



JAPAN: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS

February 2014

This report, submitted by Japan, provides information on the progress made by Japan in implementing the recommendations of its Phase 3 report. The OECD Working Group on Bribery's summary of and conclusions to the report were adopted on 5 February 2014.

The Phase 3 report evaluated Japan's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

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SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

a) Summary of Findings

Since adoption of the Phase 3 Report in December 2011, Japan has convicted a former senior executive of a Japanese company of the bribery of a foreign public official. The defendant, who admitted guilt, was fined JPY 500 000 (approximately USD 5,003). The case focused on one bribe payment. It was possible to extend the statute of limitations for this specific payment because the defendant was abroad for approximately one year after the commission of the bribe. The company was not prosecuted for various reasons, including expiration of the statute of limitations. Additionally, Japan states that two foreign bribery investigations have been initiated since June 2012. The Working Group on Bribery (WGB) continues to have significant concerns about the low level of foreign bribery enforcement in Japan, and notes that the media has reported numerous allegations involving Japanese companies. The WGB believes that implementation of the Anti-Bribery Convention is not given adequate priority by the Japanese authorities, including a lack of targeted resources for the purpose of detecting, investigating and prosecuting foreign bribery cases.

In addition, Japan has still not established the legal authority to confiscate the proceeds of foreign bribery, or made foreign bribery a predicate offence for the purpose of money laundering. The WGB's concerns about this situation date back to Phase 2 (March 2005), when a bill was before the Diet to amend the Anti-Organised Crime Law (AOCL), which would have addressed these significant weaknesses in Japan's implementation of the Anti-Bribery Convention. Letters were sent by the WGB to Japanese ministers urging Japan to enact the relevant amendments to the AOCL, first in November 2009 and then in September 2012. The bill was submitted three times between 2003 and 2009, and there are no plans to resubmit it in the foreseeable future. Controversy in Japan surrounding the bill is unrelated to the parts of the bill concerning implementation of the Convention.

The Ministry of Economy, Trade and Industry (METI) is the lead ministry responsible for implementation of the Convention in Japan, due to placement of the offence in the Unfair Competition Prevention Law (UCPL). METI's role appears to be more substantial than the WGB previously realised. METI has discretion to forward allegations that it receives through its foreign bribery hotline to the law enforcement authorities. Japan explains that any allegation "with the slightest semblance of a suspicion" of foreign bribery would be referred. However, guidelines or other safeguards regarding such referrals have not been established. Furthermore, on request by the law enforcement authorities, METI provides interpretations of the application of the foreign bribery offence to actual cases. Concerns about the suitability of METI's interpretive role are heightened because METI's publicly available materials on the foreign bribery offence continue to contain unclear information on the legality of facilitation payments in Japan, as well as what comprises a facilitation payment.

Japan's Written Follow-Up Report raises further issues of major concern. Japan has not taken concrete steps to ensure that tax inspectors proactively detect bribe payments concealed as "miscellaneous" expenses in their tax returns. In addition, as discussed above, Japan continues to face practical enforcement challenges due to the expiration of the statute of limitations for foreign bribery; although the limitations period was increased from 3 to 5 years for natural persons in June 2005 and for legal persons in June 2006.

Progress has been made by Japan in certain areas. Japan intends to include in its bilateral tax treaties language from article 22.4 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters, which will allow the sharing of tax information by tax authorities with other law enforcement and judicial authorities on foreign bribery cases. Recommendations have been fully implemented on Japan's accounting and auditing framework for preventing and detecting foreign bribery. Japan has provided targeted training on foreign bribery to contact points in Japan's overseas missions. The Japan Bank for

International Cooperation (JBIC) and Nippon Export and Investment Insurance (NEXI) have raised awareness of foreign bribery in the private sector, including among small- and medium-sized enterprises. They are also coordinating their efforts to prevent and detect foreign bribery in international business transactions that benefit from official credit support.

b) Conclusions

The WGB concludes that Japan has now fully implemented recommendations 7, 10a, 10b, 10c, 12 and 14, partially implemented recommendations 3, 4a, 4b, 4c, 6, 8, 9 and 13, and not implemented recommendations 1, 2, 5 and 11. Japan is invited to report in writing within one year on non-implemented and partially implemented recommendations.

Japan is further recommended to establish and implement an action plan to organise police and prosecution resources to be able to proactively detect, investigate and prosecute foreign bribery cases. The action plan should describe how appropriately specialised and targeted resources will be mandated and organised in order to be able to proactively detect, investigate and prosecute foreign bribery cases. The action plan should also address the following issues: a) continuing lack of clarity in METI materials about the legality of facilitation payments and what comprises a facilitation payment versus a bribe, b) means by which tax examiners could proactively detect bribe payments disguised as “miscellaneous” expenses in tax returns, and c) continuing enforcement challenges due to the expiration of the statute of limitations. Japan is recommended to report orally in March 2014 on the parameters of the action plan, and in writing in June 2014 on the details and implementation of the action plan.

The WGB will forthwith send a letter to the relevant ministers (METI, Foreign Affairs, Justice and National Police Agency), regarding the recommendation to establish an action plan, as well as the WGB’s serious concerns about the continuing non-implementation of the recommendations to establish the legal authority to confiscate the proceeds of bribing foreign public officials, and make foreign bribery a predicate offence for the purpose of money laundering.

WRITTEN FOLLOW UP TO PHASE 3 REPORT – JAPAN

Name of country: JAPAN
Date of approval of Phase 3 Report: 16 December 2011
Date of information: 18 November 2013

Instructions

1. This document seeks to obtain information on the progress each participating country has made in implementing the recommendations of its Phase 3 Review.
2. Responses to the questions should reflect the current situation in your country, not any future or desired situation or a situation based on conditions which have not yet been met. For each recommendation, a separate space has been allocated for describing future situations or policy intentions.
3. Countries are asked to answer all recommendations as completely as possible. Please submit completed answers to the Secretariat on or before **12 November 2013**.

Chapeau to Recommendations

The last sentence of the Chapeau to the Recommendations states:

The Working Group also intends to revisit the issue of placement of the foreign bribery offence in the UCPL if enforcement of the offence has not significantly increased by the time of Japan's written follow-up report in December 2013.

Japan is invited¹ to comment on the impact on enforcement of placement of the foreign bribery offence in the UCPL:

The issue of placement of the foreign bribery offence in the UCPL was first brought by WGB in June 2006 during Phase 2bis evaluation. WGB indicated that the fact that the foreign bribery offence is placed in UCPL and not in the penal code may be the reason for the low level of enforcement of the offence in Japan.

We have considered and examined this issue since then but for the following reasons, we believe that the placement of the foreign bribery offence has not affected the enforcement efforts of the offence;

Prosecutors Office has indicted a number of offences stipulated in UCPL, including 28 cases in 2011, 83 cases in 2012 (As pointed out repeatedly, it is our legislative practice to stipulate offences in relevant

¹ Japan is not under any obligation to report in its written follow-up report on this issue. However, since the Working Group intends to revisit this issue in the context of the written follow-up report, Japan is invited to provide input to help ensure an informed discussion.

specific legislations. UCPL is a piece of legislation well-known to Japanese law enforcement officers).

While we have thus no doubt that our law enforcement officers are fully aware of the foreign bribery offence in UCPL, we took several measures to raise the profile of the offence among law enforcement authorities, such as announcing the importance of enforcement of the foreign bribery offence in UCPL in the assembly of law enforcement authorities.

MOJ and NPA have received opinions from prosecutors and police officers respectively that they well recognize the existence of the foreign bribery offence in UCPL and do not think that the degree of recognition and the effectiveness of combating the foreign bribery would be enhanced by moving it to the Penal Code or creating a separate law.

Through our participation in the Foreign Bribery Conference in Washington D.C and so on, we have come to the view that the main reason of the low level of enforcement of the foreign bribery offence lies in its very nature, especially the difficulty to detect its case lead. Foreign participants may have recognized many difficulties Japanese law enforcement officers had faced in this regard as well as their seriousness to deal with foreign bribery cases. Therefore, it is our challenge to more actively detect leads of foreign bribery cases, building on what our law enforcement officers have learned in Foreign Bribery Conference and so on.

On 11 September 2013, Aichi Prefectural Police arrested a former senior executive of FUTABA Industrial Co., a major car-parts manufacture, for the foreign bribery offense in the UCPL, bribing a public official in China to overlook an illegal operation at its plant in Guangdong province. Eventually, he was prosecuted and fined a half million yen.

Thus, it is our view that the placement of the foreign bribery offence in UCPL does not affect the level of enforcement of the offence.

PART I: RECOMMENDATIONS FOR ACTION

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

Text of recommendation 1:

1. The Working Group recommends that Japan take appropriate steps according to its legal system to ensure that sanctions imposed on natural and legal persons in practice are sufficiently effective, proportionate and dissuasive, in accordance with Article 3 of the Convention.

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

Regarding recommendation 1, we would like to explain our actions at recommendation 5 by way of avoiding repetitions.

If no action has been taken to implement recommendation 1, 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:

2. The Working Group recommends that Japan take appropriate steps within its legal system to urgently establish the necessary legal basis for confiscating the proceeds of bribing foreign public officials upon conviction of foreign bribery, to ensure that Japan is in compliance with Article 3.3 of the Convention. (Convention, Article 3.3)

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

Regarding recommendation 2, we would like to explain our actions at recommendation 5 by way of avoiding repetitions.

If no action has been taken to implement recommendation 2, 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:

3. The Working Group recommends that Japan find an appropriate way to balance the emphasis on prevention with facilitating enforcement of the foreign bribery offence by the Ministry of Economy, Trade and Industry (METI), or alternatively, that METI increase coordination with relevant ministries and agencies, such as the Ministry of Justice, to achieve this balance. (Convention, Article 5; Commentary 27; 2009 Recommendation, Annex I, para. D)

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

In order to facilitate enforcement of the foreign bribery offence, METI has strengthened the coordination with law enforcement authorities. In 2012, METI established clear guidelines on how allegations concerning bribery of foreign officials should be processed and transmitted to NPA and MOJ. (For further information, please see the implementation of the recommendation 9(v)). In addition, METI has contributed to the smooth enforcement of the law by having meetings with the law enforcement authorities and providing quick responses to their questions on the interpretation of the Unfair Competition Prevention Law regarding actual cases.

If no action has been taken to implement recommendation 3, 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(a):

4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Japan immediately take appropriate steps to actively detect and investigate foreign bribery cases, and the Working Group further recommends that Japan:

- a) Continue to use non-compulsory investigative measures and seek MLA at the earliest possible stage where appropriate, and provide a progress report to the Working Group in 24 months on consideration by Japan of the use of new investigative techniques for foreign bribery, such as wire-tapping and grants of immunity from prosecution, including through the special advisory body established by the Ministry of Justice to review Japan's criminal justice system;

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

- Use of non-compulsory investigative measures and MLA at the earliest possible stage

Regarding use of non-compulsory investigative measures, in Futaba case, Aichi prefectural police conducted voluntary investigations in early stage, and it resulted in successful indictment and conviction of the suspect.

Regarding use of MLA, law enforcement authority has been utilizing MLA requests on foreign bribery cases just after the authority became aware of allegations of such cases. Such MLAs include assistances such as bank accounts information, their transaction reports and interviews of important witnesses.

- Consideration of the use of new investigative techniques, including through the special advisory body established by MOJ

On 6 June 2011, Minister of Justice announced the establishment of "the Special Subcommittee on a Criminal Justice System for a New Era," with a view to discussing the new criminal justice system to meet the need of present day time including interrogation recordings as well as new investigative techniques.

The subcommittee has 40 members consisting of criminal law scholars, legal professions and intellectuals and met 19 times from June 2011 to January 2013 and actively discussed among other topics the introduction of new investigative techniques. These discussions included the examination of the legal system of other countries (Italy, United States and Korea). As a result, the subcommittee announced their basic direction in January 2013 in the document titled "Basic design of Criminal Justice System for a New Era".

The Basic Design highlighted the need of further examining new investigative techniques such as "mitigation/remission, prosecutorial agreement and immunity for cooperative witness/and suspect" and "interception of communication", and the working group was established by the subcommittee to continue discussion and review in further details.

The subcommittee has been held twice since January 2013, and the working group has been convened 8 times since March 2013. The topic of their discussions has included a general framework for the new system and issue of the new investigative techniques.

The subcommittee is open-ended with no specific termination dates. Also, as explained in the Phase 3 evaluation, this discussion and review of the abovementioned new investigative techniques is part of greater and ongoing discussions on a new criminal justice system for the new era. Therefore, we would like to stress that it is premature to draw any conclusion from these discussions at this stage.

If no action has been taken to implement recommendation 4(a), 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(b):

4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Japan immediately take appropriate steps to actively detect and investigate foreign bribery cases, and the Working Group further recommends that Japan:

- b) Further strengthen the framework for investigating foreign bribery cases by ensuring that special investigative divisions in district prosecutors' offices with special responsibility for economic and financial crimes: i) expressly include foreign bribery within the crimes they cover; ii) are adequately resourced and equipped to detect, investigate and prosecute foreign bribery cases; and iii) coordinate effectively with police and other relevant agencies, including the National Tax Agency and the Securities and Exchange Surveillance Commission; and

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

- Regarding (i) inclusion of foreign bribery within the scope of responsibilities of special investigative divisions in district prosecutors' offices;

As described in 6 month written follow-up report, MOJ has amended the regulations applicable to the prosecutor specially assigned to economic and financial criminal cases so as to expressly include the detection, investigation and prosecution of foreign bribery cases within the scope of their duties, and such amendment entered into force on 1 June 2012.

- Regarding (ii) placement of adequate resource for detection, investigation and prosecution of foreign bribery case in special investigative divisions in district prosecutors offices;

As described in 6 month written follow-up report, we believe that adequate resources are placed in special investigative divisions in Tokyo, Osaka, Nagoya etc.

More importantly, as Japan previously explained, the detection, investigation and prosecution of foreign bribery cases does not exclusively rely on prosecutors belonging to special investigative divisions. That is, a team of prosecutors from other divisions or offices would occasionally work with special investigative divisions where appropriate, which means that additional resources are readily available for foreign bribery investigations.

In addition, regarding the capacity of each prefectural police, it is noted that each prefectural police has adequate resource for detection, investigation and prosecution of foreign bribery case. In Futaba case, the 2nd investigative division of Aichi prefectural police detected and investigated the case, and with

enough resources, their investigation led to a successful prosecution.

- Regarding (iii) effective coordination with police and other relevant agencies;

The “framework” of effective coordination between special investigative divisions in district prosecutors offices and relevant agencies, including Police, the National Tax Agency (NTA) and the Securities and Exchange Surveillance Commission (SESC) has been well established and executed in practice, with respect to economic and financial crimes such as fraud, domestic bribery, tax invasion, security crime etc. Such framework of effective coordination, including interchange of personnel, individual case consultations prior to case referral to prosecutors office and the establishments and executions of joint-investigation have resulted in a number of successful investigations and prosecutions of economic and financial crimes.

Therefore, our challenge regarding recommendation 4(b) (iii) is how we make use of and strengthen such framework to actively investigate and prosecute foreign bribery cases. The following steps have been taken since Phase 3 evaluation in December 2011.

As described in 6 month follow-up report, MOJ had been stressing the importance of close cooperation with relevant investigative agencies to prosecutors with regard to foreign bribery cases, and after 6 month follow-up report, MOJ have continued to stress the same message in various occasions. Along with 3 police officers participated “Foreign Bribery Conference” in Washington D.C., where effective coordination among relevant agencies was one of the main themes.

Through the abovementioned measures, we believe that prosecutors have been fully aware that effective coordination among relevant agencies is key element to actively investigate foreign bribery cases.

Also, through meetings the framework of coordination among relevant agencies has been strengthened.

Furthermore, in Futaba case, Aichi prefectural police officers had coordinated closely with relevant authorities to overcome the legal and fact finding issues etc.

To conclude, we believe Japan has been taking necessary steps to further strengthen the framework of effective coordination between special investigative divisions in district prosecutors offices and relevant agencies, and hope such framework will bring more investigation and prosecution of foreign bribery cases in near future.

If no action has been taken to implement recommendation 4(b), 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(c):

4. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Japan immediately take appropriate steps to actively detect and investigate foreign bribery cases, and the Working Group further recommends that Japan:

- c) Take appropriate steps to ensure that the law enforcement authorities systematically follow-up with JAFIC, Japan’s financial intelligence unit, on how they are utilising information from

JAFIC in their foreign bribery investigations. (Convention, Article 5; Commentary 27; 2009 Recommendation V and Annex I, para. D)

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

The semi-annual assemblies (February and September) hosted by JAFIC were held with relevant ministries and agencies, including MOJ, Supreme Prosecutors Office, NTA and SESC in 2012 and 2013, and around 50 officials participated in these assemblies, respectively. The purpose of the assembly is to follow-up on how law enforcement officials are utilizing suspicious transaction reports from JAFIC.

While these assemblies focused on all crimes related to suspicious transaction reports, participants discussed the issue of the foreign bribery offence among others.

Furthermore, at the assembly in 25 September 2013, MOJ shared with other participants a case of a successful investigation of foreign bribery case with suspicious transaction report in a foreign State, and how that State utilizes suspicious transaction reports in the investigation of foreign bribery cases.

Thus, while there have been unfortunately no prosecutions of foreign bribery cases detected and established by suspicious transaction reports, relevant ministries and agencies have been fully aware of the importance of suspicious transaction reports from JAFIC in detecting foreign bribery cases, and continued to raise their awareness on utilization of suspicious transaction reports.

If no action has been taken to implement recommendation 4(c), 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:

5. The Working Group recommends that Japan take urgent steps to adopt the necessary amendments to the Act on Punishment of Organized Crimes and Control of Crime Proceeds (AOCL) to make it an offence to launder the proceeds of bribing a foreign public official. (Convention, Article 7; Commentary 28)

Actions taken as of the date of the follow-up report to implement this recommendation (1,2 and 5):

As for the natural person, UCPL has been revised in June 2005 to increase the term of imprisonment and the amount of monetary fine for the foreign bribery offence from maximum 3 years sentence of imprisonment or maximum 3 million Yen fine to maximum 5 years sentence of imprisonment and/or maximum 5 million Yen fine. Compared to the sanction of domestic bribery which is imprisonment of maximum 3 years or (not and/or) 2.5 million Yen fine, criminal punishment of the foreign bribery offence is more severe. As for the legal persons, UCPL provides a maximum fine of 3 hundred million Yen, which is also more severe than domestic bribery which provides no criminal punishment for legal person. In addition, it should be pointed out that, although criminal punishment of domestic bribery is relatively lenient, crime rate of domestic bribery is kept very low.

Having said above, in order to evaluate whether or not the sanctions imposed on natural and legal persons are sufficiently effective, proportionate and dissuasive, in accordance with Article 3 of the

Convention, not only the term of imprisonment and the amount of monetary fine but amount of confiscation of proceeds should also be considered (Thus, we put the recommendation 1, 2 and 5 together to explain the actions taken).

Currently, the Act on Punishment of Organized Crime and Control of Crime Proceeds (AOCL) prescribe in a list format the crimes for which proceeds can be confiscated and the laundering of the proceed is punishable as money laundering. Currently this list does not include foreign bribery (nor domestic bribery). We have tried to amend the AOCL by stipulating all crimes for which the maximum sentence of imprisonment is 4 years or more, including foreign bribery offence, as those crimes for which proceeds can be confiscated and the laundering of the proceed can be punishable as the offence of money laundering. This approach of listing all serious crimes as predicate offences of money laundering has been consistent with the obligation of the UN Convention against Transnational Organized Crime, which defines serious crime as "maximum sentence of imprisonment of at least four years." In this manner, once the foreign bribery offence becomes predicate offence of AOCL, AOCL will provide legal framework not only to make it an offence to launder the proceeds of bribing a foreign public official but will make it possible to confiscate its proceeds of bribing foreign public official upon conviction of the offence.

As stated previously, the abovementioned amendment of AOCL has been submitted three times by the Cabinet since 2003 but has not been resubmitted since 2009 due to the political situation. The amendment of the AOCL is now under consideration by the relevant ministries, recognizing the need to conclude the Convention at the earliest timing.

If no action has been taken to implement recommendation 5, 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:

6. The Working Group recommends that Japan continue to conclude MLA treaties, particularly with its trade partners.

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

If no action has been taken to implement recommendation 6, 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:

Since Phase 3 evaluation in December 2011, Japan has not concluded any MLA treaties (Following Croatia's accession to EU in June 2013, Croatia has joined Japan-EU MLAA). However, Japan has been keeping in touch with some countries for the possible conclusion of MLA treaties.

Text of recommendation 7:

7. The Working Group recommends that Japan consider including in its bilateral tax treaties, the optional language of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention, which allows the sharing of tax information by tax authorities with other law enforcement authorities and judicial authorities on foreign bribery. (2009 Recommendation on Tax Measures for Further Combating Foreign Bribery)

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

Japan has fully understood the importance of sharing tax information by tax authorities with other law enforcement agencies and judicial authorities on foreign bribery. In this regard, Japan signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (hereinafter, “the Multilateral Convention”) on 3 November 2011, which contains a provision similar to the fourth sentence of paragraph 2 Article 26 of the current OECD Model Tax Treaty (the optional language in paragraph 12.3 of the Commentary to the Article 26 of the previous Model, hereinafter, “the Fourth Sentence”). The Convention entered into force with respect to Japan on 1 October 2013.

As of 1 November 2013, there are thirty countries (including Japan itself) in which the Multilateral Convention has entered into force. Japan does not yet have bilateral tax treaties with eight countries among them. As the Multilateral Convention has the same effect as bilateral tax treaties with the Fourth Sentence with regard to those twenty-nine countries, Japan has substantially accomplished recommendation 7.

As of 1 November 2013, Japan’s bilateral treaties either in force or signed, do not include the Fourth Sentence. However, Japan intends to include the Fourth Sentence in bilateral tax treaties which are expected to be signed in the near future; Japan expects that the number of treaties with the Fourth Sentence will increase.

If no action has been taken to implement recommendation 7, 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 ensuring effective prevention and detection of foreign bribery

Text of recommendation 8:

8. The Working Group recommends that Japan periodically review its policies and approach on small facilitation payments and urgently take steps to encourage companies to prohibit the use of such payments in their internal company controls, ethics and compliance programmes or measures. (2009 Recommendation, para. VI)

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

Small facilitation payments are not excluded from application of Unfair Competition Prevention Law

of Japan which governs the offence of bribery of foreign public officials. In other words, the offence of bribery of foreign public officials includes any act of obtaining improper business advantage in international business, regardless of whether or not it is through the provision of small facilitation payments.

In order to clarify this important point, METI announced its views on facilitation payments in the “Guidelines to Prevent Bribery of Foreign Public Officials.”

In response to the recommendation, METI conducted a sampling survey targeting small and medium-size companies. The result shows that businesses are ill-informed regarding the details of the Guidelines to Prevent Bribery of Foreign Public Officials, while many companies which answered they “know the Guidelines” have been utilizing the Guidelines.

METI has recognized a significant need to raise awareness concerning the Guidelines, including the approaches to small facilitation payments. With this recognition, METI has enhanced its efforts to deepen understanding of the contents of the Guidelines by companies, including the policy on small facilitation payments, with the cooperation of organizations such as the Chamber of Commerce and Industry. For example, METI distributed 7,000 copies of the leaflet which contains explanations of the Guidelines.

If no action has been taken to implement recommendation 8, 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 9:

9. The Working Group recommends that Japan strengthen the role of METI in preventing and detecting foreign bribery, by: i) increasing visibility of information on the foreign bribery offence on METI’s website, including the METI Guidelines to Prevent the Bribery of Foreign Public Officials, and the foreign bribery ‘reporting desk’; ii) more proactively engaging with small- and medium-size enterprises (SMEs), including by more actively promoting the METI Guidelines; iii) clarifying METI’s role in providing informal advice on foreign bribery; iv) more actively engaging with companies of all sizes on effective compliance programmes, based on international developments in this area; and (v) assessing the reasons why so far no reports of foreign bribery allegations have been received by the METI ‘reporting desk’, and establishing clear guidelines on how such reports should be processed and referred to the law enforcement authorities when received. [2009 Recommendation, para. II i), IX i), and X C i)]

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

Regarding i): Increasing Visibility of Information

In order to increase the visibility of information on foreign bribery, METI has improved the content of its website relating to bribery of foreign public officials. Specific measures to improve the content of its web site are as follows.

- To further attract the interest of private business operators and employees, METI posted a cartoon that explains the offence of bribery of foreign public officials.
- METI created and posted on the website a new material that briefly summarizes the “Guidelines

to Prevent Bribery of Foreign Public Officials” and the overseas trends regarding foreign bribery.

- METI distributed the new material to Japanese companies which operate overseas with the cooperation of the Japan External Trade Organization (JETRO) to increase their awareness.

Regarding ii): Engaging with small and medium- sized enterprises (SMEs)

METI has produced educational leaflets that succinctly describe the Guidelines, and with cooperation of various organizations such as the Japan External Trade Organization (JETRO) and The Small and Medium Enterprise Agency, METI has conducted publicity activities targeting small and medium-sized enterprises.

In addition, in May, 2013, METI provided information on the offence of bribery of foreign public officials to small and medium-sized enterprises through the Small and Medium Enterprise Agency’s public e-mail newsletter.

Regarding iii): Clarifying METI’s role

METI has the role to give formal and informal advice regarding foreign bribery set forth in the Unfair Competition Prevention Law to private companies and relevant organizations. METI clearly indicates this role in the leaflet, and advises companies on concrete strategies for preventing the offence of foreign bribery.

Furthermore, METI has made efforts to quickly and appropriately respond to formal and informal inquiries from the police and other law enforcement agencies.

Regarding iv): Corporate compliance programs

Regarding corporate compliance programs, the Guidelines explicitly outline priorities to be included in companies’ compliance programs. METI also succinctly describes such items in the educational leaflet and urges them to refer to the Guidelines when they need more information. This information has been disseminated to a large number of companies including SMEs through publicity activities.

Moreover, METI actively provides advice based on the Guidelines whenever private business operators and employees in legal departments seek METI’s advice regarding methods for introducing effective compliance programs.

Regarding v): Managing the METI “reporting desk”

Results of the survey in march 2012 indicated that private sector knowledge of METI’s reporting desk was minimal and subsequently few reports of foreign bribery allegations have been received by the reporting desk.

Therefore, METI has publicized contact information of the reporting desk on the leaflet and on the METI website to warn companies about the consequences of bribery of foreign public officials.

In response to the recommendation to establish clear guidelines on how allegations concerning bribery of foreign officials should be processed and transmitted to law enforcement, the three relevant branches of the government, namely the National Police Agency (NPA), the Ministry of Justice (MOJ) and METI, had several coordination meetings. As a result, in May, 2012, they established the official guidelines on how

the information received by METI should be transmitted to law enforcement agencies.

Under the guidelines, a) METI shares suspicious reports of cases of bribery of foreign official either orally or in writing with NPA and MOJ, and b) in cases where METI receives material or electric data from a whistle-blower, METI provides copies of such materials or data to NPA and MOJ while keeping the original on hand.

In accordance with the guidelines, METI has shared the relevant information with NPA and MOJ on actual cases.

If no action has been taken to implement recommendation 9, 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 10(a):

10. Regarding Japan's accounting and auditing framework for preventing and detecting foreign bribery, the Working Group recommends that Japan:

- a) Work with the Japanese Institute of Certified Public Accountants (JICPA) and relevant business associations to raise awareness of Japan's foreign bribery offence among the accounting and auditing profession, especially members of the profession that perform accounting and auditing activities for companies that are not subject to the Financial Instruments and Exchange Act (FIEA);

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

With cooperation of organizations such as JICPA and Business Ethics Research Centre (BERC), METI has been working to raise awareness of foreign bribery offences among both employees involved in internal control and certified public accountants including accountants conducting non-FIEA audit. Specifically, JICPA posted the documentation created by METI on the web site for members of JICPA, and METI delivered a lecture on preventing foreign bribery to certified public accountants.

If no action has been taken to implement recommendation 10(a), 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 10(b):

10. Regarding Japan's accounting and auditing framework for preventing and detecting foreign bribery, the Working Group recommends that Japan:

- b) Consider providing clearer guidance on the application of Article 193-3 of the FIEA, including on whether and/or when an external auditor should report suspected acts of foreign bribery to the Financial Services Agency (FSA) and how suspicions that have been reported to the FSA are to be shared with law enforcement authorities, and consider keeping a record of the number of opinions submitted to the FSA related to foreign bribery and how they are resolved; and

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

While the FSA does not provide such guidance, JICPA has provided and revised operational guidelines etc. below in order to urge an external auditor and an auditee company to give a proper response based on Article 193-3 of the FIEA, when any law (not limited to the FIEA) is violated or misstatement etc. on the materiality occurs, and if an external auditor and an auditee company give no action to the violation of any law.

- Publication of 'Consideration of an External Auditor in the Case of False Accounting Processing'

JICPA provided the view on, as actions taken by an auditor based on Article 193-3 of the FIEA, understanding of an auditor of request system to an authority in the case of detection of incompliance with a law and considering of cancellation of audit contract.

- Review of 'Joint Research on the Collaboration between an Auditor or Board of Auditors or an Audit Committee and an Auditor' (now Summarizing Comments from the Public)

JICPA newly provided the view on how and when an auditor officer and external auditor should collaborate, and what kind of information and views they should exchange,, based on what Business Accounting Council has established as 'The Standard of Dealing with Fraud Risk', which was brought about by the cases of accounting fraud.

Comments, etc. brought to the FSA must be kept as an administrative document under the Rule of Administrative Documents Management of the FSA.

If no action has been taken to implement recommendation 10(b), 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 10(c):

10. Regarding Japan's accounting and auditing framework for preventing and detecting foreign bribery, the Working Group recommends that Japan:

- c) Further clarify when a bribe payment to a foreign public official falsely recorded in the books and records incorporated in registration and disclosure documents would be material to a company's financial statements, for the purpose of the application of the offence of making a false statement in registration and disclosure documents. [Convention, Article 8, 2009 Recommendation, para. X A i), iii), and v)]

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

While the FSA does not provide the criteria of the materiality, JICPA established an operational guideline titled 'The Materiality in an Audit Plan and Conduct' in December 2011, which clarified the way of decision of average value of the materiality in conduct of audit by an auditor. In making this guideline, JICPA referred to International Standard on Quality Control (ISQC) (clarity ver.) published by the International Auditing and Assurance Standards Board (IAASB) and International Standards on Auditing (ISA).

If no action has been taken to implement recommendation 10(c), 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 11:

11. The Working Group recommends that Japan take appropriate measures to ensure the detection by the tax authorities of bribes to foreign public officials concealed under various tax deductible expenses, including 'miscellaneous expenses', and exercise particular care in this respect when auditing tax returns of companies that are not subject to the FIEA. (2009 Recommendation on Tax Measures for Further Combating Foreign Bribery)

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

As explained in the past consultations, the Japanese tax laws explicitly prescribe that bribes to foreign public officials are not deductible for any tax purpose.

Moreover, in order to prevent such bribes being disguised as other account titles (thus recognised as non-taxable items), our tax auditors, who have been well informed through our training programmes and the like, carefully examine the cross-border transactions of each company, including the one not subject to the FIEA.

With regard to the alert for taxpayers, the National Tax Agency's official website explains the possibility of additional penalties in cases where bribe expenditures are reported as deductible expenses by way of disguising or concealing such expenditures.

If no action has been taken to implement recommendation 11, 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 12:

12. The Working Group recommends that Japan consider providing specific training to contact points in overseas missions to help them collect and analyse information on allegations of foreign bribery and respond to questions from Japanese nationals and companies overseas regarding Japan's foreign bribery offence. [2009 Recommendation, para. IX ii), X C i)]

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

In response to the recommendation, the Ministry of Foreign Affairs (MOFA) has produced a new training material for officials in overseas missions, in order to enhance their capacity to gather information and support Japanese citizens and companies in foreign countries, in cooperation with other relevant ministries and agencies. In July 2013, the MOFA instructed all overseas missions that officials designated as contact points for the OECD Anti-bribery Convention should learn the training material.

This training material consists of three parts, namely;

1. comprehensive information about OECD Anti-bribery Convention, the Unfair Competition Prevention Law, foreign bribery cases of Japanese companies, and the phase 3 evaluation on Japan,
2. expected role of overseas missions, such as i) gathering information including press report regarding foreign bribery cases potentially involving Japanese citizens or Japanese companies in order to grasp investigative leads, ii) providing information about the OECD Anti-bribery Convention and the METI's Guideline to Japanese citizens and companies overseas, iii) supporting and consulting with Japanese citizens and companies on foreign bribery,
3. Q&A exercises based on hypothetical foreign bribery cases

If no action has been taken to implement recommendation 12, 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 13:

13. The Working Group recommends that Japan update the Working Group on any progress, on which it can publicly report, regarding research by the Consumer Affairs Agency on the effectiveness of the Whistleblower Protection Act and the number of cases brought to court under the Act and, where possible, the outcomes of these cases. Japan could consider including in this research an analysis of the possible application of the Act to Japanese private-sector employees overseas. [2009 Recommendation, para. IX iii)]

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

1. Research on the effectiveness of the Whistleblower Protection Act

1) Research on the implementation status targeting administrative organs

The researches on the implementation status of the Whistleblower Protection Act, targeting approximately 1,800 national and local administrative organs, were carried out in 2011, 2012 and 2013. The latest research was completed in September 2013.

The research found that the percentage of national and prefectural governments that had set up a reporting desk remained at 100 % and that of municipalities rose from 47.3% to 50.1%.

It was also found that there were around 3,000 to 4,000 cases per year in which the administrative organs carried out investigations or rectification measures after receiving whistleblowing. Therefore, it might be said that the system can be evaluated as being effectively functioning.

2) Research on the implementation status targeting private business operators

The research on the implementation status of the Whistleblower Protection Act, targeting approximately 3,000 private business operators, was completed June 2013.

The result shows that the awareness about the Whistleblower Protection Act of large enterprises maintained a very high level (more than 95%) and the awareness of small-to-medium-sized enterprises has been upwards trend (it rose to 64.0% from 61.4% during 2008 to 2012).

It was also found that the percentage of large enterprises that had set up a reporting desk maintained a very high level (more than 96%) and that of small-to-medium-sized enterprises has been upwards trend (it rose to 58.9% from 54.7% during 2008 to 2012).

In addition, according to the findings of the research, many private business operators showed a positive attitude about the effectiveness of installation of a reporting desk as follows (multiple answers). For example, 57.6% of them responded "The environment where employees could report about injustice in comfort was improved" and 48.2% of them responded "It is functioning as a deterrent against an illegal act".

3) Other relevant information (public relations efforts to enhance the awareness with respect to the Whistleblower Protection)

Responding to the reference to the public awareness level of the Whistleblower Protection Act in the Japan Phase 3 Report, the Consumer Affairs Agency has been implementing the following public relations

actions concerning the Act.

- In 2012 and 2013, the Consumer Affairs Agency organized explanatory meetings to raise the awareness of the Act in seven locations nation-wide (Tokyo, Hokkaido, Yamagata, Fukui, Wakayama, Kouchi and Okinawa) for the private business operators and employees. These locations were chosen as the study by the Consumer Affairs Agency had found that the rates of the existence of the reporting desk were at a low level.
- In 2012 and 2013, in order to enhance the knowledge of the officials who are in charge of dealing with the whistleblowing at the national and local governments, the Consumer Affairs Agency organized trainings workshop in five locations throughout Japan.
- In 2012 and 2013, the Consumer Affairs Agency introduced the information on the purposes of the Act and the guidelines in various meetings, where senior officials of the national and local governments attended. These meetings include the convention of ministries and agencies responsible for the Whistleblower Protection Act, and the conference of division heads who are responsible for consumer policies in the national and the local government.
- In 2012, in the symposium concerning the Whistleblower Protection Act, organized by the Japan Federation of Bar Associations, the Consumer Affairs Agency exchanged views with lawyers and experts. On that occasion, the Consumer Affairs agency also disseminated information of the Act to the public in order to raise awareness.
- In 2012, the Consumer Affairs Agency cosponsored the free telephone consultation service for whistleblowers hosted by the Tokyo Bar Associations etc. and supported the Association's activities for the whistleblower protection.
- In 2012, the Consumer Affairs Agency revised the handbook so as to make the summary of the Act easier to understand. The agency distributed approximately 15,000 copies of the handbook to the national and local administrative organs, economic associations, various consumer groups, and private business operators. The Consumer Affairs Agency provides a telephone consultation service concerning the Whistleblower Protection Act every week from Monday to Friday, from 9:30 to 17:30. In the consultation, the experts who have the specialized knowledge of the Act respond to questions and consultations (e.g. contact information of reporting desk and requirements for protection) from private business operators and employees and administrative organs, etc. They receive about 1000 questions and consultations on average per year.
- Furthermore, as part of the effort to disseminate information regarding the Act, the Consumer Affairs Agency has set up a web-site for Whistleblower Protection to provide various types of information that may assist the whistleblowers as well as the organizations. Such information includes explanations of the Act, various guidelines, various information materials, materials used in the meetings and trainings, various researches' results, Q&A.

The Consumer Affairs Agency will continue disseminating information vigorously to enhance the awareness of the importance of the Whistleblower Protection Act. As the public relations efforts, for example, the symposiums are scheduled to be held next year, where enterprises' concrete and good practices will be presented to emphasize that addressing whistleblowing appropriately could obviate the management risks and be beneficial to enterprises themselves.

Then, through analyzing the results of the research on whistleblower protection, the Consumer Affairs Agency will consider measures to increase the effectiveness of the system including a review of the guidelines and the act.

2. Number of cases brought to court under the Act and the outcomes of these cases

Though not all the cases are published, the Consumer Affairs Agency is aware that more than ten cases regarding the whistleblower protection have been brought to court to date. In many of these cases, whistleblowers side won: in typical cases several million yen was approved as the compensation for damages. In this connection, the protection of whistleblowers is provided not only through the Whistleblower Protection Act but also through, for example, the Labor Contract Act or Civil Code. Therefore, as to which law should be applied as legal basis depends on the trial strategy of the plaintiffs and, not all the cases invoked only the clauses of Whistleblower Protection Act.

3. Analysis of the possible application of the Act to Japanese private sector employees overseas.

As a general rule, the objective of Japanese laws related to whistleblower protection is to protect the workers located in Japan. However, if the predetermined requirements of the international jurisdiction and the applicable laws are met, the workers of Japanese corporations overseas can be protected in the Japanese law courts by the Whistleblower Protection Act or other acts.

If no action has been taken to implement recommendation 13, 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 14:

14. The Working Group recommends that Japan take appropriate steps to coordinate the efforts of the Japan Bank for International Cooperation (JBIC) and Nippon Export and Investment Insurance (NEXI) to prevent and detect foreign bribery in international business transactions benefitting from official export credit support and that NEXI and JBIC also raise awareness of the risks of foreign bribery among Japanese companies, especially SMEs. [2009 Recommendation, para. III vii), XII ii); 2006 Recommendation on Bribery and Officially Supported Export Credits, para. 1 (a)]

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

JBIC has established the Legal Affairs and Compliance Office as an integrated compliance management unit and has been making efforts to improve compliance through this office. The office has developed Compliance Manual and Compliance Program and circulates them to all JBIC staffs, including its management, and raises awareness of compliance, including foreign bribery.

Specifically, JBIC sets an internal rule about the response to any act in violation of laws or regulations, including foreign bribery, which stipulates JBIC employees' reporting duty immediately after detecting any illegal event with regard to projects in which JBIC is involved.

To raise staffs' awareness of compliance issues including the risk of foreign bribery, JBIC implements compliance trainings in a timely manner and checks its staffs' understanding by conducting a test.

Regarding actions taken toward Japanese companies, JBIC displays the brochure, made by METI, for prevention of foreign bribery on its public space of the meeting room.

NEXI continued its efforts to raise awareness of risks of foreign bribery among Japanese companies

by calling attention to it and cooperating with METI in distributing educational leaflets that succinctly describe the content of the Guidelines.

In particular, NEXI is supporting overseas business of SMEs by using a support network between NEXI and regional banks based on service agreements with those banks promoting the use of NEXI insurance. With such purpose, NEXI has raised awareness of risks of foreign bribery among SMEs by distributing the educational leaflets in such occasions including seminars for exporters held in cooperation with those regional banks.

If no action has been taken to implement recommendation 14, 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:

PART II: ISSUES FOR FOLLOW-UP BY THE WORKING GROUP

Text of issue for follow-up:

15. The Working Group will follow-up the issues below as case law and practice develops on the implementation of the foreign bribery offence in the UCPL:

- a) Whether in practice the foreign bribery offence covers the case where a bribe has been transferred with the agreement of the foreign public official to a third party, such as a political party, business partner, charity, or family member;

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:

As described in Phase 3 on-site visit, according to the case law developed in domestic bribery, in the case where a bribe is transferred to a third party with the agreement of the foreign public official, the offence of foreign bribery would be established if such third party, 1) is considered to be an agent of foreign public official and it is fair to regard that such bribe is transferred to foreign public official, 2) is considered to be categorized as foreign public official himself/herself, such as his/her spouse, or 3) has conspired with foreign public officials to transfer a bribe to such third party.

Unfortunately, there has no new case law etc. developed with regard to foreign bribery offence since Phase 3 evaluation.

Text of issue for follow-up:

15. The Working Group will follow-up the issues below as case law and practice develops on the implementation of the foreign bribery offence in the UCPL:

- b) The liability of legal persons for the foreign bribery offence, including 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 legal persons depends upon the conviction or punishment of the natural person who perpetrated the offence; (iii) legal persons are subject to the provision on nationality jurisdiction; and (iv) whether liability of a parent company would be triggered if someone representing it directed or authorised a representative of a foreign subsidiary to bribe a foreign public official; 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:

As described in Phase 3 on-site visit, a legal person would be punishable for the offences committed by its representative, an agent, employee or any other person with regard to the business of said legal person. The headquarter of a legal person in Japan would be punishable for the offence committed by the foreign subsidiary if the representative, an agent, employee or any other person of the headquarter has conspired together to commit the offence, including the case where the headquarter directs or authorises a representative of a foreign subsidiary to bribe a foreign public official ((b) (iv)) and the headquarter emanates the bribe for related company ((b)(i)).

Also, as described in Phase 3 on-site visit, according to case law developed with respect to cooperate liability, it is unnecessary for the liability of legal persons to have the natural person convicted or punished ((b)(ii)), and legal person is punishable if a Japanese national of the said company commits foreign bribery abroad and punishable according to the provision on nationality jurisdiction ((b)(iii)).

Unfortunately, there has been no new case law etc. developed with regard to foreign bribery offence since Phase 3 evaluation.

Text of issue for follow-up:

15. The Working Group will follow-up the issues below as case law and practice develops on the implementation of the foreign bribery offence in the UCPL:

- c) New five-year statute of limitations, to ensure that it allows an adequate period for the investigations and prosecution of the foreign bribery offence.

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 statute of limitation of the offence of foreign bribery for natural and legal person extended from 3 years to 5 years in 2005, together with the increase of the maximum sentence of natural person from 3

years to 5 years. In addition, the Code of Criminal Procedure (Paragraph 1 of Article 255) provides the suspension of the statute of limitation in the case where/while the offender is outside Japan. The suspension of the statute of limitation is very useful, while considering international nature of foreign bribery.

In Futaba case, although the period of statute of limitation was originally until December 2012, it was extended to December 2013 since the offender had travelled and stayed abroad for a year in total after he had committed the offence of foreign bribery.

Therefore, as this case shows, five-year statute of limitation allows an adequate period for the investigation and prosecution of the foreign bribery case.