japanese authorities were not motivated to do so under the circumstances of an impending Phase *2bis* on-site visit. Given the foregoing and that neither METI nor the Ministry of Justice consider such an assessment their responsibility, as well as that the Ministry of Justice has informally concluded that there

are no issues or problems to be resolved, serious doubts continue about the level of Japan's commitment to the effective implementation of the Convention.

5. Moreover, based on confidential discussions with the Japanese authorities concerning the non-filed investigations reported in Phase 2 and responses to questions of the lead examiners regarding other possible allegations, it is the finding of the lead examiners that before the Phase 2 examination in January 2005, the Japanese authorities took a passive approach to foreign bribery allegations, and since January 2005, efforts may have increased, but certainly not to a sufficient degree.

## **2. Recommendations of the Working Group**

### ***a. Recommendations to Japan***

6. The Working Group recommends that Japan should be proactive in investigating allegations of foreign bribery, with the goals of advancing investigations and bringing prosecutions, and recommends the following specific measures be taken to actively pursue evidence in foreign bribery cases involving Japanese interests:

- (a) use non-compulsory investigative measures at the earliest possible stage, such as witness interviews and requests for the voluntary disclosure of financial records, including in the absence of sufficient evidence to meet the burden of proof to obtain warrants for compulsory investigative measures;
- (b) seek mutual legal assistance at the earliest possible stage to obtain non-compulsory investigative measures, including in the absence of sufficient evidence to meet the burden of proof to obtain warrants for compulsory investigative measures
- (c) increase coordination and communication between the public prosecutors' offices and the National Police Agency concerning the foreign bribery offence, for the purpose of ensuring an effective flow of information between police and prosecutors about ongoing and potential foreign bribery enquiries or investigations, as well as seriously consider increasing the involvement of the police in foreign bribery investigations, including where the cases are not referred to prosecutors by the police; and
- (d) specifically include in the ongoing research by the Ministry of Justice on how to increase the effectiveness of investigative measures, consideration of the foreign bribery offence, in particular regarding the potential use of wire-tapping and grants of immunity, bearing in mind that because most of the evidence in foreign bribery cases is available abroad, it may be difficult to secure adequate evidence for prosecution in the absence of greater investigative powers.

7. The Working Group recommends that Japan urgently co-ordinate and undertake an objective assessment of the legal and procedural impediments to the effective investigation and prosecution of the offence of bribing a foreign public official in Japan, and present in writing the findings of the assessment to the Working Group within six months of the Phase 2*bis* examination in the Working Group. In making this assessment, the Working Group recommends that the Japanese authorities, in consultation with appropriate members of civil society, assess possible impediments and give full consideration to the findings and recommendations in the Phase 2 and Phase 2*bis* reports on Japan, paying particular attention to the impressions of the lead examiners regarding what could be the factors contributing to the absence of formal investigations and prosecutions, including their findings as described in the preceding paragraph.



8. In order to further strengthen the legislative framework for fighting foreign bribery, ensure full implementation of the relevant Phase 2 Recommendations, and increase the priority of the foreign bribery offence, the Working Group recommends that the Japanese authorities take the following steps:

- (a) enhance the visibility and enforcement of the foreign bribery offence as a matter of priority, notably by moving the foreign bribery offence from the UCPL to the Penal Code;
- (b) delete from the 2006 METI Guidelines the interpretation of “international business” for the purpose of the foreign bribery offence, which refers to “business repeatedly and continuously conducted” for the “purpose of profit”, and make it absolutely clear in the Guidelines that Japanese law does not permit an exception for facilitation payments;
- (c) revisit the issue identified in the Phase 2 Report regarding the standard of liability of materiality applicable to the offence of making a false statement in disclosure documents under the Securities and Exchange Law, and ensure that Japanese law fully complies with Article 8 of the Convention; and
- (d) take appropriate measures to ensure that public and private employees are aware that the Whistleblower Protection Act applies, not only to internal acts of whistle-blowing, but to acts of whistle-blowing to police and prosecutors as well.

***b. Recommendation for Follow-Up by the Working Group***

9. The Working Group recommends follow-up of the following matters as practice develops:

- (a) the application of nationality jurisdiction to legal persons for the foreign bribery offence; and
- (b) the use of confessions in foreign bribery investigations and prosecutions, as well as whether there are any particular difficulties in establishing the voluntariness of confessions in foreign bribery cases at trial.

## ANNEX

### RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP (FROM PHASE 2 REPORT ON JAPAN)

1. The Working Group appreciates the efforts made by Japan since the Phase 1 examination to amend its laws concerning and relating to the offence of bribing a foreign public official to rectify areas in which the Working Group deemed it was not in compliance with the Convention. The Working Group also acknowledges the efforts made by the Japanese authorities to translate legislation and documents throughout the examination process, and provide timely responses to the draft Phase 2 Report of the lead examiners.
2. At the December 2004 Working Group meeting, the Working Group found that the Japanese Government had failed to provide sufficient information to enable it to perform an objective assessment of Japan's implementation of the Convention, as the Japanese authorities did not disclose the existence or non-existence of any foreign bribery investigations due to a claim of secrecy. Thus, the Working Group recommended that Japan provide within 30 days non-identifying information about non-"filed" investigations of bribing foreign public officials (*i.e.* the number of such investigations opened and closed, the reasons for closing any such cases, and the legal, evidentiary, mutual assistance, and other problems encountered in such investigations). Pursuant to this recommendation, the Japanese authorities submitted limited non-identifying information about four investigations which are no longer in progress. The Working Group notes that the Japanese authorities only canvassed three major District Public Prosecutors Offices and three major Police Prefectures about the existence of non-"filed" investigations. It also notes that essentially the only information disclosed about these four investigations was that the Japanese authorities did not pursue the investigations mainly due to the absence of nationality jurisdiction for foreign bribery and because of inadequate evidence.
3. In light of the information provided during the Phase 2 review, including the follow-up information presented by Japan at the Working Group meeting of January 2005, it is the finding of the Working Group that Japan has not demonstrated sufficient efforts to enforce the offence of bribing a foreign public official. However, the Japanese authorities stated that, since nationality jurisdiction came into force in January 2005, they will now be able to pursue foreign bribery cases more aggressively.
4. In view of these circumstances, another on-site evaluation will need to take place in Japan in approximately one year for the purpose of reviewing efforts that have been made to investigate and prosecute foreign bribery cases. The on-site visit shall be approximately two to three days and shall include meetings with prosecutors, police officers and other persons and bodies deemed relevant by the lead examiners with respect to non-filed investigations reported at the January 2005 meeting, as well as new investigations. The Working Group expects that the Japanese authorities will disclose during the on-site evaluation, the concrete but non-identifying information about the nature of any problems encountered in investigating and prosecuting foreign bribery cases, as well as how the relevant laws have been applied in practice, in particular those on the establishment of nationality and territorial jurisdiction. The Working Group further expects that the Japanese authorities will provide at the on-site visit all relevant non-identifying information about "filed" as well as non-"filed" investigations, including:
  - (i) The time frame of the offences and the investigations, including the time spent investigating the cases,
  - (ii) Whether access to financial records and MLA was requested, and if not why,

- (iii) Whether suspects and witnesses were interviewed, and if not why,
  - (iv) Whether search warrants were served to obtain access to company records or other evidence, and if not why,
  - (v) Whether information was requested from the tax authorities, and if not why, and
  - (vi) How the police and prosecutors co-ordinated in the investigation.
5. The Working Group recommends that the Japanese authorities assess as a priority the impediments to effective investigation and prosecution. In this regard, based on the information provided by Japan during the January 2005 meeting, the Working Group urges Japan to make use of MLA at the non-“filed” investigation stage, increase co-ordination of the law enforcement efforts between prosecution and police, and address any difficulty encountered in establishing and enforcing territorial jurisdiction in order to enable Japan to advance non-“filed” investigations concerning foreign bribery offences.
  6. Having regard to the object and purpose of the Convention, the Working Group also recommends that the Japanese authorities assess if and how the Japanese law prevents disclosure of non-identifying information concerning the investigation and prosecution of foreign bribery offences. The Working Group stresses that such disclosure is a necessary pre-condition for an effective monitoring mechanism as provided for in article 12 of the Convention.
  7. In addition, based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Japan, the Working Group (i) makes further recommendations to Japan under Part I, and (ii) will follow-up the issues under Part II where there has been sufficient practice in Japan.

## **I. Recommendations**

### ***Recommendations for Ensuring Effective Prevention and Detection of Foreign Bribery***

8. With respect to promoting awareness of the Convention and the offence of bribing a foreign public official established in the *Unfair Competition Prevention Law* (UCPL), the Working Group recommends that Japan make efforts to increase the awareness of:
  - (i) key agencies including the Ministry of Economy, Trade and Industry (METI), Ministry of Justice, Ministry of Foreign Affairs and Ministry of Finance about the important links between foreign bribery and other areas of government activity, such as public procurement, export credit, official development assistance and anti-monopoly cases;
  - (ii) police and prosecutors through training specifically targeting the foreign bribery offence either separately or in the context of overall anti-corruption and corporate crime training;
  - (iii) agencies involved in contracting relationships with companies doing business abroad including the Japan Fair Trade Commission (JFTC), Securities and Exchange Surveillance Commission (SESC), Financial Services Agency (FSA), Japan Bank for International Co-operation (JBIC), Nippon Export and Investment Insurance Agency (NEXI), and Japan International Co-operation Agency (JICA); and
  - (iv) the legal profession. (Revised Recommendation, Paragraph I)

9. With respect to the reporting of the offence of bribing a foreign public official to the competent authorities, the Working Group recommends that Japan:
  - (a) Consider establishing, notwithstanding the secrecy provisions under the National Public Service Law and the Local Public Service Law, an obligation for all public officials; and establishing procedures requiring all employees of relevant entities including JBIC, NEXI and JICA, to report as a matter of course to the law enforcement authorities any payments suspected of being bribes to foreign public officials; (Revised Recommendation, Paragraph I)
  - (b) Establish as a matter of priority a formal system to enable METI to effectively process allegations of foreign bribery and pass them on to the law enforcement authorities, given its role as the government agency responsible for the implementation of the UCPL, which includes the foreign bribery offence, and the METI Guidelines and the resulting likelihood that it will receive allegations; (Revised Recommendation, Paragraphs I and II)
  - (c) Clarify that external auditors are required to report indications of possible illegal acts of bribery to management and, as appropriate, to corporate monitoring bodies, and consider providing an exception to the duty of confidentiality by requiring external auditors to report indications of a possible illegal act of bribery to competent authorities;<sup>34</sup> (Revised Recommendation Paragraph V.B.iii)and iv))
  - (d) In applying its legislation in the field of whistle-blowing, improve the protection of persons who report directly to the law enforcement authorities; and pursue its efforts to make such measures more widely known among companies and the general public; (Revised Recommendation, Paragraph I) and
  - (e) Consider establishing a centralised mechanism for the purpose of facilitating the sharing of information and co-ordination of investigations and prosecutions of transnational bribery cases.
10. With respect to the prevention and detection of foreign bribery through accounting requirements, external audit and internal company controls, the Working Group recommends that Japan:
  - (a) Ensure that all of the activities listed under article 8.1 of the Convention are prohibited, including the establishment of off-the-books accounts and the recording of non-existent expenditures, for the purpose of bribing foreign public officials or of hiding such bribery, and ensure the provision of effective, proportionate and dissuasive penalties for such omissions and falsifications; (Convention, Article 8) and
  - (b) Encourage the development and adoption of adequate internal company controls, including standards of conduct, and provide companies with more guidance concerning the establishment of effective internal auditing and supervisory mechanisms (including how to respond to solicitation from foreign public officials). (Revised Recommendation, Paragraph V.B.)
11. With respect to the detection and prevention of foreign bribery through money laundering legislation, the Working Group recommends that the Government of Japan encourage the *Diet* (Parliament) to pass as a matter of priority the Bill to amend the *Anti-Organised Crime Law* in order to include the proceeds of bribing a foreign public official in the definition of “crime proceeds” for the purpose of the application of the money laundering offences. (Convention, Article 7)

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<sup>34</sup> The Working Group notes that this is a general issue for many Parties.

### ***Recommendations for Ensuring Effective Prosecution and Sanctioning of Foreign Bribery Offences***

12. With respect to the implementation of the offence of bribing a foreign public official under the UCPL, the Working Group recommends that Japan:
  - (a) Through its Supreme Public Prosecutors Office, undertake an internal review of the reasons for the absence of “filed” investigations and prosecutions of foreign bribery cases; (Convention, Article 5, Revised Recommendation, Paragraphs I and II i)
  - (b) Review the interpretations of “facilitation payments” and “international business transactions” provided in the METI Guidelines and all other relevant guidance issued by the Japanese authorities including METI, to ensure that they conform to the Convention and Commentaries on the Convention and do not mislead companies about what acts are covered by the foreign bribery offence. The Working Group further recommends that METI conduct this review in consultation with the Ministry of Justice and other relevant ministries as well as with the prosecutorial authorities through the Ministry of Justice; (Convention, Article 1)
  - (c) Consider clarifying that all cases where a foreign public official directs the transmission of the benefit to a third party are covered, not just those where the official receives “in substance” the benefit; (Convention, Article 1)
  - (d) Take necessary steps to extend to an appropriate period the statute of limitations applicable to the offence of bribery of foreign public officials so as to ensure the effective prosecution of the offence; (Convention, Article 6) and
  - (e) Compile statistical information on the sanctions imposed for violations of the foreign bribery offence under the UCPL, including the confiscation of the bribe, suspension of sanctions and use of the summary procedure. (Convention, Articles 3.1 and 3.3)
13. With respect to the tax treatment of bribes to foreign public officials, the Working Group is not sufficiently satisfied that Japan is in full compliance with the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, and therefore recommends that Japan enact legislation or amend its regulations as a matter of priority to effectively prohibit the tax deductibility of any bribe payments to foreign public officials made by any individuals or companies of any size. (1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)

### **II. Follow-up by the Working Group**

14. The Working Group will follow-up the following issues once there has been sufficient practice:
  - (a) Developments in Japanese law with respect to the recommendations of the Subcommittee on Corporate Activities related to International Business Transactions, Trade and Economic Co-operation Committee, Industrial Structure Council, including the recommendation to undertake a study of the appropriateness of including the foreign bribery offence in the UCPL. It is also recommended that Japan report the findings of the study to the Working Group; (Convention, Article 1)
  - (b) Whether (i) a legal person is liable where the bribe is for the benefit of a company related to the legal person from which the bribe emanated, (ii) the liability of a legal person depends upon the conviction or punishment of the natural person who perpetrated the offence, and (iii) legal persons are subject to the new provision on nationality jurisdiction; (Convention, Article 2)

- (c) Whether the sanctions imposed pursuant to the UCPL for the foreign bribery offence as a whole are effective, proportionate and dissuasive taking into account: (i) monetary sanctions, and (ii) the application of the expected amendment to the AOCL for confiscating the proceeds of bribing a foreign public official; (Convention, Articles 3.1 and 3.3)
- (d) The anti-money laundering system focusing on: (i) the absence of coverage of some non-financial businesses and professions from the reporting requirements; (ii) the penalties for the single failure to make a “Suspicious Transaction Report” or perform customer identification; (iii) the obligation under article 239(2) of the Code of Criminal Procedure for public officials to make an “accusation” to the law enforcement authorities when they consider that there exists an offence; and (iv) the level of feedback from the law enforcement authorities concerning suspicious transactions reports made to them; (Convention, Article 7) and
- (e) The policies of agencies such as JBIC, NEXI and JICA and Japan’s public procurement authorities on dealing with applicants convicted of foreign bribery or otherwise determined to have bribed a foreign public official, to determine whether these policies are a sufficient deterrence. (Convention Article 3.2; Revised Recommendation Paragraphs II v) and VI)