



PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN JAPAN

December 2011

This Phase 3 Report on Japan by the OECD Working Group on Bribery evaluates and makes recommendations on Japan's implementation and application 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. It was adopted by the Working Group on 16 December 2011.

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EXECUTIVE SUMMARY

The Phase 3 Report on Japan by the OECD Working Group on Bribery evaluates and makes recommendations on Japan's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and related instruments. The Report focuses on developments since Japan's Phase 2 evaluation in March 2005, taking into account other Phase 2 monitoring steps, including Japan's Phase 2*bis* evaluation in June 2006, and written self-assessment report and written follow-up report in October 2007. It also addresses cross-cutting horizontal issues that are routinely covered in each country's Phase 3 evaluation. The Group notes that Japan has obtained convictions for foreign bribery in two cases since the foreign bribery offence came into force in Japan in 1999. Of particular note is the second case, which involved substantial bribe payments in relation to a major infrastructure project financed in part by official development assistance (ODA) from Japan. This case resulted in convictions of four natural persons, including the representative of a foreign subsidiary, and the company itself, which was also delisted for two years from ODA-funded contracting. Nevertheless, prosecutions in two foreign bribery cases in 12 years appears very low in view of the size of the Japanese economy, and the Working Group continues to have serious concerns that Japan still does not appear to be actively enforcing its foreign bribery offence.

Japan must take measures to ensure that sanctions for individuals and legal persons are 'effective, proportionate and dissuasive' in accordance with Article 3 of the Convention, and take urgent measures to ensure compliance with Article 3.3 of the Convention by establishing a legal basis for confiscating the proceeds of bribing foreign public officials. Japan must also take urgent steps to encourage companies to prohibit the use of facilitation payments, and make it an offence to launder the proceeds of foreign bribery. The Working Group also recommends that the Ministry of Economy, Trade and Industry (METI), the lead ministry on the implementation of the Convention, balance its emphasis on prevention of foreign bribery by Japanese companies and individuals with facilitating enforcement of Japan's foreign bribery offence. Moreover, the Group recommends that METI strengthen its prevention role by, for instance, increasing visibility of information about foreign bribery on its website and more actively engaging with companies on establishing compliance programmes. The Working Group will also follow-up certain features of Japan's framework for addressing foreign bribery, such as application of its foreign bribery offence to cases where a bribe is transferred to a third party with the agreement of the foreign public official and corporate liability for the offence. In two years, the Working Group will 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.

The Working Group acknowledges indications by Japan that they are making greater use of mutual legal assistance (MLA) and non-compulsory investigative measures at an early stage in foreign bribery investigations. The Working Group also has a clear expectation that Japan will give serious consideration to using new investigative techniques, such as wire-tapping and grants of immunity from prosecution. It also appears that the police and prosecutors, and other agencies such as the National Tax Agency and Financial Service Agency's Securities and Exchange Surveillance Commission, are beginning to more closely coordinate and share information. Japan has also taken some steps that should increase reports of allegations of foreign bribery, including a legal requirement that external auditors report possible illegal acts to law enforcement authorities, developing contact points in overseas missions for collecting information on foreign bribery allegations, and providing whistleblower protections for public and private sector employees.

The Report and the recommendations, which reflect the findings of experts from Canada and Norway, were adopted by the OECD Working Group on Bribery on 16 December 2011. The Working Group invited Japan to submit a written report in six months on progress in actively detecting and investigating foreign bribery cases and on its implementation of recommendations 2, 4 and 5, an oral report in one year on recommendations 8, 9 and 13, and, according to regular Phase 3 procedure, a written report in two years on its progress implementing all the recommendations. This report is based on the laws, regulations and other materials supplied by Japan and information obtained by the lead examiners during their three-day, on-site visit to Tokyo from 26 to 28 July 2011, during which the examiners met with representatives of Japan's public administration, private sector and civil society.

A. INTRODUCTION

1. The on-site visit

1. From 26 to 28 July 2011, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (WGB) visited Tokyo as part of the Phase 3 evaluation of Japan's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and related anti-bribery instruments. The 38 States Parties that make up the WGB were represented at the on-site visit by lead examiners from Canada and Norway. The lead examiners were supported by members of the OECD Secretariat.¹

2. The purpose of the on-site visit was to meet with the main stakeholders in Japan's efforts to combat the bribery of foreign public officials in international business transactions. The on-site visit focused on practical steps taken by Japan to implement and enforce the Anti-Bribery Convention, as well as the 2009 Recommendation for further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation), and the 2009 Recommendation of the Council on Tax Measures for further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

3. Cooperation by the Japanese government was excellent throughout the Phase 3 process. Prior to the visit, Japan responded to the standard Phase 3 questionnaire and a supplementary questionnaire with country-specific questions (Phase 3 Questionnaire). In preparation for the on-site visit, Japan also provided translations of relevant legislation, policy documents and court decisions. During the on-site visit, the evaluation team met with representatives of the Japanese government, private sector and civil society.² The discussions were focused on the most important issues identified by the lead examiners in preparation for the on-site visit. Due to the use of consecutive translation throughout the meetings, it was necessary to be concise and organised. Following the on-site visit, the Japanese authorities responded to extensive questions and requests for further documentation that arose from the discussions during the on-site visit.

4. The on-site visit was well attended by a broad range of officials from various relevant ministries and agencies in the Japanese government with working level experience on implementation of the Anti-Bribery Convention and related instruments. The Japanese government was also represented by the Parliamentary Senior Vice-Minister for Foreign Affairs, Mr. Yutaka Banno. The Japanese authorities made impressive efforts to bring to the meetings law enforcement authorities from different major economic centres. Government representatives made every effort to share information about cases of the bribery of foreign public officials, within Japanese rules on the confidentiality of investigations, including cases that

¹ Canada was represented by Ms. Cheryl Cruz, Legal Officer, Criminal, Security and Diplomatic Law Division, Foreign Affairs and International Trade Canada; and Staff Sergeant Gisele Rivest, Commercial Crime Branch, Royal Canadian Mounted Police. Norway was represented by Mr. Atle Roaldsøy, Senior Advisor, Ministry of Justice of Norway; and Ms. Elisabeth Frankrig, Chief Legal Advisor, Ministry of Finance of Norway. The OECD Secretariat was represented by Mr. Patrick Moulette, Head, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs; Ms. Christine Uriarte, Counsellor, Anti-Corruption Division; and Ms. Mary Crane-Charef, Communications Officer, Anti-Corruption Division.

² See Annex 2 for a list of participants.

had been prosecuted and ongoing investigations. Meetings with the private sector and civil society were also well attended. Private sector representatives included nine large listed companies, notably three small-to medium-sized enterprises (SMEs) from various sectors, business associations, and representatives from the accounting and auditing, legal and tax professions. Participants also included representatives from civil society, academia and the media.

2. Summary of monitoring steps leading to Phase 3

5. Japan has already undergone a number of monitoring steps leading up to its Phase 3 evaluation, including Phase 1 (May 2002) and Phase 2 (March 2005), and the regular follow-up reporting that all States Parties to the Anti-Bribery Convention provide. Japan has also undergone certain exceptional monitoring steps, in accordance with the WGB's monitoring procedures, as follows: 1) Phase *2bis* evaluation (June 2006); 2) written Self-Assessment Report and written follow-up report (October 2007); and 3) two annual oral reports (March 2008 and October 2009). In addition, in November 2009, letters were sent by the WGB to four Japanese ministers.³ In summary, the exceptional steps were taken to follow-up specific concerns that the WGB had about Japan's implementation of the Anti-Bribery Convention. In particular, the Working Group had serious concerns that the Japanese authorities were not pro-actively investigating and prosecuting allegations of foreign bribery involving Japanese individuals and companies. Where relevant, these concerns are mentioned in this report.⁴

3. Outline of the report

6. This report is structured as follows: Part B examines Japan's efforts to implement and enforce the Convention and the 2009 Recommendations having regard to Group-wide (horizontal) issues for evaluation in Phase 3. It pays particular attention to enforcement efforts and results, as well as 'country specific' (vertical) issues arising from progress made by Japan on weaknesses identified in Phase 2 and Phase 2bis, and issues raised by changes in the domestic legislation or institutional framework of Japan; and Part C sets out the WGB's recommendations and issues for follow-up.

4. Economic Background

7. Japan's economy is the third-largest in the world, after the United States and China, which surpassed Japan's economy in 2011. Trade is vital for Japan's economy growth, as many of its leading industries are major exporters. Moreover, Japanese exports of manufactures earn the foreign exchange needed to purchase raw materials for its economy: Japan's industrial sector is heavily dependent on imported raw materials and fuels. Japan's major export partners in 2010 were China (18.9 percent), United States (16.4 percent), South Korea (8.1 percent), and Hong Kong, China (5.5 percent; 2009). Its major export goods in the same year were transport equipment, motor vehicles, semiconductors, electrical machinery and chemicals.⁵ The United States is the largest recipient of Japan's outward foreign direct investment (FDI), with a stock of USD 231 billion in 2009, followed by the Netherlands (USD 77.53 billion), China⁶ (USD 77.5 billion), the Cayman Islands (USD 65 billion) and Australia (USD 32 billion).

3. The letters were sent to the following ministers in the Government of Japan: Minister of Justice; 2. Chairman of National Commission on Public Safety, Minister of State for the Abduction Issue; 3. Minister of Economy, Trade and Industry; and 4. Minister for Foreign Affairs.

4. All of the WGB's evaluations of Japan are available on the OECD website at: http://www.oecd.org/document/14/0,3746,en_2649_34859_44585102_1_1_1_1,00.html

5. CIA – The World Factbook – Japan (<https://www.cia.gov/library/publications/the-world-factbook/geos/ja.html>)

6. This figure includes FDI statistics for the People's Republic of China, Hong Kong, Macao, and Chinese Taipei.

FDI in Asia, however, is on the rise: From 2003 to 2009, the level of FDI outflows to Asian FDI recipients increased from USD 6 billion to USD 21.3 billion.⁷

8. Since Japan's Phase 2bis evaluation in 2006, two major events have affected Japan's economy: first and most recently, the March 2011 earthquake and ensuing tsunami, and second, the 2008-2009 global financial crisis. The long-term effects of the 9.0-magnitude earthquake and tsunami that devastated north-eastern Japan are yet to be determined. After the earthquake and tsunami, Japan's stock market dropped as much as 10 percent in a single day, though it recovered to 95 percent of its pre-earthquake level within one month. The Government estimated the damage to social infrastructure, housing and the private firms' fixed capital at around 3.5 percent of GDP. Despite the short-term negative impact of the earthquake, the economy has been recovering as industrial production has risen to within 8 percent of its pre-earthquake peak, although the pace of recovery is now moderating after an initial spurt.⁸

9. Japan's exposure to the global financial crisis was limited, but the collapse of world trade took a heavy toll: Export volumes fell by 40 percent in early 2009 and industrial production dropped by one-third.⁹ Total economic output at the end of 2010 remained 4 percent below its pre-crisis peak in 2008 and Japan remains the only OECD country facing entrenched deflation, which emerged in the late 1990s.

10. In response to the financial crisis and to further encourage Japanese exports, the Japanese Government has proposed a New Growth Strategy aiming to open the agricultural and services sectors to greater foreign competition and boosting exports through free-trade agreements. The Strategy places extra emphasis on strengthening ties with Asian trading partners, which account for 56 percent of Japanese exports. Japan enacted its first Economic Partnership Agreement with Singapore in 2002, followed by agreements with ten other countries, of which eight were in Asia, plus an agreement with ASEAN. Japan also signed an agreement with Peru in May 2011. Japan may be considering participating in negotiation for further wide-ranging free trade agreements, such as the Trans-Pacific Partnership (with Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the United States, and Vietnam). Also as part of its push to expand Japanese business abroad, the Japanese Government established in June 2011 a new 'Framework for Supporting SMEs in Overseas Business', which is led by the Ministry of Economy, Trade and Industry's (METI) Small and Medium Enterprise Agency.¹⁰ According to government estimates, there are 4 190 719 small- to medium-sized enterprises (SMEs) in Japan, accounting for 99.7 percent of all enterprises.¹¹ Under this new framework, the Government aims to support their overseas expansion by, among other measures, setting up 50 000 business deals between Japanese SMEs and foreign companies.

7. OECD International Direct Investment database, as of July 2011.

8. OECD, Economic Survey of Japan, March 2011 (http://www.oecd.org/document/62/0,3746,en_33873108_33873539_47651390_1_1_1_1,00.html)

9. OECD, 2011 OECD Economic Survey of Japan (http://www.oecd.org/document/62/0,3746,en_33873108_33873539_47651390_1_1_1_1,00.html)

10. METI, 'Establishment of the "Framework for Supporting SMEs in Overseas Business": Comprehensive assistance to SMEs advancing into overseas markets', June 2011 (http://www.meti.go.jp/english/press/2011/0623_01.html); METI, '2011 White Paper on Small and Medium Enterprises in Japan', July 2011 (http://www.meti.go.jp/english/press/2011/0701_04.html).

11. The Japanese government's definition of an SME varies by business category. For (1) manufacturing, construction, transport, and other industries (excluding categories 2-4, which follow), SMEs are defined as enterprises with capital of up to JPY 300 million and up to 300 regular employees; small enterprises are those with up to 20 employees. For (2) wholesale businesses, SMEs are defined as enterprises with capital of up to JPY 100 million and up to 100 employees; small enterprises are those with up to 5 employees. For (3) services businesses, SMEs are defined as enterprises with capital of up to JPY 50 million and up to 100 employees; small enterprises are those with up to 5 employees. For (4) retail businesses, SMEs are defined as enterprises with capital of up to JPY 50 million and up to 50 employees; small enterprises are those with up to 5 employees.

5. Cases involving the bribery of foreign public officials

11. Following Japan's Phase 2 evaluation in March 2005, Japan prosecuted two cases of bribing foreign public officials under the foreign bribery offence in Japan's Unfair Competition Prevention Law (UCPL). These cases were discussed by the Japanese authorities during the on-site visit. The summary of these cases, which follows, includes only anonymised information about the cases, including the identity of the defendants, in accordance with the Japanese tradition and rules on confidentiality in criminal proceedings. During the on-site visit, the Japanese authorities also discussed one investigation that had been closed, and three ongoing investigations. Since discussions on these cases were strictly confidential, this report provides only minimal information regarding them.

a) *Summary of completed cases*

(i) *Case # 1*

12. The first case involved the bribery of two foreign government officials by Defendant 'A,' a senior executive of a foreign subsidiary of a Japanese company, and Defendant 'B,' an employee of the same foreign subsidiary, in order to obtain favourable treatment in a foreign public procurement contracting process. The bribes, which were in the form of material gifts, were worth approximately JPY 800 000 (USD 10 400).¹² The company did not win the contract, the value of which is not specified. Defendant 'A,' a Japanese national, was convicted and fined JPY 500 000 (USD 6 500). Defendant 'B,' also a Japanese national, was convicted and fined JPY 200 000 (USD 2 600). The defendants admitted guilt, and were convicted on summary trial. The facts that gave rise to the case took place in 2004, and the convictions were obtained in 2007. This case was detected through a whistleblower. This case is discussed throughout this report where relevant.

(ii) *Case # 2*

13. The second case involved the bribery of a senior official of a foreign public procurement authority in relation to a substantial infrastructure project that was financed in part by official development assistance (ODA) from Japan. Four Japanese defendants were convicted under the foreign bribery offence in the UCPL and sentenced as follows: Defendant 'A,' a senior executive of a Japanese company was sentenced to imprisonment with work for 2 years. Defendant 'B,' another executive of the company, Defendant 'C,' a manager of the company, and Defendant 'D,' a representative of a 'paper' subsidiary in a third country, were sentenced to imprisonment for 2.5 years, 1.5 years, and 20 months, respectively. The sentences for all these defendants were suspended for three years. The company was also convicted and fined JPY 70 million (USD 910 000). Upon the arrest of Defendant 'A,' the company was delisted from official development assistance (ODA) funded contracting for 24 months by the Japan Bank for International Cooperation (JBIC), and delisted from the Japan International Cooperation Agency's (JICA) registration list of consultant firms. The Court specified that bribes were paid totalling approximately USD 820 000, and stated that this represented only a part of the approximate total of USD 2.432 million paid to the foreign public official. The value of the contract won by the company through all the bribe payments including those that were not prosecuted was approximately USD 24 million in total. The bribe payments that gave rise to the prosecutions took place between 2003 and 2006, and the convictions were obtained in 2009. In response to a separate indictment, the Court also sentenced the company in 2008 to a fine of JPY 16 million (USD 208 000) for evading approximately JPY 81 million in income taxes through fraudulent

12. The conversion of Japanese Yen (JPY) into US dollars (USD) throughout this report is based on the exchange rate on 14 September 2011.

accounting.¹³ This case was detected in the course of investigating another alleged offence involving the company. It is discussed throughout the report where relevant, including under the discussion on the statute of limitations, regarding the reason why certain bribe payments were not prosecuted in this case.¹⁴

b) *Summary of closed investigations*

14. Due to insufficient evidence, the Japanese authorities closed an investigation regarding the alleged bribery of a foreign public official by a Japanese company. The bribery also allegedly involved affiliates of the Japanese company, and was for the purpose of obtaining a major public procurement infrastructure project. Mutual legal assistance (MLA) was successfully obtained from the foreign public official's country, but did not provide evidence of handing over a bribe to a foreign public official, or the identity of such an official. The Japanese authorities do not indicate that they explored other possible avenues to secure evidence in this case.

c) *Summary of ongoing investigations*

15. The Japanese authorities described two out of three ongoing investigations by prosecutors' offices of the bribery of foreign public officials. The two cases allegedly involve a foreign subsidiary of a Japanese company and a local agent. They were reported by the relevant Japanese company, which provided documentation. Japan has requested MLA from the relevant jurisdictions, but so far the requests have either not been satisfied, or have not provided evidence of foreign bribery. Several other cases involving the same company are not being pursued due to the expiration of the statute of limitations.

16. The National Police Agency (NPA) reported that police authorities are also currently investigating possible foreign bribery cases, and provided limited information about one of those cases, which involves a major infrastructure contract. Due to the expiration of the statute of limitations, some of the alleged bribery payments are not being investigated.

¹³ The company tried to deduct the amount of the bribes from its income by claiming them as 'consignment fees'.

¹⁴ See Part B 4 c) of this report.

Commentary

The lead examiners consider that the number of investigations and prosecutions in more than 12 years since the offence came into force in Japan seems very low, particularly given the size and scope of the Japanese economy, as it can be expected that the higher the level of exports and outward foreign direct investment (FDI), the greater the risk of exposure to bribe solicitation in foreign jurisdictions.

The lead examiners have the clear impression that Japan is still not actively detecting and investigating foreign bribery cases, and that this is likely a major impediment to a more effective enforcement of Japan's foreign bribery offence.

The main focus of this report is on assessing potential obstacles to Japan's active enforcement of the foreign bribery offence and recommending constructive solutions on addressing this issue. As a result, the lead examiners recommend that Japan immediately take appropriate steps to address this problem, and report back in this regard within six months of adoption of this report [2009 Recommendation, V].

B. IMPLEMENTATION AND APPLICATION BY JAPAN OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

17. This part of the report considers the approach of Japan to key Group-wide cross-cutting issues identified by the WGB for the evaluation of all Parties subject to Phase 3. Where applicable, consideration is also given to vertical (country-specific) issues arising from progress made by Japan on weaknesses identified in Phase 2, or issues raised by changes in the domestic legislation or institutional framework of Japan.

1. Foreign bribery offence

a) Small facilitation payments

18. Japan's offence of bribing a foreign public official in the UCPL does not provide a defence or exception for small facilitation payments, as permitted by Commentary 9 on the Anti-Bribery Convention. However, at the time of Phase 2, Phase 2bis, and Japan's Phase 2 written follow-up report, the METI *Guidelines to Prevent Bribery of Foreign Public Officials* (METI Guidelines) contained information on small facilitation payments that might have conveyed to the private sector that such payments were not prohibited by the foreign bribery offence. Since then, the misleading information was deleted in 2010, and the lead examiners are satisfied that the outstanding recommendation to revise the METI Guidelines in this respect has been fully implemented.

19. Under Paragraph VI of the 2009 Recommendation, each member country is recommended to periodically review its policies and approach on small facilitation payments, and encourage companies to prohibit their use through internal company controls, ethics and compliance programs or measures, as recommended by Paragraph VI of the 2009 Recommendation. The Japanese authorities explain that the Subcommittee on Corporate Affairs related to International Business Transactions, Trade and Economic Cooperation Committee, Industrial Structure Council, which was formed by METI in 2003, periodically

reviews the issue of facilitation payments.¹⁵ For instance, in January 2007 and September 2010, the Subcommittee reviewed the findings of the WGB in Japan's Phase 2 and Phase 2bis reports, respectively, and as a result, METI revised the Guidelines to Prevent Bribery of Foreign Public Officials, to clarify that facilitation payments are not permitted under the UCPL. Since 2005, the Subcommittee met in December 2005, April 2006, September 2006, September 2008 and July 2010.

20. Discussions with the private sector at the on-site visit indicated a high level of concern about solicitations from foreign public officials for facilitation payments. For instance, a representative of the accounting and auditing profession stated that small facilitation payments would be very difficult to detect in the current auditing framework, which uses audit sampling. He explained that this is a concern for the profession in Japan, which recognizes that effective corporate social responsibility does not just extend to preventing large illegal payments, especially since making systematic facilitation payments is usually indicative of a larger structural problem in a company. As a result, the accounting and auditing profession is undertaking a study on facilitation payments to more fully understand the extent of the problem and recommend solutions.¹⁶

21. Two large listed companies stated that their corporate policy is to prohibit facilitation payments; however, one said that it would also need to investigate the 'customs' in this respect in the country where the payment is solicited. The other one said that its foreign subsidiaries often complain about requests for facilitation payments. A third large company said that it has not so far received questions from its foreign subsidiaries about facilitation payments. SMEs also complained about frequent solicitations for facilitation payments in relations to their foreign operations, but one observed that the phenomenon is starting to decrease.

22. A research paper on facilitation payments published by an academic in Japan shows that 31.4 percent of Japanese companies surveyed have a policy on facilitation payments, either for or against them. Of these companies, less than 20 percent have explicit rules on how to deal with such payments, and of those, half tolerate them.¹⁷

23. Despite the deletion of potential misleading information on small facilitation payments in the METI Guidelines, to date the Japanese authorities have not actively engaged with Japanese companies to encourage them to prohibit making small facilitation payments; although METI representatives indicate that they will begin to do so in the context of raising awareness of the METI Guidelines.

Commentary

The lead examiners note that Japan has fully implemented the outstanding recommendation to delete misleading information in the METI Guidelines about facilitation payments.

In response to concerns in the private sector about continuing requests for facilitation payments in relation to their operations abroad, and a recent research study that shows that Japanese companies do not necessarily have clear policies and rules prohibiting or discouraging such payments, the lead examiners recommend that Japan implement Paragraph VI of the 2009 Recommendation, to periodically review Japan's policies and approach on

¹⁵ More information about the formation and purpose of the Subcommittee can be found in the Phase 2 Report on Japan (see pp. 10-11).

¹⁶ See section B.7. for more information on accounting and auditing.)

¹⁷ Umeda, Prof. Toru, *Corporate practices on how to deal with facilitation payments: experiences of Japanese subsidiaries operating in Southeast Asia*, Reitaku University, March 2010. The 2007 survey targeted 950 Japanese companies involved in international business, of which 97 responded.

small facilitation payments. The lead examiners welcome indications that METI will begin to actively encourage companies to prohibit the use of facilitation payments in their internal company controls, ethics and compliance programmes or measures in relation to raising awareness of the METI Guidelines. The lead examiners therefore recommend that Japan urgently follow-through with this measure, and that Japan's oral report in one year from the date of adoption of this report include information on progress in this regard.

b) Interpretation of 'international business'

24. At the time of Phase 2, Phase 2bis, and Japan's Phase 2 written follow-up report, the term 'international business' in the foreign bribery offence in the UCPL was interpreted in the METI Guidelines as follows: 'acts concerning business repeatedly and continuously conducted for the purpose of profit'. As a result, in Phase 2bis, the Working Group recommended that Japan delete this language from the METI Guidelines. In 2007, the misleading information was deleted from the Guidelines, and the lead examiners are thus satisfied that the outstanding recommendation to revise the METI Guidelines in this respect has been fully implemented.

Commentary

The lead examiners note that Japan has fully implemented the outstanding recommendation to delete the misleading interpretation in the METI Guidelines on 'international business'.

c) Bribes that benefit third parties

25. The foreign bribery offence in the UCPL does not expressly cover the case where transmission of the bribe is directed to a third party beneficiary, and jurisprudence, including on cases of domestic bribery under the Penal Code, does not clearly show that this situation is covered under Japanese law unless the foreign public official receives the benefit 'in substance'. The Phase 2 Report therefore recommends that Japan '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...'

26. In the responses to the Phase 3 Questionnaire, the Japanese authorities confirm that a case where the bribe has been transferred to a third party has not yet been investigated under the UCPL. They also explain that jurisprudence on the domestic bribery offence in the Penal Code establishes that it is an offence to direct the bribe to a third party, such as a 'family member' of the official, who has conspired together with the official or someone acting as a messenger for the official, with the result that in substance the bribe can be deemed to have been given to the official. They state that there must be a clear correlation between the advantage that is given to the third party and the performance of the foreign public official's duties.

Commentary

In the absence of supporting jurisprudence, the lead examiners wish to follow up on whether in practice the foreign bribery offence in the UCPL would cover the case where a bribe has been transferred to a third party, such as a political party, business partner, charity, or family member with the agreement of the foreign public official. They note that to date no foreign bribery case involving this kind of fact situation has been investigated or prosecuted by the Japanese authorities.

d) Placement of foreign bribery offence in UCPL

(i) Outstanding issue from Phase 2bis

27. Since Phase 1 the WGB has had serious concerns about the placement of the foreign bribery offence in Japan's UCPL, and wondered whether use of the UCPL might have contributed to the low level of enforcement. In particular, the WGB wondered whether placement of the offence in the UCPL was impeding the level of awareness in Japan of the foreign bribery offence, and the level of priority given to foreign bribery investigations and prosecutions. Moreover, the Group questioned whether placement of the foreign bribery offence in the UCPL was incompatible with vigorous enforcement of the offence, since METI, the ministry with overall responsibility for the UCPL, is responsible for promoting foreign trade and investment. As a result, the Phase *2bis* Report recommended that Japan 'enhance the visibility and enforcement of the foreign bribery offence as a matter of priority, notably, by moving the offence from the UCPL to the Penal Code'. At the time of the Phase 2 written follow-up report this recommendation remained outstanding.

28. The Japanese authorities strongly disagree with the Phase *2bis* recommendation to move the foreign bribery offence from the UCPL to the Penal Code. They underline that inclusion of the offence in the UCPL is consistent with the fundamental principles of Japan's legal system, which only foresees inclusion of core criminal offences in the Penal Code. In addition, the Penal Code does not include any offence against legal persons. Other kinds of criminal offences are normally included in specialised criminal statutes, such as the UCPL. The Japanese authorities do not believe that placement of the foreign bribery offence in the UCPL has been an impediment to its effective enforcement. In particular, they stress that since the convictions in Case #2 have been widely publicised, the UCPL is now associated with foreign bribery. They add that the private sector is more likely to consult with METI than other ministries on the application of the foreign bribery offence, so that it makes sense that the offence is in the UCPL and thus under the overall responsibility of METI. In summary, the Japanese authorities view this Phase *2bis* recommendation as unworkable, and believe that it might impede constructive action by Japan on the Working Group's recommendations as a whole.

29. The lead examiners remain concerned that the UCPL has impeded the active enforcement of the foreign bribery offence in Japan for the same reasons that were cited by the Working Group in Phase 2 and Phase *2bis*.¹⁸ However, they do not believe that the Working Group's recommendation in Phase *2bis* to move the offence to the Penal Code is the best way forward at this stage, in view of several factors. The lead examiners believe that moving the offence to the Penal Code might involve a change to the fundamental principles of Japan's legal system, which Commentary 2 on the Anti-Bribery Convention explicitly states is not the intention of the Convention. The lead examiners also note that the foreign bribery offence has been in the UCPL for 12 years, including five and a half years since Phase *2bis*, and since then two prosecutions have occurred, which has helped raise awareness in the public and private sectors that the offence is contained in the UCPL. Some progress in investigating foreign bribery has been noted.¹⁹ As a result, the examiners consider that rather than pursuing the Phase *2bis* recommendation, at this stage it may be more constructive for Japan to focus its efforts on making the most of the legislative technique that has been chosen, and improve implementation of the foreign bribery offence in the UCPL.

Commentary

¹⁸ The concerns of the Working Group are set out in pages 28 to 30 of the Phase *2bis* Report on Japan, and include METI's overriding responsibility for promoting trade and industry, which might appear counterintuitive to enforcing a criminal offence prohibiting bribery in international business. In addition, at the time of Phase *2bis*, Japan had not obtained a conviction of foreign bribery, and the METI Guidelines contained misleading information about the foreign bribery offence, which has since been deleted. The Working Group also noted that the bulk of Japan's bribery offences were contained in the Penal Code, and prosecutions for offences in general under the UCPL seemed low.

¹⁹ For more information on investigations and prosecutions, see section B.5.

The lead examiners recommend that the Working Group 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.

(ii) *Improving visibility of the foreign bribery offence in the UCPL*²⁰

30. One important way to ensure high visibility of a foreign bribery offence, and thus send the message that enforcement is a priority, is making it easy to locate on the relevant government website. However, it is difficult to locate information about the offence on METI's website; it is located under the heading, 'Intellectual Property Protection', which would not be the obvious place to look for this kind of information. During the on-site visit, discussions with METI officials and private sector representatives demonstrated that METI has an important role to play in the prevention of foreign bribery. In addition to the METI Guidelines, which provide companies with advice on preventing and raising awareness of corruption in their overseas operations, METI officials state that a 'very important part of their mission' is responding to informal requests for information from the private sector. Typical questions concern whether a particular action constitutes foreign bribery under the UCPL, including small payments, and entertainment and social expenses. Companies also request advice on how to develop an organisational structure to prevent foreign bribery. Officials in METI's Intellectual Property Policy Office with several years of UCPL experience typically answer these questions, after consulting with METI lawyers, but would refer questions to the Ministry of Justice (MOJ) and other agencies, 'depending on their character'. These METI officials do not receive special training for this task. However, MOJ officials stated that they would refer questions about interpretation of the foreign bribery offence to METI, since METI is the leading ministry on implementation of the Anti-Bribery Convention.

(iii) *Detection of foreign bribery by METI*

31. METI might also have an important role to play in detecting incidents of foreign bribery, since it might receive reports of foreign bribery from companies and other members of the public. For this reason, in Phase 2, the WGB recommended that Japan establish a system to enable METI to effectively process allegations of foreign bribery and pass them on to the law enforcement authorities. In response to this recommendation, METI established a 'reporting desk' on its website for this purpose. The 'reporting desk' is not easy to locate, as it is also found under the heading 'Intellectual Property Protection'. Japan states that upon receiving a whistleblower report of foreign bribery, it would refer the whistleblower to the appropriate 'administrative organ, which has the authority to impose a disposition or a recommendation, etc., about the reportable fact...' So far, METI has not received any whistleblower reports on foreign bribery.²¹

32. At the on-site visit, private sector representatives discussed engagement with METI on the foreign bribery offence. One large listed company consulted METI on establishing a compliance programme, but claims it did not get answers to fundamental questions, such as on the control and screening of business partners. Instead, METI told the company to talk to other companies. Two other large listed companies believe that METI should be making policy recommendations on effective compliance programmes based on international developments in this area. Three major listed companies agreed that the most significant risk area for which they need advice concerns foreign subsidiaries in emerging markets.²²

20 . For more information on public awareness and the reporting of foreign bribery, see section B.10.

21 . For more information on whistleblower protections, see section 10.c.

22 . For more information on public awareness and the reporting of foreign bribery, see section B.10.

33. Two SMEs stated that they would consult a private lawyer if they needed advice on the foreign bribery offence. One SME stated it would consult the Japan External Trade Organization (JETRO, which is an independent administrative organ under METI),²³ if it needed advice on small facilitation payments, and two thought they would go to JETRO if they knew of foreign bribery committed by competitors. Two SMEs were confused about the application of the foreign bribery offence to their conduct abroad. One SME expressed a desire to obtain information about the application of different countries' legal systems to its overseas operations, and another would like to know how to respond to invitations by foreign public officials to engage in entertainment and social activities. The SMEs were generally unaware of the METI Guidelines until they prepared for the on-site visit.

34. The Japanese versions of JETRO's *Guidelines for Environmental and Social Considerations* refer to foreign bribery as a risk in JETRO's projects to support SMEs developing their business abroad. However, JETRO has not received any inquiries from the private sector about foreign bribery.

35. The Organization for Small and Medium Enterprises and Regional Innovation (SMRJ, which is an independent administrative agency under METI),²⁴ has received a few general inquiries about bribery in foreign markets. METI encourages SMRJ to give advice to SMEs on how to prevent foreign bribery.

Commentary

The lead examiners acknowledge that as the lead ministry on Japan's implementation of the Anti-Bribery Convention, due to placement of the foreign bribery offence in the UCPL, METI has an important role to play in the prevention of foreign bribery in the private sector, including through the dissemination of the METI Guidelines and providing informal advice to the private sector upon request. However, the lead examiners believe that METI's prevention and detection role could be strengthened, and thus recommend the following: 1) Increasing visibility overall on METI's website regarding the foreign bribery offence in the UCPL, the METI Guidelines, and the foreign bribery 'reporting desk' ; 2) More proactive engagement with SMEs, including through more active promotion of the METI Guidelines through seminars and publications; 3) Clarification of METI's role in providing informal advice on foreign bribery, for instance on the METI website; 4) More active engagement with companies of all sizes on effective compliance programmes based on international developments in this area; 5) 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.

In addition, given that the Anti-Bribery Convention is primarily a criminal law treaty requiring active enforcement of each Party's foreign bribery offence, the lead examiners recommend that the Japanese authorities find an appropriate way to balance METI's emphasis on prevention with facilitating enforcement of the offence. If it is not appropriate or possible for METI to take on this role, as the lead ministry in Japan on the foreign bribery offence, the lead examiners recommend that METI increase coordination with relevant ministries and agencies, such as the MOJ, to better achieve this balance.

²³ JETRO promotes mutual trade and investment between Japan and the rest of the world. Its current main focus is on promoting inward FDI in Japan and helping Japanese SMEs maximise their global export potential (See JETRO's website for further information: <http://www.jetro.go.jp/en/jetro/>).

²⁴ SMRJ provides targeted and personalised support measures to SMEs through its nine regional branch offices across Japan. (See SMRJ's website for further information: <http://www.smrj.go.jp/english/index.html>).

2. Responsibility of legal persons

36. Pursuant to Article 22 of the UCPL, which establishes the liability of legal persons for the foreign bribery offence, a legal person is liable to punishment by fine for the foreign bribery offence when ‘a representative of a juridical person, or an agent, employee or any other of a juridical person’ has committed the foreign bribery offence ‘with regard to the business of said juridical person’.

37. In Phase 2, the Working Group stated that it would follow-up once there has been sufficient practice 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; and (iii) legal persons are subject to the provision on nationality jurisdiction. In Phase *2bis*, the Working Group recommended again following up the application of nationality jurisdiction to legal persons for the foreign bribery offence.

38. Out of the two cases of foreign bribery that have been prosecuted in Japan, one, described as Case #2 in this report, which was decided in 2009, involved the conviction of a legal person. Representatives of the company’s head office in Japan, a branch office in the country of the foreign public official, and a ‘paper’ subsidiary in a third country, were all involved in the scheme and were also convicted. According to the Court records, the company had created ‘cunning bribery schemes to avoid accusations of UCPL violations...such as creating paper companies or subsidiaries outside of Japan to conceal its operation’.

39. In the responses to the Phase 3 Questionnaire, the Japanese authorities explained that pursuant to the UCPL, a legal person is ‘vicariously liable’ for ‘crimes committed by its representative, an agent, an employee or others with regard to its business’. Following the on-site visit, the Japanese authorities clarified that such liability applies to acts by any person who acts in connection with the business of a legal person, which includes a part time employee or ‘any other’ person. This appears very broad, but given that only one company has been prosecuted to date, and in the absence of jurisprudence, it is difficult to assess whether this liability fully covers the approach to the liability of legal persons recommended in Annex I of the 2009 Recommendation.²⁵ For the same reasons, it is also difficult to adequately assess whether the liability of legal persons depends upon the conviction or punishment of the natural person who perpetrated the offence, and whether legal persons are subject to the new provision on nationality jurisdiction.

40. Private sector representatives emphasised the risk of foreign bribery by foreign subsidiaries in emerging markets. The Japanese authorities explained in their responses to the Phase 3 Questionnaire that ‘the headquarters of a legal person in Japan would be punishable for the offence committed by a foreign subsidiary, if the representative, an agent, employee or any other person of the headquarters had conspired’ together with a representative of the foreign subsidiary to commit the offence, thus providing a link between the Japanese headquarters and the foreign subsidiary. However, this statement raises the question of whether the 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.

25. The title of Annex I of the 2009 Recommendation is, ‘Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions’.

Commentary

The lead examiners recommend continuing follow-up of the application of the liability of legal persons in the UCPL to the foreign bribery offence as case law and practice develop, 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.

3. Sanctions

a) Sanctions under the UCPL

(i) Natural persons

41. In June 2005, following the Phase 2 evaluation (March 2005), Japan raised the level of punishment for natural persons for the foreign bribery offence as follows: 1) the term of imprisonment was raised from a maximum of 3 years to a maximum of 5 years; 2) the fine was increased from a maximum of JPY 3 million (USD 39 000) to a maximum of JPY 5 million (USD 65 000)²⁶; and 3) imprisonment and a fine could be imposed together.

42. In Case #1, the two convicted natural persons were sentenced to fines in the amount of JPY 500 000 (USD 6500) and JPY 200 000 (USD 2600), respectively. These fines appear low, considering that the bribes were worth 800 000 (USD 10 400). The Japanese authorities confirm that mitigating factors may have included the defendants' admissions of guilt, and the fact that the company did not win the contract that the bribe was intended to obtain.²⁷

43. In Case #2, the four convicted natural persons were sentenced to imprisonment for 2 years with work, 3 years, 2.5 years and 20 months, respectively. These sentences were suspended for all four of the defendants. Given that the value of the bribe given to the foreign public official was USD 820 000, that the value of the contract obtained by the company through all the bribe payments, including ones that were not prosecuted, was approximately USD 24 million in total, and that the contract was partly financed by ODA funds, suspended sentences of imprisonment could appear not sufficiently 'effective, proportionate and dissuasive' as required by Article 3.1 of the Anti-Bribery Convention.

44. It is Japan's view that suspended sanctions could be considered in line with this standard. Sentences imposed from 2006 to 2009 for financial and economic crimes in the court of first instance follow a similar trend as those for foreign bribery. For example, in 2008 the rate of imprisonment without suspension of execution of the sentence was as follows for economic and financial offences under the following statutes: 10.5 percent under the Income Tax Act, 5.6 percent under the Corporation Tax Act, 33.3 percent under the Companies Act, 0 percent under the Anti-Monopoly Act, and 0 percent under the Bid-Rigging Act.²⁸ The Japanese authorities indicated a similar trend of imposing suspended sentences of imprisonment for the bribery of domestic public officials. Statistics on the sentences imposed on natural

26. The sanctions for natural persons were increased in order to facilitate the extension of the statute of limitations for natural persons to 5 years. The statute of limitations is discussed under A.5.c.

27. Since this case was dealt with by summary procedure, detailed reasons were not provided by the Court.

28. The cited statistics are provided in Appendix 1-6 of the 'White paper on crime 2009' (<http://hakusyo1.moj.go.jp/en/58/nfm/mokuji.html>)

persons for the supply-side of bribing domestic public officials, and for offences such as fraud and theft could have been useful in assessing Japan's compliance with Article 3.1.

45. During the on-site visit, an academic stated that use of imprisonment is avoided where possible and appropriate in Japan, as rehabilitation is the overriding goal of the criminal justice system. Another academic explained that the use of imprisonment is 'not related to law enforcement' but to 'deterrence'. Both academics stated that the sanctions imposed on the natural persons in Case #1 and Case #2 were appropriate for Japan. The use of conditional prison sentences for the individual perpetrators in Case #2, in particular, raises some concern for the lead examiners, as they could appear very lenient under the circumstances, and might not be considered sufficiently 'effective, proportionate and dissuasive', as required by Article 3.1 of the Convention.

(ii) *Legal persons*

46. Under the UCPL, legal persons are liable to a maximum fine of JPY 300 million (USD 3.9 million) for the offence of bribing a foreign public official.

47. In Case #1, the legal person was not prosecuted or convicted. In Case #2, the legal person was convicted and fined JPY 70 million (USD 910 000). The same legal person was also fined JPY 16 million (USD 208 000) for tax evasion through fraudulent accounting including in relation to bribe payments (see discussion under A.5.a) on Case #2). The fine therefore amounts to more than the value of the bribe that was given – USD 820 000. On the other hand it is not comparable to the value of the contract that was obtained through all the bribe payments including those that were not prosecuted (i.e., USD 24 million in total). Aggravating factors included that the contract was partly financed by ODA funds, and that the bribery was conducted in a systematic manner, such as by creating affiliates outside of Japan to conceal the bribery. Mitigating factors included that the company was disqualified from official development assistance (ODA) contracting bids for 24 months and delisted from the Japan International Cooperation Agency's (JICA) registration list of consultant firms, upon the arrest of one of the defendants (not as a sanction upon conviction).²⁹ The Court also referred to the following mitigating factors: 1) the company's reputation was damaged and consequently the company was 'forced to withdraw itself from international business' after 40 years; 2) it was expected to go into liquidation; and 3) it had made important development contributions.

48. The Court's view of the reputational damage caused in Japan to a legal person that has been convicted of an offence was supported by a representative of the accounting and auditing profession, a representative of the legal profession, and an academic. Nevertheless, the sentence imposed on the company in Case #2 does not appear to take into account that it is part of a major corporate group, which according to the website of its holding company dominates its sector domestically and globally. In any case, the lead examiners are not satisfied that the fine imposed, taking together all the aggravating and mitigating factors cited by the Court, meets the standard under Article 3.2 of the Anti-Bribery Convention, which requires that 'legal persons shall be subject to effective, proportionate and dissuasive' sanctions, including monetary sanctions. In particular, due to the substantial discrepancy between the amount of the fine imposed on the company and the value of the contract obtained by bribing, the fine imposed could be considered merely the cost of doing business.

Commentary

The lead examiners are concerned that sanctions imposed on legal and natural persons might not be sufficiently effective, proportionate and dissuasive, and recommend that Japan take

29. The actions taken by JICA upon arrest of the defendant are discussed more fully under section 11.

appropriate steps according to its legal system to ensure that sanctions imposed on natural and legal persons in practice are in accordance with Article 3 of the Convention.

The lead examiners consider that how to reconcile a Party's sentencing practices and the requirement in Article 3.1 on 'effective, proportionate and dissuasive criminal penalties' is a horizontal issue that affects several Working Group on Bribery members.

4. Confiscation of the bribe and the proceeds of bribery

49. Pursuant to Article 2(2)(ii) of the Act on Punishment of Organized Crimes and Control of Crime Proceeds (AOCL), the bribe given to a foreign public official can be confiscated (i.e., 'any property given through a criminal act'). However, confiscation of the proceeds of bribing a foreign public official (i.e., the benefit obtained from bribing a foreign public official, such as a public procurement contract), is not available.

50. The absence of such confiscation has been a significant issue for Japan, beginning in Phase 2 (March 2005), when the WGB identified it as a follow-up issue in view that a Bill to Amend the AOCL was before Parliament. When Japan gave its second Phase 2 annual report in October 2009, the Japanese authorities reported that the Bill still had not been passed. This posed a serious concern for the WGB, because there had not been any authority to confiscate the substantial proceeds obtained by the company convicted in Case #2 in 2009, or impose a monetary sanction of comparable effect, as required by Article 3.3 of the Anti-Bribery Convention. Indeed, the maximum fine of JPY 300 million (USD 3.9 million) available for legal persons convicted of foreign bribery constituted less than 20 percent of the value of the contract won by the company in Case #2 through all the bribe payments, including the ones that were not prosecuted (i.e., USD 24 million). As a result, the Chairman of the WGB sent letters on behalf of the WGB to four Japanese ministers, including the Minister of METI, the Minister of Justice and the Minister of Foreign Affairs,³⁰ urging Japan to enact the Bill to Amend the AOCL without further delay.

51. In March 2010, the Ambassador to the Japanese Permanent Delegation to the OECD replied that Japan had complied with Article 3.3 of the Convention, because the maximum fine available for legal persons – JPY 300 million (USD 3.9 million) – could be considered a monetary sanction of 'comparable effect' to confiscation. The Ambassador also stated that the Bill to Amend the AOCL 'is a serious issue, and the Japanese authorities will consult among the relevant ministries and agencies and give full consideration to this matter'.

52. During the on-site visit, the lead examiners discovered that the Bill to Amend the AOCL was rejected by Parliament in July 2009. The Japanese authorities informed them that following rejection of the Bill, Japan is considering ways to have the necessary implementing legislation in place in order to 'conclude' the UN Convention against Transnational Organized Crime. However, the Japanese authorities stated that they do not consider that rejection of the Bill impacts on their compliance with Article 3.3 of the Anti-Bribery Convention, reiterating the government's view that the maximum fines for natural and legal persons for the foreign bribery offence have a 'comparable effect' to confiscation.

53. During the on-site visit, one academic stated that the bribe and proceeds of bribing should be confiscated in foreign bribery cases, 'even though this is not easily done in Japan'. A representative of the MOJ stated that even though the proceeds of bribery cannot be confiscated, the 'amount of the profit is a very important factor when deciding a penalty'. He also told the lead examiners that, for this reason,

30. The fourth letter was sent to the Chairman of the National Commission on Public Safety, Minister of State for the Abduction Issue.

prosecutors make best efforts to collect information on the profits. A prosecutor from a district office was of the view that a fine as a punishment is different from confiscation, but added that normally the larger the proceeds, the higher the fine penalty. Information on how the profit is calculated in determining an appropriate fine penalty would assist in future assessments of this issue.

Commentary

The lead examiners are of the view that Japan is not in compliance with Article 3.3 of the Anti-Bribery Convention, because, ‘monetary sanctions of comparable effect’ are not available to compensate for the inability at law to confiscate the proceeds of foreign bribery in cases where the proceeds exceed the maximum available fine of JPY 300 million (USD 3.9 million). The lead examiners therefore recommend that Japan take appropriate steps within its legal system to urgently establish the necessary legal basis. The lead examiners recommend that Japan report back to the WGB regarding its progress in this regard within six months of the adoption of this report.

5. Investigation and prosecution of the foreign bribery offence

54. In view that only two cases of bribing a foreign public official have been prosecuted in Japan since the foreign bribery offence in the UCPL came into force in 1999, the lead examiners naturally tried to determine if some aspects of Japan’s legal and institutional framework on investigating and prosecuting foreign bribery could represent obstacles to enforcement. A significant portion of the on-site visit focused on how Japan detects and investigates foreign bribery, and the framework for doing so, including coordinating and communicating between various agencies. The lead examiners determined that there are certain areas, discussed below in this part of the Report, that need to be strengthened. In the context of enforcement of the foreign bribery offence in the UCPL, the lead examiners note with interest that Japan is enforcing its domestic bribery offence with essentially the same tools as for foreign bribery. In 2010, 60 persons were prosecuted for bribing domestic public officials, and 53 public officials were prosecuted for receiving or requesting bribes.

a) Investigative techniques

(i) Use of non-compulsory investigative measures

55. In Phase 2bis, the WGB recommended that Japan actively pursue evidence in foreign bribery cases by using non-compulsory investigative measures at the earliest stage, such as witness interviews and requests for voluntary disclosure of financial records, including in the absence of sufficient evidence to meet the burden of proof for compulsory investigative measures. Japan also recommended in its Self-Assessment Report that it actively makes use of voluntary investigative measures at the earliest possible stage, where appropriate.

56. Japan explains in its responses to the Phase 3 Questionnaire that in the absence of sufficient evidence to obtain a warrant for compulsory measures, such as search and seizure of documents in a company’s premises, it could use non-compulsory measures, such as requesting a suspected company to submit evidence on a voluntary basis, which in turn might support the request for a warrant. Japan adds that such voluntary measures must be carefully applied because of the risk of tipping-off the company that is being investigated, which could result in the destruction of evidence. Currently in Japan there are no formal incentives for corporate voluntary disclosure.

57. Article 197(2) of the Code of Criminal Procedure provides non-compulsory measures that can be used, such as requesting official documents, bank records, and questioning suspects. In Japan, a warrant is not required to obtain financial account information, or information about a company, including the

identity of the owner, proof of incorporation, legal form and the names and addresses of directors. During the on-site visit, the Japanese authorities explained that in one case financial records were provided voluntarily by the relevant financial institution. Japan also reports having successfully used non-compulsory investigative measures in one case in which it obtained email and employment records voluntarily from a company. In another case, company representatives have been voluntarily interviewed by the law enforcement authorities.

58. During the on-site visit, one academic, who was on the task force that conducted Japan's Self-Assessment, stated that there would have been more foreign bribery investigations to date if Japan had increased its use of voluntary investigative measures. Another academic said that voluntary measures should be used more, and that the deficit in this respect is due to the low priority of foreign bribery enforcement in Japan. MOJ stated that the Japanese general public would not agree that the Japanese authorities are too cautious about applying non-compulsory investigative measures.

(ii) *Use of MLA at earliest stage*

59. In Phase 2bis, the WGB recommended that Japan actively pursue evidence in foreign bribery cases by seeking MLA at the earliest possible stage, to obtain non-compulsory investigative measures, including in the absence of sufficient evidence to meet the burden of proof for compulsory investigative measures. In the responses to the Phase 3 Questionnaire, Japan states that it has made seven MLA requests to date regarding foreign bribery cases. Two of these requests were made to other Parties to the Anti-Bribery Convention. Of the five requests to non-Parties, one has been answered, and Japan withdrew the request to another. The Japanese authorities further explain that 'to the greatest extent possible and where necessary, Japan has been sending MLA requests at the earliest stages of investigation'; although several of these requests remain pending. In the responses to the Phase 3 Questionnaire, the Japanese authorities explain that they are cautious about requesting MLA so as not to abuse the resources of foreign jurisdictions. They are also concerned that MLA requests could be leaked to the media. As a result, Japan does not intend to limit itself to just using the MLA framework to obtain information from foreign authorities; Japan may also communicate informally with a foreign jurisdiction to find a mutually appropriate way to share information, and has done this in practice.

60. During the on-site visit, Japan discussed the challenges in obtaining prompt MLA in foreign bribery cases, and described pro-active steps taken by the prosecution authorities to follow-up such requests.

61. At the on-site visit, two academics stated that one of the reasons for the low level of enforcement of the foreign bribery offence in Japan is the difficulty obtaining information from foreign jurisdictions.

62. Through the United Nations Asia and Far East Institute (UNAFEI), which is funded solely by the Japanese government, Japan has been promoting the sound development of criminal justice systems and mutual cooperation in UN member states, particularly developing economies in the Asia and Pacific Region, through technical assistance and training programmes. For instance, the 14th UNAFEI UN Convention against Corruption (UNCAC) Training Programme on 'Effective Legal and Practical Measures against Corruption', from 13 October to 10 November 2011, will involve several countries from Asia, the Pacific, and Africa, and will include a component on improving international cooperation between those countries and Japan on corruption cases. The Programme will also specifically cover the bribery of foreign public officials under the Anti-Bribery Convention. Japan explains that, while these UNAFEI programmes are not directly aimed at expediting specific MLA requests, participants build up networks by sharing experiences and views, which lays a solid foundation for effective cooperation.

(iii) *Use of new investigative measures*

63. In Phase 2bis the WGB recommended that Japan actively pursue evidence by considering the potential use of wire-tapping and grants of immunity from prosecution in foreign bribery cases. Japan recommended in its Self-Assessment Report that it ‘continue exploring the introduction of new investigative measures’. Japan’s responses to the Phase 3 Questionnaire explain that Japan is ‘considering new investigative tools, including those mentioned in the [WGB’s] recommendation’.

64. During the on-site visit, prosecutors from various public prosecutors’ offices described the challenges to obtaining credible intelligence information and evidence in foreign bribery cases. The representative of one public prosecutor’s office said that an official system is needed to obtain bank information speedily from other countries. A prosecutor from another office said that it is increasingly difficult to get statements from witnesses, because they view this kind of cooperation as disadvantageous to their self-interests. This prosecutor believed that an environment needs to be established in Japan that encourages giving statements. The challenge obtaining statements applies to all crimes in Japan. A representative of another public prosecutor’s office stated that there is a need for wire-tapping authority in foreign bribery cases, and plea bargaining would also be helpful.

65. MOJ reported that it has established a special advisory organ to conduct a review of the criminal justice system in Japan, which will include a re-examination of current investigative measures available in foreign bribery investigations and the feasibility of new investigative tools in such cases.

Commentary

The lead examiners acknowledge indications from the Japanese authorities that since Phase 2, Japan has increased its use of non-compulsory investigative measures where possible and appropriate, and encourage Japan to actively continue in this direction.

The lead examiners also acknowledge indications from the Japanese authorities that since Phase 2, Japan has increasingly sought MLA at the earliest possible stage. The lead examiners recognise that obtaining effective MLA is a horizontal issue affecting many Parties to the Anti-Bribery Convention, and that regional outreach by Japan through measures such as UNAFEI’s training and technical assistance programmes are an important way to help and encourage non-Parties to the Anti-Bribery Convention provide prompt and effective MLA in foreign bribery cases in response to MLA or information-sharing requests from Japan.

In addition, the lead examiners have a clear expectation that through the special advisory body established by MOJ to review Japan’s criminal justice system, Japan will be giving in-depth consideration to the potential use of new investigative techniques, such as wire-tapping and grants of immunity of prosecution, and recommend that Japan provide a report on progress in this regard.

b) *Coordination and communication about cases*

(i) *Police and prosecutors*

66. In Phase 2bis, the WGB recommended that Japan actively pursue evidence of foreign bribery by increasing coordination and communication between public prosecutor’s offices and the NPA, as well as by seriously considering the involvement of the police in foreign bribery investigations. In Japan’s Self-Assessment Report, Japan recommends that it ‘enhance information exchanges on foreign bribery cases between the police and prosecution authorities’.

67. Steps have been taken by Japan to enhance law enforcement's capacity in foreign bribery cases. In April 2007, the NPA set up a section in charge of foreign bribery in the 2nd Investigation Division, Criminal Investigation Bureau, and the term for the section has been extended for 3 years from April 2010. The section consists of one assistant director and one section chief, who provide instructions and guidance to prefectural police and coordinate obtaining evidence from abroad on foreign bribery cases. Within police prefectures, 2nd investigation divisions in charge of 'intellectual offences' are also in charge of investigating foreign bribery cases. In practice, investigators attached to other divisions may also be requested to help with foreign bribery investigations. The NPA is currently conducting at least one foreign bribery investigation. In addition, the Japanese authorities explain that specialised sections exist within police departments and the Ministry of Justice to coordinate international cooperation on economic crime investigations.

68. Moreover, in July 2011, the Supreme Public Prosecutor's Office (SPPO) announced a reorganisation of the prosecution service, which puts greater emphasis on financial and economic crimes. The SPPO explained at the on-site visit that previously special investigations divisions focused on crimes involving Japanese politicians, but now more emphasis will be placed on financial and economic crimes and 'possibly' companies operating overseas will be targeted. They explained that although investigations would not specifically focus on foreign bribery, it is possible that more foreign bribery offences would be detected as a result of the new emphasis. Special investigations divisions, which place special emphasis on economic and financial crimes, are located in three district public prosecutor's offices – Tokyo, Osaka and Nagoya. The following district public prosecutor's offices have special investigative divisions in charge of economic and financial crimes and public security related crimes – Sapporo, Sendai, Saitama, Yokohama, Kyoto, Kobe, Hiroshima, Takamatsu and Fukuoka. Prosecutors assigned to 37 other district public prosecutor's offices could also pursue foreign bribery cases.

69. The SPPO further explained that the reorganisation of the prosecution service also entails increased resources on collaboration between the police and prosecutors and relevant agencies with quasi-criminal powers, such as the National Tax Agency (NTA) and the Financial Services Agency (FSA), which should provide more opportunity to exchange information and cooperate in foreign bribery investigations. MOJ confirmed that there are no confidentiality rules impeding the effective sharing of information on foreign bribery offences between these agencies.

70. Case #2 illustrates how effectively and flexibly prosecution resources can be coordinated in foreign bribery cases. The investigation involved more than 20 prosecutors divided into four teams – one team investigated the defendant company, another investigated the related public procurement contract and foreign public officials, a third team investigated the money flows related to the bribery, and a fourth team investigated other related parties. The Japanese authorities explain that once a foreign bribery investigation commences, the public prosecutor's office gathers resources as needed, including other prosecutors and assistant prosecutors who may belong to other divisions or even other district prosecutors' offices.

71. MOJ and prosecutors discussed the potential for detecting foreign bribery cases in the course of investigating other economic crimes, which is what happened in Case #2. Sharing information detected in this manner requires close cooperation between the relevant law enforcement authorities. In the responses to the Phase 3 Questionnaire, Japan stated that, for money-laundering investigations, Japan's Financial Intelligence Centre (JAFIC) shares with investigative authorities (such as, for example, prefectural police) relevant information from suspicious transaction reports (STRs) that could assist in investigations concerning money-laundering crimes and predicate offences.³¹ Following the on-site visit, Japan added that, in general for economic crime investigations, it is regular practice for prosecutors of special investigation divisions to have sound cooperative relationships with the NTA and the FSA's Securities and

31 . See section B.6 for more information on money-laundering.

Exchange Surveillance Commission (SESC) for tax and securities offences. Cooperation is not limited to the conduct of investigations, but begins with daily communications and also early consultation on cases.

72. Regarding coordination between police and prosecutors, the Japanese authorities report that most of the foreign bribery investigations have been conducted by the prosecution authorities, and no foreign bribery investigation has so far been detected through collaborative efforts of police and prosecutors.³² Nevertheless, the Japanese authorities maintain that in general, coordination between police and prosecutors is sufficient, and normally, police and prosecutors begin discussing a case ‘a few months before an arrest occurs’. The NPA also states that police and prosecutors closely collaborate, and in more complicated cases, the police start talking to the prosecutor’s office early on in an investigation. For instance, a police prefecture has begun talking to the relevant public prosecutor’s office about at least one foreign bribery case it is investigating.

(ii) *Quasi-criminal investigative authorities*

73. In the responses to the Phase 3 Questionnaire, the Japanese authorities state that it is more likely to detect foreign bribery cases in the course of searches and seizures in the investigations of other offences, such as tax evasion, than any other means. The potential for detecting foreign bribery in the course of investigating other economic offences is also demonstrated in Case #2, as discussed above. Given that there are not any legal obstacles for the sharing of information between the law enforcement authorities and the tax authorities, and the recent prosecutorial reform that puts greater emphasis on this kind of coordination, there appears to be an improved potential for detecting foreign bribery cases through investigations of tax related offences. .

74. At the on-site visit, the NTA explained that it holds daily discussions with public prosecutor’s offices at the local and regional level on accusations of tax evasion and other offences, and sometimes it has shared leads on foreign bribery in these discussions. However, it does not have information about the specific number of times this has occurred. (The manner in which the NTA detects bribe payments to foreign public officials is discussed under section B.8. in this report.) A MOJ official with prosecutorial experience confirmed that the NTA and public prosecutor’s offices exchange information on a daily basis, and not only regarding tax evasion cases. The NTA further confirms that public prosecutors’ offices often request information from regional tax offices as part of their investigations. In Case #2, the relevant public prosecutor’s office shared information with the NTA about possible tax evasion, and asked the NTA to start an investigation.

75. The Japanese authorities explained that public prosecutor’s offices also have a sound cooperative relationship with the Securities and Exchange Surveillance Commission (SESC), which is part of the FSA. Information is exchanged for investigating securities offences, such as insider trading, market manipulation, etc. The framework for coordination between the prosecutors and the SESC is similar to the one between prosecutors and the NTA – it extends beyond cooperating on investigations and includes daily communications on cases that have not reached the investigation stage.

Commentary

The lead examiners believe that there is some evidence that steps taken by Japan to detect foreign bribery cases, and coordinate information sharing between police, prosecutors and other agencies, such as the NTA and SESC, are working; for instance, Case #2 involved

32. Overall, the vast majority of cases in Japan are investigated by the police. For instance, in 2010, out of 416 735 cases, excluding traffic cases, 410 548 were investigated by the police. Although public prosecutors’ offices can investigate any criminal offence, according to the Japanese authorities, the focus of prosecution resources is on white collar crimes, such as bribery.

collaboration between prosecutors and the NTA. In addition, the police are communicating with the relevant public prosecutor's office about at least one foreign bribery case it is investigating. Moreover, there are no legal impediments to the effective sharing of information and coordination between these actors.

In order to further strengthen the framework for investigating foreign bribery cases, including by coordinating and sharing information between the relevant agencies in Japan on foreign bribery cases, the lead examiners recommend that Japan ensure the following: 1) that special investigation divisions, which place special emphasis on economic and financial crimes (and where relevant public security related crimes) in district prosecutors' offices expressly include foreign bribery within their ambit of crimes; 2) they are adequately resourced and equipped to detect, investigate and prosecute foreign bribery cases; and 3) they coordinate effectively with police and other relevant agencies, including the NTA and SESC.

c) Statute of limitations

76. Following Phase 2, Japan's Parliament passed an amendment in June 2005 to the UCPL extending the statute of limitations for the foreign bribery offence from 3 to 5 years for natural persons. A similar amendment was passed for legal persons in June 2006, extending the statute of limitations for the foreign bribery offence from 3 to 5 years, and was to come into effect in January 2007. These amendments were intended to implement the WGB's Phase 2 recommendation that Japan take necessary steps to extend the statute of limitations for the foreign bribery offence to an appropriate period to ensure the effective prosecution of the offence.

77. The Japanese authorities explain that in Case #2, one of the fact situations took place before the amendment to extend the statute of limitations from 3 to 5 years. Nevertheless, because the period was suspended when the suspects were abroad, it was possible to prosecute this fact situation. In a case currently under investigation by the police authorities, for which the relevant statute of limitations is also the previous 3-year period, the running of the statute has expired for some of the fact situations.

78. Some prosecution authorities who participated in the on-site visit did not necessarily support a further extension of the statute of limitations, since this would require going back even further in time in foreign bribery investigations, and therefore relying on old evidence. The MOJ stated that the 5-year statute of limitations is appropriate in view of the concern about using old evidence. A representative of the media said that there are foreign bribery cases that could not be prosecuted due to the expiration of the 5-year period.

Commentary

The lead examiners note that several fact situations could not be prosecuted in Case #2, even though the 3-year period that applied at that time was suspended while the suspects were overseas. The lead examiners therefore recommend following-up the application in practice of the new statute of limitations of 5 years, to ensure that it allows an adequate period of time for the investigation and prosecution of the foreign bribery offence. The lead examiners confirm that the length of the statute of limitations is a horizontal issue that affects many Parties to the Anti-Bribery Convention.

6. Money laundering

79. In Japan, the passive bribery of a domestic public official (i.e., the solicitation or receipt of a bribe by a foreign public official) is a predicate offence for money laundering purposes. According to Commentary 28 on the Anti-Bribery Convention, 'when a Party has made only passive bribery of its own

public officials a predicate offence for money laundering purposes [Article 7] requires that the laundering of the bribe payment be subject to money laundering legislation’.

80. In the responses to the Phase 3 Questionnaire, the Japanese authorities state that a Bill was submitted to Parliament to apply the money laundering offence to those assets arising from or acquired through the commission of the foreign bribery offence, or acquired as a reward for the commission of the crime. However, the Bill has been rejected. This issue has been outstanding since Phase 2, when the WGB recommended that Japan encourage Parliament to pass as a matter of priority the Bill to amend the AOCL, 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. At the time of Japan’s written follow-up report in October 2007, the Working Group was satisfied that Japan had encouraged the Diet to pass the relevant amendment and therefore considered this recommendation ‘satisfactorily implemented’. The continued absence of confiscation of the proceeds of bribing a foreign public official, which is discussed earlier in this report (see under section B.4.) is also linked to the definition of ‘crime proceeds’ in the AOCL. As discussed in relation to confiscation of the proceeds of bribery, Japan is considering ways to have the necessary legislation in place in order to ‘conclude’ the UN Convention against Transnational Organized Crime.

81. It does not appear that the Japan Financial Intelligence Centre (JAFIC), Japan’s financial intelligence unit (FIU), which is part of the NPA, has provided information to the law enforcement authorities that has led to the detection or assisted with the investigation of any foreign bribery cases. In addition, the Japanese authorities have not confirmed whether JAFIC has received any suspicious transaction reports (STRs) where foreign bribery is the predicate offence. A prosecutor from one district prosecutor’s office had no concrete experience using JAFIC information in any kind of investigation. A prosecutor from another district prosecutor’s office discussed the use of JAFIC information in a narcotics investigation. A prosecutor from a third district prosecutor’s office uses JAFIC information regularly, but has never found indications of foreign bribery. The NPA reported although that it has used JAFIC information, unfortunately there has been no case where JAFIC information led to the arrest in foreign bribery cases.

82. In response, the representative of JAFIC said that financial institutions might not be looking for money laundering transactions related to the proceeds of bribing foreign public officials. MOJ said that the absence in the AOCL of a money laundering offence where foreign bribery is the predicate offence should not be an obstacle to making effective STRs involving the proceeds of foreign bribery, because STRs do not necessarily identify the specific crime to which the suspected proceeds in question relate.

Commentary

The lead examiners believe that Japan’s Anti-Money Laundering system cannot apply effectively to laundering the proceeds of bribing a foreign public official, in the absence of a legal provision that makes it an offence to launder the proceeds of such bribery, and this may be one important reason why so far information from Japan’s FIU has not provided indications or suspicions of foreign bribery. They recommend that Japan take urgent steps to adopt the necessary amendments to the AOCL. In addition, the lead examiners recommend that Japan’s law enforcement authorities systematically follow-up with the FIU on how they are utilising information from the FIU in their foreign bribery investigations.

7. Accounting requirements, external audit, and company compliance and ethics programmes

a) Overview of Japanese accounting and auditing requirements

83. The Japanese accounting and auditing framework has been updated since Japan's last evaluation by the WGB. The two laws pertaining to companies' accounting requirements, external audit, and company compliance and ethics programmes are the 2007 Financial Instruments and Exchange Act (FIEA) (formerly the Securities and Exchange Law [SEL]) and the 2005 Companies Act.³³ The MOJ governs the disclosure requirements under the Companies Act, while the FSA oversees disclosures under the FIEA. To date, no foreign bribery cases have been brought in Japan in relation to violations of Japan's accounting and auditing laws and measures.

84. The FIEA applies to publicly listed companies and some unlisted large companies. Less than one percent of Japanese enterprises are obligated to report under the FIEA.³⁴ These companies must: (1) file registration statements with the FSA when they offer their own shares and/or bonds in public offerings; (2) submit annual Securities reports and quarterly financial statements to the FSA; and (3) have management assess the effectiveness of the internal control of financial reporting and prepare an internal control report that is audited by the same auditors who audit the companies' financial statements.

85. The Companies Act applies to stock companies (*kabushiki-kaisha*), general partnership companies (*gomei-kaisha*), limited partnership companies (*goshi-kaisha*), and limited liability companies (*godo-kaisha*). Roughly 3.4 million companies fall under the Companies Act, accounting for approximately 80 percent of Japanese business entities. The Act requires these companies to hold an annual shareholders meeting a certain period of time (typically provided as within three months under the articles of incorporation of each company) after the balance sheet date to approve financial statements. Financial statements must be submitted to and approved by the annual shareholders meeting. These documents are then mailed to the shareholders together with the business report, maintained at all times at the head office and a condensed balance sheet must be published in newspapers or gazettes. While the MOJ governs the disclosure requirements under the Act, it does not oversee the disclosure under such rules.

86. Special conditions apply to large companies.³⁵ These companies must also submit their financial statements to external audit. Approval of these statements must then be approved by the Board of Directors. Balance sheets and the statement of income are then published in gazettes or newspapers or on a website. The 4 278 companies that report under both the Companies Act and the FIEA must prepare consolidated financial statements where applicable and disclose them in their annual reports. Boards of Directors of large companies must also carry a resolution on the development of systems necessary to ensure that the execution of their duties complies with the laws and regulations and the articles of

33. The Certified Public Accountants Act (Article 30, Article 34-21) also makes up part of Japan's accounting and auditing framework but applies to certified public accountant and audit corporations. It states that the Prime Minister may issue a disciplinary action in the case where a CPA or audit corporation: (1) intentionally attests financial documents containing false matters, mistakes or omissions as those containing no false matters, mistakes, or omissions; and (2) in negligence of due care, attest financial documents containing false matters, mistakes or omissions as those containing no material false matters, mistakes or omissions. (Translation provided by the Japanese Government.)

34. According to statistics from the METI, the Financial Accounting Standards Foundation (https://www.asb.or.jp/asb/asb_j/establishment/), and the 2009 Economic Census for Business Frame (<http://www.stat.go.jp/english/data/e-census/2009/gaiyou.htm>), there are roughly 3.4 million legal persons registered in Japan. The number of Japanese companies required to report under the FIEA is 4 278 as of June 2011, or 0.1258 percent of Japanese legal persons.

35. Large companies are defined as those that are capitalized at JPY 500 million or more or whose liabilities are JPY 20,000 million or more at the fiscal year-end.

incorporation, and other systems prescribed by the ‘Ordinance of the Ministry of Justice as systems necessary to ensure the properness of operations of a Stock Company’ and this resolution should be included in the business report.³⁶

87. In the responses to the Phase 3 Questionnaire, Japan stated it has not to date detected foreign bribery through the enforcement of books and records requirements, accounting standards, auditing standards, and financial statement disclosure documents.

b) Prohibition of false accounting practices

88. In its Phase 2 and Phase 2bis evaluations of Japan, the WGB was concerned that the then-SEL did not expressly refer to the types of documents required to be covered under Article 8.1 of the Convention (i.e., accounting records). The WGB at that time feared that, without this precision, false statements in accounting records may not necessarily trigger a false statement in disclosure documents, which would trigger liability to a penalty. In response to these recommendations, Japan stated in its responses to the Phase 3 Questionnaire that the FSA issued an official notice to the JICPA³⁷ in April 2005 entitled, ‘Prevention of Bribery of Foreign Public Officials in International Business Transactions’. The FSA notice requests JICPA to ensure the following matters:

‘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 [now FIEA].’

89. Japan also stated that, under the Companies Act, matters to be recorded in account books, balance sheets and profit and loss statements are decided in accordance with generally accepted accounting principles. Generally Accepted Auditing Standards (GAAS) in Japan are made up of standards that are determined by the Business Accounting Council, an advisory body established within the FSA. Implementation guidance on these standards is issued by JICPA. Since 2005, Japan has worked to bring its GAAS in line with International Financial Reporting Standards (IFRS).

c) Reporting obligations under the FIEA

90. In Phase 2, the WGB recommended that Japan clarify that external auditors are required to report 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. As of its Phase 2 written follow-up report, the WGB agreed that Japan had implemented this recommendation with the FSA’s issuing of the 2005 note, ‘Prevention of Bribery of Foreign Public Officials in International Business Transactions,’ which states that ‘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’.

36. Japanese Institute of Certified Public Accountants (JICPA) International Relations Committee, *Corporate Disclosure in Japan: Overview*, June 2010 (<http://www.hp.jicpa.or.jp/english/about/publications/pdf/PUBLICATION-Overview2010.pdf>)

37. In order to practice as a certified public accountant in Japan, a qualified person must register with the JICPA and join its membership. All JICPA members must follow JICPA committee statements and guidelines under Article 41 of the JICPA constitution.

91. In its response to the Phase 3 Questionnaire, Japan reported that new provisions promulgated in June 2007 under the FIEA—Articles 193-3(1) and 193-3(2)—require external auditors to submit an opinion to the Commissioner of the FSA if, after having discovered and reported possible illegal acts to the specified issuer and suggesting rectifying measures, the specified issuer has failed to ‘rectify’ or ‘take any other appropriate measures’. Any person who contravenes the provisions of Article 193-3 will be punished by a non-penal fine of JPY 300 000 or less (FIEA Article 193-3, pars. 1-3; FIEA Article 208-2, items 4-6). These provisions have been applied to the audit attestation of financial statements since the fiscal year commencing in April 2008. In response to these amendments, JICPA’s Auditing Standards Committee (ASC) revised its Statements No. 11, ‘Illegal Acts’ and No. 35, ‘The Auditor’s Responsibility to Consider Fraud in an Audit of Financial Statements’. Under Statement No. 11, auditors should communicate possible noncompliance to those charged with governance. However, the auditor need not do so for matters that are ‘clearly inconsequential or trivial’. With respect to what constituted as ‘clearly inconsequential or trivial’ under JICPA ACS Statement No. 11, Japan expressed that this term has to be seen in light of FIEA Article 193-3, which defines materiality as ‘any fact in violation of the laws and regulations or any other fact which may have an impact on the assurance of adequacy of the Documents on Financial Calculation’. However, no concrete examples of the interpretation of these terms were provided. Under Statement No. 35, identified or suspected fraudulent acts should be communicated to the appropriate level of management. In addition, JICPA issued in November 2008 a question-and-answer (Q&A) sheet on reporting requirements under Article 193-3 of the FIEA, which is available on the JICPA website. JICPA conducted seminars in February 2009 on the Q&A sheet with its members to ensure their understanding.

92. Japan stated that only one report has been made to the FSA Commissioner to date. This case did not relate to foreign bribery. Should such a case arise under Articles 193-3, the FSA stated at the on-site visit that this information would be considered by the FSA’s SESC—which has the authority to conduct an investigation and levy administrative penalties—and that the SESC would notify the FSA and, in some cases, would share the information with law enforcement and the NPA’s financial intelligence unit, JAFIC. Following the on-site visit, Japan provided a correction to this information, stating that JAFIC is not involved in the reporting scheme under the FIEA. Article 218 of the FIEA states that ‘a [SESC] Commission Official may, when it is necessary for official inspection, search, or seizure, request assistance of police officials’.³⁸

93. It is not clear under what conditions an auditor would consider the issuer to not have rectified or taken appropriate measures, therefore requiring the auditor to submit an opinion to the FSA Commissioner under Article 193-3. In on-site visit discussions with the accounting and auditing profession, which were attended by the FSA, one representative stated that, if they found evidence of foreign bribery, the major concern would be whether there were repeated instances of bribery. ‘If we feel there is a possibility that the company will have to pay a ‘compensation,’ that would be a risk to the financial statements... We are not public prosecutors. If it’s one single case, we may not decide to go to the authority.’ Another representative stated that, under current accounting and auditing requirements, ‘it would be hard to find a violation of the UCPL.’ Japan disagrees with this interpretation of the obligation under Article 193-3 and states that the official interpretation of this Article is that CPAs have the obligation to report to the authority regardless of whether it is a single foreign bribery case or not.

d) *Standard of materiality*

94. In the Phase 2 and 2bis evaluations, the WGB also expressed concern that bribe payments would not meet the standard of liability of materiality applicable to the offence of making a false statement in disclosure documents.³⁹ At the time of Japan’s Phase 2bis evaluation, a misrepresentation in the accounts

38. For more information on the coordination and communication about cases, see section B.5.b.

39. More information about the WGB’s assessment of the Japanese standard of materiality for foreign bribery, see pp. 33-34 of the Phase 2 Report on Japan and p. 15 of the Phase 2bis Report on Japan.

of a company concerning the payment to a foreign public official would only be considered a ‘material matter’ if it were judged to have an impact on the financial statements of the company and thus on investors. Based on analysis of past misrepresentations in cases of violations of the SEL (now the FIEA), the WGB concluded bribe payments would rarely meet this threshold.

95. In its response to the Phase 3 Questionnaire, Japan stated that ‘materiality is individually judged by taking into account seriousness of effects on investors.’ FIEA Article 193-3(1) defines materiality as ‘any fact in violation of the laws and regulations or any other fact which may have an impact on the assurance of adequacy of the Documents on Financial Calculation’. JICPA ACS Statement No. 11’s definition of immateriality as ‘clearly inconsequential or trivial’ is judged according to the definition in Article 193-3. The 2008 JICPA Q&A sheet adds, ‘it is interpreted that it is the auditor’s responsibility to determine what facts actually constitute facts in violation of laws and regulations, including the ‘determination of materiality’ in accordance with the generally accepted auditing standards and other relevant rules.’ It remains unclear, therefore, if and/or when a bribe would be considered to have an impact on financial statements. Japan states that, according to the JICPA Q&A sheet, the consideration of materiality should be judged by auditors on a case-by-case basis.

96. Further, representatives from the accounting and auditing profession and the private sector noted the difficulty of detecting facilitation payments under the current accounting and auditing framework. One representative state, ‘If a company as a whole was bribing, this would have a material impact and would be within the scope of reporting. Facilitation payments would not likely be detected.’ The Japanese Government disagrees with this latter statement. The importance of this issue, however, has not gone unnoticed. The accounting and auditing profession said it is trying to raise awareness of foreign bribery and the UCPL and has undertaken—with the Japanese business association, Keidanren and Reitaku University—a research report on small facilitation payments.

e) Criminal and administrative penalties for falsification of registration and disclosure documents

97. In its Phase 3 Questionnaire, Japan stated that, in addition to the criminal punishments in Article 197 of the SEL (now the FIEA), administrative surcharges were introduced in 2005 for the falsification of disclosure documents. Since then, penalties under the FIEA have increased twice, in 2006 and 2008. Today, falsification of a security registration statement is punishable by a fine equalling ‘a certain percentage of the subscription or sale price’. Falsification of a security report is punishable by a fine of either JPY 6 million (USD 76 000) or ‘6/100,000 times’⁴⁰ the total stock market price—the higher of the two. Natural persons face under ten years of imprisonment or less than JPY 10 million (USD 126 000) in fines for the falsification of disclosure statements; legal persons face fines of less than JPY 700 million (USD 9 million). Under the Companies Law, falsifications of such account books, balance sheets, or profit and loss statements shall be subject to non-penal fines.

Commentary

The lead examiners are satisfied that, since Phase 2, Japan made efforts to bring its accounting and auditing requirements in line with Article 8 of the Convention. The lead examiners also commend Japan for being one of the few WGB countries to require external auditors to report possible illegal acts to law enforcement authorities. Given, however, that the vast majority of Japanese companies are not required to report under the FIEA, and that financial statements required under the Companies Act are not submitted directly to any government authority, the lead examiners recommend the Japanese Government work with

40. Japan explains that this fraction is ‘calculated based on the assumption of level of illegal gains that would be obtainable at lower market funding rates by false accounting.’

JICPA and business associations (such as Keidanren and the Japanese Chamber of Commerce and Industry) in order to raise awareness of Japan's foreign bribery offence among the accounting and auditing profession, especially those working for or with companies that are not subject to FIEA rules.

The lead examiners also recognise Japan's efforts, via JICPA, to raise awareness of the introduction of FIEA Article 193-3, but consider clearer JICPA guidance on the application of FIEA Article 193-3 would be useful, especially regarding whether an auditor should report a possible illegal act to the FSA. Furthermore, Japan should consider clarifying how information related to possible illegal acts reported to the FSA under Article 193-3 is shared with law enforcement and should also consider keeping a record of the number of opinions submitted to the FSA Commissioner under FIEA Article 193-3, whether these opinions relate to foreign bribery, and how these opinions are resolved.

On the issue of the standard of liability applicable to the offence of making a false statement in registration and disclosure documents, the lead examiners are of the opinion that it is still not clear if and/or when a foreign bribery payment would be considered material to a company's financial statements. They therefore recommend further clarification from the government on this issue to JICPA for dissemination to the accounting and auditing profession.

8. Tax measures for combating bribery

98. Information sharing between the NTA and law enforcement authorities, including in Case #2, is discussed earlier in this report under B.5. This part of the report focuses on how the NTA identified the bribe payments in Case #2, and the potential identification of such payments in relation to other foreign bribery cases. It also looks at implementation by Japan of Recommendation I (iii) of the 2009 Tax Recommendation, to consider including in Japan's bilateral tax treaties the optional language of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention.

99. In Case #2, the tax authorities discovered that the wire transfer of the funds for the bribe payments was concealed in the company's tax return as 'consignment fees'. The Japan Federation of Certified Public Tax Accountants' Associations (JFCPTA) believes that companies might also try to conceal foreign bribery payments under the 'miscellaneous expenses' category in their tax returns. If a deduction were claimed for a bribe payment, the Japanese authorities explain that 'a careful and exhaustive examination' would be conducted, and the tax deduction would be denied if the expenditure were confirmed to be a bribe payment. In addition, if the tax payer tried to conceal the bribe payment as another kind of expense that is allowable, a more severe administrative penalty would be imposed. The JFCPTA states that the tax payer would be required to pay 40 percent additional tax. The NTA explains that in the case of a 'malicious taxpayer', a tax investigation using compulsory measures would be conducted, and if convicted of the criminal offence of tax evasion, a defendant would be liable to a maximum term of imprisonment with work for 10 years, and/or a maximum fine of JPY 10 million (approximately USD 130 000), or the equivalent amount of the evaded tax, if it exceeds the maximum fine.

100. A representative of the accounting and auditing profession believes that there is a greater risk for companies not subject to the FIEA, which includes unlisted companies,⁴¹ to conceal bribes to foreign public officials under certain categories of allowable expenses, in particular 'miscellaneous expenses', because since such companies are not subject to external audits, there is a greater risk that concealed bribes in their books and records would not have been detected before submitting their tax returns.⁴² The Japanese

⁴¹ Unlisted companies make up 95 percent of companies in Japan.

⁴² External audit requirements are discussed in this report under Section 7.

authorities do not agree that this puts companies not subject to the FIEA at a higher risk for concealing bribes as allowable expenses, because the tax authorities review all tax returns.

101. Japan states that its bilateral treaties do not include the optional language of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Treaty, which under certain conditions allows the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters, including corruption. Although the Japanese authorities have not confirmed whether they intend to include the optional language in future bilateral tax treaties, on 3 November 2011, Japan signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters,⁴³ which contains a provision similar to paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention.

Commentary

The lead examiners recommend that the tax authorities take appropriate measures to ensure the detection by tax authorities of bribes to foreign public officials concealed under various deductible expenses, including ‘miscellaneous expenses’, and that they exercise particular care in this respect when auditing tax returns for companies that are not subject to the FIEA, since they are not subject to the extra scrutiny provided by external audits. The lead examiners also recommend that Japan consider including the optional language of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention in its bilateral tax treaties.

9. International cooperation

102. In Japan’s Self-Assessment Report, it recommends that it ‘promote the conclusion of bilateral and multilateral MLA treaties’. In this regard, Japan reports that since Phase 2, it has concluded six new bilateral treaties with the following jurisdictions, in order of the date the treaties were signed: United States; South Korea; P.R. China; Hong Kong, China; Russia and the European Union. It has also signed the Multilateral Memorandum of Understanding on Consultation and Cooperation and the Exchange of Information of the International Organization of Securities Commissions (IOSCO), which enables securities and derivatives regulators from signatory countries to share with each other essential investigative material. The lead examiners acknowledge that Japan provided effective MLA in Case #2, which resulted in convictions in a non-Party.

103. Regarding implementation of Article 9.1 of the Anti-Bribery Convention, which requires prompt and effective legal assistance to another Party to the Convention regarding foreign bribery proceedings, MOJ explained at the on-site visit that it has received three such requests from Parties to the Anti-Bribery Convention. All of these requests, which were already executed, took five months to execute from the time of receipt of the request. On the average, the response time for MLA requests is six months. However, the lead examiners do not have information from relevant Parties to the Convention on how effectively Japan has responded to their requests for MLA on foreign bribery cases; therefore it is difficult to adequately assess this issue.

104. MOJ also explained that responding to an MLA request can involve a lot of interaction with the requesting authorities, as occurred in one of the requests from a Party to the Anti-Bribery Convention. In

43. Article 22.4 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters provides that information obtained under the Convention may be relevant for other purposes such as pursuing serious financial crimes including corruption. The Convention permits such other use in the following circumstances: (i) the information may be used for such other purposes under the laws of the supplying country; and (ii) the competent authority of that Party authorises such use. So far, 31 countries have signed the Convention.

that case, it took two months to compile boxes of bank records and other documents. The NPA finds that processing MLA requests can take ‘quite a long time’, especially translating the requests into Japanese.

105. There is no fixed procedure for tracking outgoing and incoming MLA requests, but MOJ keeps track of the number of requests received, executed and pending, and regularly follow-up on progress on pending requests.

Commentary

The lead examiners welcome Japan’s conclusion of six new bilateral treaties for MLA, and recommend that Japan continue to conclude such agreements, particularly with its trade partners.

The lead examiners do not have information from relevant Parties to the Convention on how effectively Japan has responded to their requests for MLA on foreign bribery cases; therefore it is difficult to adequately assess this issue.

10. Public awareness and the reporting of foreign bribery

a) Awareness of the Convention and the offence of foreign bribery

106. As of Japan’s Phase 2 written follow-up report, the WGB recommended Japan make efforts to increase the awareness of the legal profession. In its response to the Phase 3 Questionnaire, Japan stated the Japan Federation of Bar Associations (JFBA) has established an International Criminal Legislation Committee responsible for this issue. Members of the Committee have participated in international anti-corruption conferences, such as the second, third and fourth sessions of the Conference of States Parties to the UNCAC and reported back on these meetings in JFBA’s monthly periodical (June 2008) and newsletter (April 2010, with a forthcoming issue in January 2012). The JFBA also held a training seminar on the Anti-Bribery Convention and the UCPL (reported in the May 2011 JFBA newsletter); members of the JFBA International Criminal Legislation Committee met with members of the International Bar Association’s Anti-Corruption Committee in June 2011; and the JFBA sponsored a workshop on international corruption for its members jointly with the International Bar Association, OECD and United Nations Office on Drugs and Crime, also in June 2011.

107. Japan’s responses to the Phase 3 Questionnaire also cite broader-ranging awareness activities for the public and private sectors, including MOJ white papers and trainings for public prosecutors, promotion of METI Guidelines to Prevent Bribery of Foreign Public Officials⁴⁴, and the inclusion of materials on the Anti-Bribery Convention on Ministry of Foreign Affairs (MOFA) and METI websites. Japan entirely funds operations of the UNAFEI, which in its efforts to promote sound criminal justice systems and mutual cooperation in United Nations member states, in particular developing countries in the Asia and the Pacific Region has helped raise awareness of the crime of foreign bribery and facilitate the exchange of

44. For more information on the METI Guidelines, see sections B.1.a-b, d.

information and best practices among law enforcement practitioners in the region and beyond.⁴⁵ Japan also contributed €125,000 in 2009 to fund activities of the Asian Development Bank / OECD Anti-Corruption Initiative for Asia and the Pacific.

108. In response to the recommendation made in its Self-Assessment Report to enhance foreign language abilities and to increase the knowledge of foreign legal systems amongst relevant personnel from investigative authorities, the MOJ reported that: since 2002, all newly recruited public prosecutors are required to take the Test of English as a Foreign Language (TOEFL); since 2009, more than 80 public prosecutors have been dispatched overseas for 6 to 24 months for international experience; since 2008, more than 80 public prosecutor assistants officers were given the opportunity to attend language schools; and some public prosecutors and prosecutor assistants were afforded two- to three-year posts in Japanese diplomatic missions to familiarise them with foreign legal systems and languages. The NPA also convenes language training courses for investigators at the National Police Academy every year.

109. METI, as the lead government agency under the UCPL and as an agency without enforcement powers, explained its main responsibility under the law as preventing foreign bribery by Japanese companies and raising awareness of this crime. To this end, METI leads the Government's private sector awareness-raising efforts. It has issued and updated the METI Guidelines. These Guidelines were included in a series of seminars in 2010, jointly organised with the Japan Patent Office, in 19 prefectures for 2,261 private-sector representatives to raise awareness of the UCPL and the crime of foreign bribery. METI also appoints a representative of the Japan Chamber of Commerce and Industry (JCCI) to the subcommittee on Corporate Affairs of the International Business Transactions, Trade and Economic Cooperation Committee of the Industrial Structure Council, which serves as a consultative organisation serving the Minister of METI. Representatives of METI's Intellectual Property Policy Office (IPO) also provide advice to representatives of the private sector seeking advice (usually by telephone) on how to comply with the UCPL.⁴⁶ Japanese multinational enterprises participating in the Japan Phase 3 on-site visit were highly aware of Japan's foreign bribery offence under the UCPL, the updated METI Guidelines, the Anti-Bribery Convention and Annex II of the 2009 Recommendation, the Good Practice Guidance on Internal Controls, Ethics and Compliance. In these discussions, at which METI was present, a number believed that there is a higher risk of prosecution under the foreign bribery offences of other countries than under the UCPL. A few also said they had contacted METI's IPO for compliance advice but said they received unclear answers or were advised to seek advice from other companies, to do more research online, or to consult with business associations. The business associations participating in the Phase 3 on-site visit were also highly aware of Japan's foreign bribery offence and the Anti-Bribery Convention, though Japan's largest business association—Keidanren—had not yet updated its own guidance to reflect changes in the METI Guidelines regarding the interpretation of 'international business transactions' and the interpretation of 'facilitation payments'.⁴⁷

45 . In the Self-Assessment Report of the Government of Japan, Recommendation 2 states: '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.' Par. 95 of the conclusions of the Self-Assessment Report also states: '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.'

46 . For more information on METI's outreach to the private sector on the UCPL, see section B.1.d. For more information on METI's responding to informal requests from the private sector in particular, see par. 27.

47 . For more information on METI's prevention and awareness-raising activities, see section B.1.d.

110. The Japan Phase 3 on-site visit also included an unprecedented number of SMEs, which provided a unique opportunity to assess their level of awareness of the risks of foreign bribery to their business. Their level of awareness was very low, despite the fact that: (a) SMEs represent 99.7 percent of all Japanese companies, according to Japanese Government estimates, and (b) the Government is actively encouraging SMEs to seek business opportunities overseas under the ‘Framework for Supporting SMEs in Overseas Business’. All three of the SMEs participating in the on-site visit had operations in or relations with China that involved public officials; two of the three had received government subsidies from the SMRJ, which is an independent administrative organ under METI, to help expand their overseas operations; but none of them were aware of the two foreign bribery cases prosecuted in Japan, the METI Guidelines, nor the OECD Good Practice Guidance before receiving METI briefing materials prior to the Phase 3 on-site visit discussions. At the on-site visit, METI stated there is no specific government policy to raise awareness of foreign bribery among SMEs, but noted it would be willing to look into the possibility of offering a programme targeting the needs of SMEs. For their part, SMEs said they could benefit from SME-specific seminars and materials from agencies and organisations they interact with most often, including JETRO and SMRJ, which are both independent administrative organs under METI, and the JCCI.

b) *Duty to report suspicions of foreign bribery*

111. A public official must file an ‘accusation’ with the judicial police or a public prosecutor when ‘he/she believes, through exercising his/her duty, that a criminal offence has been committed’ (Article 239(2) of the Code of Criminal Procedure). Public officials who report such activities are protected under the Whistleblower Protection Act. (Whistleblower protections are further discussed in section B.10.c, below.)

112. Since December 2006, MOFA has issued three times (December 2006, January 2008 and August 2008) a directive to overseas establishments instructing them to report back to Tokyo allegations of foreign bribery involving Japanese individuals or companies. Reports should include a summary of the alleged case, the names of the person or company involved; the name and position of the foreign public official reported to have received or solicited the bribe; public information related to the briber; information on criminal procedures taken in the bribe-receiver’s country, if any; and any other relevant information. MOFA stated that information gathered by Japanese overseas establishments are immediately shared with law enforcement authorities. Furthermore, in January 2008, MOFA required overseas establishments to designate a foreign bribery ‘contact point’ to be in charge of issues related to the Anti-Bribery Convention. Generally, MOFA stated awareness of these Directives and the Anti-Bribery Convention is highest in establishments in those countries receiving the highest levels of Japanese ODA.⁴⁸ MOFA added similar points of contact have been assigned to overseas offices of the JICA. Japan reported that overseas establishments of Japan have reported alleged cases under the 2006 and 2008 directives. No formal training is afforded to officials serving in Japanese overseas establishments on foreign bribery.

Commentary

The lead examiners commend Japan for the high level awareness demonstrated by large Japanese companies of the UCPL and the OECD anti-bribery instruments. The lead examiners also commend Japan for the unprecedented level of participation from SMEs during the on-site visit. The awareness of foreign bribery among SMEs was low, which the lead examiners recognize is a horizontal challenge for the WGB. Still, given that SMEs make up 99.7 percent of Japanese companies and that the Government is encouraging SMEs to do

48. For more information on ODA, see Section 12.

more business abroad, the lead examiners welcome METI's willingness to do more to target SMEs in their preventive and awareness-raising efforts.

The lead examiners also welcome Japan's efforts to develop contact points in overseas missions responsible for collecting information on alleged foreign bribery cases. The lead examiners would recommend that Japan consider offering specific anti-bribery training to these contact points so they are better able to (a) collect and analyse information related to alleged foreign bribery cases, and (b) to respond to questions from Japanese citizens and companies regarding Japan's foreign bribery offence.

c) **Whistleblower protection**

113. Japan's Whistleblower Protection Act entered into force in April 2006. Foreign bribery is an offence provided under the Whistleblower Protection Act. The Act also protects private-sector and public-sector whistleblowers whose reports are in the public interest against dismissal and unfair treatment. Whistleblowers are also protected if they report to enforcement authorities and, in certain circumstances, to external parties, such as labour unions or the media, for example. Employees of Japanese companies working overseas are not provided protections under the Act, since the Act is meant to protect workers subject to Japanese labour law. The Whistleblower Protection Act provides that the prohibition of dismissal or other disadvantageous treatment of public officials shall be applied to provisions for whistleblower protection in the laws related to public officials. There are no penalties set out in the Whistleblower Protection Act for violating whistleblower protections. Whistleblowers whose protections have been violated bring their cases to court for remediation.

114. To date, the Consumer Affairs Agency (CAA) is aware of three cases that have been brought to court (two in 2008 and one in 2009). Japan explains that of these three cases, the plaintiffs (i.e., the whistleblowers), 'won' in two cases and 'partially won' in the third.⁴⁹ In accordance with its Phase 2bis and self-assessment recommendations, the Government has made efforts to raise greater awareness of the Act. In 2005, it issued the 2005 Cabinet Office's 'Guidelines for Private Business Operators Concerning the Whistleblower Act' and 'Guidelines for National Administrative Organs Concerning the Whistleblower Protection Act', which was updated in March 2011. The Government also held seminars concerning the Whistleblower Protection Act in all prefectures in Japan and has, since 2006, provided a call-in service that is available every weekday to callers from the private and public sectors with questions regarding the Act. The CAA has also developed materials it posts on its Whistleblower Protection Program website and holds seminars on the Act. In September 2011, the CAA also released more than 70 sample internal whistleblower protection regulations to enterprises who had introduced reporting desks. The CAA also reported that, in October 2011, it began a study on the enforcement of the Whistleblower Protection Act, including an analysis of enforcement by over 1 800 national and local government agencies throughout

49. The CAA provided the following details regarding the three whistleblower protection cases: Case #1, 'Case to seek compensation for damages, etc.', was decided by the Osaka High Court on 16 October 2009 and was partially won by the plaintiff (worker). As a result, the plaintiff, who had been pressured to retire as a result of whistleblowing, received in reparations JPY 1.7 million (USD 21 850) but still retired. Case #2, 'Case to seek declaration of nullity of a reshuffle order, etc.', was decided by the Tokyo High Court on 31 August 2011 and was won by the plaintiff (worker). As a result, the plaintiff, who had been demoted as a result of whistleblowing, was reinstated and received in reparations JPY 2 million (USD 25 700). Case #3, 'case to seek declaration of the status on employment contract, etc.', was decided by the Matsue District Court on 2 February 2011 and was won by the plaintiff (worker). As a result, the plaintiff, whose labor contract was discontinued as a result of whistleblowing, re-obtained the labour contract and received in reparations approximately JPY 5 million (USD 64 260).

Japan. METI also posts information about the Whistleblower Protection Act on its website, where it hosts a reporting desk for suspected cases of foreign bribery with an email address.⁵⁰

115. Despite these efforts, non-government representatives noted during the on-site visit that awareness of the Whistleblower Act may not be as high as it was immediately after the Act's entry into force in 2006. (See section B.1.d. for more information on METI's whistleblower measures.) Following the on-site visit, Japan stated that a recent Japanese Government survey illustrates that awareness of the Whistleblower Protection Act is increasing. Awareness of the Act among large enterprises with more than 3,000 employees has increased from 97 percent in 2008 to 97.3 percent in 2010. Awareness among SMEs with 101 to 300 employees increased from 61.4 percent in 2008 to 63.4 percent in 2010.

116. The Whistleblower Protection Act calls for a review of the Act's enforcement five years after its entry into force (2011). After concluding its review of the Act in March 2011, the Consumer Commission—which was made up of representatives from academia, the business community, the legal profession, media, etc.—concluded there was no need to amend the Act but that, due to the insufficiency of legislative information for the review, further research was recommended. If research shows protections afforded under the Act are insufficient, the Government would undertake another review of the Act.

117. Several non-governmental representatives at the on-site visit noted that, given the important role whistleblowers play in detecting crimes like foreign bribery, the Government could strengthen the Act by expanding its scope. Japan notes that representatives from civil society, as well as from academia, the business community, the legal profession, and the media were also involved in the review of the Act by the aforementioned Consumer Commission, which had both negative and affirmative opinions on the Act's effectiveness. At the on-site visit, the lead examiners received several critical comments, and in particular an opinion submitted by a major non-governmental organisation representing Japanese legal professionals to the Government as part of its five-year review in 2011 recommended: expanding the Act's definitions of 'whistleblowing', 'whistleblower' and 'reportable fact'; reconsidering the conditions required for the nullity of a whistleblower's dismissal, cancellation of a whistleblower's contract, or prohibition of disadvantageous treatment against a whistleblower; and shortening the period of time given to administrative organs to respond to whistleblower reports. Finally, this opinion recommends imposing a criminal penalty for business operators who violate the protections outlined in the Act.

Commentary

The lead examiners commend Japan for establishing whistleblower protection legislation that affords protections to both public and private sector employees. However, in the absence of a more substantial body of cases, the lead examiners are concerned about the effectiveness of such legislation in practice. The lead examiners recommend that Japan provide an update in the Working Group on Bribery orally in one year from the date of adoption of this report on any progress that Japan can report on publicly regarding the research undertaken by the CAA on the effectiveness of the Whistleblower Protection Act and on the number of cases brought to court under the Act. Japan could consider including in this research an analysis of the possible application of the Act to Japanese private-sector employees overseas. The lead examiners consider that the provision of effective whistleblower protections is a horizontal issue that affects several Working Group on Bribery members.

50 . For more information on the METI 'reporting desk', see section B.1.d, par. 28.

11. Public advantages

118. As of Japan's Phase 2 written-follow up report, the WGB decided that the issue of public procurement authorities' policies for dealing with applicants convicted of foreign bribery or otherwise determined to have bribed a foreign public official is an issue for follow-up. This includes policies of agencies with oversight over public procurement contracting funded by ODA – including JICA – and agencies providing overseas investment assistance, including the Nippon Export and Investment Insurance (NEXI) and JBIC.

a) Official development assistance

119. According to the OECD Development Assistance Committee (DAC), Japan was the fifth-largest amongst DAC donors in 2009 (the latest year for which figures are available), at USD 9.5 billion (or 0.18 percent of Japan's gross national income). Sixty-five percent of this aid is disbursed via bilateral aid agreements, mostly with Asian governments (41.4 percent) and African governments (24.3 percent), via loans (58 percent of gross bilateral aid in 2009), grants (24 percent), and technical cooperation (17 percent).⁵¹ The agencies responsible for ODA underwent reforms in 2008. The 'new JICA' coordinates all three of Japan's previously disconnected development assistance channels: loans, grants and technical cooperation. It integrates parts of the former JBIC, which managed Japan's ODA loans, as well as responsibilities for some grants previously managed by MOFA.

120. In February 2011, MOFA updated the MOFA Guidelines for Measures against a Person Engaged in Fraudulent Practices in Japanese official Development Assistance Projects (MOJFA Guidelines for Measures). These updated rules expand the period of sanctions against bribery to foreign public officials from 2 to 12 months to from 6 to 36 months. And these updated rules install measures against repeated cases (the minimum period of measures will be twice in the repeated cases and 2.5 times in the repeated cases of bribery to foreign public officials.) Also, the 'new JICA' issued in March 2011 updated JICA Rules on Sanctions against Persons Engaged in Fraudulent Practices, etc. in Projects of ODA Loan and Grant Aid ('JICA Rules on Sanctions'). These updated rules expand the period of sanctions against bribery from 2 to 24 months to 2 to 36 months. The rules also expand from three to four years the time after the expiration of the period of sanctions related to foreign bribery when sanctions become applicable again to contractors working on ODA-assisted projects. JICA and MOFA said the revisions were adopted in response to the abuse of ODA funds discovered during the investigation and prosecution of Case #2, described in Section A.5 above.

121. JICA, MOFA and MOJ provided extensive information to the evaluation team regarding JBIC's (now JICA) and MOFA's decision to debar the company in Case # 2 after conviction. While debarment is not automatic upon conviction in foreign bribery cases, agencies can decide to debar companies suspected or convicted of foreign bribery under the JICA Rules on Sanctions. JBIC (now JICA) and MOFA therefore decided according to JBIC Rules on Sanctions and the MOFA Guidelines for Measures to disqualify the company from receiving orders for ODA loan and grant aid projects for the maximum period of 24 months (from August 2008 to August 2010). Following this case, Japan also suspended the process of providing new ODA loans to Vietnam (the country of the bribed foreign public official) from August 2008 to

51 . For a full discussion of the OECD DAC's review of Japan's development assistance policies and measures, see the 2010 DAC peer review of Japan, available online here: http://www.oecd.org/document/39/0,3343,en_2649_34603_45378791_1_1_1_1,00.html

February 2009.⁵² Japan reports that the company in Case #2 has not returned to the JICA lists of consultant firms, as it has withdrawn from ODA business.

b) Officially supported export credits

122. Japan's two export credit agencies are NEXI and the part of JBIC that did not merge with JICA in 2008. Both agencies participate in the OECD Working Party on Export Credit and Credit Guarantees. Both agencies have also adopted anti-corruption guidelines that are practiced in accordance with the 2006 OECD Council Recommendation on Bribery and Officially-Supported Export Credits. Japan stated in its responses to the Phase 3 Questionnaire and during the on-site visit that both agencies' guidelines include provisions on declarations on corruption, grounds for rejection and termination of contracts, and reporting obligations. Contracts for officially-supported export credits can be terminated and/or rejected on the basis of a client or an applicant being the subject of allegations or convictions of foreign bribery. Japan confirmed there have been no cases of suspension or termination of official export credit because of foreign bribery. Only JBIC noted that it requires its customers to submit their declarations in writing on having appropriate anti-bribery management control systems in place; NEXI receives this information orally.⁵³ Both JBIC and NEXI consult the publicly available international debarment lists. JBIC requires its customers to submit their declarations in writing on the consultation of the above lists.

123. Representatives from NEXI participating in the on-site visit explained that it also conducts awareness-raising activities, including seminars with the private sector that include case studies (not including reference to the two cases prosecuted in Japan) and reference to the foreign bribery offences in countries like the United States and the United Kingdom. These activities do not specifically target small-to medium-sized exporters, as SMEs make up only 1 to 2 percent of NEXI customers. JBIC said it also raises awareness among its staff.

c) Public procurement

124. Japan confirmed in its responses to the Phase 3 Questionnaire that it considers the existence of internal controls, ethics and compliance systems or measures in its decision to grant public procurement contracts. Regarding internal controls, Japan conducts its government procurement based on the World Trade Organisation's Plurilateral Agreement on Government Procurement and relevant accounting laws and ordinances. Japanese public procurement procedures must be carried out according to the Act for Promoting Proper Tendering and Contracting for Public Works and the Act on Prevention of Delay in Payment under Government Contracts. Japanese public procurement procedures must also comply with Article 3 of the Act on Responsibility of Government Employees who Execute the Budget and Article 98 of the National Public Service Act.

Commentary

On ODA, the lead examiners commend Japan for deciding to debar the company convicted of foreign bribery in Case No. 2 and for learning from this experience to strengthen its JICA Rules on Sanctions. On export credit, the lead examiners encourage JBIC and NEXI to coordinate their efforts to prevent and detect foreign bribery in international business transactions benefitting from official export credit support. The lead examiners also welcome

52. For a full discussion of joint anti-ODA-related corruption measures undertaken by Japan and Vietnam in the wake of the PCI case, see the Ministry of Foreign Affairs summary (also referenced in Japan's Phase 3 questionnaire responses) here: <http://www.mofa.go.jp/region/asia-paci/vietnam/oda-related0902.pdf>

53. Article 1.a) of the OECD Council Recommendation on Bribery and Officially-Supported Export Credits recommends that Members encourage exporters and, where appropriate, applicants requesting support to 'develop, apply and document appropriate management control systems that combat bribery'.

NEXI's willingness to require written confirmation from applicant exporters requesting official export credit that they have appropriate anti-bribery management control systems in place. Given that more Japanese companies—especially SME's—will be looking for business opportunities overseas, the lead examiners welcome further efforts by JICA, JBIC and NEXI to raise awareness of the risks of foreign bribery.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

1. Recommendations of the Working Group

The Working Group on Bribery commends the Japanese authorities for their full cooperation and disclosure throughout the Phase 3 process. Since Phase 2, Japan has made progress on a number of issues. Japan has fully implemented the following recommendations: 1(iv) on raising awareness of foreign bribery in the legal profession and 5(b) on information in the METI Guidelines on 'small facilitation payments' and the interpretation of 'international business transactions'. Progress has been made on implementing recommendation 2(d) on whistleblower protections, and recommendation 5(c) on bribes that benefit third parties has become an issue for follow-up. Recommendation 2(b) on METI's system for processing allegations of foreign bribery received by it remains partially implemented, as well as 3(a) on compliance with Article 8 of the Anti-Bribery Convention on fraudulent accounting. Progress has been made on the following recommendations from Phase 2bis: Recommendation 1(a) on using non-compulsory investigative measures at the earliest stage, 1(b) on seeking MLA at the earliest possible stage to obtain non-compulsory measures, Recommendation 1(c) on increasing coordination and communication between law enforcement agencies and 1(d) on new investigative measures, which can now be considered partially implemented. Recommendation 2(a) to move the foreign bribery offence from the UCPL—legislation under the responsibility of METI—to the Penal Code has been reconsidered by the Working Group, which considers it unfortunate that the offence is not in the Penal Code, but at this stage has chosen to focus on making concrete recommendations on how to improve METI's role as the lead ministry on the implementation of the Anti-Bribery Convention.

Despite these areas of progress, the Working Group continues to have serious concerns that Japan still does not appear to be actively detecting and investigating foreign bribery cases, and this is likely a major impediment to a more effective enforcement of Japan's foreign bribery offence. Convictions in only two cases have been obtained in more than 12 years since the foreign bribery offence came into force in Japan—a number that seems very low in view of the size of the Japanese economy. As a result, the Working Group recommends that Japan address this problem urgently and make a written report to the Group on progress in this regard in six months.

In conclusion, based on the findings in this report on the implementation by Japan of the Anti-Bribery Convention, the 2009 Anti-Bribery Recommendation and related OECD anti-bribery instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites Japan to also report in writing within six months of the report (June 2012) on implementation of Recommendations 2 on confiscation (including information on how the profit is calculated in foreign bribery cases), 4 on investigation and prosecution, and 5 on money laundering; and report orally within one year (December 2012) on implementation of Recommendations 8 on small facilitation payments, 9 on the role of METI and 13 on whistleblower protection; and submit a written follow-up report within two years

(December 2013) on all recommendations and follow-up issues. 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.

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

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.

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)

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)

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;
- 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
- 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)

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)

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

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)

Recommendations for ensuring effective prevention and detection of foreign bribery

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)

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)]

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);
- 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
- 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)]

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)

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)]

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)]

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)]

2. Follow-up by the Working Group

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;
- 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
- 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.

ANNEX 1: PHASE 2, PHASE 2BIS RECOMMENDATIONS OF THE WORKING GROUP AND ISSUES FOR FOLLOW-UP AND SELF-ASSESSMENT RECOMMENDATIONS BY JAPAN

Phase 2 Recommendations of the Working Group and Issues for Follow-up

Recommendations in Phase 2

*Written
follow-up*⁵⁴

Recommendation in Preamble to Phase 2 Recommendations:

Par. 5 The Working Group recommends that the Japanese authorities assess as a priority the impediments to effective investigation and prosecution. In this regard, based on the information provided by Japan during the January 2005 meeting, the Working Group urges Japan to make use of MLA at the non-“filed” investigation stage, increase co-ordination of the law enforcement efforts between prosecution and police, and address any difficulty encountered in establishing and enforcing territorial jurisdiction in order to enable Japan to advance non-“filed” investigations concerning foreign bribery offences. *Partially implemented*

Recommendations for Ensuring Effective Prevention and Detection of Foreign Bribery

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:
 - i. key agencies including the Ministry of Economy, Trade and Industry (METI), Ministry of Justice, Ministry of Foreign Affairs and Ministry of Finance about the important links between foreign bribery and other areas of government activity, such as public procurement, export credit, official development assistance and anti-monopoly cases; *Satisfactorily implemented*
 - ii. police and prosecutors through training specifically targeting the foreign bribery offence either separately or in the context of overall anti-corruption and corporate crime training; *Satisfactorily implemented*
 - iii. 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 *Satisfactorily implemented*
 - iv. the legal profession. (Revised Recommendation, Paragraph I) *Not implemented*
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:

54. This column sets out the WGB’s findings on Japan’s 10 October 2007 *Japan Phase 2: Follow-Up Report on the Implementation of the Phase 2 Recommendations*.

- 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) *Satisfactorily implemented*
- 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) *Partially implemented*
- 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;⁵⁵ (Revised Recommendation V.B.(iii) and (iv)) *Satisfactorily implemented*
- 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 *Partially implemented*
- 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. *Satisfactorily implemented*
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 *Partially implemented*
- 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.) *Satisfactorily implemented*
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) *Satisfactorily implemented*

⁵⁵ The WGB notes that this is a general issue for many Parties.

Recommendations for Ensuring Effective Prosecution and Sanctioning of Foreign Bribery Offences

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) *Satisfactorily implemented*
 - 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) *Partially implemented*
 - 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) *Not implemented*
 - 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 *Satisfactorily implemented*
 - 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) *Satisfactorily implemented*
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) *Satisfactorily implemented*

Follow-up by the Working Group

1. 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 Cooperation Committee, Industrial Structure Council, including the recommendation to undertake a study of the appropriateness of including the foreign bribery offence in the UCPL. It is also recommended that Japan report the findings of the study to the Working Group. (Convention, Article 1)

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

Phase 2bis Recommendations of the Working Group and Issues for Follow-up⁵⁶

Recommendations in Phase 2bis

1. The Working Group recommends that Japan should be proactive in investigating allegations of foreign bribery, with the goals of advancing investigations and bringing prosecutions, and recommends the following specific measures be taken to actively pursue evidence in foreign bribery cases involving Japanese interests:
 - a. use non-compulsory investigative measures at the earliest possible stage, such as witness interviews and requests for the voluntary disclosure of financial records, including in the absence of sufficient evidence to meet the burden of proof to obtain warrants for compulsory investigative measures;
 - b. seek mutual legal assistance at the earliest possible stage to obtain non-compulsory investigative measures, including in the absence of sufficient evidence to meet the burden of proof to obtain warrants for compulsory investigative measures
 - c. increase coordination and communication between the public prosecutors’ offices and the National Police Agency concerning the foreign bribery offence, for the purpose of ensuring an effective flow of information between police and prosecutors about ongoing and potential foreign bribery enquiries or investigations, as well as seriously consider increasing the involvement of the police in foreign bribery investigations, including where the cases are not referred to prosecutors by the police; and
 - d. specifically include in the ongoing research by the Ministry of Justice on how to increase the effectiveness of investigative measures, consideration of the foreign bribery offence, in particular regarding the potential use of wire-tapping and grants

56. This table sets out the WGB’s recommendations to Japan following the adoption on 15 June 2006 of Japan’s Phase 2bis evaluation. The WGB has not, to date, formally evaluated Japan’s implementation of these recommendations.

of immunity, bearing in mind that because most of the evidence in foreign bribery cases is available abroad, it may be difficult to secure adequate evidence for prosecution in the absence of greater investigative powers.

2. The Working Group recommends that Japan urgently co-ordinate and undertake an objective assessment of the legal and procedural impediments to the effective investigation and prosecution of the offence of bribing a foreign public official in Japan, and present in writing the findings of the assessment to the Working Group within six months of the Phase 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.
3. In order to further strengthen the legislative framework for fighting foreign bribery, ensure full implementation of the relevant Phase 2 Recommendations, and increase the priority of the foreign bribery offence, the Working Group recommends that the Japanese authorities take the following steps:
 - a. enhance the visibility and enforcement of the foreign bribery offence as a matter of priority, notably by moving the foreign bribery offence from the UCPL to the Penal Code;
 - b. delete from the 2006 METI Guidelines the interpretation of “international business” for the purpose of the foreign bribery offence, which refers to “business repeatedly and continuously conducted” for the “purpose of profit”, and make it absolutely clear in the Guidelines that Japanese law does not permit an exception for facilitation payments;
 - c. revisit the issue identified in the Phase 2 Report regarding the standard of liability of materiality applicable to the offence of making a false statement in disclosure documents under the Securities and Exchange Law, and ensure that Japanese law fully complies with Article 8 of the Convention; and
 - d. take appropriate measures to ensure that public and private employees are aware that the Whistleblower Protection Act applies, not only to internal acts of whistle-blowing, but to acts of whistle-blowing to police and prosecutors as well.

Recommendation for Phase 2bis Follow-Up by the Working Group

2. The Working Group recommends follow-up of the following matters as practice develops:
 - a) the application of nationality jurisdiction to legal persons for the foreign bribery offence; and
 - b) the use of confessions in foreign bribery investigations and prosecutions, as well as whether there are any particular difficulties in establishing the voluntariness of confessions in foreign bribery cases at trial.

Japan's Self-Assessment: Recommendations by the Japanese Government on how to Rectify Impediments⁵⁷

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 unfavourable 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

57. These recommendations were made by Japan as part of its Self-Assessment Report, which was required of Japan by the WGB as part of Japan's Phase 2bis evaluation. The Self-Assessment Report was reviewed by the WGB as part of Japan's written follow-up report, adopted in October 2007. The WGB has not, to date, formally evaluated Japan's implementation of these recommendations.

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.

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.

ANNEX 2: LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Government Ministries and Bodies

- Consumer Affairs Agency
- Financial Services Agency
- Japan Bank for International Cooperation
- Japan International Cooperation Agency
- Ministry of Economy, Trade and Industry
- Ministry of Finance
- Ministry of Foreign Affairs
- Ministry of Justice
- National Police Agency
- National Tax Agency
- Nippon Export and Investment Insurance
- Public Prosecutors Office

Private Sector

Private enterprises

Representatives from six large enterprises

Representatives from three SMEs

Business and professional associations

- Representatives from three economic organisations

Legal profession and academics

- Japan Federation of Bar Associations
- Representatives from two universities

Accounting and auditing profession

- Representatives from six accounting and auditing firms
- Japanese Institute of Certified Public Accountants
- Japan Federation of Certified Public Tax Accountants' Associations

Civil Society, international organisations and the media

- Transparency International Japan
- Representative from the media
- United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders

ANNEX 3: LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

AOCL	Act on Punishment of Organized Crimes and Control of Crime Proceeds
ASC	Auditing Standards Committee
CAA	Consumer Affairs Agency
FIEA	Financial Instruments and Exchange Act
FIU	Financial intelligence unit
FSA	Financial Services Agency
GAAS	Generally Accepted Auditing Standards
IFRS	International Financial Reporting Standards
JBIC	Japan Bank for International Cooperation
JCCI	Japan Chamber of Commerce and Industry
JETRO	Japan External Trade Organization
JFBA	Japan Federation of Bar Associations
JFCPTA	Japan Federation of Certified Public Tax Accountants' Associations
JAFIC	Japan Financial Intelligence Centre
JICPA	Japanese Institute of Certified Public Accountants
JICA	Japan International Cooperation Agency
METI	Ministry of Economy, Trade and Industry
METI IPO	METI Intellectual Property Policy Office
MOFA	Ministry of Foreign Affairs
MOJ	Ministry of Justice
IOSCO	International Organisation of Securities Commissions
MLA	Mutual legal assistance

NPA	National Police Agency
NTA	National Tax Agency
NEXI	Nippon Export and Investment Insurance
ODA	Official development assistance
OECD	Organisation for Economic Co-operation and Development
OECD DAC	OECD Development Assistance Committee
SESC	Securities and Exchange Surveillance Commission
SMRJ	Organization for Small and Medium Enterprises and Regional Innovation
SEL	Securities and Exchange Law (now FIEA)
SME	Small- to medium-sized enterprise
SPPO	Supreme People's Prosecutor's Office
STR	Suspicious transaction report
UCPL	Unfair Competition Prevention Law
UNAFEI	United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders
UNCAC	United Nations Convention against Corruption
WGB	Working Group on Bribery in International Business Transactions