



JAPAN: PHASE 2

FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS

APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED 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 10 October 2007.

TABLE OF CONTENTS

I. JAPAN: SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY	3
II. SELF-ASSESSMENT REPORT OF THE GOVERNMENT OF JAPAN	7
III. ANNEX TO SELF-ASSESSMENT REPORT – VIEWS OF EXPERTS	34
IV. WRITTEN FOLLOW-UP TO PHASE 2 REPORT	45
V. JAPAN: ADDENDUM TO THE WRITTEN FOLLOW-UP TO THE PHASE 2 REPORT	65

I. JAPAN: SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

Introduction

1. In March 2007, Japan presented two reports to the Working Group on Bribery – its Self-Assessment Report and the Phase 2 Written Follow-Up Report. These two reports, including the summary and conclusions of the Working Group, have been consolidated for publication.

Self-Assessment Report

2. The recommendation for a self-assessment by Japan was made by the Working Group on Bribery in the Phase 2bis Report (June 2006). In Phase 2bis,¹ due to continuing concerns about Japan's implementation of the Convention, in particular regarding the need for Japan to proactively pursue evidence in foreign bribery cases, the Working Group recommended that Japan urgently coordinate and undertake an objective self-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 its findings in writing to the Working Group within six months.² The Working Group also recommended that in making its assessment, Japan, in consultation with appropriate members of civil society, give full consideration to the findings and recommendations of the Working Group in Phase 2 and Phase 2bis.

3. Overall, the Working Group is satisfied that Japan has made a serious and comprehensive effort to satisfy the recommendation for an objective self-assessment. The report presents the Government of Japan's findings and conclusions on consultations with several civil society representatives, chosen on the basis of their expertise and credentials, as well as police, prosecutors and officials from the following key government bodies: Cabinet Office, National Police Agency, Financial Services Agency, Ministry of Justice, Ministry of Foreign Affairs, Ministry of Finance, and Ministry of Economy, Trade and Industry (METI).

4. Japan concludes that the most significant impediment to the effective investigation and prosecution of the offence of bribing a foreign public official in Japan is the difficulty in obtaining investigative leads, including credible whistle-blowing information. Japan also makes other important findings regarding obstacles to obtaining reliable leads, such as the need for the Japanese investigative authorities to improve their foreign language skills and knowledge of foreign legal systems. The Japanese Government also believes that a low level of awareness by the general public and the private sector of the

¹ The Phase 2bis examination, including a second on-site visit, was recommended by the Working Group in Phase 2 due to its finding that Japan had not demonstrated sufficient efforts to enforce the offence of bribing a foreign public official.

² The Self-Assessment Report by Japan was due to be presented six months following the adoption of the Phase 2bis Report in June 2006. However, for the sake of simplicity, the Working Group on Bribery decided to delay the presentation of the Self-Assessment Report until the March 2007 Working Group meetings, at which Japan was scheduled to present its Phase 2 Written Follow-Up Report.

foreign bribery offence and whistle-blowing protections could be contributing to the problem in obtaining leads.

5. With respect to investigative measures, according to the self-assessment report, since Phase 2 Japan has applied for MLA for non-compulsory measures at an early stage in two cases, and will continue to do so where appropriate, bearing in mind the need to protect the secrecy of investigations. Japan also deems it appropriate to apply non-compulsory investigative measures at an early stage, again taking into account the need to protect the secrecy of investigations. The Japanese authorities are concerned that information could be leaked if non-compulsory investigative measures are applied at an early stage, resulting in the destruction or concealment of evidence.

6. Based on its findings and conclusions, the Japanese Government makes several recommendations in the self-assessment report to enhance its information gathering mechanisms, including the following: (i) increase public awareness of the whistleblower law and the foreign bribery offence; (ii) enhance information gathering at Japanese overseas missions; (iii) promote the conclusion of bilateral MLA agreements, and utilise MLA at the earliest stage, where appropriate; (iv) actively make use of voluntary investigative measures at the earliest stage, where appropriate; (v) enhance the investigative authorities' foreign language abilities and knowledge of foreign legal systems; (vi) promote coordination between police and prosecutors, where appropriate; and (vii) continue exploring the use of immunity from prosecution and plea bargaining.

7. The Working Group endorses these recommendations, but also believes that three very important issues were not adequately considered by Japan. Most importantly, Japan has not addressed the overall concern of the Working Group in Phase 2 and Phase 2bis – *i.e.* that Japan was not sufficiently proactive in investigating and prosecuting foreign bribery cases. Secondly, the Working Group feels that the Japanese Government has not adequately considered moving the foreign bribery offence from the Unfair Competition Prevention Law (UCPL) to a separate statute, in light of the comments of certain civil society experts that this might enhance the visibility of the offence,³ and in light of the Working Group's longstanding concern that the overall mission of the Ministry of Economy, Trade and Industry (METI) (*i.e.*, promotion of foreign trade by Japanese companies) is not entirely consistent with the goal of the Convention. Thirdly, Japan has not considered whether territorial jurisdiction in Japan is adequate for covering the acts of Japanese parent companies (*e.g.*, incitement and authorisation) in relation to foreign bribery by foreign subsidiaries.

8. Moreover, the Working Group believes that the effectiveness of these recommendations could be enhanced by including the following elements: (i) targeting the media, parliamentarians, and lawyers in the awareness-raising campaign; (ii) addressing technical defects in the whistleblower law regarding acts of whistle-blowing directly to the law enforcement authorities; (iii) including Japanese overseas liaison officers in measures for enhancing information gathering abroad; and (iv) not overemphasising concerns about compromising the secrecy of investigations when considering whether to apply for early MLA or non-compulsory investigative measures, given that there is a five year statute of limitations for investigating cases of foreign bribery in Japan, and that, in any case, delays in investigating could result in the disappearance of evidence.

³ Two civil society representatives referred positively to moving the foreign bribery offence from the UCPL to a separate statute, and a third representative stated that it may be necessary to contemplate such a step or amending the UCPL if problems are not resolved despite ongoing efforts to reinforce the countermeasures under the UCPL.

Phase 2 Written Follow-Up Report

9. Japan has made significant progress since Phase 2, having implemented the majority of the Working Group's Recommendations. In particular, since Phase 2 three significant statutory amendments have been made to improve compliance with the Convention, beginning with the establishment of nationality jurisdiction over the foreign bribery offence under the UCPL in January 2005, with the result that foreign bribery offences committed abroad by Japanese nationals and officials are now covered. Secondly, the *Diet* amendments extending the statute of limitations for the foreign bribery offence from three to five years came into force in November 2005 for natural persons and January 2007 for legal persons. Thirdly, amendments to the Corporation Tax Law and Income Tax Law to expressly deny the tax deductibility of bribe payments to foreign public officials in all circumstances entered into force in April 2006.

10. Other achievements include awareness-raising of the Convention and the foreign bribery offence among key government agencies, including those involved in contracting opportunities with Japanese companies that do business abroad, as well as police and prosecutors. Japan has also made important inroads for ensuring that public officials report to the relevant authorities suspicions of foreign bribery that arise in the course of carrying out their duties, and extended the protections under the Whistleblower Protection Act to whistle-blowing offences under the UCPL, including the foreign bribery offence. Furthermore, measures for detecting foreign bribery offences through company controls have been improved. For instance, steps have been taken to clarify the reporting obligations of auditors, and the Japanese Government has been encouraging the voluntary establishment of internal controls for the purpose of preventing the bribery of foreign public officials.

11. The Working Group further identifies certain areas where recommendations have been partially implemented, calling for Japan to make further progress. These areas include the need to take concrete steps to increase coordination and communication between police and prosecutors on foreign bribery cases, and, as identified in relation to the self-assessment report, make efforts to determine whether territorial jurisdiction can be applied effectively to cases where a Japanese parent company plays some role (e.g., authorisation or incitement) in the bribery of a foreign public official abroad by a foreign subsidiary. The Working Group is also concerned that the role of METI in receiving foreign bribery allegations needs to be clarified, especially in light of new information that METI provides interpretations of the foreign bribery offence in response to inquiries. With respect to whistleblowers, the Working Group is concerned that the availability of protections under the Whistleblowers Protection Act for whistle-blowing acts directly to the law enforcement authorities is too limited.

12. In addition, the Working Group notes that the standard of materiality for fraudulent accounting offences under the Securities Exchange Law still applies, and the penalties for fraudulent accounting pursuant to the new Corporate Code are very low. With respect to the METI Guidelines on the foreign bribery offence, which are intended primarily for the private sector, the Working Group welcomes deletions and clarifications of misleading information, but notes that there remains a confusing discussion on facilitation payments.

13. The Working Group also identifies two Phase 2 Recommendations that have not been implemented. The first concerns promoting awareness of the Convention and the foreign bribery offence to the legal profession. The second concerns the application of the foreign bribery offence to cases where the bribe is transferred directly to a third party, such as a charity or political party, in accordance with an agreement between the briber and the foreign public official. Japan was recommended to clarify that such cases are covered, due to the doubts of the Japanese authorities in Phase 2 in this regard. In the written follow-up report the Japanese authorities state that it is difficult to imagine a case involving a third party beneficiary where the foreign public official and the third party beneficiary have not "colluded", or the benefit was not received in substance by the foreign public official.

14. Finally, the Working Group is satisfied that the Japanese Government has encouraged the *Diet* to pass the bill to amend the Anti-Organised Crime Law (AOCL). The bill, which amends the definition of “crime proceeds” to include the proceeds of bribing a foreign public official, was already before the Diet in Phase 2. However, since the bill has still not been passed, the unsatisfactory situation continues in Japan whereby the bribery of a foreign public official is not a predicate offence for the purpose of applying money laundering legislation.

15. In conclusion, based on the findings of the Working Group on Bribery with respect to Japan’s implementation of its Phase 2 Recommendations, the Working Group determines that Recommendations 1(i), 1(ii), 1(iii), 2(a), 2(c), 2(e), 3(b), 4, 5(a), 5(d), 5(e), and 6 have been satisfactorily implemented; Recommendations 2(b), 2(d), 3(a), 5(b), and the Recommendation in paragraph 5 of the preamble to the Phase 2 Recommendations have been partially implemented; and Recommendations 1(iv) and 5(c) have not been implemented. Moreover, the Working Group will continue to monitor the follow-up issues as practice develops.

Next Steps

16. The Working Group recommends a yearly informal meeting between the lead examiners and the Japanese authorities in the margins of the Working Group on Bribery meetings, to enable the lead examiners to assess progress by Japan in implementing the recommendations in the self-assessment report, and the Phase 2 Recommendations of the Working Group that are not yet fully implemented. These meetings will in particular review whether Japan is proactively investigating and prosecuting foreign bribery cases. The assessment of the lead examiners will be reported to the Working Group Plenary with the opportunity for further discussions.

II. SELF-ASSESSMENT REPORT OF THE GOVERNMENT OF JAPAN

Contents

Preamble	9
I. INTRODUCTION	9
1. Overview of the Self-Evaluation Process	9
a) Self-Evaluation Process: Establishment of a Task Force.....	9
b) Consultations with Civil Society	9
c) Consultations of the internal Task Force Meeting.....	10
d) Creation of the Report.....	11
2. Ensuring Objectivity	11
3. Government Institutions.....	11
4. Relations with the Council of Experts under the Ministry of Economy, Trade and Industry	12
5. Participant List.....	12
a) Civil Society Participants.....	12
b) Government Officials	12
c) Police Officers and Public Prosecutors.....	13
6) Process of Drafting the Evaluation Report.....	14
II. FINDINGS FROM CONSULTATIONS	14
1. Findings from Consultations with Civil Society.....	14
a) Criminal Procedures (including use of voluntary investigations, grants of immunity from prosecution, and coordination between police and prosecution)	14
b) Transition of Crimes Related to the Bribery of Foreign Public Officials from the UCPL to the Penal Code	15
c) Materiality applicable to the offence of making a false statement.....	15
d) Whistleblower Protection Act.....	15
e) Preventing the Bribery of Foreign Public Officials with respect to ODA	16
f) Facilitation Payments.....	16
g) Enhancing Awareness about Legislation Relevant to Crimes relating to the Bribery of Foreign Public Officials	16
h) Enhancing Information Gathering	17
i) Tax Authority/ Certified Public Tax Accountants	17
j) Strengthening the Corporate Internal Governance Structures	17
2. Findings from Consultations with Police.....	17
a) Amount of Information.....	18
b) Investigation Methods, etc.....	18
c) Prompt MLA Requests	18

3.	Findings from Consultations with Prosecutors	18
a)	Opinions regarding investigative leads	18
b)	Moving the foreign bribery offence from the Unfair Competition Prevention Law (UCPL) to the Penal Code	19
c)	Other.....	19
4.	Findings from Consultations with relevant Government Bodies.....	19
III. INTERPRETATION OF FINDINGS BY JAPANESE GOVERNMENT IN CONSULTATION WITH CIVIL SOCIETY		20
1.	Criminal Procedures (including use of voluntary investigations, grants of immunity from prosecution, and coordination between police and prosecution).....	20
2.	Other Findings	21
i)	Transition of Crimes Related to the Bribery of Foreign Public Officials from the UCPL to the Penal Code.....	21
ii)	Clarification of the Guidelines for the Prevention of Bribery of Foreign Public Officials.....	22
iii)	Materiality applicable to the offence of making a false statement.....	23
iv)	Whistleblower Protection Act	23
v)	Demining of Jurisdiction.....	24
vi)	Preventing the Bribery of Foreign Public Officials with Respect to ODA	24
vii)	Facilitation Payments	25
viii)	Enhancing Awareness about Legislation Relevant to Crimes relating to the Bribery of Foreign Public Officials.....	25
ix)	Enhancing Information Gathering.....	28
x)	Tax Authority/ Certified Public Tax Accountants.....	28
xi)	Strengthening the Corporate Internal Governance Structures.....	29
IV. CONCLUSIONS OF THE JAPANESE GOVERNMENT		30
1.	Conclusions regarding Legal and Procedural Impediments to Effective Investigation and Prosecution of Offence of Bribing a Foreign Public Official in Japan	30
a)	Information gathering.....	30
b)	Raising awareness about the foreign bribery offence, etc.....	31
c)	Different kinds of criminal procedures	32
2.	Recommendations by the Japanese Government on how to Rectify Impediments	32

Preamble

1. Pursuant to Recommendation 7 in the Phase *2bis* Report on Japan concerning the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was disclosed on 29 June 2006, that states: “The Working Group recommends 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 *2bis* 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 *2bis* 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,” the Government of Japan has carried out a self-assessment in consultation with members of civil society. The findings, their interpretation and the recommendations of the self-assessment are as follows:

I. INTRODUCTION

1. Overview of the Self-Evaluation Process

2. Based on Recommendation 7 of the aforementioned additional examination, the Government of Japan conducted an internal evaluation from September 2006 to February 2007 after undertaking consultations with external experts. An overview of that process follows.

a) Self-Evaluation Process: Establishment of a Task Force

- The Government of Japan established the Phase *2bis* examination report recommendation 7 Task Force for consideration of self-analysis (hereinafter referred to as “the Task Force”). The Task Force was comprised of people representing the following government-related organizations that are concerned with the Phase 2 report and the Phase *2bis* examination Report: The Cabinet Office, the National Police Agency, the Financial Services Agency, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Finance (as well as the National Tax Agency), and the Ministry of Economy, Trade and Industry.
- The consultations of the Task Force were held on a total of 12 occasions, including both discussions with experts and internal meetings. (Five meetings with experts and seven Task Force meetings.)

b) Consultations with Civil Society

- From November 2006 through December 2006, the Task Force held the following discussions with civil society:
 - First meeting: 9 November 2006
 - Second meeting: 17 November 2006
 - Third meeting: 1 December 2006
 - Fourth meeting: 15 December 2006
 - Fifth meeting: 18 December 2006

- In selecting people to participate as experts, the following standards were applied, and efforts were made to ensure broad representation:
 - i) To locate individuals in possession of sufficient knowledge relating to efforts to prevent the bribery of foreign public officials;
 - ii) To select experts from multiple and diverse areas of specialty; and
 - iii) To secure the participation of experts who would be representative of the concerned areas.
- Preceding the first consultation meeting, the Task Force provided the experts with the Phase 2 Japan report, the full text in both English and Japanese of the Phase *2bis* Report, explanatory material relating to relevant domestic legal structures, and related regulations concerning the Unfair Competition Prevention Law (UCPL), as well as other documents. The provision of these documents made it possible for the experts to conduct the necessary consideration of the Phase *2bis* Report.
- During the first and second rounds of consultations, the Task Force provided a detailed explanation to the experts on the Phase 2 examination and the overview of the Phase *2bis* examination, as well as recommendation 7 of the Phase *2bis* examination report. Furthermore, the methodology for the consultations was provided, including, for example, an explanation that opinions expressed by experts would be attached to this Japanese report to Recommendation 7. In addition, a question-and-answer session was held regarding the methodology to be used to conduct the consultations.
- During the consultations that took place from the third through the fifth round, the Task Force heard from the experts on their opinions, and question-and-answer sessions as well as exchange-of-opinion sessions were also held. The opinions of the experts, which were checked by the experts after the consultations, are attached to this report.

c) Consultations of the internal Task Force Meeting

- After its establishment, the Task Force met on seven separate occasions to hold internal meetings as follows:

First meeting:	28 June 2006
Second meeting:	3 August 2006
Third meeting:	4 September 2006
Fourth meeting:	19 September 2006
Fifth meeting:	22 September 2006
Sixth meeting:	16 February 2007
Seventh meeting:	16 February 2007

In addition, communications, discussions, and coordination took place on a daily basis.

- On 5 February 2007 the National Police Agency conducted a hearing at the National Police Agency Headquarters in which it heard from 11 police officers, superintendents and inspectors in charge of investigating intellectual crimes (including investigations of instances of bribes of foreign public officials) at the Prefectural Police Departments in charge of the country's major cities in order to hear their views concerning those matters that impede the investigation of crimes involving bribes of foreign public officials.

- From 31 January 2007 through 9 February 2007, the Ministry of Justice had its Criminal Affairs Bureau conduct hearings of the prosecutors assigned to each of the Special Investigation Departments at the Tokyo District Public Prosecutors Office, Osaka District Public Prosecutors Office, and Nagoya District Public Prosecutors Office on those matters that impede the investigation and prosecution of crimes involving bribes of foreign public officials. At the same time, responses pertaining to this matter were elicited in document form from the Sapporo District Public Prosecutors Office, the Fukuoka District Public Prosecutors Office, and the Hiroshima District Public Prosecutors Office.

d) Creation of the Report

3. As a result of the consultations conducted within the Task Force, as outlined in (b) and (c) above, the opinions of experts, police officials and prosecutors and the views of the Government of Japan in relation to those opinions, were gathered and compiled into this report.

2. Ensuring Objectivity

4. In order to ensure the objectivity of this self-assessment report, Japan took the following measures:

- a) As noted on pages 10 through 12, Article (5)(a), the Task Force held a total of five rounds of consultations with experts not working for the Government (comprised of members of civil society). The results of those consultations formed the basis for this self-assessment report.
- b) The Task Force consulted with police officers and prosecutors who are active on the front lines of investigative activities (pages 14 through 15, paragraph (5)(c)). The results of those consultations also formed the basis for this self-assessment report.
- c) The Task Force held consultations with the concerned representatives of various ministries and agencies within the Government and other concerned public agencies (pages 12 through 14 (5)(b)). The results of those consultations also formed the basis for this self-assessment report.
- d) After having compiled this report, the task force asked the opinions of experts on the whole report. In consequence, the opinion was that the content of the report was appropriate.

3. Government Institutions

5. The following is an outline of the various Government institutions that were represented on the Task Force and the respective roles that they played in the compilation of this report.

- Cabinet Office: Matters relating to the Whistleblower Protection Act and enhancing awareness about legislation relevant to crimes relating to the Bribery of Foreign Public Officials.
- National Police Agency: All matters dealing with items concerning investigations, enhancing awareness about legislation relevant to crimes relating to the Bribery of Foreign Public Officials, methods to enhance the structure for collecting information, and the various criminal procedures.

- Financial Services Agency: All matters relating to materiality applicable to the offence of making false statement, enhancing awareness about legislation relevant to crimes relating to the Bribery of Foreign Public Officials and strengthening corporate internal governance structures.
- Ministry of Justice: All matters relating to investigation and prosecution, enhancing awareness about legislation relevant to crimes relating to the Bribery of Foreign Public Officials, enhancing the information collection system, various criminal procedures, and matters relating to the transition of those crimes related to the bribery of foreign public officials from the UCPL to the Penal Code, and strengthening corporate internal governance structures.
- Ministry of Foreign Affairs: All matters concerning the coordination of the overall work required for the preparation of the report, coordination for the meetings of the Task Force, and coordination and arrangement of the consultations with civil society, enhancing awareness about legislation relevant to crimes relating to the Bribery of Foreign Public Officials as well as matters relating to preventing the bribery of foreign public officials in the implementation of Japan's Official Development Assistance (ODA).
- Ministry of Finance (as well as the National Tax Agency): All matters concerning Tax Authority and Certified Public Tax Accountants and enhancing awareness about legislation relevant to crimes relating to the Bribery of Foreign Public Officials.
- Ministry of Economy, Trade and Industry: All matters relating to the transition of crimes related to the bribery of foreign public officials from the UCPL to the Penal Code, as well as facilitation payment, enhancing awareness about legislation relevant to crimes relating to the Bribery of Foreign Public Officials and enhancing corporate internal governance structures.

4. Relations with the Council of Experts under the Ministry of Economy, Trade and Industry

6. The aforementioned Council had no involvement in this self-assessment report.

5. Participant List

a) Civil Society Participants

- Expert 1: Member of an NGO, expert on business ethics.
- Expert 2: University Professor, expert on ODA.
- Expert 3: University Professor, expert on criminal law.
- Expert 4: Attorney at law, member of the Japan Federation of Bar Associations.
- Expert 5: Member of Japanese trade union.
- Expert 6: Member of the Japanese Institute of Certified Public Accountants.
- Expert 7: Member of the Japan Federation of Certified Public Tax Accountants' Associations.
- Expert 8: General Manager, Legal dept. of a trading company.

b) Government Officials

Note: The following list states only the titles of Task Force attendees and does not indicate specific individuals.

Cabinet Office

Chief of Policy Planning, Policy Planning Division, Quality-of-Life Bureau
Official, Policy Planning Division, Quality-of-Life Bureau

National Police Agency

Deputy Director, Second Investigation Division, Criminal Investigation Bureau
Chief, Second Investigation Division, Criminal Investigation Bureau
Deputy Director, International Affairs Division
Senior Officer, International Affairs Division

Financial Services Agency

Chief of International Accounting Unit, Corporate Accounting and Disclosure Division, Planning and Coordination Bureau

Ministry of Justice

Senior Attorney for International Affairs, International Affairs Division, Criminal Affairs Bureau
Attorney, Criminal Affairs Bureau

Ministry of Foreign Affairs

Director, OECD Division, Economic Affairs Bureau
Special Officer, OECD Division, Economic Affairs Bureau
Official, OECD Division, Economic Affairs Bureau
Deputy Director, Aid Policy and Management Division, International Cooperation Bureau

Ministry of Finance (as well as National Tax Agency)

Official, International Organizations Division, International Bureau, Ministry of Finance
(Consultation with Section Chief, International Operations Division, Commissioner's Secretariat, National Tax Agency)

Ministry of Economy, Trade and Industry

Director, Intellectual Property Policy Office, Economic and Industrial Policy Bureau
Deputy Director, Intellectual Property Policy Office, Economic and Industrial Policy Bureau
Chief, Intellectual Property Policy Office, Economic and Industrial Policy Bureau

* Participating Agencies

General Affairs Department and Procurement Department, JICA

Policy Planning and Coordination Department and Development Assistance Strategy Department, JBIC

Planning and Administration Department, NEXI

c) Police Officers and Public Prosecutors

Police Officers

- Superintendent, Second Investigation Division, Metropolitan Police Department
- Police Inspector, Second Investigation Division, Hokkaido Prefectural Police
- Police Inspector, Second Investigation Division, Miyagi Prefectural Police
- Police Inspector, Second Investigation Division, Saitama Prefectural Police
- Police Inspector, Second Investigation Division, Chiba Prefectural Police
- Police Inspector, Second Investigation Division, Kanagawa Prefectural Police
- Police Inspector, Second Investigation Division, Aichi Prefectural Police
- Police Inspector, Second Investigation Division, Kyoto Prefectural Police
- Police Inspector, Second Investigation Division, Osaka Prefectural Police
- Police Inspector, Second Investigation Division, Hyogo Prefectural Police
- Police Inspector, Second Investigation Division, Fukuoka Prefectural Police

Public Prosecutors

- Public Prosecutor, General Affairs Department, Tokyo District Public Prosecutors Office
- Public Prosecutor, Special Investigation Department, Tokyo District Public Prosecutors Office
- Public Prosecutor, Special Investigation Department, Osaka District Public Prosecutors Office
- Public Prosecutor, Special Investigation Department, Nagoya District Public Prosecutors Office
- Public Prosecutor, Special Crime Department, Hiroshima District Public Prosecutors Office
- Public Prosecutor, Special Crime Department, Fukuoka District Public Prosecutors Office
- Public Prosecutor, Special Crime Department, Sapporo District Public Prosecutors Office

6. Process of Drafting the Evaluation Report

7. The Task Force listened to the opinions of experts, police officers, and prosecutors through consultations with experts and internal meetings, and after thoroughly taking into account these opinions, incorporated them into the Government of Japan's report.

II. FINDINGS FROM CONSULTATIONS

1. Findings from Consultations with Civil Society

8. The findings from the consultations with experts are summarized as follows (see Annex for details of each expert's opinions):

a) *Criminal Procedures (including use of voluntary investigations, grants of immunity from prosecution, and coordination between police and prosecution)*

9. Experts expressed that while they can agree with the general idea of making active use of voluntary investigations and mutual legal assistance (MLA), they noted that such measures in practice will

be difficult to carry out due to their possible interference with the secrecy of the investigations. Regarding coordination between police and prosecution, it was expressed that coordination is possible in individual cases. Regarding the relaxing of requirements for wire-tapping, questions were raised, based on factors including the need to make adjustments in wire-tapping and demands for the protection of communication privacy provided by the Constitution. Regarding grants of immunity from prosecution, experts noted that careful consideration should be given when taking into account whether or not immunity will conform to the standards of Japanese society.

10. Refer to the following for the specific opinions:

- 1: comment by Expert 3- 3.
- 2: comment by Expert 5- 2.(2)
- 3: comment by Expert 8-4.(2)

b) *Transition of Crimes Related to the Bribery of Foreign Public Officials from the UCPL to the Penal Code*

11. Experts noted that it could not be inferred that the reason there has not been a single case of prosecution is because the offence of bribing a foreign public official is provided in the UCPL and not in the Penal Code. Opinions were stated that it was not conceivable to provide the offence in the Penal Code as this could change the consciousness of nationals with regard to the bribery of foreign public officials. Furthermore, it is inappropriate to transfer these crimes to the Penal Code from the point of view of protected legal benefit and the introduction of corporate punishment. It was also conveyed that if the purpose of the transition is to enhance awareness, perhaps the creation of an independent law might be considered.

Refer to the following for the specific opinions:

- 1: comment by Expert 3- 2.(1)
- 2: comment by Expert 8- 6.
- 3: comment by Expert 1- 2.(1)
- 4: comment by Expert 5- 3.

c) *Materiality applicable to the offence of making a false statement*

12. Experts noted that Japanese auditing standards are on the same level as international standards. Other expert noted that it was found that the materiality standard is determined on the basis of whether or not general investors are affected, and therefore, as it now stands, Japan is fully capable of coping with the situation and does not need to amend the Financial Instruments and Exchange Law.

13. Refer to the following for the specific opinions:

- 1: comment by Expert 6-3.(2)
- 2: comment by Expert 5- 2.(3)

d) *Whistleblower Protection Act*

14. Experts noted that making the Whistleblower Protection Act more widely known to the general public and companies would promote accusations and reporting concerning crimes related to the bribery of foreign public officials. Experts also noted that the Whistleblower Protection Act has a limitation which states that it does not apply to those workers to whom the Japanese Labour Standards Act does not apply (i.e. the local law of overseas countries is applied).

Refer to the following for the specific opinions:

- 1: comment by Expert 6- 1.(1),(2)
- 2: comment by Expert 5- 4. (1), 6.
- 3: comment by Expert 8- 2.
- 4: comment by Expert 2-4. , 5.

e) *Preventing the Bribery of Foreign Public Officials with respect to ODA*

15. Experts expressed opinions that consultant companies not essential to ODA projects, etc., should be removed from ODA projects, and that the reasons for the involvement of various consultants in ODA projects as well as the details of the expenditure should be confirmed. Furthermore, there were also opinions expressed stating that it is rare for ODA-related foreign bribery issues to become cases in Japan.

Refer to the following for the specific opinions:

- 1: comment by Expert 4- 2.
- 2: comment by Expert 2- 3.

f) *Facilitation Payments*

16. Experts noted that global standards should be made clear on the admissibility of facilitation payments. There were also opinions stated that facilitation payments should be expressly legalized and that an information disclosure mechanism should be established. Furthermore, some experts expressed that in any case granting facilitation payments is an act that might be punished in Japan, and therefore criticism of Japan is unfounded.

Refer to the following for the specific opinions:

- 1: comment by Expert 8- 5.
- 2: comment by Expert 1- 1.(3)
- 3: comment by Expert 4- 4.
- 4: comment by Expert 3-2.(2)

g) *Enhancing Awareness about Legislation Relevant to Crimes relating to the Bribery of Foreign Public Officials*

17. Experts noted that crimes relating to the bribery of foreign public officials are not very widely known, and therefore matters such as the significance of the offence, punishment and the protection of whistleblowers should be made more widely known to companies, workers, and the general public. There were also views that companies such as trading firms that do business outside Japan have a full understanding of the offence. Furthermore, it was also stated that whistle-blowing might increase if the offence were more widely known.

Refer to the following for the specific opinions:

- 1: comment by Expert 1- 3. , 4., 5.
- 2: comment by Expert 6-1.
- 3: comment by Expert 5-1. , 4., 6.
- 4: comment by Expert 8-3.(1)

h) Enhancing Information Gathering

18. Experts noted that information gathering involves difficulties as the foreign bribery offence concerns acts which are committed overseas. Furthermore, some experts felt that the information-gathering mechanism of investigative authorities should be strengthened and that it was important to enhance awareness about the whistleblower protection system that facilitates the procurement of whistle-blowing reports. There were also opinions that investigative authorities must change their attitude toward information gathering and the filing of investigations.

Refer to the following for the specific opinions:

- 1: comment by Expert 8- 4.(1)
- 2: comment by Expert 5- 5.
- 3: comment by Expert 2- 3., 5.
- 4: comment by Expert 1- 2.(2)
- 5: comment by Expert 6-1.(2)
- 6: comment by Expert 4-1.

i) Tax Authority/ Certified Public Tax Accountants

Refer to the following for the specific opinions:

- 1: comment by Expert 4- 5.
- 2: comment by Expert 7-2., 3.

j) Strengthening the Corporate Internal Governance Structures

19. Experts stated that the internal governance for crimes related to the bribery of foreign public officials in Japanese companies is being strengthened. Furthermore, on the other hand, leaving aside internal governance structures, some experts felt that it is not necessarily the case that many companies are making serious efforts in connection with crimes relating to the bribery of foreign public officials.

Refer to the following for the specific opinions:

- 1: comment by Expert 6- 2.
- 2: comment by Expert 8-3.
- 3: comment by Expert 1-3.(2)
- 4: comment by Expert 2-4.

2. Findings from Consultations with Police

20. On 5 February 2007 the National Police Agency conducted a hearing at the National Police Agency Headquarters in which it heard from 11 police officers and superintendents, as well as inspectors in charge of investigating intellectual crimes (including investigations of instances of bribes of foreign public officials) at the Prefectural Police Departments in charge of the country's major cities in order to hear their views concerning those matters that impede the investigation of crimes involving the bribes of foreign public officials.

21. The major opinions were as follows:

a) Amount of Information

22. Companies which deal in international business are concentrated in the major cities (Tokyo, Osaka). Therefore very little intelligence relating to the bribery of foreign public officials exists in local cities.

b) Investigation Methods, etc.

23. Regarding domestic bribery cases, investigative practices are established because there are a considerable number of arrests carried out by each prefectural police department.

24. On the other hand, foreign bribery offences differ from domestic bribery cases on a number of points. For example, because the foreign public officials on the receiving end are abroad, the police are forced to rely on MLA and other measures. Furthermore, in view of the inadequate reservoir of information concerning the investigation methods of other countries, such as examples of arrests, it is necessary to explore new investigation methods.

c) Prompt MLA Requests

25. Paragraph 1, Article 18 of the UCPL provides that “No person shall give, or offer or promise to give, any money or other benefits to a foreign public officer for the purpose of having the foreign public officer act or refrain from acting in a particular way in relation to his/her duties, or having the foreign public officer use his/her position to influence another foreign public officer to act or refrain from acting in a particular way in relation to that officer’s duties, in order to obtain illicit gains in business with regard to international commercial transactions.” In filing an investigation, it is necessary to verify the facts regarding the provision and receipt of bribes as well as the authority vested in foreign public officials on the receiving end.

26. Furthermore, if the authority vested in a foreign public official is able to be verified, it is necessary not only to collect objective evidence in a foreign country but also to obtain concrete testimonies from the aforementioned foreign public official, etc. as the next step. If the aforementioned foreign public official is outside of Japan, Japanese investigative agencies will not be able to make direct inquiries into the case and will require inquiries by the investigative authorities of the other country. Such investigations will require investigative cooperation of the investigative authorities of the foreign country. In this regard, Japan should give consideration to requesting MLA at the earliest possible stage.

3. Findings from Consultations with Prosecutors

27. From 31 January 2007 through 9 February 2007, the Ministry of Justice had its Criminal Affairs Bureau conduct hearings of the prosecutors assigned to each of the Special Investigation Departments at the Tokyo District Public Prosecutors Office, Osaka District Public Prosecutors Office, and Nagoya District Public Prosecutors Office on those matters that impede the investigation and prosecution of crimes involving bribes of foreign public officials. At the same time, responses pertaining to this matter were elicited in document form from the Sapporo District Public Prosecutors Office, the Fukuoka District Public Prosecutors Office, and the Hiroshima District Public Prosecutors Office.

a) Opinions regarding investigative leads

28. The lack of leads (information) has been identified as the largest impediment to investigation and prosecution. Aside from just rumors found in the media, etc., authorities must be able to obtain credible

leads. Although in the investigation of other cases authorities are keeping an eye out for leads on foreign bribery offences, the fact of the matter is that leads are not being found.

29. The most effective lead source for the foreign bribery offence is whistle-blowing, and therefore it is believed that such measures must be made more widely known within companies.

30. With regard to information from overseas, it is believed that credible information, such as the trial results of the bribe-taking side, is valid.

b) *Moving the foreign bribery offence from the Unfair Competition Prevention Law (UCPL) to the Penal Code*

31. Opinions were expressed that transferring the foreign bribery offence to the Penal Code is not thought to enhance the visibility of the offence among the general public.

32. Furthermore, it is not believed that the investigating side will be affected depending on which law provides the offence, in terms of the difficulty of the investigation or the ease of information gathering. While there seem to be opinions in favor of providing the offence in a separate independent law, it is not believed that this will bring any benefits.

c) *Other*

33. The Working Group has singled out the use of non-compulsory investigative measures at the earliest possible stage (as well as mutual legal assistance (MLA) requests for non-compulsory investigative measures). However, if authorities turn to non-compulsory investigative measures without careful consideration, there is a high degree of risk that, due to the nature of the case, information from the investigation will leak to the suspect, or others, and, as a result, evidence will be destroyed. In this regard, it is believed that the use of non-compulsory investigative measures requires full and careful deliberation.

34. As for challenges for the prosecutorial mechanism, it is necessary to continue to make the offence of bribing a foreign public official more widely known within the Public Prosecutors Office and to foster those prosecutors with foreign language abilities. Furthermore, it is necessary to deepen their understanding of foreign legal systems, etc.

35. MLA is essential for shedding light on matters such as the flow of money overseas and the authority vested in foreign public officials. Nonetheless, there have been cases in which our overseas counterparts have responded in a less than adequate manner.

4. Findings from Consultations with relevant Government Bodies

36. Based on the discussions which were held within the divisions listed below, the Task Force conducted consultations on seven occasions as indicated in 1. (1) (c) above. The consultations culminated in the compilation of the Government's findings, which are shown in 3. below.

- Policy Planning Division, Quality-of-Life Bureau, Cabinet Office
- Second Investigation Division, Criminal Investigation Bureau, National Police Agency
- International Affairs Division, National Police Agency
- Corporate Accounting and Disclosure Division, Planning and Coordination Bureau, Financial Services Agency
- Japan Financial Intelligence Office (Financial Services Agency)
- Securities and Exchange Surveillance Commission (Financial Services Agency)

- International Affairs Division, Criminal Affairs Bureau, Ministry of Justice
- Criminal Affairs Division, Criminal Affairs Bureau, Ministry of Justice
- Director of the Legislative Division, Criminal Affairs Bureau, Ministry of Justice
- OECD Division, Economic Affairs Bureau, Ministry of Foreign Affairs
- Aid Policy and Management Division, International Cooperation Bureau, Ministry of Foreign Affairs
- Loan Aid Division, International Cooperation Bureau, Ministry of Foreign Affairs
- International Organization Division, International Bureau, Ministry of Finance
- (International Operations Division, Commissioner’s Secretariat, National Tax Agency)
- (Co-ordination Division, Commissioner’s Secretariat, National Tax Agency)
- Intellectual Property Policy Office, Economic and Industrial Policy Bureau, Ministry of Economy, Trade and Industry

III. INTERPRETATION OF FINDINGS BY JAPANESE GOVERNMENT IN CONSULTATION WITH CIVIL SOCIETY

1. Criminal Procedures (including use of voluntary investigations, grants of immunity from prosecution, and coordination between police and prosecution)

a) Views of the experts

37. Experts expressed that while they can agree with the general idea of making active use of voluntary investigations and mutual legal assistance (MLA), they noted that such measures in practice will be difficult to carry out due to their possible interference with the secrecy of the investigations. Regarding coordination between police and prosecution, it was expressed that coordination is possible in individual cases. Regarding the relaxing of requirements for wire-tapping, questions were raised, based on factors including the need to make adjustments in wire-tapping and demands for the protection of communication privacy provided by the Constitution. Regarding grants of immunity from prosecution, experts noted that careful consideration should be given when taking into account whether or not immunity will conform to the standards of Japanese society.

b) Views of the Government of Japan

- i) Regarding the use of voluntary investigative measures at the earliest possible stage, such as witness interviews and procurement of financial (bank) records, the Government intends to tell prosecutors to actively pursue these measures in cases in which they are appropriate, keeping in mind the requests to safeguard the secrecy of the investigations in order to avoid the risk of destroying incriminating evidence, which was also noted in the consultations with prosecutors.
- ii) Regarding MLA requests, Japanese prosecutorial authorities have adopted the policy to actively make use of MLA at an early non-filed investigation stage and, in fact, requested MLA for overseas investigative authorities (twice in 2006). In the future, the authorities will continue to make use of MLA at the earliest possible stage in those necessary cases. In addition, from the viewpoint of promoting MLA with countries overseas, the Government has been making progress toward the conclusion of mutual legal assistance treaties (MLAT)

with major countries and regions and, furthermore, will continue to promote cooperative arrangements with respect to individual cases.

- iii) Regarding coordination between prosecution and police, the Government believes that it is not necessary to pursue this from the initial stages for each and every case. Examples of instances in which coordination is pursued include: (a) obtaining the cooperation of the police when a case under investigation by prosecutors requires a large-scale investigation arrangement; and (b) holding preliminary consultations with prosecutors for cases in which police find it difficult to assess the evidence. The Government is also adopting mechanisms such as establishing forums at large agencies for holding regular consultations on problematic cases.
- iv) In Japan, the wire-tapping law that was formulated covers only limited types of crimes, such as organized murder and drug and firearm crimes, and moreover, imposes rigorous requirements. This was the result of debates in the Diet over whether the law would encroach upon communication secrecy, which is ensured under the Constitution. Given this background, the Government believes that it will be difficult at this stage to include the offence of bribing a foreign public official with the types of crimes covered by the wire-tapping law, or to relax the requirements for wire-tapping.
- v) Regarding immunity from prosecution and plea bargaining, the Government believes that these measures supplement the limitations of the traditional investigation method of obtaining statements through interrogation. Furthermore, the Government believes that they may turn out to be effective measures against certain crimes. On the other hand, various issues have been singled out, such as whether or not these measures will be consistent with the Japanese people's sense of justice and fairness. The Government therefore believes it will be necessary to continue to study and explore these measures from multiple angles, keeping in mind such matters as the legal systems of countries overseas and the studies and analyses of the circumstances surrounding their implementation. From this standpoint, studies are currently under way on those investigation methods, etc. adopted by other countries.

2. Other Findings

2.1. Transition of Crimes Related to the Bribery of Foreign Public Officials from the UCPL to the Penal Code

a) Views of the experts

38. Experts noted that it could not be inferred that the reason there has not been a single case of prosecution is because the offence of bribing a foreign public official is provided in the UCPL rather than in the Penal Code. Opinions were expressed that it was not conceivable to provide the offence in the Penal Code as this could change the consciousness of nationals with regard to the bribery of foreign public officials. Furthermore, it is inappropriate to transfer this offence to the Penal Code from the point of view of protected legal benefit and the introduction of corporate punishment. There were also opinions stated that if the purpose of the transition is to enhance awareness, the creation of an independent law might be considered.

b) Views of the Government of Japan

39. The UCPL establishes a sufficient legal framework for implementing the aims of the Convention in Japan, on account of the fact that – among other reasons – the aims of the Convention and the objectives

of the UCPL are in agreement, and the UCPL includes those provisions for the punishment of legal persons which are also claimed by the Convention. Moreover, harsher punishments are established for the foreign bribery offence under the UCPL than for the offence of bribing a Japanese public official under the Penal Code, therefore the Government recognizes that providing the foreign bribery offence in the UCPL has a higher level of deterrence.

40. As has been noted to date in the Phase 2 examination and the Phase *2bis* examination, a relationship of priority does not exist between the crimes provided in the Penal Code and the crimes provided in special laws excluding the Penal Code. Furthermore, there have been numerous cases in which the punishments provided in special laws have been applied. As a number of experts clearly stated, the Government does not share the understanding that providing the foreign bribery offence in the UCPL impedes the investigation and prosecution. Therefore, the Government sees no need to move the offence from the UCPL to the Penal Code.

41. In addition, while some experts have commented on the possibility of formulating an independent law on the foreign bribery offence from the viewpoint of enhancing its visibility, what is essential for enhancing the visibility of the foreign bribery offence is to continue our publicity and awareness-raising efforts. The Government does not believe that providing the offence in an independent law will enhance its visibility. Therefore, the Government has no plans to formulate an independent law concerning the foreign bribery offence. However, from the viewpoint of enhancing visibility, the Government intends to continue to make efforts to publicize and raise awareness about the offence through opportunities such as training programs and various types of meetings for law enforcement agents. (As to those measures which have been taken to enhance visibility, please refer to Page 34, ii) Increasing awareness of law enforcement agencies.)

42. As for the opinion of an expert in particular that lawyers' awareness is not broad enough, the Government intends to consult with lawyers' associations on how to enhance their awareness.

2.2. Clarification of the Guidelines for the Prevention of Bribery of Foreign Public Officials

a) Views of the experts

b) Views of the Government of Japan

43. As of January 2007, the Guidelines to Prevent the Bribery of Foreign Public Officials (METI Guidelines) have been amended as follows:

- i) Regarding the interpretation of "facilitation payments," the revised Guidelines clearly state that as long as the UCPL prerequisite is fulfilled, this will constitute the offence of bribery of foreign public officials under the UCPL, regardless of whether it is through a small facilitation payment or not.
- ii) Regarding the interpretation of "international business transactions," the description of international business as "acts concerning business repeatedly and continuously conducted for the purpose of profit," has been deleted. The revised Guidelines clarify that international business transactions include all international business activities.

2.3. Materiality applicable to the offence of making a false statement

a) Views of the experts

44. Experts noted that Japanese auditing standards are on the same level as international standards. Other expert noted that it was found that the materiality standard is determined on the basis of whether or not general investors are affected, and therefore, as it now stands, Japan is fully capable of coping with the situation and does not need to amend the Financial Instruments and Exchange Law.

b) Views of the Government of Japan

45. The Government has taken the following measures, which it considers sufficient enough to ensure the objectives of Article 8 of the Convention:

- i) In light of the Recommendations from the Phase 2 examination Report on Japan, the Financial Services Agency issued an official notice to the Japanese Institute of Certified Public Accountants dated 20 April 2005 entitled “Prevention of Bribery of Foreign Public Officials in International Business Transactions” on the following content and requested to make it known to auditors:
“For companies being audited it is illegal to act as follows: to establish off-the-books accounts, to trade off the books, to carry out inadequately identified transactions, or to record non-existent expenditures for the purpose of bribing foreign public officials or of hiding such bribery. Such acts of misconduct are subject to punishment under the Securities and Exchange Law (SEL).”
- ii) Furthermore, the Government made amendments to the law for the purpose of maintaining effectiveness, including the introduction of surcharges (an administrative measure) in addition to the criminal punishments in Article 197 of the SEL (introduced in April 2005 for registration documents and in December 2005 for ongoing disclosure documents). In so doing, administrative surcharges can now be imposed for the falsification of disclosure statements, in addition to the criminal punishments to date.

* *Amount of surcharge:* For a security registration statement containing a false statement: a percentage of the subscription or sale price; for a security report containing false statement (ongoing disclosure): either 3 million yen or 3/100,000 times the total stock market price – the higher of the two.

Moreover, a bill which enhances the penalties for the falsification of disclosure statements and raises the penalty to under ten years of imprisonment or less than 10 million yen in fines (less than 700 million yen in fines for companies) was approved in the Diet (and came into force in July 2006).

2.4. Whistleblower Protection Act

a) Views of the experts

46. Experts noted that making the Whistleblower Protection Act more widely known to the general public and companies would promote “accusations” and reporting concerning crimes related to the bribery of foreign public officials. Experts noted that the Whistleblower Protection Act has a limitation in that it does not apply to those workers to whom the Japanese Labour Standards Act does not apply (i.e. the local law of overseas countries is applied in these cases).

b) *Views of the Government of Japan*

47. The Cabinet Office made efforts to widely distribute information about the Whistleblower Protection Act through orientation sessions, symposiums, the Cabinet Office's web-site, etc., and the METI Guidelines expressly state that by specification the Whistleblower Protection Act applies to offences under the Unfair Competition Prevention Law, and that employees who report the offence of giving improper benefit to foreign public officials may receive protections under the Act.

48. The Cabinet Office and the METI shall continue to carry out efforts to make the system widely known to ensure its smooth operation through cooperation with labor and capital.

49. With regard to workers employed overseas, developed countries should actively carry out outreach activities, particularly to promote the national efforts of developing countries that are likely to be targeted. In this regard, Japan wishes to enhance its activities directed at developing countries, including capacity-building seminars. Japan intends to actively participate in efforts such as the Anti-Corruption Initiative for Asia-Pacific and other endeavors.

2.5. Demining of Jurisdiction

a) *Views of the experts*

b) *Views of the Government of Japan*

50. Through the amendment of the UCPL in 2004, a provision was newly established stipulating that a Japanese national who commits foreign bribery offences outside of Japan may be charged in Japan. Although this provision is not directly applied to legal persons, when a Japanese natural person commits foreign bribery offences, the legal person to whom the aforementioned natural person belongs is punishable, as well as the natural person, pursuant to the provisions set forth in paragraph 1 of Article 22 of the UCPL.

2.6. Preventing the Bribery of Foreign Public Officials with Respect to ODA

a) *Views of the experts*

51. Experts expressed opinions that consultant companies not essential to ODA projects, etc., should be removed from ODA projects, and that the reasons for the involvement of various consultants in ODA projects as well as the details concerning the purpose of its funds should be confirmed. Furthermore, some experts also expressed that it is rare for ODA-related foreign bribery issues to become cases in Japan.

b) *Views of the Government of Japan*

52. At present, the Ministry of Foreign Affairs, the Japan International Cooperation Agency (JICA), and the Japan Bank for International Cooperation (JBIC) each have measures to suspend a company engaged in corrupt or fraudulent practices such as bribery, conduct in violations of the Anti-monopoly Act, and bid-rigging, from participation in tenders. Naturally, if a foreign bribery offence is uncovered, the company concerned will be subject to the specific measure.

53. With regard to Japanese official development assistance (ODA) projects, the Government, JICA and JBIC carefully examine the scope of the operations that will be carried out by the consultants. The appropriate consultants for the implementation of these operations are competitively selected in principle, and the Government is not of the view that unnecessary consulting companies are involved.

54. As for the expenditure of the consultants, loan aid is provided with an obligation to repay and therefore the recipient has incentives to use such funds efficiently. This urges the recipient as well as JBIC to carry out a careful examination of the payment to the consultants to avoid unnecessary use. In the case of the utilization of technical assistance without an obligation to repay, the use of the funds is carefully examined in particular to avoid unnecessary use.

2.7. Facilitation Payments

a) Views of the experts

55. Experts noted that global standards should be made clear on the admissibility of facilitation payments. Some experts also stated that facilitation payments should be expressly legalized and that an information disclosure mechanism should be established. Furthermore, some opinions expressed that in any case the use of facilitation payments might be punished in Japan, and therefore criticism of Japan is unfounded.

b) Views of the Government of Japan

56. The Government recognizes that it is difficult to legalize facilitation payments when there is a lack of a clear definition in the treaty.

57. In Japan, the Government states that as long as the UCPL prerequisite is fulfilled, this will constitute the offence of bribery of foreign public officials under the UCPL, regardless of whether it is in the form of a facilitation payment or not.

2.8. Enhancing Awareness about Legislation Relevant to Crimes relating to the Bribery of Foreign Public Officials

a) Views of the experts

58. Experts noted that crimes related to the bribery of foreign public officials are not very widely known, and therefore matters such as the significance of the offence, punishment and the protection of whistleblowers should be made more widely known to companies, workers, and the general public. Some experts felt that companies such as trading firms that do business overseas have a full understanding of the offence. Furthermore, there were also opinions stated that whistle-blowing might increase if the offence were more widely known.

b) Views of the Government of Japan

Increasing Awareness of Company Employees

59. To date, the Government has been striving to improve the visibility of the foreign bribery offence in companies through orientation sessions of the METI Guidelines for industry associations, including the Nippon Keidanren, Japan Foreign Trade Council, Inc., and the Japan Machinery Center for Trade and Investment, as well as through the newly-created website concerning the prevention of the bribery of foreign public officials. According to a survey on the awareness of the foreign bribery offence given to companies conducting international transactions, most companies are aware of the fact that the provision of illicit gains to foreign public officials is forbidden. Furthermore, the survey shows that over three-fourths of the companies have internal provisions concerning the prevention of the bribery of foreign public officials. The Government intends to continue its efforts to make the offence more widely known through the appropriate methods of the visibility phase.

60. In October 2006 at the seminar held by the Japan Overseas Enterprises Association (JOEA), the Government of Japan gave a presentation on the measures taken by the Japanese Government as well as its efforts to prevent bribery that were included in the Phase 2*bis* examination of Japan, and strove to increase the awareness of company personnel.

Increasing Awareness of Law Enforcement Agencies

61. The National Police Agency notified all prefectural police of the purpose and content of the amendment when a provision was newly established stipulating that a Japanese national who commits a bribery offence of foreign public officials outside of Japan may be charged in Japan. In addition, the National Police Agency has been explaining the content of a foreign bribery offence as well as making it widely known through: (i) a conference held annually in April with the participation of the prefectural police heads of the divisions in charge of white-collar criminal investigations (including investigations of foreign bribery offence cases); and (ii) training held annually in April for the police (chief inspector and assistant inspector) responsible for guiding prefectural police investigators in charge of white-collar criminal investigations (including investigations of foreign bribery offence cases).

62. In August and October 2004 and in February 2006, the Ministry of Justice distributed to all prosecutors the materials that make known the content of the amendments to the Unfair Competition Prevention Law. In January 2006, detailed commentary on foreign bribery offences written by public prosecutors from the Criminal Affairs Bureau of the Ministry of Justice was published in commercial publications subscribed to by many prosecutors and public prosecutors' assistant officers. The publications included information about the establishment of a new provision introducing nationality jurisdiction, as well as information about the extension of the limitation period for prosecutions.

63. At the Ministry of Justice, public prosecutors from the International Affairs Division, Criminal Affairs Bureau of the Ministry of Justice, offer lectures on the occasion of the "General Training for Public Prosecutors" for public prosecutors who have been in their posts for approximately three to five years, as well as the "Specialized Training for Public Prosecutors" for public prosecutors who have been in their posts for approximately seven to ten years, which are held regularly every year. In these lectures, public prosecutors provide explanations on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions so that the prosecutors may familiarize themselves with the content of the amendments to the Unfair Competition Prevention Law.

64. At the National Prosecutor-Generals' Meeting, with participants from the heads of the Public Prosecutor's Offices across Japan (Supreme Public Prosecutors Office, 8 High Public Prosecutors Offices, and 50 District Public Prosecutors Offices), the amendments to the Unfair Competition Prevention Law were taken up as one of the main topics under the instruction of the Director-General of the Criminal Affairs Bureau, Ministry of Justice. In addition, the Director-General made the Convention and the amendments to the Unfair Competition Prevention Law known at a meeting of finance and economy-related public prosecutors who are in charge of the investigation and prosecution of foreign bribery offences, as well as gave instructions as to the active investigation and prosecution of foreign bribery cases. Furthermore, public prosecutors from the International Affairs Division, Criminal Affairs Bureau of the Ministry of Justice provided explanations on the findings and recommendations concerned in the Phase 2 Report and the Phase 2*bis* Report.

Implementation and Increasing Awareness of the Whistleblower Protection Act

65. The Whistleblower Protection Act (implemented in April 2006) provides those protections for employees who report the bribery of a foreign public official provided in the Unfair Competition Prevention Law to the law enforcement authorities. In addition, the Cabinet Office made efforts to widely

distribute information about the Whistleblower Protection Act through orientation sessions, symposiums, the Cabinet Office's web-site, etc.

Increasing Awareness of Officials of Overseas Establishments of the Government of Japan, Personnel of Aid Agencies and Personnel of the Export Credit Agency

66. The Ministry of Foreign Affairs carries out training, including training for the personnel of diplomatic establishments, to develop the skills for establishing appropriate contracting relationships and the measures for responding to the establishment of inappropriate contracting relationships before working in foreign countries (MOFA: every year, JICA: every month).

67. JICA is disseminating the necessary knowledge for carrying out appropriate procurement work (including the provision of measures) on the occasions of the training carried out before being posted abroad. In addition, JICA holds regular orientation sessions on procurement rules and regulations every month for consulting companies. These sessions include commentary on foreign bribery offences.

68. JBIC is making efforts to increase the awareness of all personnel with regard to foreign bribery offences through the distribution of materials (updated in July, 2005) that include a checklist for risk awareness and other useful information warning against the involvement in foreign bribery offences.

69. NEXI is making efforts to increase the awareness of its staff through such measures as revising insurance policy conditions, such as requiring declarations that staff members have neither been engaged in nor will engage in bribery in the form of a transaction (January 1, 2007), and holding orientation sessions for the staff members (December 18 & 21, 2006) so that they can familiarize themselves with the significance and the procedures of combating foreign bribery. In addition, to raise the awareness of customers, information concerning the importance of bribery countermeasures and specific further measures is being uploaded on NEXI's website (December 27, 2006).

Increasing Awareness in SESC, JAFIO, JFTC and Bar Associations

70. The SESC gives lectures on foreign bribery offences provided in the Unfair Competition Prevention Law in the training programs for its personnel, including for securities inspectors who are actually involved in inspection activities.

71. The Japan Financial Intelligence Office (JAFIO) of the FSA offers training for financial institutions so that directors and employees can increase their awareness of the importance of the suspicious transaction reporting system and the customer identification system in which the JAFIO refers to those financial transactions suspected of being involved in bribes to foreign public officials.

72. The Japan Fair Trade Commission made efforts to increase all personnel awareness of foreign bribery offences through certain measures, such as by posting on a message board the contents of the provisions pertaining to the offence included in the Convention and the Unfair Competition Prevention Law.

73. The Japan Federation of Bar Associations explains the Convention and its implementation method in the Federation's journal ("Liberty & Justice" Vol.55, No.12, issued on 1st of December 2004) and is making efforts to inform all lawyers.

2.9 Enhancing Information Gathering

a) Views of the experts

74. Experts noted that information gathering involves difficulties as the foreign bribery offence concerns acts which are committed overseas. Furthermore, there were opinions expressed that the information-gathering mechanism of investigative authorities should be strengthened and that it was important to increase awareness about the whistleblower protection system that facilitates the procurement of whistle-blowing reports. Some experts also stated that investigative authorities must change their attitude toward information gathering and the filing of investigations.

b) Views of the Government of Japan

75. Regarding the fact that Japan still has not filed investigations of foreign bribery offences, the Government accepts with sincerity the point made by the experts that the information-gathering mechanism of the authorities should be enhanced.

76. On this point, the Government believes that it is essential to enhance the visibility of the foreign bribery offence in investigative organizations, from the viewpoint of establishing the best method to effectively grasp the various investigative leads. For its part, the Government of Japan is continuing to carry out efforts toward making the offence more widely known.

77. In particular, in ensuring that information overseas is obtained, the Ministry of Foreign Affairs has issued a directive, on behalf of the Minister for Foreign Affairs, to the Japanese overseas establishments stating that information shall be obtained on foreign bribery cases. In accordance with this move, domestically, with respect to the handling of the information obtained through the Ministry of Foreign Affairs, the Ministry of Justice and the National Police Agency have been making preparations to establish a framework for discussing future policies within relevant investigative organizations in recognition of its necessity.

78. In the future, the Government hopes to be able to obtain investigative leads based on the information gathered in this manner.

79. Regarding the assignment of liaison officers overseas, we currently have attachés, or transferees from the Ministry of Justice or the National Police Agency, posted at Japanese diplomatic establishments in some 20 countries, and we believe that they are capable of fulfilling their duties by maintaining favorable relationships with the justice, prosecution, and police authorities in host countries. We would like to consider what concrete responses we can take other than those activities while continuing discussions within the Government and among relevant government agencies. In addition, we will make continued efforts to help enhance investigators' linguistic capabilities and research into those legal systems and investigation methods adopted in other countries.

2.10. Tax Authority/ Certified Public Tax Accountants

Accusation by Tax Authority

a) Views of the experts

80. Since tax authorities can grasp the flow of money that should be processed as unaccounted expenditures in the process of tax inspections, perhaps we can consider approaches in which the tax authorities refer the case to the investigation authorities at the point where the tax authorities find out the

aforementioned information, though we imagine there are issues involving the duty to maintain confidentiality.

b) *Views of the Government of Japan*

81. National Tax officials assume the special obligation of confidentiality under the Income Tax Law and the Corporation Tax Law, etc. other than general obligation under the National Civil Service Law. In addition, as for the authority of inquiry and inspection through tax examinations, the Tax Law provides that “it shall not be construed as that of investigation for crimes.”

82. Meanwhile, Article 239.2 of the Code of Criminal Procedure provides that an official of the Government or a public entity shall file an accusation when “he/she considers that there exists an offence in the course of the performance of his/her duties.”

83. As for an individual case, a decision will be made as to whether to file an accusation or not after the balanced maximum discretion is given to the possibility of a serious hindrance to the enforcement of tax law and the possibility of the existence of an offence.

Reporting by Certified Public Tax Accountants to the Law Enforcement Authorities

a) *Views of the experts*

84. In the event that any kind of fraud is detected, Certified Public Tax Accountants can give advice regarding corrective measures, but in reality, they cannot take any further steps in the course of tax accounting activities. Excluding cases in which provisions in other laws and regulations are applied — for example auditing activities in the Corporate Law — we believe, given tax accountants’ obligation of confidentiality, it will be difficult under current circumstances to connect detections of frauds in the course of tax accounting activities to investigations and prosecutions.

b) *Views of the Government of Japan*

85. Given that the Certified Public Tax Accountant Law requires a Certified Public Tax Accountant not to disclose confidential information which has come to be known in the course of the profession so as not to destroy the trust of taxpayers, maximum discretion is needed in considering the reporting by Certified Public Tax Accountants to the law enforcement authorities.

2.11. Strengthening the Corporate Internal Governance Structures

a) *Views of the experts*

86. Experts expressed opinions that the internal controls for crimes related to the bribery of foreign public officials in Japanese companies were being strengthened even further. Leaving aside internal governance structures, opinions were also expressed that companies are not necessarily making serious efforts in connection with crimes related to the bribery of foreign public officials.

b) *Views of the Government of Japan*

87. To date, the Government has been striving to improve the visibility of the foreign bribery offence in companies through orientation sessions of the METI Guidelines for industry associations, including the Nippon Keidanren, Japan Foreign Trade Council, Inc., and the Japan Machinery Center for Trade and Investment, as well as through the newly-created website concerning the prevention of the bribery of foreign public officials. According to a survey on the awareness of the foreign bribery offence given to

companies conducting international transactions, most companies are aware that the acquisition of illicit gains through foreign public officials is forbidden. Furthermore, the survey shows that over three-fourths of the companies have internal provisions concerning the prevention of the bribery of foreign public officials. The Government intends to continue efforts to make the offence more widely known through an appropriate method, in light of the visibility phase. It is difficult to force the implementation of monitoring regarding the internal controls of companies. However, we would like to consider confirming compliance and the situation of internal controls by, for example, implementing a voluntary questionnaire to the companies.

88. Under the Corporate Code put into force in May 2006, large companies (companies with ¥500 million or more of stated capital or ¥20 billion or more of liabilities as entered in the balance sheet for the latest business year) as well as companies with committees are required to decide on establishment and maintenance of their internal control systems at the board of directors (or by a resolution of directors in the case of companies without a board of directors) and disclose an outline of such decisions to shareholders in their business reports. Companies subject to these regulations are expected to administer their internal control systems in an appropriate manner suited to their respective circumstances.

89. Through the Financial Instruments and Exchange Law that was enacted in June 2006, an internal control reporting system will be introduced for listed companies from FY2008. Under this system, the assessment of managers concerned with the effectiveness of internal controls over financial reporting, as well as the auditing of the managers' assessment by certified public accountants, etc., will be required in order to ensure the reliability of financial reporting.

III. CONCLUSIONS OF THE JAPANESE GOVERNMENT

1. Conclusions regarding Legal and Procedural Impediments to Effective Investigation and Prosecution of Offence of Bribing a Foreign Public Official in Japan

90. Keeping in mind the comments of the experts, police, and prosecution in 3. above, the Japanese Government reexamined the legal and procedural impediments to the investigation and prosecution of the offence of bribing a foreign public official. As a result, the following conclusions have been derived:

a) Information gathering

91. It is believed that the largest impediment to the investigation and prosecution is the fact that sufficient information has not been obtained which would provide us with investigative leads. This point was also pointed out many times by the experts in 2. (1) above. Furthermore, this is clearly shown in the findings of the consultations with police which are noted in 2. (2) above, as well as the findings of the consultations with the prosecution, which are noted in 2. (3) above.

92. Based on the findings of the consultations that were held by the Government of Japan for this self-assessment, the following underlying circumstances have been found to be present:

- i) The information that investigative organizations come into contact with on a daily basis hardly contains any information that is sufficiently credible and that could turn out to be a lead on a foreign bribery offence, such as overseas court decision on bribery, etc.;
- ii) Credible whistle-blowing information has not been obtained;
- iii) A sufficient response cannot be obtained from counterpart countries (primarily developing countries) regarding MLA requests;
- iv) Although the investigative authorities have a considerable record of arrests in relation to domestic bribery cases, there is an inadequate reservoir of information concerning the investigation methods of other countries, such as examples of arrests; and
- v) The relevant personnel from investigative authorities have insufficient foreign language abilities and are also lacking in their understanding of foreign legal systems.

93. The Government of Japan is fully aware of the importance of enhancing the information-gathering mechanism for obtaining investigative leads. In this regard, the Government believes it is essential to pursue the following endeavors first: (i) to continue to make the foreign bribery offence more widely known to investigators; and (ii) to raise the awareness of the people of Japan, including company staff, from the standpoint of obtaining credible whistle-blowing information. Furthermore, the Government has been taking steps to gather information through Japanese overseas establishments. With regard to MLA, the Government has been making progress toward the conclusion of MLATs, as well as continuing to promote cooperative arrangements with respect to individual cases. In addition, the Government intends to make continuous efforts toward fostering foreign language abilities and researching topics such as foreign legal systems and the investigation methods of other countries with a record of arrests. The Government will also promote the exploration of other measures, such as increasing the number of attachés from investigative authorities in Japan's overseas establishments and consulting with the relevant governmental agencies.

b) *Raising awareness about the foreign bribery offence, etc.*

- a) In order to further raise the efficiency of information gathering, the Government believes that it is critical to step up its efforts and make the foreign bribery offence even more widely known to people and companies. In addition, it is necessary to create circumstances for people to find out that whistleblowers are protected from unfavorable treatment, such as dismissal, under Japanese legislation.
- b) Based on the findings of the consultations that were held by the Government of Japan for this self-assessment, the following underlying circumstances have been found to be present:
 - i) Authorities have not fully grasped the development of the internal control systems of companies and the state of implementation of internal auditing (this is interpreted to the effect that even in the absence of case examples of filed investigations, there are cases in which the bribery prevention measures of companies have been enhanced due to the strengthening of compliance and internal management systems);
 - ii) The Whistleblower Protection Law went into effect only in June 2005. Some time is needed in order to make the law fully known.
- c) As for the development of internal control for fighting against bribery in companies, experts' opinions differ. On one hand, there is opinion that the internal controls for crimes

related to the bribery of foreign public officials in Japanese companies are being strengthened even further. On the other hand, there is a view that companies are not necessarily making serious efforts in connection with crimes related to the bribery of foreign public officials. The Government intends to continue enhancing its efforts to make widely known the crime of foreign bribery through such measures as a seminar on the METI Guidelines and training sessions to familiarize people (and employees) with the relevant laws and regulations.

- d) In addition, experts have commented that people are not deeply familiar with the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the UCPL, and that it is necessary to make them more widely known, including their significance and punishments. To date, the Government of Japan has been striving to improve the visibility of the foreign bribery offence in companies through orientation sessions of the METI Guidelines for industry associations, including the Nippon Keidanren, Japan Foreign Trade Council, Inc., and the Japan Machinery Center for Trade and Investment, as well as through the newly created website concerning the prevention of the bribery of foreign public officials. The Government intends to continue its effort to make the offence more widely known through an appropriate method that is in line with the visibility phase.

c) *Different kinds of criminal procedures*

94. The Government of Japan will actively apply grants of voluntary investigations and promote coordination between police and prosecution if appropriate, as mentioned in (b) Views of the Government of Japan, Pages 25 through 26. Regarding such measures as immunity from prosecution and plea bargain, the Government will continue exploring whether or not it will apply these methods to the foreign bribery offence.

2. Recommendations by the Japanese Government on how to Rectify Impediments

1. Keeping the above-mentioned points in mind, the Government of Japan accepts with sincerity the point that the information-gathering mechanism of the authorities should be enhanced. In order to seize leads for advancing investigation and prosecution, as well as to facilitate the acquisition of sufficient evidence, the Government believes that the following steps are necessary:
 - i) To take measures to ensure that people are aware that whistleblowers are protected from unfavorable treatment such as dismissal under Japanese legislation. To this end, the Government will, with the cooperation of both workers and management, make efforts to raise awareness in order to ensure that the content of the foreign bribery offence and the whistleblower protection system are understood with greater accuracy and by more people;
 - ii) To enhance the information gathering at Japanese overseas establishments in order to improve the gathering of information from overseas. In this regard, the Government has already issued a directive in December 2006 and it will continue to call upon overseas establishments;
 - iii) To promote the conclusion of bilateral mutual legal assistance in criminal matters treaties in order to establish a mechanism that will enable the implementation of a more effective MLA. At present Japan has two treaties, one with the United States and one

with the Republic of Korea. Furthermore, Japan is currently in the negotiation process for the conclusion of MLATs with Hong Kong, China, and Russia;

- iv) To actively make use of voluntary investigative measures at the earliest possible stage when appropriate, such as through witness interviews and procurement of financial (bank) records, keeping in mind requests to safeguard the secrecy of the investigations;
 - v) To enhance the foreign language abilities and capabilities relating to foreign legal systems, etc., of the relevant personnel from investigative authorities. To this end, the Government will continue to make the foreign bribery offence more widely known to the relevant personnel from investigative authorities. In addition, it will foster the foreign language abilities of personnel, carry out research on foreign legal systems, etc.;
 - vi) To enhance information exchanges concerning the foreign bribery offence. To this end, the Government will promote coordination between police and prosecution and develop the information exchanges with experts in Japan and, above all, with non-governmental organizations (NGO); and
 - vii) To continue exploring the introduction of new investigation measures.
2. Among the opinions that were expressed in the consultations with experts, it was voiced that while efforts aimed at investigation and prosecution are also important with respect to the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, it is just as important to keep in mind the viewpoint of preventing the actual act of bribing a foreign public official. Not only are the efforts of the investor side indispensable to reducing bribery, but so are the efforts of the side receiving the investment. Therefore, Japan intends to actively engage in measures to increase the awareness of bribery and strengthen the legal system of developing countries, which are often the recipient economies by, for example, holding discussions on the methods of enhancing the companies' systems for compliance with legislation, as well as enhancing the Government's outreach activities. The Government of Japan recommends that the Working Group on Bribery should also enhance its outreach activities.
3. Lastly, there is no comparable statistical data regarding investigations, prosecutions and convictions on the foreign bribery offence. Statistical data is not the only benchmark to measure efforts made by the parties to the Convention. However, it is necessary for objective comparison among the parties to collect conviction cases and types of punishments handed out, which can be counted on as common standards.

95. In addition, it seems of significance that Japan mutually showcases and shares the experiences of best practices, such as the collection of information on crimes related to the bribery of foreign public officials, cases of successful investigations, examples of prosecution and arrests, and cases of convictions. The same line of cooperation should be promoted within the Working Group. Japan is ready to cooperate.

III. ANNEX TO SELF-ASSESSMENT REPORT - VIEWS OF EXPERTS

I. Expert 1

1. First, the OECD Anti-Bribery Convention can be appreciated as a good example of how international control by an international governmental organization over its member countries functions. Following the OECD's recommendations, Japan has made the necessary amendments to its related laws with other countries also having taken steps necessary to adjust what they were recommended to do.

2. Nevertheless, I have the impression that recently the OECD has been intervening too much in the countries' affairs. For instance, the issue of the application of nationality jurisdiction to legal persons, which is included in the latest recommendations to Japan, involves a big change of the principle of Japanese criminal law, so it goes beyond the area where the OECD could be stepping in and making a recommendation. Should this issue be examined, it needs to be dealt with care.

3. In addition, the recommendation to clarify in the MITI's Guidelines to Prevent Bribery of Foreign Public Officials in a way to show that there is no exception for facilitation payments is also a bit intrusive. I imagine this kind of recommendation was made because the language is indeed vague in the Guidelines. The position of Transparency International Japan (TI-Japan) is that while the final decision should be left to the will of the Diet, the conditions under which facilitation payments are permissible should be clearly stipulated by law, namely in the UCPL. TI-J' position differs from the position taken by Transparency International (TI), which has argued that there is absolutely no exception for facilitation payments. However, there is a cause for concern that if facilitation payments are prohibited completely, such payments will likely to go underground, and, discussions on facilitation payments will be discouraged. Companies may even cease to keep records on such payments on the ground that they are illegal payments. To eliminate such adverse effects, it would be better to legalize facilitation payments and to make companies to disclose information on their facilitation payments. This could create an atmosphere that will be conducive for discussions on their appropriateness. One idea is to introduce a system in which an employee of a Japanese company, if he or she is demanded to pay a small amount by a public official of the country, the employee, will be able report to a public organization such as Japanese embassies or consulates for the sake of justification.

4. Secondly, regarding the recommendation that the offence of bribing a foreign public official should be provided in the Penal Code, this is not within the realms of possibility because the Japanese Criminal Code does not have a provision for the punishment of legal persons. Therefore, the options are limited to one or the other, either to: 1) provide the foreign bribery offence in the Unfair Competition Prevention Law as is; or 2) establish a special criminal law concerning the offence of bribing a foreign public official as the Republic of Korea and Canada have. The merit of establishing a separate law as indicated in 2) is that the level of awareness and visibility will slightly improve compared to 1).

5. On the other hand, the position of TI-Japan is that the fundamental issues lie with the matters related to the stance taken by law enforcement authorities, notably the authority's stance toward collecting information and building a case. If the law is placed under the jurisdiction of the Ministry of Justice, perhaps we can expect to see a change in the stance of the law enforcement authorities. Otherwise, it is believed that the improvement in the level of awareness as a result of establishing the new law would hardly be of relevance.

6. Thirdly, according to a MITI's survey of 110 companies that are operating overseas businesses, in which employees of Japanese companies stationed overseas were asked whether they were familiar with the Guidelines to Prevent Bribery of Foreign Public Officials, 24% responded "Yes," and those who responded "No" had risen to 28%. Furthermore, it was found that nearly one-third of the companies do not carry out training on the offence of bribing a foreign public official. The data suggests that the offence is still not sufficiently known among Japanese companies.

7. Many of the major companies have been strengthening their internal control mechanisms. However, when it comes to the specific issue of the offence of bribing a foreign public official, it cannot be said that many companies are always addressing this issue with seriousness. It is therefore necessary to further raise the companies' sense of awareness on this issue.

8. Fourthly, another point is that the offence of bribing a foreign public official is a minor issue that is not well known among the general public. Each and every person does not necessarily have to know. However, "corruption" is an issue that is drawing international attention, for example as illustrated by the repeated use of the word in the United Nations Convention against Corruption. Nonetheless, the word "corruption" is hardly used in Japanese legal documents. It is certain that the ratification of the Convention against Corruption will lead to the use of "corruption" as a legal term. Although the government will be expected to take various steps to prevent corruption, I urge the government to take caution to ensure that the implementation of the OECD Convention does not become submerged among the many issues concerning the prevention of corruption.

9. On the part of TI-Japan, we are interested in exchanging information on this matter. As well as making a request, allow us to express our belief that it will be desirable if the government also calls upon NPOs such as ourselves and that we are able to jointly tackle this issue.

10. In response to the following questions from the Ministry of Justice: "Do you believe that the level of people's awareness toward the offence of bribing a foreign public official is low?" and "Do you believe that the chances of arrest will increase if the level of people's awareness increases?") I do not have any concrete data, but based on my personal experience, it is certain that the level of awareness among the general public is considerably low. I understand that the Ministry of Justice and the National Police Agency are also carrying out training. However, when I asked three people I know who were formerly prosecutors and are now lawyers, all of them said that they did not know about the offence of bribing a foreign public official. A low level of awareness among lawyers means that the level of awareness among the general public is naturally low. If the level of awareness toward this offence increases, the number of reports made about suspicious cases may as well increase.

II. Expert 2

1. I would like to make three comments on the government's measures for investigation and prosecution in light of my experience with official development assistance (ODA) practice and my current concentration on "Economic Development and Governance" as a university faculty member. My conclusion is that while I can fully understand the measures of Japan, it needs to be more creative in conveying how Japan is tackling this problem.

2. First, the schemes for resolving and achieving a matter vary by society. However, examinations of this type are made vis-à-vis the experiences and the socio-cultural characteristics of the principal members of the international community. Furthermore, the examinations attempt to resolve matters based on those experiences and characteristics. Because of this reality, for example, the strengths of Japanese

governance, etc., that differ from those experiences and characteristics are sometimes overlooked. Therefore, I believe the examinations must be carried out in a way that takes this point fully into account.

3. Secondly, corruption and scandal are different. Corruption always exists in Europe, the United States and Japan and becomes a scandal when it comes to light. Even in relation to ODA, the problem of bribing a foreign public official is actually quite widespread. However, in Japan it hardly escalates into an incident and is not widely taken up in newspapers and in the Diet. The exception is the bribery case involving a trading company in Mongolia, but the reason this case received wide coverage was because it related to the incident involving the Four Northern Islands. This case would probably not have made such big headlines as a problem if it only concerned Mongolia. In other words, the existence of corruption rarely comes into the open unless it becomes a scandal. Because the bribery of a foreign public official is not an issue that grabs the interest of the people, the reality may be that the issue will not come to the fore unless it becomes a scandal.

4. My third point is that Japan needs to demonstrate that it is taking vigorous steps. If the perception is that “bribery of this scale cannot be helped” and is understood and accepted, including the fact that those involved are people in important positions (people with political influence), there will be little whistleblowing and it will be difficult to carry out an investigation and build a case. When an incident like the one in Mongolia occurs, punish the criminal and teach a lesson to others. These incidents cannot be deterred unless exceptional incidents are dealt with using exceptional measures. At any rate, it is necessary to build up a record by prosecuting at least one case to send out a message.

5. (In response to the following questions from the Ministry of Justice: “Do you believe that the level of people’s awareness toward the offence of bribing a foreign public official is low?” and “Do you believe that the chances of arrest will rise if the level of people’s awareness increases?”) There are two inconsistencies regarding the level of awareness. People who have an interest in ODA believe that there is a lot of bribery going on. On the other hand, there are few people who actually have an interest in ODA. Furthermore, the public’s concern will not rise if the editor is not accepting articles that are written on this subject or nothing happens to the people in important positions (people with political influence). For example, there must be many people, including those from the same company, who have information concerning this subject and would like to report it but have nowhere to report such information. This is one problem. In addition, because there is a crackdown on whistleblowers who disclose internal information, people do not risk becoming the one who ignites an incident. However, there are many people who feel that this is not right. Therefore, once the problem receives wide coverage and draws the interest of society, there is more information being provided. As a start, it is necessary to begin by prosecuting one case.

III. Expert 3

1. When reviewing the foreign corruption statute and its function, it is necessary to follow the fundamental principles of criminal justice, namely, the doctrine that inflicting punishment should be the last resort and that due process should be strictly obeyed, while, at the same time, to give international developments proper consideration. Painstaking fact-finding is required before finding a defendant guilty of a crime, and the evidentiary standard to file a criminal charge is remarkably high here in Japan, which has attracted firm public support so far. If the recommendations of the Working Group on Bribery should include criticisms against these principles and the public support for them, it could not be accepted very easily.

2. Some specific issues can be addressed with respect to substantive laws.

a) Stipulating the provision in the Penal Code

Prohibition against bribing a foreign public official is now provided in the Unfair Competition Prevention Law (UCPL). I do not think it wise to stipulate the clause in the Penal Code instead. Codifying the crime in the UCPL has nothing to do with the fact that there has been no indictment so far. Whistle-blowers, and investigative authorities as well, would not care which statutory law the crime is prescribed in. I also doubt the wisdom of moving the clause to the Penal Code from some other perspectives. The Penal Code stipulates various crimes according to legally-protected rights and interests, and the foreign corruption would not find an appropriate place in it. The Penal Code does not have any clause to punish corporations, which will not be altered in the near future.

If the main purpose of moving the clause is to raise its visibility, however, it may be possible to stipulate the crime and its punishment in a single specific act instead of the UCPL which provides miscellaneous crimes. If the intention of the revision is to make it clear that the crime is a natural offense (*malum in se*), rather than an administrative one (*malum prohibitum*), then it will not be automatically necessary to codify the crime into the Penal Code. We already have a precedent of a specific code, that is, the Act to Punish the Environmental Crimes.

b) Guideline to Prevent Bribery of Foreign Public Officials

The Guideline published by the Ministry of Economy, Trade and Industry correctly describes the current judicial interpretation under the Japanese legal tradition, including the definition of business. It may be necessary, however, to make another translation more comprehensible to Anglo-American lawyers. Since the Guideline clearly states that criminal responsibility should not be exempted by invoking an excuse of facilitation payments, I do not believe that the Guideline needs a revision in this context.

c) Securities Exchange Act

The recommendation of the OECD also challenges the standard on material misstatement in the Act. I do not believe, however, that there is any urgent need to amend the Act in this perspective. The degree of ‘materiality’ depends upon any prejudices caused on investors, and the current definition, I think, is sufficient enough.

3. Procedural issues can also be addressed as follows.

a) Proactive use of non-compulsory investigative measures as recommended by the Working Group would not be easily objected to. Utilizing them, however, is difficult. Interviewing witnesses in these cases might lead them to team up to lie, which would, in turn, endanger the prosecution’s case. When the procedure to require public and private entities to submit relevant materials to investigative authorities is instituted, those entities are supposed to cooperate with them. However, there are no means to oblige them to. I do not believe that accounting records would be disclosed voluntarily. As to the current standard of *prima facie* case to obtain a search and seizure warrant, I do not think there is any urgent need to change the practices.

The recommendation in this respect, regrettable to say, does not seem to appreciate the Japanese criminal justice system. I think that utilizing non-compulsory measures would hardly be a solution to detect and indict these criminal activities.

- b) One can also easily come up with mutual judicial assistance, which I would have no flat objection to. I am afraid, however, that tampering with testimonial evidence might occur while the mutual judicial assistance is calling for, when, otherwise, the secrecy of the investigation would be strictly observed.
- c) Cooperation between the public prosecutors' office and the police should be fostered in general terms. The wisdom of collaboration of every single case from scratch, however, should be carefully considered. Each of them has different sizes and unique roles. It would be better for them to accumulate investigative experiences on individual cases.
- d) I think it non-feasible in foreseeable future to amend the Wiretapping Act so as to have foreign corruption crimes as the specified offenses under it and to make it easier to get the wiretap warrant, since its legislation itself had strong objections when it was enacted.
- e) The idea of granting of immunity from criminal prosecution should be advocated more than ever before, since it is getting more and more difficult to elicit voluntary statements from suspects of organized crimes. This investigative method, however, should be carefully scrutinized in light of public support and the Japanese legal tradition. The Ministry of Justice and other authorities concerned should keep on making careful and detailed research on it.

IV. Expert 4

1. First, in order to strengthen the protective functions for whistleblowers, sanctions for companies found to be in violation of laws and regulations should be strengthened in the manner that sanctions be adopted in the case of bribery of a foreign public official similar to those in the case of bid-rigging, etc., whereby companies are excluded from participating in the (tender) procedures of government agencies. I believe it is often the case that companies doing work that involves foreign government agencies are also doing work with government agencies in Japan. As such, these sanctions are a matter of "life or death" for the company. For example, one possibility is to exclude companies from doing businesses with government agencies on a discretionary basis during the indictment stage, and once companies are convicted they are excluded on a mandatory basis. Even employees must want to put a stop to their company's illegal activities they discover within the company. This may raise the question, because employees risk losing their basic foundations for living due to the company's violation of laws and regulations, whether employees may actually refrain from blowing the whistle if sanctions are reinforced. However, this is not the situation in which companies currently find themselves. These types of crimes do not happen unexpectedly. They occur as a result of neglect over a long period, without ever being rectified, treated as the attributes of the company. With companies repeatedly violating laws and regulations, employees fear that their companies will be subjected to fatal sanctions, both legally and socially. Furthermore, the employees who actually blow the whistle are often involved in these acts and they take action (blow the whistle) to prevent themselves from receiving criminal punishments or disciplinary measures at a later date. What I can say as someone who has been watching the compliance of companies is that the corporate cultures in which employees keep illegal acts secret for the sake of the company with a readiness to sacrifice themselves has largely faded in the last decade. There should be no misunderstanding about this. Needless to say, we can also expect competitors to blow the whistle if such major sanctions are imposed. The Japanese government should make this clear to respective government ministries and agencies.

2. Secondly, I believe it is necessary to monitor whether overseas activities such as ODA are being carried out by no more than the necessary number of parties. The government should strengthen its sanctions by eliminating parties involved in the offence of bribery of foreign public officials as well as bid-rigging from public tenders. With respect to ODA, it is questioned why so many consultants are needed. The Ministry of Foreign Affairs should have had a good grasp of the situation through the Japan International Cooperation Agency (JICA). Though not directly concerned with the flow of ODA funds, companies normally offer bribes through third parties, and the government should take necessary measures to eliminate such flow of bribery flow of funds. At the same time, the government should make the reasons for the consultant's existence clear, and thoroughly confirm whether the consultant's remunerations are appropriate as well as the details concerning the purpose of its funds. I will mention this again below, but I believe there is a third-party entertainment-type of bribery flow of funds involved in the local expenditures of consultants.

3. Thirdly, let me address the point of clarifying the concept of bribes. In Japan I believe the relationship between business entertaining and bribery is not very clear-cut. On many occasions bribery is offered to foreign public officials through business entertaining such as golf, and it is necessary to clarify the concept of bribes. Also, as a practical matter, while I assume that the third-party entertainment-type of bribery is included in the offence of bribing a foreign public official, I believe that this is not clear for public. I think clarification on this point is needed in informing the companies also. Furthermore, I believe items of "convenience" other than money need to be examined additionally.

4. Fourthly, given that facilitation payments are excluded from the offence of bribing a foreign public official in the United States but may possibly be subject to punishment in Japan, I question this factor that is putting Japanese companies at a disadvantage vis-à-vis the competition with US companies.

5. In addition, on how investigations can be initiated: Since tax authorities can grasp the flow of money that should be processed as unaccounted expenditures in the process of tax inspections, perhaps we can consider approaches where the tax authorities refer the case to the investigation authorities at the stage where the tax authorities find out the aforementioned information, though I imagine there are issues involving the duty to keep confidentiality.

V. Expert 5

1. Corruption is a negative aspect of economic globalization, and I recognize that it is critical to overcome and prevent it. The impression I have is that in Japan the level of awareness about the offence of bribing a foreign public official is low compared to Europe. At the OECD Meeting of Trade Union Experts, we sometimes receive comments from people saying that they cannot understand why Japan does not investigate and prosecute these cases. Yes, considering that Japan has a high number of arrests for bribery at home, it would be hard to believe that bribery of a foreign public official does not take place. Be that as it may, the government must demonstrate that it is making concerted efforts to tackle this issue.

2. In many ways the hurdles to investigation and prosecution are significant in Japan, and I believe this partly explains why it is hard to build a case on the offence of bribing a foreign public official. Although conducting a criminal investigation overseas requires both time and money, the friction between Japan and OECD on this issue will never be resolved unless Japan addresses it in light of globalization.

3. In addition, since there may be a systematic cover-up of the facts regarding a bribery of a foreign public official, it is necessary to enhance the mechanism by which the local situation is assessed and information is relayed (to investigating authorities). In doing so, while I believe that the plea bargaining system is effective to some extent looking at the cases that have been established in other countries, it is

necessary to examine whether such a system will adapt in Japan. As to wire-tapping, is it not necessary to keep in mind that the Constitution of Japan calls for the protection of communication, and furthermore, that some question whether wire-tapping is truly useful for investigating the crime of the offence of bribing a foreign public official?

4. The fact that the offence of bribing a foreign public official is provided in the Unfair Competition Prevention Law is not believed to be the primary reason behind why Japan is confronting this problem of there being no formal investigations and prosecutions in the nation. A bigger problem is the way in which Japan investigates the crimes that occur overseas. However, if problems that should be resolved are not resolved despite ongoing efforts to reinforce the countermeasures pursuant to the Unfair Competition Prevention Law, it may be necessary to explore amending the Penal Code or the ways of establishing a separate, independent law.

5. The Whistleblower Protection Act, while it contains provisions concerning bans on dismissals and unfair treatment, does not have provisions for important sections including specific cases of protection, saying that they are explained in the administrative guidelines, and is a “weak” law. It is my understanding that the Act basically does not apply to employees working overseas, excluding cases where they meet certain conditions.

6. The fact should be widely known that protection applies even to cases where people are reporting to investigating authorities. However, employees with a long work history at an overseas foreign company that would know about the existence of the offence of bribing a foreign public official, and who are part of an overseas employment relationship, will not be protected under Japanese law. Some hundred thousand employees have been transferred to overseas offices for long term in Japan. Therefore, there is this problem where these employees may not be protected under local laws in countries where laws like the Whistleblower Protection Act do not exist.

7. This is an issue which the government, employers and labor should tackle together. At the OECD Meeting of Trade Union Experts as well, I intend to take up the problems of the whistleblower protection system in Japan. However, the problems will not be made known in foreign countries or to companies unless the government also makes efforts in public relations.

8. (In response to the following questions from the Ministry of Justice: Please share with us your specific views concerning the hurdles to investigation which you describe as significant. Also, you mentioned strengthening the system of conducting overseas investigations. By this do you mean strengthening the mutual cooperation in conducting an investigation? Or do you mean that Japanese investigating authorities should directly go overseas and conduct an investigation?) I do not have expertise in the area of the Penal Code. However, I once handled a case dealing with an occupational accident that occurred overseas. I asked the overseas authorities and Japan’s overseas establishment to conduct a study, but I experienced tremendous difficulties in obtaining the findings. Based on this experience, I believe requesting overseas authorities to provide various information, alone, will entail great difficulties, and in this sense I believe there are significant hurdles to investigating authorities. Given that this also concerns other crimes, I am not suggesting that the current system should be modified immediately merely for the sake of the offence of bribing a foreign public official. What I am suggesting is that instead of simply waiting for information to be sent in from overseas, someone from the investigating authority similar in status to a liaison officer can be placed overseas, for example, and secure personnel who are knowledgeable about the local situation.

9. (In response to the following question from the Ministry of Justice: The current Whistleblower Protection Act may not protect employees sufficiently. However, to the employees who are protected under the Act, is it possible to raise their awareness about the existence of the Act as well as about the whistleblower system?) The Trade Union will make efforts to inform employees as much as possible.

However, I believe the Japanese government should strengthen its awareness-raising activities and consider a review of the Act.

VI. Expert 6

Familiarization with the relevant laws and regulations

1. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the Unfair Competition Prevention law are not thoroughly recognized in Japan in depth. Therefore, further efforts to inform the people about their significance, penalties, etc are necessary. While it is important to directly inform the people, it is just as necessary to inform the companies.

2. According to the information of the Ministry of Foreign Affairs concerning overseas prosecution cases, many were made through indictment and whistle-blowing. In order for indictments and whistle-blowing to be made, it is also important to further inform people and companies about the systems related to the protection of indicters and whistleblowers. It would be effective to inform people and companies about the Whistleblower Protection Act that entered into force in April 2006.

3. In informing companies, it is important that the information is reflected in their actions. In May 2006, the Ministry of Economy, Trade and Industry's Guidelines to Prevent Bribery of Foreign Public Officials were revised to include more concrete content, in light of the "Questionnaire on the Current Situation of the Compliance Systems of Companies and Their Efforts" and the Phase I Recommendations. However, the objective of the Guidelines is to support the voluntary and preventative approaches by companies involved in international business transactions. Investigations and prosecutions are essential, but preventive measures through internal control and informing companies about them are also important.

Internal control system

4. I recognized that the fact that no cases have been established in Japan in the past for the offence of bribing a foreign public official is presented as an issue concerning the investigations. However, it is important to take preventive measures and preventive approaches that will ensure these crimes do not happen. This is something that Japan should stress.

5. The section on "Improving Effectiveness of Internal Control Exercised by Business" in the Guidelines to Prevent Bribery of Foreign Public Officials is extremely essential. The internal control systems of companies are being further reinforced in the development stages. The new Corporate Code provides that one of the assignments of the board of directors is to develop a system to ensure the appropriateness of the company's business activities. Companies are also putting this into action.

6. With the enactment of the Financial Instruments and Exchange Law in June 2006, a system for assessing and auditing the internal controls related to financial statements will be introduced starting in FY2008. Under the system, business processes related to financial statements will be documented, and managers will assess these documents. Furthermore, external auditors will audit whether or not the manager's assessment was appropriate. The consciousness of the management's top people has been changing considerably. These days, management is focused on strengthening governance, establishing a compliance system, and ensuring the accuracy of financial statements. The fact that an internal control system is scheduled to be introduced should be assessed by various foreign countries.

7. Even if no cases have been established, companies are strengthening their compliance and internal control systems, and therefore, their internal controls are being developed and operated effectively. The issue is how to explain that the actual measures to combat bribery are being implemented properly. I

assume it will be difficult for authorities to undertake examinations directly. Therefore, as an example, one idea is to survey companies on the state of the development and operation of internal control, including the development of internal control related to combating bribery as well as the implementation status of internal audits that is indicated in the Guidelines to Prevent Bribery of Foreign Public Officials. In so doing, we can grasp examples of companies that have actually modified their activities and during the examinations explain the situation surrounding the companies' measures to combat bribery. Furthermore, it will be good if the supervisory authorities can monitor the steps being taken by companies with respect to their measures to combat bribery.

Accounting and auditing standards

8. Japan's accounting standards are internationally consistent. Accounts relevant to the bribery of a foreign public official might include service charge and expense allowance, and the accounting standards on them are consistent with international standards.

9. An auditing standards of financial statements specializing in the bribery of a foreign public official exists neither in Japan nor overseas. Japan's auditing standards are comparable to international auditing standards. Japan's major auditing firms have formed partnerships with the major accounting firms (the big four) primarily in the United States, and Japanese auditing methodologies and tools are exactly the same as those of such network firms.

While the recommendations propose the introduction of an audit that is focused on the bribery of a foreign public official, this is not appropriate even from the viewpoint of international consistency.

VII. Expert 7

1. I would like to express my opinions on the premise that they are from a practical viewpoint relating to the services of Certified Public Tax Accountants (CPTAs). CPTAs carry out their assignments in accordance with the Certified Public Tax Accountant Law. Specifically, their assignments include tax proxy, preparation of tax documents, tax counseling (Article 2 of the Certified Public Tax Accountant Law), and incidental assignments such as preparation of financial statements (accounting books). Percentage-wise, approximately 60% of all CPTAs are involved in bookkeeping and filing of tax returns.

(2) There are approximately 70,000 CPTAs nationwide. However, because the opportunity to handle issues of bribery of a foreign public official arises only in cases where the client has businesses overseas, etc., just a small fraction of CPTAs handle such cases in actuality.

2. In preparing financial statements, etc., CPTAs check various expenditures and determine whether or not they constitute losses under the Corporation Tax Law. Meanwhile, even in cases where there are unaccounted and undercover expenses, according to Article 62 of the Special Taxation Measures Law, companies, if they wish to, may complete their tax procedures by paying 40% of that amount. In addition, in the case of small- and medium-sized enterprises and family corporations, there are also times when unaccounted and undercover expenses are processed as expenditures to representatives. Therefore, in the event that any kind of fraud is detected, CPTAs can give advice regarding corrective measures, but in reality, they cannot take any further steps in the course of tax accounting activities.

3. I believe CPTAs are very conscious about the need to lawfully interact with companies. However, in the case where a company is expanding its business overseas such as by establishing a company there, I believe there are instances when a company must follow the guidance and advice of overseas agents, etc.

4. Furthermore, CPTAs have an obligation to protect confidentiality. Article 38 of the Certified Public Tax Accountant Law provides that no CPTA shall disclose or divulge secrets which he or she obtained through the profession as a CPTA without any justifiable reason. Therefore, excluding cases where provisions in other laws and regulations are applied—for example auditing activities in the Corporate Law—I believe, given tax accountants’ obligation of confidentiality, it will be difficult under current circumstances to connect detections of frauds in the course of tax accounting activities to investigations and prosecutions.

VIII. Expert 8

Query regarding the recommendations

1. Japan is criticized for not formally investigating and prosecuting even one case despite having a large economy. Looking at the materials that were provided to me, however, only the United States sticks out and the rest of the countries have very low figures. I question why only Japan is being criticized.

Whistleblower Protection Act

Scope of application of the Act

2. The Act applies to workers, etc., for whom the Labor Standards Law applies. For example, Japan’s Labor Standards Law does not apply to employees of overseas offices of Japanese companies and they are therefore not protected by this Act in those foreign countries. This may be one of the limitations of the Act.

Compliance program

- a) Meanwhile, compliance-related activities at companies are being enhanced also with the entry into force of the Corporate Code. Companies are formulating compliance programs with a high sense of awareness. Furthermore, many trading companies with overseas offices and locally incorporated organizations have compliance systems in place that include these organizations.
- b) A system of consultation centers for whistle-blowing is usually established under these compliance programs. In many cases, the system also applies to employees of overseas local companies, etc., which are affiliated with the aforementioned corporate groups. As a result, one way of looking at this is that companies are compensating for the above-mentioned limitation of Japan’s Whistleblower Protection Act by ensuring the protection of whistleblowers against unfair treatment.

Familiarization with the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

- a) Informing employees about the relevant laws and regulations of this type is a major part of the compliance programs. Leaving general companies aside, I believe trading companies, etc., that do a lot of work overseas are fully aware that the bribery of a foreign public official is also a crime in Japan due to recent moves to thoroughly implement compliance measures.
- b) Company managers consider maintaining the company’s image to be extremely important. In actuality, they are always striving to protect the company’s image from a clear standpoint

that the bribery of a foreign public official constitutes not just a tax issue but also a violation of the law.

Impediments to investigations and prosecutions

Opinion

3. To date not a single case has been established concerning the offence of bribing a foreign public official. I believe one of the reasons is that these are criminal acts which occur abroad, and therefore, it is difficult to collect evidence, etc.

Plea bargaining system

a) Looking at the US examples, I understand that most of the incidents were resolved through the investigation method of plea bargaining.

b) I can understand that realistically it is difficult to build a case in countries that do not have such systems, including Japan.

c) I believe it is preposterous to discuss the adoption of a plea bargaining system in Japan just for the sake of investigating the bribery of a foreign public official. However, if this continues to pose a serious problem, I can understand to some extent the need to consider the adoption of a plea bargaining system. For example, antitrust leniency programs, etc., may be of reference.

4. The US Department of Justice website discloses the names of companies that were involved in the offence of bribing a foreign public official. However, this kind of approach may discourage companies that are worried about worsening their company's image from cooperating. The disclosure approach should be explored.

Facilitation payments

5. Under clauses of US laws, etc., facilitation payments are allowed as an exceptional measure for payments to foreign public officials. On the other hand, Japan's Unfair Competition Prevention Law does not contain provisions allowing for facilitation payments, which are subject to the interpretation of the clauses. In order to maintain fairness among countries in this world of competition, the same standards should be clarified around the world regarding the admissibility of facilitation payments.

6. Moving the foreign bribery offence from the Unfair Competition Prevention Law to the Penal Code

7. The OECD's recommendations include a proposal that the relevant laws and regulations should be provided in the Penal Code. However, I do not share the view that the people's consciousness toward the offence of bribing a foreign public official will change by placing the provisions in the Penal Code. Acts that violate the Unfair Competition Prevention Law are equally grave offences, and I believe the placement of the provisions in the Law does not result in any adverse effects.

Other

8. The opinions expressed above are based on my experiences as someone working at a company. However, these are my personal opinions and do not in any way represent the opinions of my company or companies in general.

IV. WRITTEN FOLLOW-UP TO PHASE 2 REPORTS

Name of country: Japan

Date of approval of Phase 2 Report: 7 March 2005

Date of information:

Recommendation in Preamble to Phase 2 Recommendations

Text of recommendation:

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.

Actions taken as of the date of the follow-up report to implement this recommendation:

Regarding the investigation and prosecution of the offence of giving improper benefit to foreign public officials, Japan has been making dedicated efforts to file these investigations, also taking into account that in the amendment of the Unfair Competition Prevention Law in 2004 a provision was newly established stipulating that a Japanese national who commits foreign bribery offences outside of Japan may be charged in Japan. At the same time, keeping in mind the points noted in the Phase 2 Examination and the Phase 2*bis* Examination, Japan intends to more actively utilize MLA procedures and increase co-ordination between police and prosecution.

In this regard, in order to help obtain more information concerning bribery cases of foreign public officials, the Minister for Foreign Affairs instructed all the Japanese overseas missions to proactively gather such information in December 2006. Regarding the handling of such information, the Ministry of Justice and the National Police Agency agreed to explore a policy thereafter within a relevant investigative organization.

Furthermore, Japan’s public prosecutors’ offices have already made two requests for MLA to foreign competent authorities, under the policy of actively utilizing MLA at an early non-“filed” investigation stage.

Since whether or not territorial jurisdiction applies depends on the finding of facts and evidence pertaining to each case, investigative organizations intend to continue to make appropriate responses in light of the facts and evidence.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Recommendations for Action

Text of recommendation:

1. 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:

- a) 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;

Actions taken as of the date of the follow-up report to implement this recommendation:

The Ministry of Economy, Trade and Industry is making efforts to increase awareness of the offences of bribing a foreign public official through the formulation and distribution of the “Guidelines to Prevent Bribery of Foreign Public Officials” as well as the establishment of a website about preventing the bribery of foreign public officials

The Ministry of Foreign Affairs as well as JICA carries out training including training for the personnel of diplomatic establishments, to develop the skills for establishing appropriate contracting relationships and the measures for responding to the establishment of inappropriate contracting relationships before working in foreign counties (MOFA: every year, JICA: every month).

JBIC is making efforts to increase the awareness of all personnel concerning the foreign bribery offence, through the distribution of materials (updated in July, 2005) that include a checklist for risk awareness and other useful information not to be involved in foreign bribery offences.

In October 2006 at the seminar held by the Japan Overseas Enterprises Association (JOEA), the Government of Japan gave a presentation on the measures taken by the Japanese Government as well as its efforts to prevent bribery that were in the Phase *2bis* Examination of Japan, and strove to increase the awareness of company personnel.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

1. 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:

- b) police and prosecutors through training specifically targeting foreign bribery offences either separately or in the context of overall anti-corruption and corporate crime training;

Actions taken as of the date of the follow-up report to implement this recommendation:

The National Police Agency notified all prefectural police of the purpose and content of the amendment when a provision was newly established stipulating that a Japanese national who commits a bribery offence of foreign public officials outside of Japan may be charged in Japan. In addition, the National Police Agency has been explaining the content of a foreign bribery offence as well as making it widely known through: (i) a conference held annually in April with the participation of the prefectural police heads of the divisions in charge of white-collar criminal investigations (including investigations of foreign bribery offence cases); and (ii) training held annually in April for the police (chief inspector and assistant inspector) responsible for guiding prefectural police investigators in charge of white-collar criminal investigations (including investigations of foreign bribery offence cases).

In August and October 2004 and in February 2006, the Ministry of Justice distributed to all prosecutors the materials that make known the content of the amendments to the Unfair Competition Prevention Law. In January 2006, detailed commentary on foreign bribery offences written by public prosecutors from the Criminal Affairs Bureau of the Ministry of Justice was published in commercial publications subscribed to by many prosecutors and prosecuting officers. The publications included information about the establishment of a new provision stipulating that a Japanese national who commits a bribery offence of foreign public officials outside of Japan may be charged in Japan, as well as information about the extension of the limitation period for prosecutions.

At the Ministry of Justice, public prosecutors from the International Affairs Division, Criminal Affairs Bureau of the Ministry of Justice, offer lectures on the occasion of the “General Training for Public Prosecutors” for public prosecutors who have been in their posts for approximately three to five years, as well as the “Specialized Training for Public Prosecutors” for public prosecutors who have been in their posts for approximately seven to ten years, which are held regularly every year. In the lectures, public prosecutors provide explanations on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions so that the prosecutors may familiarize themselves with the content of the amendments to the Unfair Competition Prevention Law, etc.

At the National Prosecutor-Generals’ Meeting, with participants from the heads of the Public Prosecutor’s Offices across Japan (Supreme Public Prosecutors Office, 8 High Public Prosecutors Offices, and 50 District Public Prosecutors Offices), the amendments to the Unfair Competition Prevention Law were taken up as one of the main topics under the instruction of the Director-General of the Criminal Affairs Bureau, Ministry of Justice. In addition, the Director-General made the Convention and the amendments to the Unfair Competition Prevention Law known at a meeting of finance and economy-related public prosecutors who are in charge of the investigation and prosecution of foreign bribery offences, as well as gave instructions as to the active investigation and prosecution of foreign bribery cases. Furthermore, public prosecutors from the International Affairs Division, Criminal Affairs Bureau of the Ministry of Justice provided explanations on the findings and recommendations concerned in the Phase 2 Report and the Phase 2*bis* Report.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

1. 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:

- c) agencies involved in contracting relationships with companies doing business abroad including the Japan Fair Trade Commission (JFTC), Securities and Exchange 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

Actions taken as of the date of the follow-up report to implement this recommendation:

NEXI is making efforts to increase the awareness of its staff through such measures as revising insurance policy conditions, such as requiring declaration that neither they have been engaged or will engage in bribery in the transaction (January 1, 2007), and holding orientation sessions for the staff (December 18&21, 2006) so that they can familiarize themselves with the significance and the procedures of combating foreign bribery. In addition, to raise the awareness of customers, information concerning the importance of bribery countermeasures and specific measures is being uploaded on its website (December 27, 2006).

JBIC is making efforts to increase the awareness of all personnel concerning foreign bribery offences through the distribution of materials (updated in July, 2005) that include a checklist for risk awareness and other useful information not to be involved in foreign bribery offences.

JICA is disseminating the necessary knowledge for carrying out appropriate procurement work (including the provision of measures) on the occasions of the training before being posted abroad. In addition, JICA holds regular orientation sessions on procurement rules and regulations every month for consulting companies. These sessions include commentary on foreign bribery offences.

The SESC gives lectures on foreign bribery offences provided in the Unfair Competition Prevention Law in the training programs for its personnel, including for securities inspectors who are actually involved in inspection activities.

The Japan Financial Intelligence Office (JAFIO) of the FSA offers training for financial institutions so that directors and employees can increase their awareness of the importance of the suspicious transaction reporting system and the customer identification system in which the JAFIO refers to those financial transactions suspected of being involved in bribes to foreign public officials.

The Japan Fair Trade Commission made efforts to increase all personnel awareness of foreign bribery offences through certain measures, such as by posting on a message board the contents of the provisions pertaining to the offence included in the Convention and the Unfair Competition Prevention Law.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

1. 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:

- d) the legal profession. (Revised Recommendation, Paragraph I).

Actions taken as of the date of the follow-up report to implement this recommendation:

The Japan Federation of Bar Associations explains the Convention and its implementation method in the Federation's journal ("Liberty & Justice" Vol.55, No.12, issued on 1st of December 2004) and is making efforts to inform all lawyers.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

2. 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

It is understood that as far as the notification by a public servant to investigative authorities is concerned, an accusation based on Article 239(2) of the Criminal Law (which says that a public servant must accuse someone of criminal conduct associated with a public service) does not violate the confidentiality obligation of the National Public Servant Law and other laws. Therefore, a notification obligation has already been established for public servants and Japan is attempting to keep them informed of the notification obligation. In this regard, the same is true in Article 7.(d)(iii) of the Recommendation for Establishing Anti-money Laundering Regime. The Cabinet Office, Ministry of Economy, Trade and Industry, Financial Services Agency and other ministries keep relevant institutions and organizations informed about the process of notification through websites and so on.

With regard to this point, NEXI has been fully implementing the Action Statement and Recommendation on Bribery and Officially Supported Export Credits, which was agreed at the OECD Working Party on Export Credits and Credit Guarantees (ECG). NEXI intends to continue to make efforts toward the steady implementation of the OECD Council Recommendation on Bribery and Officially Supported Export Credits, including the development of an internal operations manual. In addition, NEXI is considering the introduction of appropriate measures in light of the enforcement of the Whistleblower Protection Act (April 1, 2006).

With regard to this point, JBIC has been taking measures in light of the OECD Council Recommendation on Bribery and Officially Supported Export Credits, which was agreed in December 2006, and intends to continue to make efforts toward the steady implementation of the Recommendation. An obligation to report through the existing channels is already provided in JBIC's internal regulations. As a further step, JBIC has introduced a new reporting system additionally, in light of the enforcement of the Whistleblower Protection Act (April 1, 2006).

An obligation to report through the existing channel has already provided in the internal regulations in JBIC and JICA including the obligatory reporting on any illegal deeds. As a further step, JBIC (in November, 2004) and JICA (in April, 2006) have introduced an additional new reporting system, which requires its personnel to report any illegal deeds to its independent committee in light of the entry into enforce of the Whistleblower Protection Act (April 1, 2006).

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

2. With respect to the reporting of the offence of bribing a foreign public official to the competent authorities, the Working Group recommends that Japan:

- 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

Under the provision of Article 11 of the Whistleblower Protection Act, if the Ministry of Economy, Trade and Industry receives information about an act subject to whistle-blowing related to a foreign bribery offence, the Ministry must inform the whistleblower of an administrative agency authorized to impose a disposition (competent police, prosecution).

In addition, the Ministry has created a website on its homepage about preventing the bribery of foreign public officials, and receives consultations concerning foreign bribery offences. The website also discloses the contact information for the National Police Agency and the Public Prosecutors Office, and in so doing the Ministry is carrying out efforts to make the methods of reporting widely known.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

2. With respect to the reporting of the offence of bribing a foreign public official to the competent authorities, the Working Group recommends that Japan:
 - 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; (Revised Recommendation V.B.(iii) and (iv)).

Actions taken as of the date of the follow-up report to implement this recommendation:

In light of the Recommendations from the Phase 2 Report of Japan, the Financial Services Agency issued an official notice to the Japanese Institute of Certified Public Accountants dated 20 April 2005 entitled "Prevention of Bribery of Foreign Public Officials in International Business Transactions" on the following content and requested to make it known to auditors:

"Auditors are required to report the content of any illegal acts including bribery of foreign public officials by audited companies that they discover to management and to auditing department including corporate auditors. Furthermore, auditors are permitted to make an 'accusation' to the competent authorities when they consider that there exists an offence, including the bribery of foreign public officials, and in this regard, the duty of confidentiality in the Certified Public Accountant Law shall be removed if a legitimate reason exists."

In a company that has an accounting auditor (kaikei-kansanin), pursuant to the Corporate Code which came into force on 1 May 2006, the accounting auditor is required to report to statutory auditors (the board of statutory auditors or the auditing committee as the case may be), without delay, any illicit acts, etc. he/she/it

found while on duty relating to the exercise of duties of the company's directors (including instructions to and supervision of employees).

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

2. With respect to the reporting of the offence of bribing a foreign public official to the competent authorities, the Working Group recommends that Japan:

- 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

Actions taken as of the date of the follow-up report to implement this recommendation:

The Cabinet Office has made efforts to widely distribute information about the Whistleblower Protection Act through orientation sessions, symposiums, the Cabinet Office's web-site, etc., and the METI Guidelines expressly state that by specification the Whistleblower Protection Act applies to offences under the Unfair Competition Prevention Law, and that employees who report the offence of giving an improper benefit to foreign public officials may receive protections under the Act.

The Cabinet Office and the METI shall continue to carry out efforts to make the system widely known to ensure its smooth operation through cooperation with labor and capital.

The METI Guidelines expressly state that by specification the Whistleblower Protection Act applies to offences under the Unfair Competition Prevention Law, and that employees who report the offence of giving improper benefit to foreign public officials may receive protections under the Act. In so doing, the Ministry is carryout out efforts to make the system widely known.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

2. With respect to the reporting of the offence of bribing a foreign public official to the competent authorities, the Working Group recommends that Japan:

- 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.

Actions taken as of the date of the follow-up report to implement this recommendation:

Japan's public prosecutors' offices have adopted a policy of actively utilizing MLA at an early non-“filed” investigation stage and have made a request for MLA to foreign competent authorities. The Ministry intends to continue to utilize MLA at an early stage wherever possible for the necessary cases. At the same time, it intends to more closely coordinate and exchange information with competent foreign authorities.

Regarding the sharing of information with competent foreign authorities concerning cases of bribery, the National Police Agency believes that the ICPO channel or diplomatic channels will enable the exchange of information and materials useful for the investigations in addition to MLA requests. (Matters relating to prosecution are items that fall under the authority of prosecutors.)

In December of 2006, the Ministry of Foreign Affairs issued a directive to all Japanese overseas establishments and called for the active collection of information regarding the bribery of foreign public officials with a view to finding basic facts and clues for investigations. The Ministry is making efforts to transmit the information acquired from overseas to the competent authorities without delay.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

3. 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

Actions taken as of the date of the follow-up report to implement this recommendation:

The Corporate Code came into force on 1 May 2006, and it has come to regulate matters related to incorporation, organisation, operation, and management of companies, although such matters were previously regulated by Commercial Code and other ancillary laws. Under the Corporate Code, the matters to be recorded in account books, balance sheets, and income statements are decided in accordance with the Generally Accepted Accounting Principles in Japan (Japanese GAAP). If the account books, balance sheets or income statements so prepared contain any recordings with fallacious omissions or false recordings, directors or others. responsible for such recordings will be subject to non-penal fines.

In light of the Recommendations from the Phase 2 Report of Japan, the Financial Services Agency issued an official notice to the Japanese Institute of Certified Public Accountants dated 20 April 2005 entitled “Prevention of Bribery of Foreign Public Officials in International Business Transactions” on the following content and requested to make it known to auditors:

“For companies being audited it is illegal to act as follows: to establish off-the-books accounts, to trade off-the-books, to carry out inadequately identified transactions, or to record non-existent expenditures for the purpose of bribing foreign public officials or of hiding such bribery. Such acts of misconduct are subject to punishment under the Securities and Exchange Law (SEL).”

Furthermore, the Government made amendments to the law for the purpose of maintaining effectiveness, including the introduction of surcharges (an administrative measure) in addition to the criminal punishments in Article 197 of the SEL (introduced in April 2005 for registration documents and in December 2005 for ongoing disclosure documents). In so doing, administrative surcharges can now be imposed for the falsification of disclosure statements, etc., in addition to the criminal punishments to date.

* Amount of surcharge: Security registration statement containing false statement: A percentage of the subscription or sale price;
Security report containing false statement (ongoing disclosure): Either 3 million yen or 3/100,000 times the total stock market price – the higher of the two.

Moreover, a bill which enhances the penalties for the falsification of disclosure statements and raises the penalty to under ten years of imprisonment or less than 10 million yen in fines (less than 700 million yen in fines for companies) was approved in the Diet (and came into force in July 2006).

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

3. 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:
- 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.)

Actions taken as of the date of the follow-up report to implement this recommendation:

Under the Corporate Code that came into force in May 2006, joint-stock companies of at least a certain size (i.e. “large companies”), as well as “companies with committees,” are obligated to decide on a basic policy for establishing their internal control systems, including a law and regulation compliance system.

By the Financial Instruments and Exchange Law that was enacted in June 2006, an internal control reporting system will be introduced for listed companies from FY2008. Under this system, the assessment of managers concerned with the effectiveness of internal controls over financial reporting, as well as auditing of the managers’ assessment by certified public accountants, etc., will be required in order to ensure the reliability of financial reporting.

Since creating the METI Guidelines in 2004, the Ministry has held orientation sessions for industry associations, including the Nippon Keidanren, Japan Foreign Trade Council, Inc., and the Japan Machinery Center for Trade and Investment. In addition, the Ministry has held orientation sessions for expatriate employees across Asia through the Japan Chamber of Commerce and Industry.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

4. 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

The Government has submitted the aforementioned Bill to amend the Anti-Organised Crime Law to the Diet, and is making dedicated efforts for its passage and enactment.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

5. 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, Paragraph I and II i).

Actions taken as of the date of the follow-up report to implement this recommendation:

At the National Prosecutor-Generals’ Meeting with participants from the heads of the Public Prosecutor’s Offices across Japan (Supreme Public Prosecutors Office, 8 High Public Prosecutors Offices, and 50 District Public Prosecutors Offices), the amendments to the Unfair Competition Prevention Law were taken up as an important topic under the instruction of the Director-General of the Criminal Affairs Bureau, Ministry of Justice. In addition, the Director-General instructed, at a meeting of finance and economy-related public prosecutors who are in charge of the investigation and prosecution of foreign bribery offences, that they should familiarize themselves with the Convention and the amendments to the Unfair Competition Prevention Law and conduct active investigation and prosecution of foreign bribery cases. Furthermore, public prosecutors from the International Affairs Division, Criminal Affairs Bureau of the Ministry of Justice provided explanations on findings and recommendations in the Phase 2 Report and the Phase *2bis* Report.

We had the internal review based upon opinions expressed by public prosecutors from district public prosecutors’ offices on legal and procedural impediments to effective investigation and prosecution of offences of bribing a foreign public official under the auspices of the Supreme Public Prosecutors’ Office on the basis of the Phase *2bis* Recommendations. The conclusions of the review will be mentioned in the written self-assessment report for the Phase *2bis* Recommendations.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

5. With respect to the implementation of the offence of bribing a foreign public official under the UCPL, the Working Group recommends that Japan:
 - 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

The revised version of the METI Guidelines was released in January 2007 (Please see the Guidelines for the content).

Furthermore, the Ministry has been reviewing the METI Guidelines in consultation with the relevant ministries, including the Ministry of Justice. At the same time, it convened the Subcommittee on Corporate Activities related to International Business Transactions in December 2005 and in April and September 2006 and has included the opinions of the members, who are scholars of law, scholars of economy, lawyers, certified public accountants, representatives of business associations, and representatives of trade unions.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

5. With respect to the implementation of the offence of bribing a foreign public official under the UCPL, the Working Group recommends that Japan:
 - 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

The offence of giving improper benefit to foreign public officials is established if it is confirmed that a foreign public official and a third party that received an improper benefit were colluding, or if it is confirmed that the aforementioned benefit was attributed to a foreign public official from a substantive viewpoint. It is difficult to envision that a foreign public official would direct the provision of the benefit to a third party where the above-mentioned type of relationship is absent. All cases that should be punished can be captured under the existing law.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

5. With respect to the implementation of the offence of bribing a foreign public official under the UCPL, the Working Group recommends that Japan:

- 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

Actions taken as of the date of the follow-up report to implement this recommendation:

By the entry into force of the amended Unfair Competition Prevention Law in November 2005, the statutory penalty of the tort-feasor was upgraded from less than three years of imprisonment or under 3 million yen in fines to less than five years of imprisonment or under 5 million yen in fines or their combination. Subsequently, the period of the statute of limitations was extended from three to five years.

An amended law was passed in the Diet in 2006, making the period of the statute of limitations for legal persons the same as that for tort-feasors, and the period of the statute of limitations for the punishment of legal persons was extended from three to five years starting on 1 January 2007.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

5. With respect to the implementation of the offence of bribing a foreign public official under the UCPL, the Working Group recommends that Japan:

- 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, Article 3.1 and 3.3).

Actions taken as of the date of the follow-up report to implement this recommendation:

While to date there have been no prosecutions of the offence of giving improper benefit to foreign public officials, relevant materials will be compiled when a prosecution is made.

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Text of recommendation:

6. 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

Following the United Nations Convention against Corruption, the Income Tax Law (Article 45) and the Corporate Tax Law (Article 55) were amended in the FY2006 tax reform to expressly deny the tax deductibility of bribes payments to domestic and foreign public officials (already in force as of 1 April 2006).

If no action has been taken to implement this recommendation, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Issues for Follow-up by the Working Group

Text of issue for follow-up:

7. 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).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The appropriateness of including the offence of giving improper benefit to foreign public officials in the Unfair Competition Prevention Law was discussed at the Subcommittee on Corporate Activities related to International Business Transactions, which was convened in December 2005 and September 2006.

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions aims to prevent bribery with the recognition that bribes of foreign public officials in international business transactions distort the conditions for competition in international business transactions. On the other hand, the bribery offence in the Penal Code is intended to protect the fairness of the functions of Japanese public officials and the trust of the people and, therefore, has a different purpose from that of the Convention.

Meanwhile, the Unfair Competition Prevention Law aims to ensure fair competition among businesses and the definite implementation of relevant international commitments. Given that the UCPL corresponds to the purpose of the Convention, the Subcommittee concluded that the current measure of including the offences related to the bribery of foreign public officials in the UCPL rather than in the Penal Code is appropriate.

Text of issue for follow-up:

7. The Working Group will follow-up the following issues once there has been sufficient practice:
- 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).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

- (i) In general, since the benefit of a related company may also be the benefit of the aforementioned legal person, even where improper benefits were given for the benefit of a related company, this is interpreted as corresponding with the requirement of “to acquire improper benefits in business.”
- (ii) In punishing a legal person, it is sufficient if the natural person who gave the improper benefit is punishable and there is no need for the aforementioned natural person to actually be prosecuted or convicted.
- (iii) As explained in the Phase *2bis* Examination, it is interpreted that where a natural person is punishable by the application of the nationality jurisdiction, the legal person to which the aforementioned natural person belongs is also punishable.

Text of issue for follow-up:

- 7. The Working Group will follow-up the following issues once there has been sufficient practice:
 - 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, Article 3.1 and 3.3).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The offence of giving improper benefit to foreign public officials in the Unfair Competition Prevention Law is, in terms of statutory penalty, a heavier offence than the bribery offence in the Penal Code given that: (i) by the amendment of the UCPL in 2005, the statutory penalty was upgraded from less than three years of imprisonment or under 3 million yen in fines (no combination) to less than five years of imprisonment or under 5 million yen in fines (or their combination); (ii) the period of the statute of limitations for tortfeasors was extended from the three years to date to five years, pursuant to the upgrading of the statutory penalty; (iii) legal persons are punishable by both punishment provisions, and the statutory penalty in this case is a fine of under 300 million yen; and (iv) the bill to amend the AOCL is being deliberated in the Diet, which will enable the confiscation of the criminal proceeds obtained through the offence of giving improper benefit to foreign public officials. Therefore, the criminal penalty for the offence of giving improper benefit to foreign public officials as a whole is effective and dissuasive.

Text of issue for follow-up:

7. The Working Group will follow-up the following issues once there has been sufficient practice:
- 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

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

- (i) The Japanese Government decided to submit an anti-money laundering and combating terrorist financing bill to impose several obligations, including the suspicious transaction reporting obligation on real estate agents, dealers in precious metals and stones, etc., to the Diet in February 2007 (with the aim of adoption by the end of March 2007).
- (ii) In response to a breach of the Suspicious Transaction Report obligation pursuant to the AOCL, the supervising authorities may impose administrative actions, including orders to improve business operations and suspend business operations pursuant to the industry laws providing the functions of financial institutions (Ex: Article 26 of the Banking Law). Furthermore, in response to a breach of the customer identification obligation pursuant to the Customer Identification Law, the supervising authorities may similarly impose administrative actions pursuant to Article 9 of the Customer Identification Law or industry laws.
- (iii) It is interpreted that an “accusation” by public officials pursuant to Article 239(2) of the Code of Criminal Procedure does not constitute a breach of the duty of confidentiality in the National Public Service Law and it is believed that a reporting requirement for this issue has been established. However, as one of their agenda items, the Ministries intend to consider how to inform public officials.
- (iv) The JAFIO of the FSA has been convening typologies study meetings regularly since September 2005 with those agencies that the JAFIO provides with information on suspicious transactions (namely the Public Prosecutors Office, National Police Agency, Japan Customs, Japan Coast Guard, Narcotics Control Departments of the Ministry of Health, Labour and Welfare, and the SESC) in a bid to improve its capacity to analyze suspicious transaction reports (STRs) by receiving feedback from the agencies on actual cases in which specific STRs were utilized in criminal investigations as well as the latest trends in crimes misusing financial institutions.

Text of issue for follow-up:

7. The Working Group will follow-up the following issues once there has been sufficient practice:
- 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 Articles II(v) and VI).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

JBIC provides ODA loans under the guidelines on the procurement procedures of borrowers and the "Implementation Rules for Sanctions Against a Party Engaged in Corrupt or Fraudulent Practices Under a Contract Funded by JBIC ODA Loans", (entered into force in July 2001), which provides for and disclose inappropriate procurements and measures such as bribery, false representation, conduct in violation of the Anti-Monopoly Law, bid-rigging, fraudulent or dishonest conduct, and it has been determined that these are a sufficient deterrence.

JICA established the "Detailed Rules for Suspensions of Companies Eligible to Participate in Tenders and Other Measures" (enter into force on September 10,1993) and provides that companies will be ordered to temporarily suspend their operations if they have made bribes. It has been determined that these measures are also a sufficient deterrence from the viewpoint of compliance.

NEXI has developed appropriate responses such as undertaking enhanced due diligence, revising the insurance policy conditions(January 1, 2007) to ensure that information on the companies which are included in the debarment list of the World Bank, etc. is shared within NEXI. Furthermore, regarding the information on the companies that have breached domestic laws, NEXI will implement similar responses based on its coordination with the relevant agencies.

JBIC International Financial Operation has been taking measures in light of the OECD Council Recommendation on Bribery and Officially Supported Export Credit, which was agreed in December 2006. In a case in which bribery has been proven, JBIC International Financial Operation takes measures such as refusal of credit.

V. JAPAN: ADDENDUM TO THE WRITTEN FOLLOW-UP TO THE PHASE 2 REPORT

Recommendation in Preamble to Phase 2 Recommendations:

Please provide information regarding (i) what steps Japan has taken to increase coordination between the police and prosecutors concerning foreign bribery cases; and (ii) what Japan has done to assess why territorial jurisdiction could not be applied to any of the non-filed cases.

In handling information concerning foreign bribery cases gathered by the overseas establishments of the Ministry of Foreign Affairs, the Ministry of Justice and the National Police Agency agreed to explore a coordinating framework to effectively utilize the information for investigation within a relevant investigative organization.

Additionally, the public prosecutors and the police are working in closer cooperation in such ways as follows:

- a) with regard to cases investigated by the public prosecutors, they cooperate with the police when a large-scale system for investigation is necessary;
- b) with regard to cases in which the evaluation of evidence is difficult, the police consult with the public prosecutors prior to sending the cases; and
- c) the public prosecutors and the police have conference to discuss about problematic cases regularly in large cities.

The Japanese Government adopted nationality jurisdiction with amending the UCPL, considering the recommendations of the Phase 2 evaluation. Thus, it is understood that the question of territorial jurisdiction was overcome.

Please describe the "dedicated efforts" to "file" investigations.

The Public Prosecutors Offices have adopted the principle to make request for mutual legal assistance actively at the early stage of investigation prior to filing cases and already requested a legal assistance to foreign countries in two cases in 2006.

Recommendation 1(a)

Please describe any steps that have been taken to promote the release of the 2007 amended "METI Guidelines to Prevent Bribery of Foreign Public Officials", including to foreign investors.

Regarding the 2007 amended "METI Guidelines to Prevent Bribery of Foreign Public Officials", Ministry of Economy, Trade and Industry has published it through the Web site of METI, and held orientation sessions for the Japan Machinery Center for Trade and Investment.

To what extent if any has the training by the Ministry of Foreign Affairs specifically targeted the bribery of foreign public officials?

Diplomats assigned in each year to overseas establishments (as officials responsible for ODA matters) are to be given training in the "Adequate Accountant" in ODA Procedures in January or February. This training includes a lecture on the Convention on combating bribery of foreign public officials in international business transactions and the Unfair Competition Prevention Law.

To what extent if any has the Ministry of Finance raised awareness about the 2006 amendments to the Corporation Tax Law and Income Tax Law expressly denying the tax deductibility of bribe payments to foreign public officials?

The Ministry of Finance published brochures on the FY 2006 tax reform to upload on the home page of the ministry in spring of 2006 and to distribute to taxpayers at tax offices and other public offices.

After early summer of 2006, a number of taxpayer briefings have been conducted by tax offices in order to provide information relating to the measures on the express denial of tax deductibility of bribe payments to domestic and foreign public officials as well as the other measures taken by the FY2006 tax reform.

Recommendation 1(b)

To what extent if any has the training for *police and prosecutors* on the offence of bribing a foreign public official addressed the following: (i) ways to increase coordination between them concerning foreign bribery cases; (ii) the use of non-compulsory investigative measures at the earliest stage; (iii) the need to seek mutual legal assistance at the earliest possible stage to obtain non-compulsory investigative measures; and (iv) the application of nationality jurisdiction to legal persons?

Under the auspices of the Ministry of Justice, public prosecutors in charge of domestic and foreign bribery, financial and economic crimes from all the Public Prosecutors Office joined the meetings, where the Director-General of the Criminal Affairs Bureau, Ministry of Justice and the Director of the Criminal Affairs Department, Supreme Public Prosecutors Office reiterated the importance of cooperation with the police in investigating bribery, financial and economic crimes.

The Ministry of Justice provides various training programs for public prosecutors, in which the public prosecutors belonging to International Affairs Division of Criminal Affairs Bureau give lecture and explain the necessity to use mutual legal assistance positively in the early stage of investigation and the amendment of the UCPL with respect to the nationality jurisdiction.

As we explained at the Phase 2 bis examination, it is taken for granted that the legal person to which a natural person belongs can be punished when that natural person is punishable by applying nationality jurisdiction.

Regarding to bribery of foreign public officials, the National Police Agency of Japan instructs the followings as well as the details of the crime at meetings amongst white-collar crime section chiefs of each prefectural police HQ and trainings for leading investigators in the section.

- Early cooperation with prosecutors with considering characteristics and scale of cases
- Quick non-compulsive investigation with considering possibility of escape and evidence destruction.

Quick request to foreign investigative agencies for mutual assistance in case of high possibility of the crime suspicion, such as when the evidence has been obtained.

Recommendation 2(a)

What measures have been taken to ensure that employees of JBIC and JICA are aware of their obligation to report to the law enforcement authorities any payments suspected of being bribes to foreign public officials? How does the obligation work (i.e., is there a chain of reporting or can an employee report directly to the law enforcement authorities)?

The internal reporting system (through either ordinary chain of reporting or individual reporting) to the JBIC Compliance Committee is established by JBIC's internal rules. In case an oblique dealing such as bribery is identified through such reporting, JBIC Compliance Committee will take appropriate actions such as reporting to law enforcement authorities. Although direct reporting to the law enforcement authorities by the employees is not specified in the internal rules, such direct reporting is possible. The internal rules are, of course, readily accessible on the intranet for every employee to be aware of. Furthermore, the same (though more specific) content is referred in the Compliance Manual which has been prepared by the Compliance Committee and distributed to every employee.

JICA is also making every effort raise staff's consciousness of the necessity to prevent the illegal acts including the bribery and to culture the ethics for the work through such occasions as training. If the employees of JICA projects are involved in bribery cases of the foreign officials, it will be dealt in accordance with JICA's internal rules including the rule for the internal report system. In contrast, if such involvements are not observed, JICA will take appropriate measures in consultation with relevant organizations such as diplomatic establishments. According the internal rule, a JICA employee must report to his or her boss including board members when he/she came to know an oblique dealing. Additionally, the rule also includes the punishment for the employee engaged in the oblique dealing. Surely, the rule does not restrict the employee to report directly to prosecutor offices.

What steps if any have been taken in these respects regarding NEXI?

With regard to this point, since January 1, 2007 NEXI has been fully implementing the Action Statement and Recommendation on Bribery and Officially Supported Export Credits, which was agreed at the OECD Working Party on Export Credits and Credit Guarantees (ECG). NEXI intends to continue to make efforts toward the steady implementation of the OECD Council Recommendation on Bribery

and Officially Supported Export Credits, including the development of an internal operations manual. In addition, NEXI is considering the introduction of appropriate measures in light of the enforcement of the Whistleblower Protection Act (April 1, 2006).

Recommendation 2(b)

What kind of "consultations" on the foreign bribery offence does METI provide? [see Japan's response to Recommendation 2(b)]

Ministry of Economy, Trade and Industry is always welcoming inquiry about the information of the crime of the foreign bribery, and it has received such inquiries and provided detailed interpretation of UCPL. METI has not received information about an act subject to whistle-blowing related to a foreign bribery offence yet.

Please provide a summary of the information on the METI website concerning the prevention of the bribery of foreign public officials, as this information does not appear on the English translation of the website.

Ministry of Economy, Trade and Industry provides information about foreign bribery offence through the website, such as background of prevention of bribery of foreign public officials, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Unfair Competition Prevention Law in Japan, Guidelines to prevent Bribery of Foreign Public Officials and contact point information for inquiry or report.

Recommendation 2(c)

Has the Financial Services Agency verified whether the Japanese Institute of Certified Public Accountants has published an internal rule regarding the FSA order of April 2005 that auditors are required to report foreign bribery to management and auditing boards?

The Japanese Institute of Certified Public Accountants has an internal rule, the Auditing Standards Committee Statement; "Illegal Acts" which requires auditors to report illegal activity including foreign bribery to management and auditing boards.

What would constitute a "legitimate reason" for making such a report?

Generally speaking, the confidentiality rule may be relaxed in case where the enhancement of the public interest resulting from the disclosure of the information in question outweighs the loss of the public interest (such as the invasion of privacy) resulting from such disclosure. The suppression of foreign bribery, which constitutes a high crime under both Japanese laws and the international convention, is among the highest priorities in securing the public interest. Such reporting to the client's management and auditing boards is not to be within the duty of confidentiality.

Has it been clarified to accountants that the confidentiality rules under article 27 of the Certified Public Accountants Law do not apply in relation to reporting suspicions of the bribery of foreign public officials?

The Financial Services Agency issued the official notice dated April 20th of 2005 to the Japanese Institute of Certified Public Accountants to clarify that the duty of confidentiality under article 27 of the Certified Public Accountants Law shall be removed if a legitimate reason exists and requested to make it known to auditors.

Recommendation 2(e)

Please provide more details about the Ministry of Foreign Affairs' Directive of December 2006, which instructs overseas establishments to actively collect information regarding foreign bribery. For instance, does the Directive explain how overseas offices should collect the information, and how it should be reported internally and externally to the law enforcement authorities?

Concerning Recommendation 2(e), Japan provides the following information of Ministry of Foreign Affairs' Directive of December 2006.

When getting information regarding foreign bribery cases which Japanese people or Japanese companies (not only a branch of Japanese legal person but also JV and local subsidiary) may be involved, overseas establishments should report on the wire such information including the following points;

- a. Summary of the reported cases
- b. Name of Japanese person or Japanese company that possibly involved
- c. Name and position of a foreign public official reported to receive or attempt to receive bribe
- d. Public information on business or project related to the bribery
- e. Stage related to criminal procedures taken in the passive briber's country (such as: stage before investigation e.g. rumors, facts findings by administrative ministries or agencies, investigation and seizure, suspect arrest, or prosecution)
- f. Others reference matter (such as reliability of reporting news agencies, a future prospect of reported cases)

In the process of collecting information, fully deliberate attention should be paid, because (a) the direct contacts with companies deemed to bribe, foreign public officials deemed to be bribed, and their related persons and organizations would cause to alert persons concerned to conceal incriminating evidence, (b) if investigation is initiated, they may also produce hindrance in the investigation, (c) to leak related information to the third persons or companies in the process of inquiry might cause the possibility to violate the obligation of keeping secrecy for public officials (stipulated by article 100, paragraph 2 of the National Public Service Law).

2. The consequences of gathering information based on the Directive are to be reported in written form on wire to the Minister for Foreign Affairs in the name of head in its overseas establishment. The responsible division of Ministry of Foreign Affairs transfers the report immediately after its acceptance to the law enforcement authorities. The ways and manners of its reporting are established procedures applicable to not only the case of Directive of December 2006, between the Minister for Foreign Affairs and the heads of overseas establishments under his/her jurisdiction. Since this Directive was issued for promoting information gathering overseas, it did not include the way of direct reporting to prosecutor offices.

Recommendation 4

Please explain what is holding up the Bill to amend the Anti-Organised Crime Law in Parliament, considering that it had already been submitted to Parliament at the time of the Phase 2 examination.

The bill, which contains many provisions necessary to ratify and implement TOC Convention, UN Convention against Corruption, and CE Convention on Cybercrime, has not yet been passed despite long deliberation in the Diet, with most of the discussion focusing on the introduction of a new offense of “conspiracy of organized crime.”

Please also clarify what amendments to the AOCL are currently contained in the Bill.

The bill to amend Anti-Organized Crime Law, which was submitted to the regular session of the Diet in 2004, would, among other things, add the offense of bribery of foreign public officials to the list of the predicate offenses for money laundering. Thus, if the bill comes into effect, property which has been produced by, acquired through, or obtained in reward for a bribery of a foreign public official will also be regarded as proceeds of crime, thereby expanding the coverage of money laundering offense as well as subjecting property to confiscation or preservation order for that purpose.

Recommendation 5(a)

Please indicate when the Supreme Public Prosecutors Office held the internal review of the reasons for the absence of filed investigations and prosecutions of foreign bribery cases. Please also indicate what issues were addressed, who participated and what were the main findings. (Please note that the self-assessment report is not due until 2 March, and that this will be too late for the lead examiners to assess this part of the Phase 2 written follow-up report.)

In 5 April, 2006, the public prosecutors from the Supreme Public Prosecutors Office and the public prosecutor from the International Affairs Division of the Criminal Affairs Bureau had a meeting with

regard to the bribery of foreign public officials, where they concluded that one of the biggest reasons for the absence of filed investigations and prosecutions is the difficulty to get the information for starting investigation and that they would actively investigate the cases concerning the bribery of foreign public officials when getting such information.

As stated in the report for Phase 2 bis evaluation, concerning the legal and procedural impediments to the effective investigation and prosecution of the offense of bribing a foreign public official, under the supervision of the Supreme Public Prosecutors Office, the Ministry of Justice held meeting with public prosecutors of the Special Investigation Departments of Tokyo, Osaka and Nagoya Public Prosecutors Offices and received reply in writing from the Special Criminal Departments of Sapporo, Fukuoka and Hiroshima Public Prosecutors Offices from January 31 to February 9, 2007.

Recommendation 5(b)

Please provide a translation of the 2007 amended version of the METI Guidelines. Please also provide a summary of how the amendments address the following issues identified in Phase 2 and then again in Phase 2bis: (i) the misleading information about "facilitation payments"; and (ii) the interpretation of "international business" (i.e., that it constitutes "acts concerning business repeatedly and continuously conducted for the purpose of profit").

Japan submitted a translation of the 2007 amended "METI Guidelines to Prevent Bribery of Foreign Public Officials" on March 2.

Regarding the interpretation of "facilitation payments," the revised Guidelines clearly states that as long as the UCPL prerequisite is fulfilled, the foreign bribery offence under the UCPL is constituted, regardless of whether it is facilitation payment or not.

Regarding the interpretation of "international business transactions," the description of international business as "acts concerning business repeatedly and continuously conducted for the purpose of profit," has been deleted. The revised Guidelines clarify that international business transactions mean all of international business activities.

Please also indicate whether the Ministry of Justice and prosecutors were consulted regarding the 2007 amendments.

The Ministry of Justice was consulted on September 12, 2006.