



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

JAPAN: PHASE 2

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

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A. INTRODUCTION

1. On-Site Visit

1. From 28 June to 2 July 2004 Japan underwent the Phase 2¹ on-site visit by a team from the OECD Working Group on Bribery in International Business Transactions (Working Group). Pursuant to the procedure for the Phase 2 self and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and the 1997 Revised Recommendation (Revised Recommendation), the purpose of the on-site visit was to study the structures in place in Japan to enforce the laws and rules implementing the Convention and to assess their application in practice as well as monitor Japan's compliance in practice with the Revised Recommendation.

2. The OECD team was composed of lead examiners from Italy² and the United States³ as well as representatives of the OECD Secretariat.⁴

3. During the on-site visit, meetings were held with officials from the following ministries and other government related organisations: Ministry of Economy, Trade and Industry (METI), Ministry of Justice, Ministry of Foreign Affairs, Ministry of Finance, Cabinet Office, Supreme Public Prosecutors Office, Tokyo High Public Prosecutors Office, Tokyo and Osaka District Public Prosecutors Offices, National Police Agency, Tokyo Metropolitan Police Department, Financial Services Agency (FSA), Japan Fair Trade Commission, Securities and Exchange Surveillance Commission (SESC), National Tax Agency, Japan Bank for International Cooperation (JBIC), Nippon Export and Investment Insurance (NEXI), and Japan International Co-operation Agency (JICA).

4. The OECD team met with representatives from the following civil society organisations: Japan Chamber of Commerce and Industry, Japan Foreign Trade Council, Japan Business Federation, Japan Machinery Centre for Trade and Investment, Transparency International-Japan, Japanese Trade Union Confederation (Rengo), and Japan Citizens' Ombudsman Association. The private sector was represented by the Tokyo Branch of the Standard Chartered Bank, Sumitomo-Mitsui Bank, UFJ Bank, Asian Federation of the Institute of Internal Auditors, Accounting Standards Board, Japanese Institute of Certified Public Accountants, a member of Shin Nihon Co. (certified public accountant from this firm), and Control Risk Group K.K. The following companies participated: Mitsubishi Corporation, Mitsui and Co., NEC, Nippon Steel, Sakaguchi E.H. VOC CORP (small/medium enterprise), Toyo Engineering

¹ The Phase 1 examination of Japan took place in April 1999, following the coming into force in February 1999 of the relevant amendments to the Unfair Competition Prevention Law for the purpose of implementing the Convention. (The purpose of the Phase 1 examination is to assess whether a Party's laws for implementing the Convention and the Revised Recommendation comply with the standards there under). A Phase 1-bis examination regarding amendments to the UCPL took place in April 2002.

² Italy was represented by: Paolo Fraulini, Magistrate, Legislative Office, Ministry of Justice; and Stefania Moneti, Anti-Money Laundering Expert, Anti-Money Laundering Service, *Ufficio Italiano Cambi*.

³ The U.S. was represented by: Peter Clark, Deputy Chief, U.S. Department of Justice, Criminal Division, Fraud Section; Richard Grime, Assistant Director, U.S. Securities and Exchange Commission; and Philip Urofsky, Special Counsel for International Litigation, U.S. Department of Justice, Criminal Division, Fraud Section.

⁴ The OECD Secretariat was represented by: Nicola Bonucci, Acting Head, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs (DAF) and Deputy Director, Legal Directorate; Christine Uriarte, Principal Administrator, Anti-Corruption Division (DAF); and Gwenaëlle Le Coustumer, Administrator, Anti-Corruption Division (DAF).

Corporation, and Tokyo Electric Power Corporation (public enterprise). The Japanese legal profession was represented by three lawyers from the Bar Association, and three professors from Aoyama Gakuin University (specialist in accounting), University of Tokyo (criminal law specialist) and Reitaku University (specialist in corporate ethics).⁵

5. A separate panel was held with economic counsellors from the French Embassy, the Embassy of the Republic of Korea and the Embassy of the United States of America. The purpose of this panel was to gain insight on the level of corruption in Japan and the effectiveness of Japan's structure and policy for fighting the bribery of foreign public officials from the point of view of countries with substantial business interests in the Japanese economy.

6. In preparation for the on-site visit the Japanese authorities provided the Working Group with responses to the Phase 2 Questionnaire and responses to a supplementary questionnaire, which contained specific questions about the implementation of the Convention and Revised Recommendation in Japan. The Japanese authorities also submitted translations of relevant legislation and summaries of case law. These materials were reviewed and analysed by the OECD team and independent research was performed to obtain non-governmental viewpoints as well. At the on-site visit the Japanese authorities provided a translation of the *Guidelines to Prevent Bribery of Foreign Public Officials* (METI, 26 May 2004), translations of further legislation and some statistical information. Material submitted by the Japanese authorities following the on-site visit included translations of the *Report on Measures for Effective Prevention of Bribery of Foreign Public Officials*,⁶ relevant parts of the *METI Guidebook on the Unfair Competition Prevention Law (2003)*, and additional translations of legislation.

7. The OECD team appreciates the time and effort dedicated by officials from the Japanese government in organising the on-site visit as well as the hard work involved in translating the requested extensive documentation. In addition the OECD team is grateful for the important contribution of the Japanese Delegation to the OECD in liaising with the Japanese authorities in Tokyo for the purpose of organising and following-up the on-site visit.

2. Level of Access to Opinions and Information

a. Availability of Participants

8. Leading up to the on-site visit the lead examiners and Secretariat followed the normal procedure of drafting an agenda for the visit, including topics for panel discussions and suggested participants. The Japanese authorities sought significant changes to the agenda at a very late date. It was the opinion of the lead examiners, the Secretariat and the Management Group of the Working Group that Japan was taking an unduly and unjustifiably narrow view of the scope of the examination and the topics relevant to the Phase 2 process. Although Japan eventually acceded in large part to the proposed agenda, the examination team notes that several officials failed to appear at some of the scheduled panels as well as media representatives. In addition, on several occasions, the Japanese authorities challenged the right of the lead examiners to inquire into certain areas, common to Phase 2 examinations, on the grounds of relevance and in certain circumstances pursuant to a secrecy obligation (discussed below).

⁵ Some of the representatives from the private sector and all three professors were members of the Subcommittee on the Corporate Affairs related to International Business Transactions, Trade and Economic Co-operation, Industrial Structure Council.

⁶ Subcommittee on Corporate Activities related to International Business Transactions Trade and Economic Co-operation Committee, Industrial Structure Council, 6 February 2004.

b. Absence of Formal Investigations and Prosecutions

9. The press has widely reported on several cases⁷ allegedly involving Japanese companies in the bribery of foreign public officials dating from the mid-1990s. Three of these cases appear to involve transactions that occurred following the coming into force of Japan's foreign bribery offence in February 1999. The lead examiners recognise that the press does not necessarily report this kind of information correctly, but nevertheless press reports containing information about criminal activity can form an important source of information for the law enforcement authorities. For this reason they questioned the Ministry of Justice, METI, prosecutors and the National Police Agency, as well as other relevant agencies, on whether the allegations had led to investigations. The Japanese authorities claimed that due to secrecy obligations (discussed below), they were unable to shed light on this. However, at the very least the lead examiners were able to determine that none of the press allegations had led to court proceedings or the "official filing" of an investigation (see discussion below).

10. Given the size of Japan's economy and its level of exports and outward foreign direct investment, including economic activity in some countries believed to be at high risk for soliciting bribes,⁸ the lead examiners were surprised that no cases have been formally investigated or led to court proceedings since the coming into force of the foreign bribery offence. Indeed in view of the press allegations it was difficult to comprehend the absence of even one formal investigation. The lead examiners felt however that they encountered a general low level of concern on the part of the Government's representatives about the reasons for the absence of formal investigations and court proceedings.

11. The lead examiners attempted to discover whether any foreign bribery investigations had been declined and whether there were any ongoing investigations. Since they knew that no case had reached the courts, but were also aware of at least three alleged cases extensively reported by the press involving the bribery of foreign public officials by Japanese companies (discussed above), they asked whether these or any other cases had been referred to the law enforcement authorities or investigated by the police or the prosecutorial authorities, and what had been the outcome of such referrals and investigations if any.

12. The lead examiners were particularly disturbed by the unwillingness of the Japanese authorities to provide even basic statistical information regarding the number of cases or allegations involving foreign bribery that had come to the attention of the authorities. At the on-site visit the lead examiners questioned each of the agencies directly involved in the implementation of the Convention—METI, the Ministry of Justice, National Police Agency⁹ and the public prosecutors' offices—about whether they had received any such allegations and whether any cases had been "filed", investigated or prosecuted. Representatives of the various agencies refused to answer, stating that they were bound by a secrecy rule¹⁰ that prohibited the

⁷ Since none of the reported cases have been the subject of trial proceedings or reached the stage of a formal investigation and it is not known whether they are the subject of preliminary investigations, the allegations are not discussed in this report.

⁸ See analysis of Japan's economic indicators in A.4b. "Economic Indicators".

⁹ Following the on-site visit the Japanese authorities provided in writing that prefectural police headquarters are required to report "important intellectual crimes" to the National Police Agency, when they deem the cases "clearable". Amongst the four categories of crimes to be reported are "acceptance and receiving bribery (including foreign bribery in the UCPL)".

¹⁰ Following the on-site visit the Japanese authorities provided the legal basis for the secrecy obligation, citing provisions in the *National Public Service Law*, the *Local Public Service Law* and the *Code of Criminal Procedure*. They explained that these laws prohibit a "yes" or "no" response to the lead examiners' question about whether any foreign bribery cases are under investigation, because under the current circumstances in Japan even such a limited response could reveal the identity of the alleged parties in combination with other information. This could result in a violation of the privacy of the alleged parties

release of information concerning any investigations that had not resulted in an “official filing”¹¹ with the prosecutors. The lead examiners understand that every case referred by the police to the prosecution authorities is automatically “filed”, and that no case involving foreign bribery has been “filed”, or “filed” and consequently closed. In addition, during the Working Group meetings the Japanese authorities indicated that all “accusations” made by public officials pursuant to article 239(2) of the *Code of Criminal Procedure* automatically result in the “official filing” of an investigation. Accordingly, based upon the limited information available to the lead examiners, it appears that no case of bribing a foreign public official under the UCPL has been either:

- (a) decided by the courts,
- (b) referred by the police authorities to the prosecution authorities,
- (c) officially filed as a result of an “accusation” made by a public official under article 239(2) of the *Code of Criminal Procedure*,¹²
- (d) officially filed by the prosecution authorities, or
- (e) officially filed and subsequently closed.

13. The lead examiners consider that Japan has applied an extremely strict interpretation to its secrecy provisions, and are not persuaded that the limited information that they sought could have threatened the privacy of any alleged parties involved in foreign bribery offences or the confidentiality of any investigations. The lead examiners consider that prejudicing cases would be counterproductive to the purpose of the Working Group, and therefore would have ensured that any information provided about cases would have been used in the strictest confidence and only for the purpose of assessing Japan’s implementation of the Convention. Information about cases would have only been disclosed to the extent that the said interests would not be affected.

14. Secrecy claims were also made in relation to certain other information sought by the examination team. The National Police Agency was prohibited from disclosing information about techniques used for investigating domestic and foreign bribery, and could not state whether METI has reported any penal offences under the UCPL. In addition in light of the absence of discussions regarding investigations, it was not possible to assess in practice how effectively the various law enforcement authorities co-ordinate and communicate with each other when investigating a foreign bribery offence.

and the confidentiality of the investigations. The Japanese authorities state that article 100(1) of the *National Public Service Law* and article 34(1) of the *Local Public Service Law* stipulate that Japanese public officials shall not disclose the secrets that have come to their knowledge in the course of performing their duties. Article 47 of the *Code of Criminal Procedure* states that “no document relating to a trial shall be made public prior to the opening of a public trial, except when it is necessary in light of public intent or other reasons deemed appropriate”.

¹¹ When a case is “officially filed” the formal investigation commences and the case is given a number. This stage of the investigative process has evolved through practice and the Code of Criminal Procedure does not differentiate between “filed” and “non-filed” investigations. The Japanese authorities stress that investigations that have not been “filed” are regulated under the *Code of Criminal Procedure*.

¹² Following the Working Group meetings, the Japanese authorities further clarified that in addition all “accusations” made by “any person” pursuant to article 239(1) of the Code of Criminal Procedure automatically result in the “official filing” of an investigation.

3. Focus of Report

15. Taking into account the information obtained by the OECD team during the on-site visit and from the responses to the Phase 2 questionnaires and other sources, the analysis that follows focuses on ways in which Japan needs to increase the effectiveness of its measures for the prevention, detection, investigation, prosecution and sanctioning of the offence of bribing a foreign public official.

4. Background Data

a. System of Government and Legal System

16. The Constitution of Japan establishes a system of representative democracy in which the *Diet*, also known as the *Kokkai*, is the “highest organ of state power”. The Emperor is the “symbol of the state and the unity of the people”. The Prime Minister, who heads the Cabinet, has the right to appoint and dismiss ministers of state. A majority of ministers must come from the *Diet*. The *Diet* consists of the House of Counsellors or *Sangi-in* with 247 seats and the House of Representatives or *Shugi-in* with 480 seats. Japan has a decentralised system with 47 prefectures, although the government is largely centralised.

17. Japan’s legal system was originally modelled after the German criminal and French civil law. Following the Second World War constitutional law and criminal procedure were reformed based on U.S. models.

b. Economic Factors

18. Japan’s free market economy is the second largest in the world. The Japanese economy is highly efficient and competitive in sectors involved in international trade, but less productive in areas including agriculture, distribution and services. Following a period of one of the highest economic growth rates in the world--between the 1960s and 1980s--Japan’s economy slowed dramatically in the 1990s marking the end of the “bubble economy”. The Asian financial crisis in the late 1990s also had a substantial effect, with real GDP growing at an average of 1% in contrast to in the 1980s when it was about 4% per year. Currently Japan is suffering the worst period of economic growth since World War II. Nevertheless, Japan’s long-term economic prospects are considered good in large part due to its reservoir of industrial leadership and technicians, well-educated and industrious work force, high savings and investment rates, and intensive promotion of industrial development and foreign trade.¹³

19. Having few natural resources, trade is vital to Japan for earning the foreign exchange needed to purchase raw materials for its economy. Japan’s major export partners in 2003 were the United States (13.41 trillion yen¹⁴), China (6.64 trillion yen), Republic of Korea (4.02 trillion yen), Taiwan (3.61 trillion yen) and Hong Kong (3.46 trillion yen). Its major export goods in the same year were transport equipment (13.26 trillion yen), electrical machinery including electronics (12.87 trillion yen), and machinery including office machinery (11.2 trillion yen). Starting from a very high base Japan’s market share of exported manufactured goods has declined by about 50% over the past decade, which is substantially more than in any other OECD country. In 2003 Japan’s exports to China increased by 33%, apparently due to demand from Japanese firms based in China that are importing intermediate goods unavailable in China for

¹³ U.S. Department of State, Bureau of East Asian and Pacific Affairs, March 2004.

¹⁴ On 14 September 2004, 100 yen equalled 0,74 Euro or 0,91 USD.

use as inputs in goods destined both for exports and for the domestic Chinese market. In 2003 China accounted for around 25% of Japan's exports to Asia and almost 45% of Japan's imports from the region.¹⁵

20. Japan's major import partners in 2003 were China (8.73 trillion yen), the United States (6.82 trillion yen), Republic of Korea (2.07 trillion yen), Indonesia (1.91 trillion yen) and Australia (1.74 trillion yen). Its major import goods in the same year were machinery (13.97 trillion yen), minerals (9.35 trillion yen), and foodstuff (5.10 trillion yen). A significant development in 2003 was the increase in distance between China and the U.S. as sources of Japanese imports, with imports from China rising by 13%.¹⁶

21. In 2002 the top countries for investment by Japanese firms overseas were the United States (991.3 billion yen), Cayman Islands (491.9 billion yen), France (435.6 billion yen) and Netherlands (364 billion yen). In the same year the top countries for foreign direct investment in Japan were the United States (594 billion yen), Netherlands (392 billion yen), Cayman Islands (203 billion yen), Germany (119.5 billion yen) and Luxembourg (66.7 billion yen).¹⁷

22. Japan plays a significant role as a donor of official development assistance (ODA). In the 1990s Japan was the highest foreign aid donor in absolute terms with ODA peaking at 13 billion USD in 2000. Since then Japan lost the lead position to the U.S. due to cuts and the yen's relative weakness. Asian countries are the primary recipients of ODA from Japan, receiving 54.8% of the total in 2001.¹⁸

23. Another important feature of the economic system in Japan is the *keiretsu* form of industrial organisation, which has prevailed in business relations in Japan for two or three decades. It can be summarised as "a loose conglomeration of firms sharing one or more common denominators".¹⁹ It is a system of cross-shareholdings where typically 30-50% of stocks are cross-held in the same *keiretsu* as a method of preventing take-overs by outside investors. A horizontal keiretsu (of which there are six in Japan) is a large business conglomerate or cartel organised around banks, industrial firms and trading companies. A vertical keiretsu operates within one industry, and is characterised by a cascading structure of shareholding and personnel transfers (from lead firm to first tier supplier, from first-tier supplier to second, and so on). Virtually every large Japanese firm heads a vertical *keiretsu*.²⁰

5. Developments since Phase 1 Examination

(i) 1999-2002: Phase 1-bis Examination

24. In April 2002, the Working Group undertook a Phase 1-bis examination of Japan to review amendments made in 2001 to the *Unfair Competition Prevention Law* (UCPL)—Japan's law for

¹⁵ U.S. Department of State, Bureau of East Asian and Pacific Affairs, March 2004; Ministry of Finance Japan Trade Statistics Press Release; *Japan—Country Report—March 2004, OECD Economic Surveys: Japan*, Volume 2003/18—February 2004, at p. 116; and The Economist Intelligence Unit at p. 38.

¹⁶ Ministry of Finance Japan Trade Statistics Press Release; and *Japan—Country Report—March 2004*, The Economist Intelligence Unit at p. 38.

¹⁷ Ministry of Finance Japan Trade Statistics Press Release.

¹⁸ *OECD Economic Surveys: Japan*, Volume 2003/18—February 2004 at p. 21; and *Japan—Country Profile 2004*, the Economist Intelligence Unit at p. 54.

¹⁹ Wright, Dr. R.W., Investopedia.com; see also *Networking in Japan: the Case of Keiretsu* (12 April 1990)

²⁰ *Japan II* (A.V. Vedpuriswar, Global CEO, July 2002); *Carlos Ghosn: Cost Controller or Keiretsu Killer* (Risaburo Nizel, OECD Observer, 28 April 2000)]; *The Japanese Political Situation since 1954* (Empereur.com)

implementing Article 1 of the Convention²¹—to address certain concerns of the Working Group in Phase 1. These amendments concerned removal of the “main office” exception from the UCPL and the broadening of the definition of “foreign public official”. The Working Group noted that other shortcomings²² identified in Japan’s Phase 1 evaluation had not been addressed by the amendments.

Removal of “Main Office Exception”

25. The original implementing law provided an exception under article 10-bis(3)²³ of the UCPL to the foreign bribery offence where the “main office” of the person giving the bribe was located in the same country for which the foreign public official engaged in public service. There was no definition in the UCPL or elsewhere in the law about what constituted a “main office”. During the Phase 1 examination of Japan in April 1999, the Japanese authorities believed that the courts would look at decisions regarding the definition of a “head office” under the Commercial Code, which had defined it as the centre of management of an entity’s business. Following these precedents the Japanese authorities surmised that a division of a Japanese corporation located in a foreign country would not be deemed the “main office”, but that a subsidiary of a Japanese parent corporation located in a foreign country would usually be deemed to be the “main office”. They confirmed that no offence would be committed if a Japanese national employed by a foreign subsidiary of a parent Japanese corporation bribed a foreign public official in Japan in relation to the business of the subsidiary.

26. It was the opinion of the Working Group in Phase 1 that article 10-bis(3) of the UCPL created a major loophole in the implementation of the Convention, with the result that a significant proportion of the cases covered by the Convention would not be prosecuted. The Japanese authorities maintained that the “main office” exception was consistent with Article 1 of the Convention, as it represented the Japanese interpretation of “international business”.

27. In view of the concerns of the Working Group in Phase 1, the UCPL was amended for the purpose of deleting the “main office” exception and replacing it with the language “in an international commercial transaction”. In the Phase 1-bis evaluation, the Working group congratulated Japan for eliminating this exception. Nevertheless during the Phase 2 on-site visit the lead examiners reviewed the interpretation of the definition of “international business” in the offence of bribing a foreign public official, being attentive to Japan’s position at the time of Phase 1 that the “main office” exception merely interpreted “in the conduct of international business” under Article 1 of the Convention. The findings of the lead examiners in this respect are discussed later in this report.

Expansion of Definition of “Foreign Public Official”

28. At the time of the Phase 1 examination the Working Group had serious doubts about whether the definition of “foreign public official” under article 10-bis(2)(iii) of the UCPL met the standard under Commentary 14 on the Convention²⁴ regarding the degree of indirect control by a foreign government(s)

²¹ The amendments were adopted in June 2001 and entered into force in December 2001.

²² Other issues identified in the Phase 1 Evaluation of the Working Group were the coverage of bribes that benefit third party beneficiaries, the level of sanctions for legal persons, the length of the statute of limitations, and the tax treatment of bribes payments made to foreign public officials.

²³ The numbering of the relevant articles in the UCPL has changed since the Phase 1 examination. In this report the numbering corresponds to the articles at different times, and thus the reader will note an inconsistency.

²⁴ Commentary 14 states that “a ‘public enterprise’ is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, inter alia, when the government or governments hold the majority of the enterprise’s

over an enterprise that deems it a “public enterprise”. Article 10-bis(2)(iii) did not specify that indirect control is a sufficient trigger, and did not appear to cover the case where a foreign government exercises *de facto* control over an enterprise but does not hold in excess of 50% of the shares with the right to vote (i.e. the case where a foreign government owns less than the majority of shares with the right to vote but has the majority of voting power).²⁵ This type of share-ownership, commonly known as “golden shares”, provides the holder with the power to block important management decisions, or simply increases voting power. In this respect the UCPL refers to the ownership of “more than half of the stockholders’ rights to vote”.

29. The Japanese authorities countered that a number of instances of indirect control were covered by the rest of article 10-bis(2), which referred to enterprises “of which the number of executives...appointed or named by one or more of national or local foreign governments exceeds one-half of that enterprise’s executives”, and that Commentary 14 only requires coverage of the concrete example in the second part of its definition.

30. To respond to the concerns of the Working Group in Phase 1, Japan amended article 10-bis(2)(iii) by qualifying it with the following additional language: “...and such person as defined in the Government Ordinance as a ‘foreign public official’”. The Government Ordinance lists several forms of foreign governmental indirect control over an enterprise; including control through an enterprise which itself is controlled by a foreign government in certain cases. In the Phase 1-bis evaluation, the Working Group doubted whether Japan’s amended definition fully covered all enterprises over which a foreign government may indirectly exercise a dominant influence. The continued concern of the Working Group was due to the absence of express language in the Government Ordinance covering the situation where a foreign government owns less than the majority of shares with the right to vote but has the majority of voting power. Japan repeated its position that it only was required by Commentary 14 to cover the concrete example in its definition.

31. During the Phase 2 on-site visit, the lead examiners reviewed the items under the Government Ordinance, and were satisfied that they are broad enough to cover the situation that appeared to be outstanding at the time of Phase 1-bis. In particular the lead examiners are satisfied that the case of control through “golden shares” is covered due to the interpretation of the relevant provision in the Government Ordinance provided by guidelines issued in May 2004 by the Ministry of Economy, Trade and Industry (*METI Guidelines*).²⁶ The *METI Guidelines* state that an enterprise is a “public enterprise” where it is under the control of a foreign government “through the holding of golden shares, without permission, license, approval or consent etc. under which the whole or part of resolutions at general stockholders’ meetings do not take effect”.²⁷

(ii) 2003-2004: Work of METI Consultative Committee

32. In 2003 the Ministry of Economy, Trade and Industry (METI) created a Consultative Committee to advise it on matters related to the implementation of the Convention. The Consultative Committee was created to respond to the mounting global concern in recent years about fraud and corruption, including the

subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise’s administrative or managerial body or supervisory board.”

²⁵ In this respect, article 10-bis (2) referred to direct ownership by a foreign government(s) of more than one-half of the enterprise’s total issued stocks with the right to vote or total subscribed capital.

²⁶ The *METI Guidelines* are discussed in detail in various parts of this report.

²⁷ See page 20 of the *METI Guidelines*.

bribery of foreign public officials.²⁸ The Consultative Committee (also known as the Subcommittee on Corporate Affairs related to International Business Transactions, Trade and Economic Co-operation, Industrial Structure Council) was composed of representatives of the private sector and civil society, including academics, industry leaders, a trade unionist, lawyer, accountant and journalist.²⁹ METI and the Ministry of Justice acted as observers. In February 2004 the Consultative Committee issued a *Report on Measures for Effective Prevention of Bribery of Foreign Public Officials*.

33. Although the *Report* had not been translated into English for the on-site visit,³⁰ the lead examiners discussed its contents with representatives of METI at the on-site visit and learned that it contained several recommendations, including 1. the introduction of nationality jurisdiction in respect of the foreign bribery offence, 2. the introduction of the authority to confiscate the proceeds of bribing foreign public officials, and 3. improvements regarding companies' internal controls. The *Report* also proposed the establishment of guidelines to support a voluntary and precautionary approach in companies involved in international business transactions. The Consultative Committee recommended that these guidelines include measures for increasing the effectiveness of internal controls in companies, and a commentary on Article 1 of the Convention on the elements of the offence as well as the other articles of the Convention.

34. The *METI Guidelines* were issued approximately two weeks before the on-site visit took place (on 26 May 2004), and the lead examiners received translations of the 32-page document at the outset of the visit. The part of the *Guidelines* providing interpretations of the elements of the foreign bribery offence is lengthy and requires an in-depth review. For this reason the *Guidelines* are discussed throughout the report in respect of Japan's interpretation of the foreign bribery offence, and the background to the *Guidelines* is discussed in a separate section.

35. Based on the recommendations of the *Report*, METI drafted amendments to the UCPL on nationality jurisdiction. In response to the report the Ministry of Justice drafted an amendment to the *Anti-Organised Crime Law (AOCL)* on confiscation of the proceeds of the bribery of foreign public officials.

Nationality Jurisdiction

36. At the time of the Phase 1 examination, nationality jurisdiction did not apply to the offence of bribery of a foreign public official. The Working Group welcomed the Japanese authorities' statement that they would continue to examine whether their current basis for jurisdiction was effective.³¹ Taking into account the Phase 1 recommendation to take remedial action, the Consultative Committee recommended in the *Report*³² that the Japanese authorities introduce nationality jurisdiction. A bill amending the UCPL was

²⁸ According to the *METI Guidelines* increasing global concern about corruption has been reflected in, for instance, the calls made at the Evian Summit in June 2003 for enhanced actions to combat fraud and corruption, and the approval in 2003 of the *UN Convention against Corruption* to which Japan is a signatory.

²⁹ The Consultative Committee consisted of fourteen members: Six academics, three company representatives, one representative from the Chamber of Commerce, one trade union representative, one lawyer, one editorial writer and one Certified Public Accountant.

³⁰ A translation of the *Report* was provided two months following the on-site visit.

³¹ Article 4.4 of the Convention requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials. At the time of Phase 1, Japan had concluded that there was no need to adopt nationality jurisdiction, because this had not been done in respect of domestic bribery, and because pursuant to its territorial jurisdiction an act performed abroad is "considerably punishable".

³² The Consultative Committee discussed the application of nationality jurisdiction over the bribery of foreign public officials since January 2003, and it proposed that legislation should introduce nationality jurisdiction

adopted by the *Diet* on 19 May 2004 and published in the *Official Gazette* on 26 May. It will enter into force on 1 January 2005.

37. The amending law introduces a new article 14-(3) to the UCPL, which provides: “The offences under Article 14(1)(vii) (limited to the part thereof which relates to Article 11-(1))[i.e. bribery of foreign public officials³³] are subject to article 3 of the *Penal Code* [i.e. nationality jurisdiction³⁴]”. Therefore, Japanese citizens bribing foreign public officials abroad will soon be subject to Japanese jurisdiction.

38. The Japanese authorities have not provided information on the implementation of article 3 on nationality jurisdiction in practice and the possible requirements or conditions set by case law.

Proposed Confiscation Amendments

39. In Phase 1 the relevant Japanese legislation (i.e. the *Anti-Organised Crime Law*, which had not yet come into force,³⁵ and article 19 of the *Penal Code*) provided the authority to confiscate the bribe but not the proceeds of bribery. The Japanese authorities stated that it was too difficult to identify the proceeds of active bribery for this purpose. They also believed that the fines available as sanctions under the UCPL were high enough to be considered “monetary sanctions of comparable effect”.³⁶ The Working Group concluded that the UCPL did not meet the standard under the Convention for the confiscation of proceeds of bribery and strongly recommended that the Japanese authorities take action to meet this concern.

40. During the Phase 2 examination it was learned that the Japanese authorities drafted a Bill amending the *Anti-Organised Crime Law* (AOCL) for the purpose of enlarging the definition of “crime proceeds” to include “any property produced by, obtained through, or obtained in reward for” the offence of bribing a foreign public official under article 11(1) of the UCPL (amongst other offences). This amendment would enable the confiscation of the proceeds of the bribery of a foreign public official as well as expand the ambit of the money laundering legislation (the latter issue is discussed in further detail below). Representatives of the Ministry of Justice and the Japan Financial Intelligence Office (JAFIO) explained that the Bill had been submitted by the Ministry of Justice in 2003 during the normal sessions of the *Diet* but had not been passed. The Ministry of Justice resubmitted the Bill in the general session of the *Diet* in 2004, and deliberations on it will continue in the extraordinary Diet session in the autumn of 2004. Following the on-site visit the Japanese authorities provided a translation of the relevant parts of the Bill, which are analysed in detail later in this report.

Proposed Amendments to Money Laundering Offence

over the bribery of foreign public officials in its February 2004 report. The government decided on the UCPL amendment bill in Cabinet Council on 9 March 2004.

³³ “Any person who falls under any of the following items shall be liable to imprisonment for a period not exceeding three years or a fine not exceeding 3 000 000 yen ... (vii) A person who violated any provision of Article 9, Article 10 or Article 11-(1).”

³⁴ Article 3 of the *Penal Code* provides for nationality jurisdiction for a limited list of offences. “This code shall be applied to a Japanese national who commits any of the following crimes outside the territory of Japan ...”

³⁵ The *Anti-Organised Crime Law* was promulgated on 18 August 1999, and due to come into force within 6 months of the date of promulgation.

³⁶ Note that in Phase 1 the Working Group was of the opinion that the fines for legal persons under the UCPL were not sufficiently effective, proportionate and dissuasive in view of the large size of many Japanese corporations, particularly since confiscation of the proceeds of active bribery was not available.

41. At the time of the Phase 1 examination neither the passive nor the active bribery of a domestic or foreign public official constituted a predicate offence for the purpose of applying the money laundering legislation. However pursuant to the AOCL, which entered into force in February 2000, “crime proceeds” would include: 1. any pecuniary or other advantage given in the course of bribing a foreign public official under 10-bis(1) of the UCPL, and 2. any property received as a bribe by a Japanese public official. The Japanese authorities reiterated their justification for not making the proceeds of bribing subject to the provisions in the AOCL on confiscation—that it is too difficult to identify the proceeds.

42. In Phase 2 the Japanese authorities advised that the amendment to the AOCL enlarging the definition of “crime proceeds” would also widen the scope of the money laundering offence to include laundering the proceeds of bribing a foreign public official under article 11(1) of the UCPL. In addition confiscation of the proceeds of bribing a foreign public official involved in a money laundering offence would be possible. The contents of the AOCL amendment in this respect are analysed in detail later in the report.

(iii) 2002-2004: Proposals for a Whistleblower Protection Law

43. Traditionally corporate culture in Japan was characterised by the complete loyalty of employees to their company in exchange for lifetime employment. Whistleblowers were not provided with any statutory legal protection³⁷ against retaliation such as the refusal of promotion and harassment by management. This approach started to change with a series of consumer protection scandals revealed by whistleblowers.³⁸ Other disclosures related to the illegal acceptance of public funding and bid-rigging. The change in attitude is reflected in the establishment in 2002 of the Public Interest Speak-up Advisers (PISA), a group that provides legal advice to employees through a hotline manned by lawyers, accountants and academics.³⁹ PISA activities show that public disclosure is still rare because many employees continue to fear retaliation. In the business sector where internal disclosure is gaining ground, some large companies encourage the exchange of information within the company, and some are pioneering programs for the protection of whistleblowers.

44. The Japanese authorities responded to the new trend with the promulgation on 18 June 2004 of the *Whistleblower Protection Law*, which is not yet in force.⁴⁰ The Japanese authorities explained that the *Law* will protect private and public employees from dismissal or disadvantageous treatment where whistleblowing is in the public interest. The Cabinet Office (agency in charge of the issue) explained that employees will be protected if they report their suspicions either internally or to the regulatory agency charged with the responsibility for the relevant sector/industry of the company. The whistleblower can also report to other persons, including the mass media or consumer organisations in situations where it is too difficult to report internally or the company takes no remedial action following a whistle-blowing act. In addition the reporting must prevent the occurrence of the reported act or the spread of damages. The *Law* encompasses crimes related to human life, health, and financial property, but does not cover offences under the UCPL. At the time of the on-site visit METI representatives indicated that the scope of the law would

³⁷ The Japanese authorities explain that some courts have provided protection in individual cases. They add that the protection has been varied and the rules have not been transparent. Case law in this regard has not been provided.

³⁸ One in particular was mentioned by several participants: in 2000, Mitsubishi recalled nearly two million vehicles after an employee disclosed safety risks to the Transport Ministry.

³⁹ It was unfortunately not possible to meet a representative of PISA during the on-site visit.

⁴⁰ The date of its entry into force will be specified in a cabinet order within 2 years after its promulgation. The Japanese authorities indicated that the law is based on the model of the 1998 United-Kingdom *Public Interest Disclosure Act*.

be extended by way of a government ordinance within one year, and indicated that it is “almost certain” that the UCPL will be included in the ordinance list. During the Working Group meetings the Japanese authorities announced that the Government Ordinance “will” cover offences under the UCPL.

45. Overall the new law was welcomed by non-governmental participants who supported the inclusion of the UCPL in the ordinance’s list, but were nevertheless not certain that this would dramatically improve the detection and prosecution of corruption cases, mainly because of the tradition of loyalty to the company. Whereas trade-unions do not seem to have been very active in protecting whistleblowers so far, a trade-unionist considered that they could play a role in the new legal framework by, for instance, receiving information from whistleblowers. A lawyer believed that the legal protection of whistleblowers will encourage companies to establish an appropriate internal compliance system.

46. The examining team welcomes the initiative to adopt a law protecting whistleblowers. However, the lead examiners are concerned about the implications of some features of the *Law* for the reporting of foreign bribery. Since the translation of the *Law* was provided some time after the on-site visit, there was not an opportunity to engage in a full airing of their concerns.

47. The *Law* does not state that any person who is not a public official who believes that a criminal offence has been committed is entitled pursuant to article 239(1) of the *Code of Criminal Procedure* to submit an accusation to the law enforcement authorities. Nor does it state that a public official is required to submit an accusation pursuant to article 239(2). On the contrary the *Law* specifies that the person must report the suspicion to the regulatory agency in charge of the infringed law (in the case of foreign bribery this would be METI). In turn the regulatory agency is not obliged to inform the law enforcement authorities. Moreover a whistleblower who reports suspicions of an offence to persons other than the employer or the regulatory organ will be protected only where the report is considered necessary in order to prevent the occurrence of the offence or the spread of damage. In the context of enforcing the Convention, the lead examiners are concerned that this structure, rather than encouraging reporting of suspected foreign bribery, creates potential impediments and filters to such reporting. However the Japanese authorities believe that the protections in the *Law* will apply equally to individuals who report to the relevant regulating agency or directly to the law enforcement authorities.

48. In addition, METI does not appear adequately equipped to handle the responsibility of receiving whistle-blowers reports if the *Law* does indeed result in coverage of whistle-blowing foreign bribery acts. In the lead examiners’ discussions with METI, it quickly became apparent that METI had not developed any internal procedures for receiving such reports, nor had it any rules, regulations, or standards for determining which reports, if any, would be passed to the police or prosecutors for investigation and potential prosecutions. (See also B.2.a.(ii) on “Disclosure by the Media and Citizens”)

Commentary

The examining team welcomes the initiative to introduce a law for the protection of whistleblowers in Japan, and believes that in principle this law should be applied to whistle-blowing acts concerning the offence of bribing a foreign public official under the UCPL. However, the lead examiners recommend that in applying its legislation in the field of whistle-blowing, Japan improve the protection of persons who report directly to the law enforcement authorities, and pursue its efforts to make such measures widely known among companies and the general public.

B. ANALYSIS OF EFFECTIVENESS OF JAPAN'S MEASURES FOR PREVENTING, DETECTING AND INVESTIGATING BRIBERY OF FOREIGN PUBLIC OFFICIALS

1. Awareness

49. In Japan the implementation of laws is the responsibility of the specific Ministry in charge of preparing amendments and raising awareness: the Ministry of Justice in the case of the *Penal Code*, METI in the case of the UCPL. The Intellectual Property Policy office within METI drafted the 2000 and 2004 amendments and regularly updates the *Guidebook on the UCPL*. Official guidebooks are a common tool used by the Japanese authorities to explain the substance of the law, its rationale and history. Therefore when the foreign bribery offence was introduced in 1998, METI revised the *Guidebook on the UCPL* accordingly. The 1999 version of the *Guidebook on the UCPL* provided only a brief description of the offence of bribing a foreign public official,⁴¹ and the 2001 and 2003 versions contain much more extensive information (see discussion under part C.1.a (i) "Instruments for Interpreting the Foreign Bribery Offence"). METI also published in 1999 a separate guidebook entirely dedicated to the bribery of foreign public officials. The Japanese authorities explained that the information in this guidebook is essentially the same as that contained in the *Guidebook on the UCPL*.

a. Government Awareness and Training

(i) Key Agencies⁴²

50. Discussions with the Ministry of Economy, Trade and Industry (METI), the Ministry of Justice and the Ministry of Foreign Affairs demonstrated a good knowledge of the Convention and the UCPL provisions on bribery of foreign public officials. METI officials are well aware of the foreign bribery offence, particularly since it is rare for METI to be responsible for the implementation of a criminal offence. In addition METI organised internal meetings on the revision of the UCPL.

51. The Ministry of Foreign Affairs regularly issues guidelines and instructions to the Japanese embassies. It already disseminated information on the offence of bribery of foreign public officials and planned to issue additional information on the amendments to the offence in July 2004. A Ministry of Foreign Affairs representative explained that economic counsellors in embassies would rely on these guidelines when contacted by Japanese companies facing problems when doing business abroad, such as solicitation from local public officials for bribes. If a foreign bribery offence came to their attention they would eventually contact the Foreign Affairs Bureau in Tokyo.

52. The representatives of the Ministry of Justice indicated that information on foreign bribery was distributed to public prosecutors as well as the Criminal Affairs Bureau within the Ministry.

53. The Ministry of Finance (including the Customs and Tariff Bureau), while aware of the existence of the bribery provisions of the UCPL, did not offer any information notice or training to their agents. The Customs and Tariff Bureau has not considered the potential link between international smuggling activities and the bribery of foreign public officials.⁴³

⁴¹ See <http://www.apic.jiii.or.jp/pdf/text/text/2-10.pdf> (Asia-Pacific Industrial Property Center website).

⁴² The level of awareness and training activities in relation to the National Tax Agency is discussed under B.3.a. on the "System for Denial of Tax Deductibility of Bribe Payments to Foreign Public Officials".

⁴³ According to the website for Japan Customs (www.customs.go.jp) the priorities regarding smuggling activities are drug trafficking and firearms smuggling.

54. Despite this general knowledge about the offence of bribing a foreign public official and of the Convention, most officials met during the visit showed little or no appreciation of the important links between foreign bribery and other government activities such as public procurement, export credit, official development assistance and anti-monopoly law.

(ii) Investigative, Prosecutorial and Judicial Authorities

55. The prosecutors met by the examining team were fully aware of the introduction of the foreign bribery offence in 1998 and of its subsequent amendments. The Ministry of Justice distributed the Convention and UCPL to all prosecutors in 1999. However they were not aware of the recently issued *METI Guidelines*, and would not feel bound by them in any case. The Ministry of Justice provides training programs for public prosecutors,⁴⁴ but a prosecutor indicated that specific training concerning the UCPL, bribery methods and investigation techniques had not been provided. So far specific training within prosecutors' offices seems to only occur upon personal initiatives (for instance in the Osaka office a prosecutor drafted an internal guideline on the interpretation of the offence).

56. During the on-site visit, the representative of the National Police Agency (NPA) stated that informative notices are systematically sent to the police prefectures when laws are amended. This had been done concerning the introduction of the foreign bribery offence in 1998 and will be done concerning the 2004 amendment introducing nationality jurisdiction. The police offer training to all new recruits and upon promotion. This training is general and includes investigation of intellectual crimes, which are considered to include foreign bribery. However no specific training has been provided concerning the foreign bribery offence.

(iii) Agencies indirectly involved in Implementation of the Convention and Revised Recommendation

57. The Japan Fair Trade Commission (JFTC) and the Securities and Exchange Surveillance Commission (SESC) feel that the fight against bribery of foreign public officials is outside their defined scope of activity. Consequently their representatives were not able to indicate what they would do if they detected a case of bribery in the course of performing their duties.⁴⁵ For instance the examining team wanted to know what an official from JFTC would do upon discovering that a foreign bribery transaction was involved in the same set of facts involving bid-rigging in relation to foreign public procurement. The JFTC had not considered this possibility despite a relevant case that occurred in 1999. This case, which the Japanese authorities explain was not investigated by the JFTC, involved three employees of a Japanese trade company who were indicted on charges of interfering in bidding for a foreign development project funded by Japan. To win the government project, they wrongfully obtained bidding information from officials of the Ministry of Foreign Affairs. Information found in newspapers indicates that the Japanese officials have been indicted for misusing funds and conspiring to rig bids.⁴⁶

⁴⁴ Training includes the "Newly-appointed Public Prosecutors Practical Course" for newly appointed prosecutors, the "General Public Prosecutors Training Course" for prosecutors with approximately 3 years of duty, and the "Public Prosecutors Specialist Training Course" for prosecutors with approximately 7 years of duty.

⁴⁵ After the on-site visit, the Japanese authorities submitted an additional written answer indicating that if JFTC discovered an offence of bribery linked to an anti-monopoly offence JFTC would not deal with it, but would refer the case to the competent authorities including the public prosecutors office.

⁴⁶ The Tokyo District Court convicted one of the former Foreign Ministry officials for misusing funds and rigging bids for government aid projects for Russia. The sentence is one and a half years in prison, suspended for three years. (Japan Times, 7 March 2003)

58. The bribery of foreign public officials is not included in the training programme of the Financial Services Agency (FSA) inspectors. As well, workshops for financial institutions by the Japan Financial Intelligence Office (JAFIO) do not raise the issue of bribery of foreign public officials, although a JAFIO representative indicated that bribery is mentioned in the *Examples of Suspicious Transactions*.

59. Representatives from the Japan Bank for International Cooperation (JBIC),⁴⁷ the Nippon Export and Investment Insurance Agency (NEXI),⁴⁸ the Japan International Co-operation Agency (JICA)⁴⁹ and officials from METI⁵⁰ and the Ministry of Foreign Affairs⁵¹ participated in the panel on export-related activities and development assistance. The general impression of the lead examiners was that they were all aware of the existence of the offence of bribing a foreign public official, albeit their knowledge was superficial. For instance, the representative of JICA did not realise that the offence is contained in the UCPL. None of these participants were aware of the sections in the *METI Guidelines* on “Actions in respect of Export Credits” and “Actions in respect of ODA”. Training had not been provided by any of these agencies on the role of officials involved in export credit and development assistance in preventing and detecting foreign bribery transactions.

b. Level of Awareness and Preventive Measures in the Private Sector

(i) Business Community

60. The representatives of large companies met during the on-site visit (including financial institutions) were aware of the Convention and the foreign bribery offence under the UCPL. When questioned on press articles reporting scandals or allegations of the bribery of foreign public officials (some involving major Japanese companies), the business representatives preferred to not comment on the possibility of ongoing investigations. One company stated that it had lost a business transaction because of refusing to pay a bribe.

61. Representatives of business associations indicated that most large companies have adopted formal texts against bribery. In addition the representative of a consulting firm on business management stated that overall awareness was insufficient among employees of Japanese companies. An academic

⁴⁷ JBIC’s operations consist of two distinct components: The International Financial Operations contributes to the promotion of Japanese exports and imports and Japanese overseas economic activities through the provision of export loans, import loans, overseas investment loans, untied loans and equity participation in overseas projects of Japanese corporations. The Overseas Economic Co-operation Operations support self-reliant development efforts in developing countries (ODA operations) through ODA loans. (See JBIC website: www.jbic.go.jp)

⁴⁸ NEXI contributes to the promotion of Japanese exports and imports and Japanese overseas economic activities through the provision of the following types of insurance: export credit insurance, overseas untied loan insurance, overseas investment insurance, export bill insurance, export bond insurance and prepayment import insurance. Export credit insurance covers the losses suffered by a Japanese company that exports goods and services to a foreign country that may be incurred when, for example, the company cannot ship its goods due to war, import restrictions/prohibitions, *force majeure* or the bankruptcy of an importer. (See NEXI website: www.nexi.go.jp)

⁴⁹ JICA is mainly responsible for implementing technical co-operation for developing countries. For this purpose it provides technical training, experts, study teams, volunteers and equipment. (See JICA website at: www.jica.go.jp. See also the website of the Economic Co-operation Bureau (ODA) website at: www.mofa.go.jp/policy/oda/reform/charter.html)

⁵⁰ Trade Insurance Division, Trade and Economic Co-operation Bureau.

⁵¹ Economic Co-operation Bureau

indicated that although managers of large companies knew about the offence, they did not take the law seriously at the time of its entry into force.

62. Several initiatives should improve the attitude of Japanese companies to foreign bribery and the level of awareness of employees. The Ministry of Foreign Affairs (MOFA), which is responsible for liaising with Japanese companies abroad through its network of embassies, regularly organises seminars for those companies. For instance, one was held in July 2002 in China on the *OECD Guidelines for Multinational Enterprises*, and included discussion of the foreign bribery offence. MOFA plans to organise seminars in 2004-2005 on the revision of the UCPL introducing nationality jurisdiction. In addition METI, with the co-operation of the Japan Chamber of Commerce and Industry, Japanese Commercial and Industrial Club in Shanghai and Japan Machinery Centre for Trade and Investment, held seven seminars in Asia and Europe for various enterprises.

63. The *METI Guidelines* have, already in the short time that they have been around, made important inroads as an awareness raising tool. In addition recent corporate scandals that have received extensive media coverage, and the introduction of nationality jurisdiction, have resulted in increased attention to the need for internal compliance programmes.

64. The *METI Guidelines*, which are the core of a new awareness raising campaign, have been issued in the form of a booklet and are freely available on the Internet.⁵² In addition they were being distributed by the national, local and overseas Japanese Chambers of Commerce and Industry to their members as well as directly to Japanese companies:⁵³ METI representatives indicated that they have already started holding seminars based on the *Guidelines*. A meeting took place in late June with representatives of the construction industry and another one was planned with trading companies. In addition, following the on-site visit eight seminars took place throughout Japan.⁵⁴

(ii) Ethical and Compliance Programmes

65. There is overall agreement among the private sector and academics that the issue of awareness of the foreign bribery offence is part of the larger issue of the formalisation, development and enforcement of ethical compliance programmes in Japanese companies. Following a series of scandals involving consumers' rights during the 1990s, the general trend has been the adoption of formal codes of conduct, ethical charters, etc., mainly for risk management reasons and to improve the corporate image.⁵⁵ The consensus of civil society participants was that Japanese companies have begun taking important steps to raise ethical standards but that they still have a long way to go. A business association representative

⁵² See METI website <http://www.meti.go.jp/english/index.html>, under "other information". The English version is available at <http://www.meti.go.jp/english/information/downloadfiles/briberye.pdf>.

⁵³ 5000 copies of the guidelines were printed in Japanese and 3000 in English.

⁵⁴ During July 2004, seminars were held in the following Japanese cities: Tokyo, Takamatsu (Shikoku), Fukuoka (Kyushu), Osaka, Sapporo (Hokkaido), Hiroshima, Nagoya, Sendai and Okinawa.

⁵⁵ Although business associations such as the Japan Foreign Trade Council started establishing ethics principles in the 1970s, the movement accelerated in the 1990s with, for instance, the Keidanren 1991 Charter of Good Corporate Behaviour. A survey conducted in 1999 by the Reitaku University showed that less than half of Japanese companies had a code of conduct or a similar instrument and that around 90% paid no attention to having in place an efficient compliance system. In spring 2003, TI Japan conducted research on 1 500 listed companies of the First Section of Tokyo Stock Exchange on whether their codes of conduct or ethics have specific provisions prohibiting any form of bribery, domestic or abroad. While about 57% of the respondent companies answered "yes", 43% said "no". This suggests that large percentage of companies have not taken any arrangement in their codes of conduct even after the UCPL amendments incorporating anti-bribery provisions.

indicated that, as in most countries, companies are more or less advanced in the process, large companies being further ahead than SMEs.

66. The *METI Guidelines*, in Chapter 2 on “Improving Effectiveness of Internal Control Exercised by Business”, encourage the establishment of compliance programmes and effective organisational structures (i.e. procedures for internal reporting of suspicions or offences, website for whistle-blowing purposes), promotional and educational activities within the company, and effective controls. In addition *Internal Control in the New Era of Risks-Guidelines for Internal Control that Function together with Risk Management* (a summary of the report by the Study Group on Risk Management and Internal Control) recommends tightened internal controls.

67. The representatives of large companies met during the on-site visit all stated that they have adopted internal rules on the bribery of foreign public officials. However the codes of conducts shown to the team treat the issue of bribery with varying emphasis.⁵⁶ In any case the representatives of these companies indicated that they would address the decision of whether to offer gifts or pay entertainment expenses on a case-by-case basis.

68. Concerning the use of intermediaries, two companies stated that they issued guidelines for sales agents and consultants, and that their contracts with agents refer to laws against bribery. One indicated that it usually declines to hire former public officials. Another one indicated that it never works with foreign agents, preferring to work with large Japanese trading firms that take care of the activities abroad on its behalf. On this point the *METI Guidelines* highlight the overseas element of the foreign bribery offence, recommending the application of anti-bribery rules to foreign subsidiaries and that special attention be given to the use of local agents. The *METI Guidelines* also state that the criminal liability of Japanese companies could be triggered by the acts of employees abroad.

69. Some business associations have developed new model instruments, such as the *2002 Model Compliance Organisation* of the Japan Foreign Trade Council. These compliance systems as well as the *METI Guidelines* encourage companies to create help-lines and develop training and educational programmes for employees. The large companies that participated in the on-site visit have all provided training for their employees, and most of them created support structures such as help-lines. However two large companies reported that their help-lines or central compliance officers have received very few requests for assistance.

70. Disclosure procedures have been instituted in some large companies, notably those that have faced allegations of corruption. For instance three large companies from the trading and communication industries established procedures for employees to report violations of their codes of conduct (internally or to an outside consultant/lawyer of the company). Two of them also included express affirmation of the protection of informants against any form of retaliation, one even mentioning the possibility to make anonymous reports. But the codes also urge employees to respect the confidentiality of information and to not disclose secret information outside the company. No guarantee is given to an employee who reports an offence to the law enforcement authorities.

71. A trade union representative indicated that so far employees have been left alone to decide whether to bribe a foreign public official in order to obtain a transaction, and when caught by local

⁵⁶ Only one code of conduct explicitly mentions the bribery of foreign public officials. One code of conduct prohibits the provision of gifts and favours to public officials and distinguishes Japanese and foreign public officials concerning the aim of the gift: (a) in return for the performance of their duties for Japanese officials, and (b) for securing an improper advantage for foreign officials. Another one establishes the general principle to “maintain proper legal and ethical standards with respect to gifts and entertainment”.

enforcement authorities companies have usually declared that they were not involved. He believes that due to the UCPL offence (and especially the 2004 amendment on nationality jurisdiction) companies will now have to face their social responsibility as they can be sanctioned for the bribery of foreign public officials perpetrated by their employees. A management consulting firm stated that codes of ethics and compliance programmes have not yet resulted in material support to employees confronted with, for instance, solicitation.

(iii) Legal Professionals

72. Representatives of the legal profession and the Japan Federation of Bar Associations were aware of the foreign bribery offence due to the *Guidebook on the UCPL* published by METI and articles in specialised law journals. They have never considered it necessary to present the offence in seminars, considering that it represented just one among many amendments adopted every year in Japanese law. They also stated that there had been no incentive to provide specific legal training on the foreign bribery offence because of the absence of prosecutions, contrasted with money laundering, for instance, for which many seminars had been provided. A few lawyers nevertheless participated in a transparency symposium organised by TI-Japan in 2001. They indicated that they have never been consulted by Japanese companies about foreign bribery, and believe that in-house counsel would be more likely to come into contact with cases. The examination team suggested that regardless it would be useful for the Bar Associations to provide educational programmes. The representatives of the Japan Federation of Bar Associations indicated that they would consider holding a seminar on the offence.

Commentary

The lead examiners recommend that efforts be undertaken by the Government of Japan to raise the awareness of government officials in key agencies such as METI, the 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. In the same vein awareness training should be provided to their counterparts in the Japan Fair Trade Commission, Securities and Exchange Surveillance Commission, Financial Services Agency, Japan Bank for International Co-operation, Nippon Export and Investment Insurance Agency and Japan International Co-operation Agency. In addition the lead examiners recommend that training specifically targeting the foreign bribery offence be provided to prosecutors and police, either separately or in the context of overall anti-corruption and corporate crime training.

The lead examiners recognise the impact that the METI Guidelines have already had on the level of awareness of large Japanese companies concerning the offence of bribing a foreign public official. They also acknowledge that large companies are beginning to take important steps to adopt compliance programmes and raise awareness of foreign bribery amongst their employees and agents abroad. However more effort is needed to ensure that the programmes are effectively administered and material support is provided to employees facing difficult decisions regarding solicitation and what constitutes a bribe. The Japanese authorities should therefore consider providing companies with more guidance, perhaps in a redraft of the METI Guidelines, on the establishment of effective internal auditing and supervisory mechanisms.

Furthermore the lead examiners recommend that the Japanese Government takes steps to raise the level of awareness of members of the legal profession of the foreign bribery offence.

2. Investigation and Detection

a. Investigative Techniques

73. The police and prosecutors can use the following investigative tools contained in the *Code of Criminal Procedure* to investigate the offence of bribing a foreign public official: inspection, search and seizure upon a judge warrant, requests for suspects and witnesses to appear for questioning, arrest upon warrant issued by a judge,⁵⁷ and witness protection⁵⁸ (articles 198 to 229). The offence does not belong to the limited list of offences for which extraordinary tools are available, such as wire-tapping. Prosecutors met during the visit indicated that when seeking information from a company or bank, they would first request the information on a voluntary basis, only requesting a search warrant from a judge where voluntary compliance fails.

74. One regional prosecutor stated that he would not prosecute a case of bribery where neither the briber nor the public official confesses. Another regional prosecutor stated that he would not necessarily decline to prosecute a bribery case without a confession. They both agreed that it is difficult to obtain a confession in Japan due to the absence of immunity from prosecution for informants. An economic counsellor from a foreign embassy explained that there is a perception in Japan that in enforcing economic offences the public prosecutors must meet a very high standard even where requesting a warrant for the search and seizure of financial records. A representative of the Japan Federation of Bar Associations stated that prosecutors are unlikely to accept cases unless certain of obtaining a conviction as Japan perceives the failure to convict as very shameful. He added that in order to convict it is necessary to have a confession, wiretap evidence or hard proof contained in an e-mail.

b. Detection and Reporting

75. The police and prosecutors can initiate investigations⁵⁹ on their own initiative and upon the receipt of information from any source, including media reports.⁶⁰ The Ministry of Justice does not collect information or statistics on the sources of allegations and thus was not able to indicate which ones are more prevalent.

76. The Japanese prosecutors met during the on-site visit indicated that bribery offences do not often involve harm to a victim. This means that an important source of allegations for other offences is often not

⁵⁷ In that case the policeperson has 48 hours to present the person to a prosecutor (article 203).

⁵⁸ Article 227: "In case there is a fear that any person voluntarily made a statement at an examination of a public prosecutor, a secretary of the public prosecutor's office, or a policeman may, under coercion, make a statement different from the previous statement at the public trial date, and such person's statement is essential to prove the offence, a public prosecutor may request a judge to examine him only prior to the first trial date. In making the request, a public prosecutor shall explain the reasons for the necessity of such examination and its indispensability to prove the offence".

⁵⁹ Pursuant to the *Code of Criminal Procedure*, investigations can be carried out either by the police or directly by public prosecutors. (A regional prosecutor indicated that 98 per cent of the cases that he handles were referred to him by the police.) Under the Supreme Public Prosecutors Office there are eight high offices, 50 district offices and 810 local offices. The police are organised into the national police and the prefectural police. The national police level consists of the National Police Safety Commission (NPSC), which makes policy, and the National Police Agency (NPA). The National Police Agency (NPA) maintains Regional Police Bureaus throughout the country. In addition a Prefectural Police department is located in each of the 47 government prefectures of Japan.

⁶⁰ Article 189(2) of the CCP: "Any policeman shall, when he considers that there exists an offence, investigate the offender and evidence".

available for foreign bribery. In addition the prosecutors stated that Japanese law enforcement authorities are rarely proactive in initiating investigations by themselves, relying mostly on other sources of information, such as reports from public officials, accusations filed by citizens and media reports.

(i) Reporting Obligation of Public Officials

77. 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*). Statistics provided by the Ministry of Justice show that apart from tax and customs offences, around 140 cases initiated through this procedure are “disposed” by the prosecutors every year.⁶¹ The Japanese authorities have indicated that the making of an “accusation” by a public official in accordance with article 239(2) leads to the official “filing” of a case.

78. The general number of “accusations” by public officials appeared quite low, and indeed not all public officials met during the on-site visit felt strictly bound by article 239(2). This raised the question of whether the scope of the obligation to make an “accusation” might be too narrow. Indeed, the Japanese authorities confirmed that an “accusation” involves the making of a report as well as a request for punishment. Thus an accusation appears more onerous than reporting suspicions or making an allegation of a crime. With respect to the prohibition under article 100(1) of the *National Public Service Law* and article 34(1) of the *Local Public Service Law* against disclosing the secrets that have come to the knowledge of public officials in the course of performing their duties, the Japanese authorities state that the rule concerning the making of an “accusation” under the *Code of Criminal Procedure* takes priority because it is considered the “specific” law and the former the “general”. They explained further that this interpretation is widely accepted, although not confirmed by case law.

79. The representative of the Financial Services Agency (FSA) indicated that officials of the Securities and Exchange Surveillance Commission (SESC) would as a matter of policy report crimes within their sphere of competence, but that a corruption-related offence would not necessarily be reported.

Agencies responsible for Export Credit and Development Assistance

80. Because of their involvement in the overseas activities of Japanese companies, export credit and official development assistance (ODA) agencies are another important potential source of information about companies engaged in foreign bribery. Japan has two government agencies for the purpose of providing export credits--the Japan Bank for International Co-operation (JBIC) and the Nippon Export and Investment Insurance Agency (NEXI). ODA is the responsibility of JBIC, the Japan International Co-operation Agency (JICA) and MOFA.⁶²

81. At the on-site visit representatives of JBIC explained that JBIC officials do not have a clearly defined reporting obligation because they are not considered Japanese government officials. In any case they feel that they would have a moral obligation to report to the law enforcement authorities suspicions of foreign bribery perpetrated by applicants for export credit assistance.⁶³ One of JBIC’s representatives stated that JBIC has no experience with reporting to the law enforcement authorities, but would do so on a case-by-case basis depending on the circumstances. Another representative stated that reports have been

⁶¹ Statistics for the years 1998 to 2002; tax offences cover violations of the *Tax Law*, the *Corporation Tax Law*, the *Liquor Tax Law*, and the *Customs Law*.

⁶² See the description of the responsibilities of JBIC, NEXI and JICA in footnotes 47, 48 and 49 respectively.

⁶³ JBIC provides ODA in the form of loans and private sector investment finance which goes directly to the developing country. Thus it would not come into contact with Japanese companies with respect to its ODA side.

made to the law enforcement authorities, although they did not involve foreign bribery. During the Working Group meetings, the Japanese authorities indicated that employees of JBIC are subject to a by-law that has the same content but not the same legal basis as the “accusation” requirement under article 239(2) of the *Code of Criminal Procedure*.

82. Information has not been provided about the practice in NEXI and JICA where suspicions about foreign bribery arise. The lead examiners take note that according to their websites NEXI and JICA are considered “independent administrative institutions”,⁶⁴ a new form of governmental agency in Japan. Moreover the Japanese authorities confirm that NEXI and JICA officials are not “government officials” and therefore are not subject to the “accusation” requirement under article 239(2). Nevertheless, during the Working Group meetings the Japanese authorities stated that employees of JICA and NEXI are, like employees of JBIC, subject to the obligation to make an “accusation” pursuant to by-laws.

Reporting by METI

83. A representative of METI indicated that when METI learns about an alleged violation of a law for which METI is responsible (e.g. offences under the UCPL), the relevant METI directorate informally contacts the company allegedly involved in the violation. Under these circumstances the company is under no obligation to respond to METI’s questions. If METI officials are fairly certain that an offence has been perpetrated by the company they will report the case to the police or prosecutors. Due to secrecy obligations METI was not able to disclose whether such a consultation procedure has already taken place in respect of foreign bribery.

(ii) Disclosure by the Media and Citizens

84. A representative of the Ministry of Justice indicated that credible allegations of corruption revealed by the media could form the basis of an allegation. However he was not at liberty to disclose whether such an investigation had ever been opened on the basis of a media report. A regional prosecutor indicated that he has initiated investigations on this basis on a few occasions.

85. Concerning reporting channels for citizens and companies, the Japanese authorities were not at liberty to disclose whether competitors have filed accusations or complaints of foreign bribery or provided information, or whether company employees have brought violations to the attention of the law enforcement authorities. They nevertheless indicated that the public can provide such information directly to the police or prosecutors pursuant to article 239(1) of the *Code of Criminal Procedure*.

86. The *METI Guidelines* recommend that companies report instances of foreign bribery that come to their attention to the “applicable governmental agency”. Since the *Guidelines* were issued by METI and METI is the governmental agency with responsibility for the implementation of the foreign bribery offence, it makes sense that companies will report indications of foreign bribery directly to METI and not police or prosecutors. Moreover METI’s representatives explained that companies would be more comfortable reporting allegations to METI due to the good relationship that METI has with companies. However METI has not established a system for receiving allegations of foreign bribery or reporting them in turn to the law enforcement authorities. Given the absence of such a system and that METI does not have investigative powers to verify allegations, the examining team expressed concern about the potential for reports to be lost or filtered out before reaching the law enforcement authorities.

⁶⁴ “Independent administrative institutions” were introduced as a major part of administrative reform begun in Japan in the late 1990s. Under this system policy formulation remains the responsibility of the government and policy implementation is delegated to the “independent administrative institution”.

Commentary

The lead examiners recommend that Japan (i) 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 (ii) establish 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.

The lead examiners also recommend that, in light of the probability that METI will receive foreign bribery allegations due to its role in implementing the Convention and instructions in the METI Guidelines, METI establish as a matter of priority a formal system for receiving allegations and passing them on to the law enforcement authorities.

3. Systems for Prevention and Detection

a. System for Denial of Tax Deductibility of Bribe Payments to Foreign Public Officials

(i) Non-Deductibility of Bribe Payments

87. Japanese tax legislation does not expressly deny the tax-deductibility of bribe payments to foreign public officials. In Phase 1 the Japanese authorities explained that bribes were not tax deductible because they constituted “entertainment and social” expenses, which under article 61-4 of the *Special Taxation Measures Law* were not deductible except as follows: Corporations with capital of up to 10 million yen (74 000 Euros or 91 000 USD) could not deduct the amount of entertainment and social expenses in excess of 3.2 million yen (23 680 Euros or 29 120 USD), and corporations with capital over 10 million yen (740 000 Euros or 910 000 USD) but not exceeding 50 million yen (371 000 Euros or 454 000 USD) could not deduct the amount of the expenses in excess of 2.4 million yen (18 000 Euros or 21 000 USD). Paragraph 3 defines “entertainment and social” expenses as “entertainment, reception, secret expenses and other expenses which are disbursed by a corporation to receive, entertain, or comfort its customers or suppliers, or sending gifts to them or doing similar things...” Due to the absence of an express denial under the law for bribe payments and the exception for small companies, the Working Group recommended that the matter be reviewed again in Phase 2.

88. The Phase 2 examination revealed that the February 2004 report of the Consultative Committee to METI (see discussion about the Consultative Committee under A.2.d.(ii) on “Work of METI Consultative Committee”) referred to the tax authorities the issue of whether it is sufficiently clear that bribes to foreign public officials are not tax deductible. A representative of the National Tax Agency stated that it was decided that no further action on this issue was necessary because the non-tax deductibility of bribe payments is clear in the law and training courses have been provided to tax officers on this subject.

Application of the Law

89. By the time of the on-site visit, the only court decision provided in support of Japan’s position was a ruling of the Hiroshima High Court on 3 March 2004,⁶⁵ which the Japanese authorities warned cannot be treated as a judicial precedent because it has not yet been finalised. The Court denied the tax-deductibility of the payment in question on the basis that it constituted “entertainment and social” expenses under article 61-4 of the *Special Taxation Measures Law*. The Court determined that there was a lack of evidence that the money Company X remitted to Company B (a company established by Company X in Singapore to purchase lumber on its behalf) was used to finance a lumber transaction between Company X

⁶⁵ The case concerned 1994 and 1995 tax returns.

and the Myanmar Timber Enterprise (MTE). At issue was a commission paid to Company B by Company X and claimed as tax deductible by Company X. The Court determined that Company B used part of the commission to purchase machines and other equipment for MTE. It is assumed that the Japanese authorities submitted this case because MTE is a state-controlled company, and thus the gift of machines and other equipment to MTE could be considered a bribe to a foreign public official. During the examination in the Working Group, three more cases were submitted by Japan. Two of these cases do not appear directly on point.⁶⁶ The third case, a decision of the Kyoto District Court on 26 February 1999, concerned the tax treatment of a bribe to a public official. However, the decision of the Court is not a clear assertion that bribe payments are non-deductible.⁶⁷ Given the lack of consistent case law on this issue, the lead examiners believe that legislation or regulations are needed that unambiguously prohibit the deduction of bribes in all cases.

90. Following the Phase 1 examination the allowable deduction for “entertainment and social” expenses for small companies was increased. The Ministry of Finance representatives explained that companies with capital up to 10 million yen (74 000 Euros or 91 000 USD) are now allowed to deduct up to 4 million yen (29 700 Euros or 36 300 USD), and companies with capital up to 50 million yen (371 000 Euros or 454 000 USD) are now allowed to deduct up to 3.6 million yen (27 000 Euros or 33 000 USD). The amended article 61-4 of the *Special Taxation Measures Law (2003)* appears to provide a deduction for “entertainment and social” expenses to companies with capital or investment below 100 million yen.

91. A publication of the Ministry of Finance of Japan entitled *An Outline of Japanese Taxes 2003*⁶⁸ provides the following new information: 1. Pursuant to the *Income Tax Act (Individual Income Tax)*, expenses that are “directly necessary to acquire the receipt and those arising from the conduct of business to obtain the business income during the year”, which include “entertainment and social” expenses, are deductible without limit for individuals in the calculation of business expenses. 2. Pursuant to the *Corporation Tax Act*, the amount of expenses that do not qualify for a deduction for a consolidated group is based on the capital of the parent company. This publication was found on the website of the Japan Ministry of Finance. At the time of the Working Group meetings the Japanese authorities brought to the attention of the lead examiners that the 2004 version of the publication⁶⁹ available on the same website does not include “entertainment and social” expenses in the non-exhaustive list of allowable expenses.

⁶⁶ In the Judgement of the Yokohama District Court of 28 June 1989, the issue was the tax treatment of payments made to avoid detection of a violation of the Anti-Prostitution Law. The Court held that “cover-up costs for preventing the detection of criminal acts” could not be deducted as “necessary expenses”. It is not clear whether the specific nature of the payments in this case—to prevent detection of illegal conduct—was the critical factor in denying deductibility or whether the Court was announcing a rule applicable to all bribe payments. In the Judgement of the Grand Bench of the Supreme Court on 13 November 1968, the Court held that “operating expenses” could not be deducted as “losses” where their disbursement was prohibited by law.

⁶⁷ The Kyoto District Court held, consistent with the position of the Japanese authorities, that the bribes in question were deemed to fall under the category of “entertainment and social” expenses, pursuant to article 61-4(3) of the *Special Taxation Measures Law*. The Court stated that they fell within this category because they were made for the purpose of obtaining continuing preferential treatment by the government of Kyoto City for construction work, and not for specific services. The Court stated that therefore the bribes could be deemed to have been paid to entertain parties involved in its business and have the nature of “losses” under the *Corporation Tax Law*. However these “entertainment and social” expenses were not deductible in this specific case because the defendant company’s capital exceeded the threshold for which “entertainment and social” expenses are allowed under the Law. The Court did not address whether the taxpayer could have deducted the expenses if they fell below the capital threshold.

⁶⁸ http://www.mof.go.jp/english/tax/taxes2003e_c.pdf

⁶⁹ http://www.mof.go.jp/english/tax/taxes2004e_c.pdf

Given that both versions were simultaneously available on the internet, the lead examiners considered the state of the law in this respect unclear, and the conflicting information potentially confusing to companies.

Awareness and Training of Tax Officials

92. In the responses to the Phase 2 Questionnaire the Japanese authorities indicate that specific documents have not been issued by the tax authorities and distributed to tax officers to highlight issues related to expenses for foreign bribery. At the on-site visit the representatives of the National Tax Agency explained, without entering into the details, that training programmes have been provided to tax officers on what constitutes “entertainment and social” expenses, including the presentation of some cases involving a bribe payment.

93. Following the on-site visit the Japanese authorities provided the examination team with a case study used in its training programmes to illustrate how it covers the notion of bribe payments. The case study is in the form of a diagram which shows the path of a payment from a Japanese company (the taxpayer) to a public official in Country “A” through an agent in Country “A”. The payment is suspected of being “under the table money” for the purpose of influencing the public official to order a government agency to select the company for a public procurement contract. According to the diagram the payment is deemed an “extra commission” and as such is included as an “entertainment and social” expense with the result that the tax deduction is denied. By the time of the examination of the Working Group, the Japanese authorities had taken three steps to clarify that bribes are considered “entertainment and social” expenses. In September 2004 the Ministry of Finance issued a statement on its website⁷⁰ that bribes paid by a company are included in entertainment expenses and that the Special Taxation Measures Law provides that entertainment expenses “usually” cannot be included in expenses for the purpose of corporation tax calculation. On 24 November 2004 the National Tax Agency sent to all regional tax offices a notification that expenses disbursed for bribing foreign public officials as set forth in article 11 of the UCPL shall be treated as “entertainment and social” expenses. On 1 December 2004 the National Tax Agency issued a Japanese translation of the OECD Bribery Awareness Handbook for Tax Examiners.

94. During the panel on accounting, auditing and corporate control, which included representatives of five major Japanese accounting firms, the examination team learned that four out of five of the accounting firms’ representatives were not certain of what Japanese tax law states about bribe payments.

(ii) Reporting by Tax Authorities to Law Enforcement Authorities

95. The representatives of the National Tax Agency (NTA) stated that pursuant to article 197.2 of the *Code of Criminal Procedure*⁷¹ the NTA may respond to requests from the law enforcement authorities concerning information about the bribery of foreign public officials. They also indicated that article 239(2) of the *Code of Criminal Procedure*, which states that an official of the government or a public entity shall file an “accusation” when “he/she believes, through exercising his/her duty, that a criminal offence has been committed”, applies to NTA auditors. Since the NTA does not keep data on whether information about foreign bribery has been shared with the law enforcement authorities, it is impossible to assess whether the legal provisions have been effectively used for this purpose. Nevertheless the NTA assured the examination team that it has a good relationship with prosecutors and unofficial exchanges of information with them are common.

⁷⁰ The title of this statement is: “What is the relationship between the United Nations Convention against Corruption and taxation?” (<http://www.mof.go.jp/English/tax/bribe.htm>)

⁷¹ Article 197.2 of the *Code of Criminal Procedure* states that regarding an investigation, a report on necessary matters may be requested from public offices or public and private organisations.

96. In order to support its position that offences are reported to the law enforcement authorities, the Ministry of Justice provided statistics on the number of persons “disposed” of and “prosecuted” from 1998 to 2002 pursuant to accusations initiated by public officials. According to the statistics each year on average 670 persons were “disposed” of (number of cases closed) and 558 were “prosecuted” (number of cases referred for prosecution). Of these on average 530 persons were “disposed” of with regard to tax law violations.⁷² It is difficult to interpret these statistics because they do not include the number of cases referred to the law enforcement authorities by the NTA (or any of the other relevant agencies) each year.

97. A more relevant statistic was provided during the on-site visit—that approximately 200 tax evasion cases are “disposed of” and approximately 70 to 75% of these are “reported” to the law enforcement authorities each year. The NTA representatives stated that although these reports concern tax evasion they can be an important source of information for the law enforcement authorities on other offences. This assessment was confirmed by the Ombudsman Association, which stated that the media sometimes reports on dubious payments by Japanese companies that have been taken up by the Japanese authorities as tax evasion cases. The Ombudsman Association also believed that reports on tax evasion provide an excellent opportunity for the law enforcement authorities to delve deeper into the background of the dubious payments, which sometimes might be linked to the bribery of foreign public officials.

Commentary

The lead examiners are of the opinion that Japan is not in full conformity with the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials because:

- 1. “Entertainment and social” expenses, which the Japanese authorities state includes bribe payments, made by corporations to foreign public officials are tax deductible up to a certain limit for companies up to a certain size and consolidated groups up to a certain limit based on the size of the parent company.***
- 2. There appears to be uncertainty about whether bribe payments made by individuals to foreign public officials appear to be deductible without limit.***

The lead examiners therefore recommend that Japan amends its tax law as a matter of priority to expressly prohibit the tax deductibility of bribe payments to foreign public officials made by any individuals or corporations.

The lead examiners also recommend that tax auditors are provided with: 1. Training and awareness programmes and documentation that include a clear direction that bribes to foreign public officials are not tax deductible, and 2. Clear directions to the effect that any payments suspected of being bribes to foreign public officials are reported without delay to the law enforcement authorities.

b. Anti-Money Laundering System

(i) Offence of Money Laundering

98. Concerning the offence of money laundering, (see also discussion under A.5.(ii) on “Proposed Amendments to the Money Laundering Offence”), the *Anti-Organised Crime Law*⁷³ (AOCL) came into force in February 2000. Article 10 of the AOCL establishes the offence of disguising facts with respect to the acquisition or disposition of “crime proceeds” or concealing “crime proceeds”. Article 11 establishes

⁷² “Tax laws” mean the *Income Tax Law*, *Corporation Tax Law*, *Liquor Tax Law* or *Customs Law*.

⁷³ The full name of the *Anti-Organised Crime Law* is the *Law for Punishment of Organised Crimes, Control of Crime Proceeds and other Matters*.

the offence of knowingly receiving “crime proceeds”.⁷⁴ In relation to bribery offences, including the offence of bribing a foreign public official under the UCPL, “crime proceeds” are limited in scope to the property given as a bribe. During the Phase 1 examination the Japanese authorities stated that the proceeds of bribery would not be subject to the AOCL because of the difficulty in identifying and quantifying them.

99. Thus currently the AOCL only covers the laundering of the bribe given to a foreign public official. A Bill to amend the AOCL and broaden the definition of “crime proceeds” has not yet been passed by the *Diet*. If successfully passed the amended AOCL will broaden the definition of “crime proceeds”, so that it includes the proceeds of bribing a foreign public official under the UCPL and establishes the additional sanction of the confiscation of the “crime proceeds” for the money laundering offences. At the on-site visit Ministry of Justice officials stated that Japan has modified its policy on the difficulty of identifying and quantifying the proceeds of bribery. However they did not provide reasons for this policy change.

Commentary

The lead examiners encourage the Diet 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 money laundering offences.

In addition the lead examiners recommend that the Japanese authorities closely monitor the application of the money laundering offences to corporate money laundering activities and cases where the predicate offence was committed by a legal person.

(ii) Money Laundering Reporting

Identification and Reporting Obligation of Financial Institutions

100. The first measures to prevent money laundering were introduced in Japan in 1990 with the requirement for financial institutions⁷⁵ to identify their customers. In January 2003, the *Law on Customer Identification and Retention of Records on Transactions with Customers by Financial Institutions* (LCI) entered into force. Pursuant to a 1990 notification, financial institutions shall verify the identity of customers performing transactions above 30 million yen (226 000 Euros or 273 000 USD). However, the Japanese authorities indicate that pursuant to the LCI the threshold is currently 2 million yen (14 800 Euros or 18 280 USD). Moreover, article 4 of the LCI provides methods for verifying customer identity, including the retention of identification records for seven years, and article 5 provides the obligation to retain transaction records for seven years.

101. A basic system for suspicious transaction reporting (STRs) was established in 1992. It was enhanced in 2000 with the coming into force of the AOCL, which established a financial intelligence unit (FIU) within the FSA--the Japan Financial Intelligence Office (JAFIO).

⁷⁴ The penalties under article 10 of the AOCL are imprisonment for not more than five years or a fine of not more than 3 million yen or both. The penalties are reduced for preparation of the offence. The penalties under article 11 are imprisonment for not more than three years or a fine of not more than 1 million yen or both.

⁷⁵ As of January 2001, the terms “financial institutions” cover banks, Japan Post, credit unions, various types of cooperatives, insurance companies, securities companies, investment trust management companies, mortgage securities businesses, real estate syndicates, money lenders, money exchange businesses, etc. See <http://www.fsa.go.jp/fiu/fiue/fhe004.html>. Lawyers, accountants and real-estate professionals are not covered.

102. STRs are regulated as follows by article 54 of the AOCL: “Any [financial institution] shall promptly report to the Minister in charge ... where there is a suspicion that the property received by such financial institution in the course of its business ... is crime proceeds or drug crime proceeds, or when there is a suspicion that the other party to a transaction for such business of such financial institution is committing an act constituting an offence provided for in article 10 of this law [on the concealment of crime proceeds] or in article 6 of the *Anti-Drug Special Law* in connection with such business.” The reporting obligations under the AOCL are restricted to financial institutions, including banks, *Shinkin* banks, credit co-operatives, securities brokers and insurance companies. The Japanese authorities indicate that some non-financial professions are also covered, and that plans are underway to broaden the scope of the obligation to cover competent non-financial businesses and professions that engage in financial transactions on behalf of clients or customers, such as lawyers, accountants and real estate agencies, in accordance with the (revised) FATF 40 Recommendations.

103. The definition of “crimes proceeds” in the AOCL covers bribes given to foreign public officials without any monetary threshold. As mentioned above in relation to the discussion on the money laundering offence, it does not cover the proceeds received by the briber. However a JAFIO representative explained that as financial institutions are not required to identify the predicate offence when making a suspicious transaction report, the laundering of the proceeds of foreign bribery might in practice be reported. Nevertheless the examining team believes that detection would be improved with the adoption of the Bill on the confiscation and laundering of the proceeds of active bribery.⁷⁶

104. A representative of a Japanese bank explained that suspicious transactions identified by employees are reported to managers who in turn report to the compliance officer who forwards the information to JAFIO.⁷⁷ The process from detection to reporting to JAFIO normally takes a few days.

105. Banks represented at the on-site visit indicated that their employees receive training on money laundering detection. Some of them do not include bribery as a specific topic; others pay particular attention to the bribery of parliamentarians. They also indicated that if the press reported an allegation of bribery involving a client, the compliance officer of the bank would check the client’s accounts and transactions as a credit risk assessment exercise. However they were not able to say if the risk assessment exercise has been applied in connection with bribery allegations in the press.

106. Most major corporations in Japan are part of a *keiretsu*, which is a “loose conglomerate of firms sharing one or more common denominators”⁷⁸ (see discussion about *keiretsu* under part A.4.b. “Economic Factors”). Several large *keiretsu* consist of member firms operating in many industries, with a large financial institution (bank, trust company, insurance company) at the core of the group.⁷⁹ Therefore the examining team raised the issue of a possible conflict of interest where a *keiretsu* member uses the financial institution at the centre of its *keiretsu* to launder illegal proceeds. Would the financial institution be as likely to detect and report the suspicious transactions to JAFIO? The representative of one bank that participated in the on-site visit, which is the centre of one of the largest *keiretsu* in Japan, stated that his bank does not differentiate between the transactions of its *keiretsu* members and non-*keiretsu* members in

⁷⁶ See discussion about the Bill to amend the AOCL under A.5.(ii) “Work of METI Consultative Committee”.

⁷⁷ Some financial institutions such as banks report directly to the JAFIO whereas some others report to the Ministers in charge who in turn report to JAFIO.

⁷⁸ Wright, Dr. R.W., Investopedia.com; see also *Networking in Japan: the Case of Keiretsu* (12 April 1990).

⁷⁹ *Japan’s Corporate Groups: Some International and Historical Perspectives* (Department of Economics, Hebrew University, February 2002, at pl. 2); *Visibility versus Complexity in Business Groups: Evidence from Japanese Keiretsu* (Dewenter, Novaes & Pettway, 24 August 1999, at p.5).

terms of due diligence and reporting suspicious transactions. The examining team considers that the STR system would benefit from the description of a specific example regarding transactions among *keiretsu* members in the *Examples of Suspicious Transactions* issued by JAFIO.⁸⁰

107. The *Examples of Suspicious Transactions* do not refer explicitly to particular predicate offences as financial institutions are not required to identify them, but rather provides examples of situations that should raise suspicions. It includes “cases where public officials or company employees make high-valued transactions not commensurate with their incomes”, which could clearly cover the passive bribery of domestic officials. It is less clear that this item covers the passive bribery of foreign public officials. The list also targets a series of cross-border transactions, including remittances for economically unreasonable purposes.

108. Since 2000 and the entry into force of the AOCL the number of STRs has more or less doubled every year, with 43 768 in 2003.⁸¹ The Japanese authorities indicated that this was due to increased awareness rooted in FSA campaigns, as well as scandals of embezzlement and other financial offences disclosed in the press. The FSA representative indicated that he was not at liberty to disclose whether any STRs have referred to corruption-related offences.

Failure to report a STR or perform Customer Identification

109. The AOCL does not provide a sanction for the single failure to make a STR. Similarly the *Customer Identification Law* does not provide a sanction for the single failure to comply with customer identification or record keeping requirements. However, the Customer Identification Law provides a sanction for financial institutions that fail to comply with orders to correct a violation of customer identification requirements. In addition, the FSA representative⁸² explained that financial institutions can be subject to the following administrative actions for systemic failures to respect prescribed preventive measures: an inspection by the Inspection Bureau and supervision by the Supervisory Bureau. The latter can issue a “business improvement order” (*i.e.* a warning), a second warning, a strong warning and finally a business suspension order pursuant to the *Banking Law*.⁸³ The Japanese authorities clarified following the Working Group meetings that where the Supervisory Bureau finds serious problems, it can make a “business suspension order” without first issuing a “business improvement order”.

⁸⁰ To assist financial institutions JAFIO developed *Examples of Suspicious Transactions* (see JAFIO website at <http://www.fsa.go.jp/fiu/fiue.html>).

⁸¹ The FSA representative also explained that some financial institutions that did not report in the past now fulfil their STR obligation.

⁸² The Inspection and Supervisory Bureau within the FSA is responsible for the surveillance and monitoring of the implementation by the financial institutions of their identification and reporting obligations.

⁸³ Article 26 of the *Banking Law* provides “When deemed necessary to ensure the sound and appropriate management of banking business of a bank in light of the business or financial conditions of said bank ... the Prime Minister may require said bank to submit a plan for improvement of business operations containing a statement of the measures said bank will implement and the timing for such as necessary to ensure the sound and appropriate management of banking business, may order said bank to modify any such plan for improvement of business operations, may order said bank to suspend all or part its business operations for a period of time, may order said bank to deposit assets to competent authorities, or may order that other measures be implemented as deemed necessary for supervisory reasons.” Since its establishment in 1998 the FSA has imposed on average 17 administrative actions such as business improvement orders each year on financial institutions in relation to economic or financial crimes (e.g. theft, fraud, embezzlement) that involved the financial institution itself and/or an employee.

110. In response to concerns of the lead examiners that the absence of sanctions for a single failure to make a STR could interfere with the effectiveness of the money laundering reporting system, the Japanese authorities confirmed during the Working Group meetings that these can be sanctioned pursuant to the Banking Law. However, no practical examples were provided. Previously, officials from JAFIO stated that they should be covered by the money laundering offences, which they believed included in theory a negligent standard. However they conceded that this theory had never been tested.

Japan Financial Intelligence Office

111. JAFIO has two main areas of responsibility. It analyses STRs received from financial institutions, and forwards STRs and analysis to the law enforcement authorities (e.g. prosecutors, police customs or SESC) where it deems the information can contribute to a penal or non-penal investigation of a predicate offence covered by the AOCL. Since JAFIO has no investigatory powers⁸⁴ it must rely on information provided to it by reporting entities pursuant to the statutory reporting obligations. The proceeds of active bribery of foreign public officials are not covered by the AOCL, but at least in theory JAFIO officials are subject to article 239(2) of the *Code of Criminal Procedure*, which requires that a public official files an “accusation” when “he/she believes, through exercising his/her duty, that a criminal offence has been committed”. Statistics on the number of non-predicate offences reported by JAFIO as a result of this obligation have not been provided.

112. JAFIO received 43 768 STRs in 2003, and the number has been steadily growing since 1997.⁸⁵ In each year the majority of reports have come from Banks, *Shinkin* banks and credit co-operatives, with the second most coming from “others”, meaning institutions other than banks, securities brokers and insurance companies. The processing and analysing of this quantity of STRs requires significant resources. JAFIO is staffed with 19 persons, including 8 analysts, coming from various Japanese institutions such as customs or the police. During the on-site visit a JAFIO representative indicated that for the moment they have enough resources to meet their present workload. In any case the lead examiners believe JAFIO’s ability to carry out its tasks would be enhanced by increasing JAFIO’s technical resources, including statistical and methodological tools and systematic access to databases containing financial, administrative and law enforcement information. In addition financial institutions would be assisted in performing their reporting responsibilities if they were to obtain feedback from JAFIO concerning STRs made by them.

113. In 2003, 69% of the STRs received by JAFIO were disseminated to law enforcement authorities including the police.⁸⁶ The percentage of STRs reported since 2000 has fluctuated between 55% and 73%. A FSA representative indicated that once a report is disseminated to the law enforcement authorities JAFIO only receives feedback where the report leads to the opening of an investigation. Thus JAFIO is not informed if the information fails to lead to an investigation, supports an ongoing investigation, or if an investigation is ultimately dropped. A prosecutor explained that the law enforcement authorities only have a duty to inform a victim-complainant where an investigation is dropped. The lead examiners believe that increased feedback from the law enforcement authorities and a coordination mechanism between the law enforcement authorities and JAFIO would assist JAFIO in assessing the quality of its analysis, methodology and techniques.

⁸⁴ Only the police or prosecutorial authorities can request a financial institution to submit further information on a transaction.

⁸⁵ The number of STRs since 1997 has been as follows: 1997-9, 1998-13, 1999-1 059, 2000-7 242, 2001-12 372, 2002-18 768, 2003-43 768. Note that until January 2000 reporting was required under the *Anti-Drug Special Law* which limited its predicate offences to drug-related offences.

⁸⁶ The percentage of STRs disseminated by the police since 1997 is as follows: 1997-0%, 1998-0%, 1999-0%, 2000-73%, 2001-55%, 2002-66%.

114. JAFIO also has the power to exchange information with foreign FIUs but rarely does in practice (It has submitted less than a hundred communications abroad so far.). The Japanese authorities indicate that in practice a memorandum of understanding is required although not expressly by the AOCL; as of June 2004 Japan had concluded several agreements (with the United-Kingdom, Belgium, Korea and Singapore) and others are under negotiation.

Commentary

Given that the AOCL has only been in force since 2000 and that “crime proceeds” do not currently cover the proceeds from bribing a foreign public official, the lead examiners recommend revisiting the anti-money laundering system in Japan once sufficient time has passed for the expected amendment to have come into force. Further the lead examiners recommend that the follow-up focus on the effectiveness of the reporting system in view of: 1. the absence of coverage of some non-financial businesses and professions, 2. the absence of penalties for the single failure to report a STR or perform customer identification, 3. the obligation under article 239(2) of the Code of Criminal Procedure for public officials to file an “accusation” with the law enforcement authorities, and 4. the level of feedback from the law enforcement authorities.

c. System for Accounting and Auditing

(i) Application of Accounting Standards

Generally

115. Since Japanese accounting standards do not specifically address the prohibition of the activities listed in article 8.1 of the Convention,⁸⁷ it is necessary to consider whether in practice they would be prohibited. Article 32.2 of the *Commercial Code*, which applies to all companies limited by shares, general partnerships, limited partnerships and limited companies, simply provides that “fair accounting practices shall be taken into account”.⁸⁸ As well the representative of the Japanese Institute of Certified Public Accountants (JICPA)⁸⁹ stated that he did not believe that any accounting standard would be violated if the bribery of a foreign public official were falsely recorded in a company’s financial statements. Thus the standard under the law does not seem adequate in practice for the purpose of prohibiting the activities listed in article 8.1 of the Convention. However, following the on-site visit the Japanese Government advised that it disagrees with this opinion and stated that Japanese accounting standards would be violated if any transactions including bribery were falsely recorded in a company’s financial statements. Supporting authority for their positions was not provided by either the representative of JICPA or the Japanese Government.

⁸⁷ Article 8.1 of the Convention prohibits the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

⁸⁸ The relevant accounting practice is provided by article 1 of the *General Standards* contained in the *Financial Accounting Standards for Business Enterprises* as follows: “Financial accounting for business enterprises should provide a true and fair presentation of the financial position and of the results of operations of a business enterprise”.

⁸⁹ JICPA was established under the *Certified Public Accountants Law* as the sole professional accounting body in Japan. JICPA’s role under the law is to provide effective guidance, communication and supervision to its members. All practicing CPAs are required to be members of JICPA.

116. During the on-site visit the lead examiners also reviewed the application of the fraudulent accounting offence under article 498.1(19) of the *Commercial Code*, which applies to companies limited by shares, general partnerships, limited partnerships and limited companies, and article 197.1(1) of the *Securities and Exchange Law* (SEL), which applies to all publicly listed companies, to determine whether they could effectively capture accounting fraud perpetrated for the purpose of bribing a foreign public official or of hiding such bribery. An academic who served on the Consultative Committee to METI indicated that to his knowledge neither the fraudulent accounting offence in the *Commercial Code* nor the offence in the *Securities and Exchange Law* has been applied to the failure to report or misreporting of a bribe payment.

Fraudulent Accounting under the Commercial Code

117. Article 498.1(19) of the *Commercial Code*, provides a non-penal fine of 1 million yen (7 400 Euros or 9 100 USD) for any incorporator, managing member of a company, director, representative of a foreign company, corporate auditor, inspector, liquidator, etc.⁹⁰ for “failing to enter or record any matter to be entered or recorded, or making an untrue entry or record” in documents including the articles of incorporation and financial documents including the balance sheets, business reports, profit and loss statements and accounting books. Pursuant to article 33.1(2) of the *Commercial Code* “transactions and any other matters that might have an impact on business assets” are required to be systematically and clearly entered into the “accounting books”.

118. In theory the fraudulent accounting offence under article 498.1(19) should apply to cases where a failure to report the bribery of a foreign public official or the misreporting of a bribe payment in the financial records of a company “might have an impact on business assets”. However since neither case law nor statistics have been submitted regarding the interpretation of article 498.1(19), it is impossible to assess the application of this rule. The interpretation of article 197.1(1) of the SEL, which provides a similar standard, should shed some light on this.

Fraudulent Accounting under the Securities and Exchange Law

119. Article 197.1(1) of the SEL provides a penalty of up to five years of imprisonment or a fine of not more than 5 million yen (37 100 Euros or 45 400 USD) for any person who files registration documents that contain “untrue statements with respect to material matters”. Legal persons are liable to a fine of up to 500 million yen (3.71 million Euros or 4.54 million USD) for an offence under article 197.1(1).

⁹⁰ The other persons to whom article 498.1(19) applies are the following: “arrangement committee”; supervisor; administrator mentioned in article 398.1 of the *Commercial Code*; “inspection committee”; transfer agent; commissioned company for bondholders; commissioned company for bondholders to succeed the affairs; representative of a bondholders’ meeting; person executing resolutions thereof; deputy member mentioned in article 67-2 or deputy mentioned in article 123.3 of a *gomei-kaisha* (limited partnership company); deputy member or deputy mentioned in article 147 of a *gomei-kaisha*, or deputy mentioned in article 188.3, article 258.2, article 280.1, or article 430 of a *kabushiki-kaisha* (joint stock company); or manager.

120. Following the on-site visit the Japanese authorities submitted six summaries of cases⁹¹ involving violations of article 197.1(1) of the SEL. In three of these cases all the sentences are final and in one case the sentence of one of three defendants is final.⁹² In the other cases, trials are pending. The case summaries provide little guidance as to the standard for materiality. Indeed the Japanese authorities state in the follow-up materials that the standard of materiality is generally interpreted to mean “basic matters which may affect the decision making of investors”. The representative of the Securities Exchange Surveillance Commission stated similarly at the on-site visit that the impact on investors is the test of materiality.

121. Where the case summaries quantify the alleged misrepresentations, the amounts are very large—between 500 million (3.71 million Euros or 4.54 million USD) and almost 6 billion yen (44.5 million Euros or 54.5 million USD). In all the cases except one⁹³ the transgression in question involved either the reporting of a fictitious payment (or misstatement of the amount of a payment) or a misstatement (overstatement) of profit.

122. Article 197.1(1) of the SEL does not appear suitable for addressing fraudulent accounting perpetrated for the purpose of bribing a foreign public official or hiding such bribery, for the following two principal reasons: First, as the case summaries demonstrate, a misrepresentation in the accounts 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. Bribe payments would rarely meet this threshold. Second, the triggering event for the application of article 197.1(1)—the public filing of documents by companies that issue securities—does not apply to the majority of companies in Japan, which are not publicly listed.

(ii) Obligations of External Auditors to Report Foreign Bribery

123. The representative of the Financial Services Agency⁹⁴ (FSA) stated that an external auditor is required to report a fictitious entry related to foreign bribery to the statutory auditor or top management. If

⁹¹ Following the on-site visit the Japanese authorities also provided a list of fourteen cases concerning violations of article 197.1(1) of the SEL, only six of which included the case summaries referred to. Of the cases for which a summary was not provided, one was dismissed due to the death of the defendant, four resulted in final sentences and two are pending before the High Court. The final sentences for the cases without summaries are as follows: 1. Yamaichi Securities Case—The Chairman was sentenced to 2 years and 6 months imprisonment with suspension for 5 years, the President to 3 years with suspension for 5 years. 2. Tescon Case—The President was sentenced to 1 year and 6 months of imprisonment with suspension for 3 years. 3. Totenko Case—(This case also involved a violation of article 158 of the SEL concerning the spreading of rumours.) An executive was sentenced to imprisonment for 2 years with suspension for 4 years and a fine of 6 million yen (45 300 Euros or 54 600 USD). 4. Footwork Express Case (1)—The President was sentenced to imprisonment for 2 years with suspension for 3 years, the Vice-President to 1 year with suspensions for 3 years, and the Executive Director to 10 months with suspension for 3 years.

⁹² The sentences in these cases are as follows: 1. Nanaboshi Case (1)—The Chairman was sentenced to imprisonment for 2 years and 6 months, and the Director for 3 years and 6 months. 2. Nanaboshi Case (2)—The Chairman was sentenced to imprisonment for 2 years and 6 months, and the Director for 3 years and 6 months. 3. MTCI Case (This case also involves a violation of article 158 of the SEL concerning deceit)—The Chairman was sentenced to imprisonment for 2 years. 4. KB. Case—The Executive Director was sentenced to imprisonment for 2 years with a suspension for 3 years. (The trial for the Managing Director is pending at the High Court and the trial for the Chairman is pending at the District Court.)

⁹³ One case involves the reporting of a deposit in connection with the bailment of funds to a corporate buy-out fund operating company when in fact the money was a loan from the company to an individual.

⁹⁴ The FSA is an administrative organ with responsibilities including the following: 1. Inspection and supervision of private-sector financial institutions including banks, securities companies, insurance

management does not correct the records the external auditor is required to make a report to the shareholders, which would be publicly available. The FSA representative stated that there is no obligation on the statutory auditors or top management to report foreign bribery to the law enforcement authorities, but there is also nothing in the law that prevents them from doing so.

124. The representative of the Japanese Institute of Certified Public Accountants (JICPA) explained that independent auditors pay attention to illegal acts in general but not specifically to the bribery of foreign public officials. If an illegal act were detected there would be no obligation to report it; however in practice the auditor would report the act to management or the shareholders if it were to have an impact on the company's assets. The representative of JICPA believed that the law does not require a company to correct a fictitious entry in the financial records regarding a bribe to a foreign public official. However, following the on-site visit the Japanese Government advised that it disagrees with this opinion and clarified that if a fictitious entry in the financial documents were found, it would be subject to a correction order and criminal sanctions pursuant to the Securities and Exchange Law. Supporting authority for their positions was not provided by either the representative of JICPA or the Japanese Government.

125. An official from the Securities Exchange Surveillance Commission (SESC) called attention to article 27 of the *Certified Public Accountants Law*, which prohibits CPAs from divulging confidential information "without due reason".⁹⁵ He stated that there is no exception to the secrecy rule where a CPA becomes aware of an offence in the course of performing an audit. Hence an auditor is prevented from reporting indications of foreign bribery to the law enforcement authorities. The representative of SESC did not provide a clear response to the examination team's query about whether an auditor has a duty to cease acting for a company where an illegal act is not corrected by management.

126. A CPA from a major accounting firm stated that "any" wrongdoing shall be reported to management. However it is usually impossible to report the wrongdoing to the law enforcement authorities.

127. The lead examiners believe that an underreporting of foreign bribery transactions by external auditors to management or shareholders is likely to result from the diverging views on their reporting duties. Furthermore the interpretation of the duty of confidentiality in article 27 of the *Certified Public Accountants Act* creates an obstacle to the reporting of foreign bribery by external auditors to the law enforcement authorities.

(iii) Internal Company Controls

128. The general observation of civil society participants at the on-site visit, including two academics, a trade unionist and experts from the private sector on control risk, was that large Japanese companies are beginning to introduce internal compliance systems. They emphasised that the compliance effort is in a preliminary stage, but were optimistic that the efforts are gaining momentum (The specific features of internal controls in Japanese companies are discussed more fully under B.1.b "Level of Awareness and Preventive Measures in the Private Sector").

companies and market participants including securities exchanges; 2. Establishment of the rules for trading in securities markets; 3. Establishment of business accounting standards; and 4. Supervision of certified public accountants and audit firms.

⁹⁵. Article 27 of the *Certified Public Accountants Law* states the following: "A certified public accountant shall not, without due reason, divulge to others or use to his or her advantage the confidential matters known to him or her through his or her practice. This shall remain the same after he or she has discontinued being a certified public accountant."

129. The *METI Guidelines*⁹⁶ encourage the voluntary establishment of internal controls for the purpose of preventing the bribery of foreign public officials. The Guidelines recommend the adoption of methodologies for internal control, including the establishment of a compliance program, an appropriate organisational structure and the provision of promotional and educational activities in the company. They also recommend an audit procedure, an evaluation process involving the chief executives, and provide specific advice concerning overseas business activities. The Guidelines have already played an important role in this respect. For instance, they served as the basis for the section on foreign bribery in the Charter of Corporate Behaviour of Nippon Keidanren,⁹⁷ a federation of Japanese businesses, and at least one large company represented at the on-site visit is considering whether it has to take further action based on the Guidelines.

130. In addition representatives of METI believe that interest has increased in establishing internal controls due to representative lawsuits, in which the courts have been awarding substantial civil damages to shareholders for losses incurred due to the failure of corporate managers to develop adequate internal controls. Following the on-site visit the Japanese authorities provided summaries of the two main cases—the judgement of the Osaka District Court in 2000 regarding the losses of Daiwa Bank’s New York Branch, and the judgement of the Kobe District Court in 2002 regarding illegal payments made by Kobe Steel. In the Daiwa Bank case damages were awarded to the shareholders for losses incurred as a result of 11 years of insider trading and the 340 million USD fine paid by the bank for false reports made to the US Federal Reserve regarding the losses. In the Kobe Steel case damages were awarded to the shareholders for losses incurred due to payments made from 1990 to 1999 from a slush fund to a *Sokaiya*.⁹⁸

*Commentary*⁹⁹

It is the view of the lead examiners that Japanese accounting standards and fraudulent accounting offences neither explicitly nor in practice prohibit all the activities listed under Article 8.1 of the Convention and do not punish such activities as required by Article 8.2 of the Convention. The lead examiners consider this to be a serious obstacle to the effectiveness of Japan’s deterrence of foreign bribery, and thus recommend that Japan 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.

The lead examiners are concerned that the relevant government bodies and accounting professionals do not share the same understanding of the reporting obligations of external auditors to management and shareholders where foreign bribery is detected. They therefore recommend that consistent with Section V B (iii) of the 1997 Revised Recommendation, the Japanese Government clarifies that external auditors are required to report indications of possible illegal acts of bribery to management and, as appropriate, to corporate monitoring bodies. Furthermore in view of the duty of confidentiality in the law, which prevents auditors

^{96.} See discussion on *METI Guidelines* in this report under A.5.(ii) on “2003-2004 Work of METI Consultative Committee”.

^{97.} Nippon Keidanren, established in May 2002, is an amalgamation of Keidanren (Japan Federation of Economic Organisations) and Nikkeiren (Japan Federation of Employers’ Associations). Its membership is comprised of 1,306 companies including 91 foreign owned companies, 129 industrial associations and 47 employers’ associations.

^{98.} A *Sokaiya* is a racketeer who interferes with or blackmails a company at meetings of its shareholders.

⁹⁹ Also see the second and third paragraphs of the “Commentary” under B.1. on “Awareness”.

from reporting indications of foreign bribery to the competent authorities, the lead examiners recommend that consistent with Section V B (iv) of the Revised Recommendation, Japan considers providing an exception to the duty of confidentiality where foreign bribery is detected.

In addition the lead examiners welcome the initiative of METI to encourage the voluntary establishment of internal controls for the purpose of preventing the bribery of foreign public officials. However they also recognise that Japanese companies are generally in the preliminary stages of adopting internal controls and that progress in this regard is mostly seen in large companies. The lead examiners therefore recommend that consistent with Section V C (i) of the Revised Recommendation, Japan continues in its endeavour to encourage the development and adoption of adequate internal company controls, including standards of conduct.

C. ANALYSIS OF JAPAN'S PROSECUTION AND SANCTIONING OF THE OFFENCE OF BRIBING A FOREIGN PUBLIC OFFICIAL

1. Interpretation of the Offence of Bribing a Foreign Public Official

a. Interpretation of the Foreign Bribery Offence by the Ministry of Economy, Trade and Industry (METI)

(i) Instruments for Interpreting the Foreign Bribery Offence

131. Since the offence of bribing a foreign public official in the UCPL came into force in February 1999, the Ministry of Economy, Trade and Industry (METI) has produced official interpretations of the offence in two principal instruments¹⁰⁰: 1. The *Guidebook on the UCPL*, which is updated every other year, and 2. the *METI Guidelines to Prevent Bribery of Foreign Public Officials*, which was published on 26 May 2004. The *Guidebook* addresses all the offences under the UCPL and contains a separate section on the foreign bribery offence. Following the on-site visit the Japanese authorities provided a translation of the relevant section of the 2003 version of the *Guidebook*. A translation of the complete text of the *METI Guidelines* was provided at the outset of the on-site visit.

132. The *Guidebook on the UCPL* is sold to the public at large and is available in the government library. The Japanese authorities indicate that so far approximately 10 000 editions have been sold containing information about the foreign bribery offence.¹⁰¹ On the other hand the *METI Guidelines* are specifically intended for companies, although they also are available to government officials, including

¹⁰⁰ In addition to the aforementioned instruments, two other documents contain official interpretations of the foreign bribery offence. The Ministry of Justice issued guidelines to prosecutors on the interpretation of the offence in 1999 at the same time that the offence came into force. These guidelines have not been translated, but the examination team understands that they essentially repeat the text of the offence under the UCPL. The second document, which is published annually, is a guidebook specifically on the foreign bribery offence. This document has also not been translated, but the METI officials explained that it is essentially the same as the relevant part of the *Guidebook on the UCPL*. The Japanese authorities indicate that the guidebook specifically on the foreign bribery offence is distributed through commercial channels, and that to date approximately 1 500 editions have been sold.

¹⁰¹ Approximately 4 000 editions of the 2001 version have been sold, and 6 000 of the 2003 version.

prosecutors¹⁰² and can be purchased by the public at large. At the time of the on-site visit 5 000 copies had already been distributed with plans to have 3 000 copies of an English version distributed.¹⁰³

133. The background of the two documents is different. The *METI Guidelines* were developed due to the February 2004 *Report on Measures for Effective Prevention of Bribery of Foreign Public Officials* of the Consultative Committee, which recommends guidelines on measures for increasing the effectiveness of internal controls in companies and a commentary on the foreign bribery offences article by article.¹⁰⁴ On the other hand the *Guidebook on the UCPL* is issued every other year, and does not respond to the findings or recommendations of any particular group. Members of the Consultative Committee explained that in preparing the *Report* attention was paid to the Phase 1 and Phase 1-bis examinations by the Working Group as well as recent scandals where companies had allegedly been involved in the bribery of foreign public officials. The *Report* is also publicly available but information about its distribution has not been provided.

134. The content of the *Guidebook on the UCPL* regarding the foreign bribery offence and the *METI Guidelines* differ in two significant ways. The *METI Guidelines* address preventive measures in the form of internal company controls whereas the *Guidebook* does not. In addition the interpretations of various aspects of the foreign bribery offence are largely consistent in the two documents; however those in the *METI Guidelines* are more comprehensive and hence the document is much longer.

135. METI officials confirmed that they did not seek formal approval from the Ministry of Justice or the prosecutorial authorities about the legal interpretations in the *Guidelines*. However they stated that they consulted in advance with officials from the Ministry of Justice and Ministry of Foreign Affairs about the “context” of the *Guidelines*. Since the Japan Bank for International Co-operation (JBIC), the Nippon Export and Investment Insurance Agency (NEXI), the Japan International Co-operation Agency (JICA) and Ministry of Foreign Affairs officials responsible for export credit and official development assistance were not aware of the *Guidelines*, the examination team concluded that they also had not been formally consulted about the parts concerning export credit and official development assistance.

136. As will be seen below some areas of legal interpretation in the *METI Guidelines* and the *Guidebook on the UCPL* are controversial and might give rise to questions about whether the standards under Article 1 of the Convention are met in practice (i.e. facilitation payments, meaning of “international commercial transaction”). At the very least the lead examiners believe that the interpretations in question are misleading for companies.

137. Ministry of Justice and METI officials stated that Japanese law does not provide a defence for a reasonable mistake of law, and thus companies could not successfully argue that an offence was not committed due to misleading advice from the Government. The officials conceded that if such a situation were to occur the sentence on conviction for the company would probably be mitigated. The Japanese authorities further commented that article 38.1 of the *Penal Code*,¹⁰⁵ which provides a defence where an act is committed without the intention of committing a crime, would not provide a defence on the ground

¹⁰² The prosecutors who participated in the on-site visit had not seen the *Guidelines*.

¹⁰³ The *METI Guidelines* have been distributed to companies through METI headquarters and its nine local offices. Distribution is effected directly as well as through the Japan Chamber of Commerce (to companies with overseas operations) and local chambers of commerce.

¹⁰⁴ The *Report* of the Consultative Committee also recommends legislative amendments, which are discussed under A.5.(ii) “2003-2004 Work of METI Consultative Committee”.

¹⁰⁵ Article 38.1 states as follows: “An act without intention of committing a crime shall not be punished provided that this shall not apply when otherwise specified by the law”.

that a company acting on misleading advice from the Government could not have had the requisite intention.

138. METI officials stated that METI has the right to present the official interpretation of the foreign bribery offence under the UCPL given that it is responsible in general for the implementation of the offence.¹⁰⁶ They emphasised that the law enforcement authorities are in charge of the criminal investigation and prosecution in each case and added that the courts of course have the final say.

(ii) Areas where Interpretation of the Foreign Bribery Offence by METI is Misleading or Contravenes the Convention

Facilitation Payments

139. In Phase 1 the Japanese authorities stated explicitly that there was no exception for “small facilitation payments”.¹⁰⁷ By the time of the Phase 2 examination METI appeared to have changed its policy in this regard. The *Guidebook on the UCPL*¹⁰⁸ contains a small discussion on the acceptability of certain forms of facilitation payments and the *METI Guidelines*¹⁰⁹ provide considerable discussion on the topic. A representative of the Consultative Committee explained that numerous discussions on facilitation payments took place in formulating the *METI Guidelines*.

140. At the on-site visit officials from METI were not able to explain if and why the Government had changed its position regarding facilitation payments. Furthermore other agencies that play a key role in implementing the Convention did not agree with the new approach--Ministry of Justice officials stated that there is no exception for facilitation payments under the law, and prosecutors explained that they would prosecute a case that involved a facilitation payment.

141. The *METI Guidelines* provide the following four examples of payments that do not constitute an “improper business advantage”¹¹⁰: 1. A small payment made in order to induce a tax official to duly perform his/her duty to provide a tax reimbursement, 2. A small payment made in order to induce an official to provide a permit that has been unduly delayed, 3. A facilitation payment for the purpose of food procurement,¹¹¹ and 4. A small facilitation payment given in order to expedite a routine administrative service. Following the on-site visit the Japanese authorities clarified that the example concerning food procurement pertains to the procurement of food necessary for the survival of foreign employees working in a third country and not to the procurement of food for selling or other transactions.

¹⁰⁶ The Economic and Industrial Policy Bureau of METI is responsible for the official interpretation of the foreign bribery offence under the UCPL.

¹⁰⁷ See item 1.1.4 of the Phase 1 Report under which it states: “There is no exception to the offence for ‘small facilitation payments’”.

¹⁰⁸ On page 121 of the *Guidebook on the UCPL* it states the following: “...generally speaking, decency or good faith, expedited customs clearance, inspection and processing of an application for the issuance or extension of an entry or visitor visa, smooth operation of laying water and sewage pipes and telephone cables and other processes relating to regular administrative services would not be considered ‘improper advantage’”.

¹⁰⁹ See pages 13-14, 16 and 30-32 of the *METI Guidelines*

¹¹⁰ See page 16.

¹¹¹ The case of providing an advantage to a village mayor in order to facilitate food procurement in another country is provided as an example.

142. In discussing the allowable threshold for facilitation payments, METI officials sometimes stated that the level of acceptability is related to the standard in the country in which the payment is given. Similarly, a footnote in the METI Guidelines¹¹² states that the subject of facilitation payments “needs to be examined by taking the context in the respective countries into consideration”. During the Working Group meetings a representative of METI clarified that the level of acceptability of a facilitation payment is related to the economic development (“economic standard”) of the country for which the foreign public official exercises his/her public function. A separate section in the *METI Guidelines* provides the text of the legislative provisions of eight Parties¹¹³ to the Convention containing exceptions for small facilitation payments, ostensibly for the purpose of assisting companies in determining the level of acceptability for facilitation payments in those countries. The lead examiners are concerned that this approach, rather than providing guidance as to what is permitted under Japanese (or foreign) law, invites Japanese companies to choose whichever Party’s exception for facilitation payments suits its current needs regardless of where the business transaction will take place.

143. Out of seven companies that participated in the on-site visit none of them had established a policy on facilitation payments. However four of the companies believed that they are sometimes necessary and deal with situations involving them on a case-by-case basis. Two of these companies were deliberating on how to define facilitation payments in order to take into account the *METI Guidelines*. The other three companies do not permit the payment of bribes in any circumstances. The representative of a major business federation, which issues a Charter of Corporate Behaviour, stated her organisation would follow the policy in the *METI Guidelines* concerning facilitation payments. An academic, who is a member of the Consultative Committee and provides advice to companies on how to design corporate compliance programmes to prevent corruption, stated that the trend is for companies to describe allowable facilitation payments in their codes of conduct. He explained that previously companies would have said nothing at all about them. He explained further that the precise threshold of acceptability depends on the custom in the foreign country. A similar opinion was provided by the representative of another major business association, who stated that a different guideline on facilitation payments is needed for each country in which a company does business. He also felt that the private sector should collectively determine a quantitative level of acceptability.

144. The lead examiners acknowledge that small facilitation payments are not prohibited by the Convention. They do not suggest that by providing an exception for small facilitation payments Japan is in contravention of the Convention. However the lead examiners question the validity and the soundness of the Japanese exception in light of the authority for its establishment and its interpretation.

145. The source of the exception for facilitation payments is not in the law but in guidelines that have no legal weight. The exception has not been subjected to public debate, and indeed it has not been agreed to by the Ministry of Justice or prosecutors. Instead of providing a clearly articulated exception to ensure that companies are not misled or confused, the *Guidelines* present examples that are themselves not entirely clear. In fact the METI representatives themselves presented not entirely clear interpretations of the exception, at times blending facilitations payments with the notion of local customs.¹¹⁴ This was also

¹¹² See footnote 12.

¹¹³ The *METI Guidelines* state at page 30 that eight countries are confirmed to have legally provided for the exemption of facilitation payments. It then provides information about the exemptions in the following countries: United States, Canada, Korea, Australia, New Zealand, Switzerland, Belgium and Greece. During the Working Group meetings, the representative of the Greek government clarified that Greece does not provide an exception for facilitation payments. The Japanese authorities undertook to correct this misstatement.

¹¹⁴ Footnote 14 of the METI Guidelines also refers to “possible judgement criteria” including “a prior decision on the amount and frequency of gift offering (for ceremonial occasions, etc.) to and entertainment expenses

the interpretation of the exception by some private-sector representatives and a member of the Consultative Committee. The lead examiners believe that Japan, if it wishes to have an exception for facilitation payments, must spell out the scope of that exception in clear and certain terms.

International Commercial Transaction

“Main Office Exception”

146. As mentioned earlier,¹¹⁵ since Phase 1 the offence of bribing a foreign public official in the UCPL was amended to remove what was commonly referred to as the “main office exception”. This was accomplished by deleting article 10-bis(3), which provided an exception to the foreign bribery offence where the “main office” of the person giving the bribe was located in the same country for which the foreign public official engaged in public service. The Japanese authorities were responding to concerns articulated by the Working Group in Phase 1 that article 10-bis(3) created a major loophole in the implementation of the Convention because it would normally be the case that no offence would be committed if a Japanese national employed by a foreign subsidiary of a parent Japanese corporation bribed a foreign public official in Japan in relation to the business of the subsidiary. In place of article 10-bis(3) Japan added the language “in an international commercial transaction”¹¹⁶ to the foreign bribery offence. Previously the offence had not been qualified in this way, but in Phase 1 the Japanese authorities stated that the “main office exception” represented Japan’s interpretation of the language “in the conduct of international business” in Article 1 of the Convention.

147. Since the lead examiners knew that the “main office exception” represented Japan’s interpretation of the phrase “in the conduct of international business”, and had replaced the exception with comparable language, they sought reassurance at the on-site visit that the “main office exception” had not been maintained through the interpretation of the new language. On receiving the *METI Guidelines* at the on-site visit, the examination team discovered that one of the examples of what constitutes “international business” sounded very similar to the “main office exception”. In this example the following situation is deemed “business in the home country” rather than “international business”: “An employee of a company of Country ‘C’ bribes a public official of Country ‘C’ in Japan with the intention of obtaining permission to sell food products in Country ‘C’”. Since the example does not specify that the company is not a subsidiary of a Japanese parent company, the “main office exception” might appear to have been kept alive in the interpretation of “international business”. Thus the lead examiners were concerned that the “main office exception” might have resurfaced through this example.

148. At the on-site visit Ministry of Justice representatives thought that the company in the example in the *METI Guidelines* could not be a subsidiary of a Japanese parent. Following the on-site visit the Japanese authorities clarified that the company described in the example was meant to be a company that “has nothing do to with any other country than Country ‘C’”. They stated further that if the company in the example were a subsidiary of a Japanese parent company, the transaction would fall under the definition of “international business”. Nevertheless, they agree to clarify this point in the *Guidelines*. On the other hand the *Guidebook on the UCPL* suggests that although the clause that described the “main office exception” was deleted from the UCPL, it is now encompassed by the interpretation of “international business”:

for foreign public officials, etc. within the scope of law and custom...” Commentary 7 to the Convention states that it is an offence to bribe a foreign public official “irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage”.

¹¹⁵ The history of the “main office exception” is discussed under A.5.(i) “Removal of ‘Main Office Exception’”.

¹¹⁶ This phrase is sometimes translated as “in the conduct of international business”.

“The exclusion of the application clause had been adopted by this Law prior to the amendment based on the understanding that where the country in which the principal office of the party giving a bribe is located is the same country to which the foreign public official, etc. who is receiving the bribe belongs, such action shall not be regarded as offering an improper advantage in the conduct of international business...No other signatories however adopted such an exclusion...Consequently in light of the pursuit of global harmonisation...this provision was deleted. Meanwhile, in order to exclude relevant actions taken exclusively in the conduct of domestic business in cases where a country in which the principal office of the party giving a bribe is located is the same country to which the foreign public official, etc. who is receiving the bribe belongs, a requirement of ‘international business’ was added”. (Emphasis added)

Business Repeatedly and Continuously Conducted for the Purpose of Profit

149. The *METI Guidelines* state that “international business” refers to “acts concerning business repeatedly and continuously conducted for the purpose of profit”. This interpretation was also given in Japan’s responses to the Phase 2 Questionnaire and by METI and Ministry of Justice officials during the on-site visit. Ministry of Justice officials stated at the on-site visit that it is not required that the illegal act is repeated and continuously conducted, but that the company in question has the intention to carry out the business activity, “which is any act conducted in a repeated or continuous manner in order to make a profit”. Following the on-site visit they clarified that a company engaging in its first business transaction would be covered unless exceptionally the company did not conduct any further transaction or relevant activity.

150. Following the on-site visit the Japanese authorities submitted case law concerning the interpretation of “repeatedly and continuously” by the Supreme Court in relation to a violation of the *Practicing Attorney Law* (5 December 1959). They believe this decision applies to other offences related to business activity, including the foreign bribery offence. The Court held that the notion of “engaging in business”, which was an element of the offence in question, requires an intent by the offender to conduct such activity continuously, regardless of the number of times that the business has been conducted in practice. The Japanese authorities did not submit case law on the interpretation of the requirement that the business is conducted for the “purpose of profit”.

151. The lead examiners are of the opinion that the Convention does not exempt from its purview business transactions where there is no intent to conduct the business activity continuously. It is also their view that the Convention does not differentiate between business for profit and not for profit. In the absence of case law it is not clear what is captured by the term “for the purpose of profit”. For instance, does it mean that non-profit companies are excluded from the application of the offence? Does it mean that the courts would look at whether the specific transaction resulted in a profit? If the answer to the latter question is affirmative, how would the Japanese authorities determine whether a profit has been obtained for an individual transaction in a large company that has engaged in innumerable transactions during the relevant accounting period? In addition would a bribe emanating from the public sector be considered for the purpose of obtaining a profit?

Commentary

The lead examiners believe that the interpretations concerning facilitation payments and “international business transactions” are counterproductive in that they could mislead companies about what actions are covered by the foreign bribery offence. Thus the lead examiners recommend that METI undertakes a review of these interpretations in all the relevant instruments issued by it including the METI Guidelines. They also recommend that the review is done in consultation with agencies including the Ministry of Justice and the

relevant ministries as well as the prosecutorial authorities through the Ministry of Justice with a view to amending them where appropriate to ensure clarity and consistency with the Convention.

In performing the above review the lead examiners recommend that the Japanese authorities pay particular attention to the following:

- 1. The exception for facilitation payments must be stated in unambiguous terms and must meet the standard under Commentary 9 to the Convention. Moreover in clarifying the exception the Japanese authorities need to be attentive to Commentary 7 to the Convention, which clarifies that it is an offence to bribe a foreign public official irrespective of local custom.*
- 2. The term “international commercial transactions” must apply to the bribery of a foreign public official in all the situations covered by the Convention, including cases where there is no intent to carry out the business activity repeatedly and continuously, as well as cases where the business is not conducted for the purpose of profit. In addition the Japanese authorities must ensure that the “main office” exception, which was removed after Phase 1 and replaced with the language “international commercial transactions”, is not maintained in the official interpretation of the new language.*

b. Interpretation of Specific Elements of the Offence

(i) Bribes through Intermediaries

152. As identified in Phase 1, article 11(1) of the UCPL does not expressly apply to bribery acts made through an intermediary. Similarly provisions on domestic corruption do not mention intermediaries. The Japanese authorities stated that nevertheless, bribing through an intermediary is sanctioned in practice, regardless if the intermediary is aware that he/she is involved in a bribery transaction.¹¹⁷ In addition the Japanese prosecutors indicated that offences commonly do not expressly cover the use of intermediaries.

153. The prosecutors stated that if an intermediary does not offer the bribe to the foreign public official an offence has not been committed by the principal briber. They also stated that if a manager of a company instructs an employee to offer a bribe to a public official, and the employee informs the police instead of following the direction, there is no possibility to prosecute the manager. According to the Japanese authorities, under Japanese law these cases are not considered to have commenced, and thus are not covered due to 1. the non-application of the law of attempts to the bribery of a foreign (and domestic) public official, 2. the absence of the notion of conspiracy in Japan as it is defined in common law countries, and 3. the absence of liability under the Penal Code for authorisation or incitement. The lead examiners questioned whether article 61 of the Penal Code regarding liability for “instigating” an offence could cover this situation, but the Japanese authorities responded that pursuant to case law the instigation of an offence is not covered as a separate offence where the offence is not carried through.¹¹⁸ Following the on-site visit the Japanese authorities clarified that in certain cases the full offence is considered to have occurred despite the non-performance of the intermediary. This depends on the relationship of the intermediary with the briber and the public official, the role he/she is expected to play and his/her previous actions. However the Ministry of Justice explained that if the offer does not reach the public official for

¹¹⁷ In both cases, the briber is prosecuted as principal offender.

¹¹⁸ Pursuant to Commentary 11 to the Convention, “if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party’s legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official”.

reasons other than the non-performance by the intermediary of his/her tasks (e.g. the letter containing the offer to bribe is lost), the full offence is considered to have been perpetrated.

154. The examining team suggested that regardless if the intermediary follows-through with a direction to bribe a foreign public official, an offence should be considered to have been committed. Given that it is common practice for companies to use intermediaries, including local agents, to transact foreign business on their behalf, the failure to cover these situations could represent a sizable gap in the implementation in practice of the Convention. Moreover in cases where the intermediary follows-through with the direction to bribe, it is often extremely difficult to gather evidence from abroad, and thus the only evidence available may be the direction given by the Japanese company in Japan to the intermediary to bribe a foreign public official. However according to the representatives of the Ministry of Justice, the difficulty connected with proving that an offer was made abroad by the intermediary is not necessarily insurmountable.

(ii) Bribes that Benefit Third Parties

155. As identified in Phase 1, the offence of bribing a foreign public official under the UCPL does not expressly apply to the case where there is a third party beneficiary.¹¹⁹ The Japanese authorities explained that despite the absence of express language to this effect, the jurisprudence on cases of domestic active bribery apply to the foreign bribery offence. However since the *Penal Code* provision on the bribery of Japanese public officials expressly covers the case where the bribe goes to a third party¹²⁰ the lead examiners voiced concern about the value of the case law on domestic bribery in this respect.

156. The position of the Japanese authorities is that the case law on the bribery of a domestic public official is relevant because there have been judgements that did not refer specifically to the presence in the *Penal Code* of the sections that mention third parties. However as conceded by the Japanese authorities these cases only cover the situation where it can be deemed that “in substance” the advantage has been given to the official. The Japanese authorities submitted a recent case involving the payment of the wages of a Councillor’s secretary, which was deemed by the Court to represent a bribe.¹²¹ The judgement did not refer to the specific provision in the *Penal Code* on third parties. The lead examiners consider this decision to be consistent with previous decisions since the benefit—being spared the cost of his secretary’s wages—went directly to the Councillor.

157. The examining team remained concerned that the foreign bribery offence does not cover every instance where a public official directs that the benefit goes to a third party. For instance the Japanese prosecutors admitted that it is doubtful whether the case would be covered where the foreign public official directs that a payment goes to a charity, political party or legal person with which the public official does not have a relationship so that he/she cannot be considered to have received any benefit. They also stated that it would generally be difficult to apply the foreign bribery offence where the third party is a legal person.

¹¹⁹ The Working Group recommended that this issue be followed in Phase 2 of the evaluation process to determine whether in practice the offence under the UCPL is specifically applied in cases involving third party beneficiaries.

¹²⁰ Article 198 of the *Penal Code*, which establishes the offence of active bribery of a domestic public official, applies by cross-reference to the situations covered in respect of the passive bribery of a domestic public official. Pursuant to article 197-2 the case is covered where a domestic public official demands or promises a bribe to be given to a third person.

¹²¹ See KSD case (Tokyo District Court, 26 March 2002).

Commentary

The lead examiners recommend that the Japanese authorities 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, in order to ensure the effective implementation of the Convention.

c. Application of Foreign Bribery Offence to Legal Persons

Generally

158. Article 15 of the UCPL, entitled “Dual Liability”, establishes the liability of a “legal entity” where “an officer representing a legal entity, or a representative, employee or any other worker of a legal entity” has committed “with regard to the business of the legal entity” any of the violations described in article 14, which provides the penalty for several offences including the foreign bribery offence. Article 15 states that the legal person shall be liable to a fine not exceeding 300 million yen (2.22 million Euros or 2.73 million USD) “in addition to” the liability of the natural person to a punishment under article 14.

159. Statistics from 1998 to 2002 were provided on the number of prosecutions and convictions of legal persons in each of those years. On the average 1 747 legal persons were prosecuted each year and 259 were convicted. In the absence of information on the number of cases that were reported to the prosecutorial authorities and the nature of the penalties imposed upon conviction it is difficult to interpret these statistics. Moreover statistics are not available about the corresponding cases against natural persons.

160. Article 15 contains ambiguous language concerning the following: 1. the liability of a legal person for a bribe that benefits a related legal person, and 2. the connection between the liability of a natural and legal person. In addition clear evidence has not been provided regarding the application of the new provision on nationality jurisdiction to legal persons.

Liability for Bribes that benefit related Legal Persons

161. For a legal person to be liable under article 15 of the UCPL a violation of article 14 must be made by a natural person “with regard to the business of the legal entity”. This language seems to establish a requirement that the bribe must benefit the legal person from which it emanates. Thus bribes for the benefit of related companies, such as subsidiaries, holding companies or members of the same *keiretsu*¹²² might be seen as beyond the purview of article 15.

162. The prosecutors who participated in the on-site visit stated that they believed bribes for related companies including members of the same *keiretsu* are covered. Representatives of the Ministry of Justice were certain that they are covered. Case law supporting the Government’s position has not been submitted.

Link between the Liability of Natural and Legal Persons

163. The lead examiners believe that an effective process for addressing the responsibility of legal persons for the bribery of foreign public officials is essential due to the complicated decision-making structures frequently employed by large corporations, which do not necessarily lend themselves to the identification of specific individuals involved in corporate wrongdoing. By focussing on isolated acts by individuals the investigation fails to consider the impact of corporate bureaucracy upon the commission of the offence. The decision to bribe in a large corporation would normally be a collective act and thus it

¹²² See the discussion on the *keiretsu* system of industrial structure under A.4b. on “Economic Factors”.

would often be difficult if not impossible to isolate individuals for prosecution. In addition, to be able to effectively prosecute the legal person alone may provide a convenient and fair alternative to the conviction of a mere agent of the corporation or low level employees, whose acts may be the result of corporate pressure or politics.

164. In Phase 1 the Japanese authorities explained that the statement in article 15 that the legal person is liable “in addition to” the liability of a natural person to a penalty under article 14 appears quite often in Japanese legislation, and does not introduce the requirement of dual liability. In support of their position the Japanese authorities cited a case of the Supreme Court from 1956.¹²³

165. In the meantime the consolidated version of the UCPL has been issued, with the title “Dual Liability” in relation to article 15. In addition at the on-site visit the prosecutors highlighted the positive trend in Japan to prosecute the legal person if the natural person is punished, raising again the issue of whether the liability of the legal person is linked in practice to the punishment of the natural person.

Nationality Jurisdiction

166. On 1 January 2005 the amending law introducing nationality jurisdiction for the offence of bribing a foreign public official will come into force.¹²⁴ The amended article 14 will apply to the liability of natural persons under the same article. However the provision does not expressly apply to the liability of legal persons under article 15 of the UCPL.

167. During the on-site visit the Chairperson of the Consultative Committee stated that nationality jurisdiction “might” apply to legal persons. On the other hand the Ministry of Justice officials stated that they were certain that legal persons will be covered. They indicated that legal persons will be liable for foreign bribery committed abroad by their Japanese employees. They stated further that since nationality jurisdiction over a legal person will be linked to the nationality of the natural person who commits the offence on its behalf, legal persons will not be liable for the actions abroad of their non-Japanese representatives.

Commentary

In the absence of practice, the lead examiners recommend revisiting the liability of legal persons for the offence of bribing a foreign public official in view of certain ambiguities concerning its application and concern that these ambiguities might be obstacles to the effectiveness of corporate liability for the offence, and recommend that this follow-up include a review of the following areas:

- 1. The liability of legal persons for the bribery of foreign public officials where the bribe benefits a company related to the legal person from which the bribe emanated.*
- 2. Whether in practice the liability of a legal person is subject to the conviction or punishment of the natural person responsible for the act of bribery.*
- 3. Whether in practice the new provision on nationality jurisdiction is applied to legal persons and if so whether it is effective.*

¹²³ Supreme Court Judgment 1956. 12.22 *Keishu* 10.12.1683.

¹²⁴ Further information about the relevant Bill is found under A.5.(ii) “2003-2004 Work of METI Consultative Committee”.

2. Level of Priority given to Foreign Bribery Cases

168. A prosecutor from one of the regional offices stated that it is not “popular” for prosecutors to have knowledge of the methods for combating foreign bribery. He added that currently affirmative steps are not taken by prosecutors to look for foreign bribery cases. Moreover, as mentioned in the discussion on the awareness of the prosecutorial authorities, specific training on the foreign bribery offence has not been provided to prosecutors.¹²⁵

169. The Director General of the Supreme Public Prosecutor’s Office indicated that his office would like to exert the utmost effort in terms of providing any guidance or direction to prosecutors regarding the foreign bribery offence. He added that at various meeting of prosecutors a lot of emphasis had been given to “bribery cases in general”.

Placement of Foreign Bribery Offence in UCPL

170. The lead examiners inquired about whether placement of the foreign bribery offence in the UCPL instead of the *Penal Code* had contributed to the absence of prosecutions and formal (“filed”) investigations.¹²⁶ Their questions in this regard were in part related to the concerns of the Working Group in Phase 1 that since the purpose of the UCPL as stated in article 1 is “to contribute to the sound development of the national economy”,¹²⁷ only cases of foreign bribery that affect the national market might be covered by the foreign bribery offence.

171. At the on-site visit Ministry of Justice officials defended placement of the foreign bribery offence in the UCPL on the ground that the choice of statute depends on the interest that the crime is intended to protect, and that the interest at issue is the protection of fair competition. However in the *Report of Measures for Effective Prevention of Bribery of Foreign Public Officials*, which was translated for the examination team following the on-site visit, the Consultative Committee recommends a “continuous study” on the appropriateness of the placement of the offence in the UCPL given that the offence will apply to bribes that do not affect the domestic market following the introduction of nationality jurisdiction. (The Japanese authorities did not indicate whether they have followed the recommendation of the Consultative Committee in this regard.)

172. The foreign bribery offence seems out of place in the UCPL for other reasons as well. All of the offences in the UCPL except for the foreign bribery offence relate to intellectual property protections (e.g. false and misleading advertisement by causing confusion with a well-known brand, place of origin, etc.). Indeed the Consultative Committee states in the *Report* that the foreign bribery offence has no relevance to

¹²⁵ See B.1.a.(ii) on “Investigative, Prosecutorial and Judicial Authorities”.

¹²⁶ Japan is the only country that has so far implemented Article 1 of the Convention in unfair competition prevention legislation. (Note that Poland established the administrative liability of legal persons for the offence under its Act on Combating Unfair Competition, but the foreign bribery offence itself was established by amending the domestic bribery offence in the Penal Code.) Other Parties to the Convention have implemented the foreign bribery offence through amendments to the penal code or have enacted specific legislation.

¹²⁷ Article 1 of the UCPL also refers to the accurate implementation of international agreements related to the prevention of unfair competition. The reference to international agreements specifically relates to the *Paris Convention* and its special agreement, the *Madrid Agreement*, which establish the protection of industrial property through the use of registration marks [*Outline and Practices of Japanese Unfair Competition Prevention Law* (Masayasu Ishida, Japanese Patent Office, 1999)].

intellectual property rights.¹²⁸ Civil claims such as the right to request an injunction and claims for damages are available for all of the forms of unfair competition under the UCPL except for foreign bribery. Moreover the *Penal Code* is considered the “basic law against corruption”,¹²⁹ providing virtually all of Japan’s bribery offences except for foreign bribery.

173. The lead examiners were also concerned that there might not be sufficient prosecutorial activity under the UCPL for it to have a significant enough profile for inclusion of the foreign bribery offence in the UCPL. Ministry of Justice officials stated that at the time that the decision was taken to place the offence in the UCPL, there was already an established record of successful prosecutions under the UCPL. Officials from METI concurred and added that the presence of the foreign bribery offence in the UCPL is widely known among METI employees. On the other hand an academic stated that there would be a greater level of awareness of the offence if it were contained in the *Penal Code*.

174. Following the on-site visit the National Police Agency indicated that in the last three years it has co-ordinated two cases under the UCPL.¹³⁰ In addition the Japanese authorities provided statistics on the number of all UCPL violations prosecuted from 1980 to 2002. The number of prosecutions ranged from zero in 1997 and 1998 to 37 in 2002. The average number of prosecutions per year was approximately 15. Information about the number of UCPL violations received by prosecutors was not provided. In the responses to the Phase 2 supplementary questionnaire the Japanese authorities state that in 2002 the number of all non-*Penal Code* violations received by the prosecutors’ offices was 990 737. In the same year 1 213 841 *Penal Code* offences were received by the prosecutors’ offices.

Prosecutorial Discretion

175. The lead examiners also inquired about whether the application of article 248 in the *Code of Criminal Procedure*, which provides prosecutors with the discretion to not prosecute where “it is unnecessary to prosecute according to the character, age and environment of an offender, the weight and conditions of an offence as well as the circumstances after the offence”, had resulted in the non-prosecution of foreign bribery cases.¹³¹ One regional prosecutor stated that the criteria for non-prosecution in article 248 are very broad and that specific guidelines on what these criteria mean in relation to foreign bribery had not been issued. It was his opinion that the criterion of the “character” of the offender is broad

¹²⁸ See page 44 of *Report on Measures for Effective Prevention of Bribery of Foreign Public Officials* by the METI Consultative Committee (6 February 2004).

¹²⁹ *An Overview of the Japanese Criminal Justice Legislation against Corruption* (Professor Yuichiro Tachi, 3rd Annual Conference of the ABD/OECD Anti-Corruption Initiative for Asia-Pacific, Tokyo, 28-30 November 2001). Professor Tachi points out that the *Penal Code* covers the following corruption-related offences: article 193 (abuse of authority by public officer), article 194 (abuse of authority by special public officer), article 195 (violence and cruelty by special public officer), article 196 (aggravation of the above two articles), article 197 (acceptance of bribes, advance acceptance of bribes), article 197-2 (bribes to third persons), article 197-3 (bribery for dishonest acts, subsequent bribery), article 197-4 (receiving bribes for exertion of influence), article 197-5 (confiscation of bribes and collection of monetary equipment), and article 198 (giving bribes).

¹³⁰ Both of these cases are “forged expression” cases concerning poultry. Note that the following cases must be reported to the NPA by the prefectural police headquarters: 1. very large cases, and 2. cases that involve many prefectures. In addition, “important intellectual crimes” deemed clearable must be reported to the NPA, including “acceptance and receiving bribery (including foreign bribery in the UCPL)”.

¹³¹ In respect of the exercise of prosecutorial discretion the relevant part of Article 5 of the Convention is recalled: “Investigation and prosecution of the bribery of a foreign public official...shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved”.

enough to cover whether the accused is a high-ranking official in the Japanese government, but clarified that a high ranking government official is more likely to be prosecuted than one who is not.

176. With respect to considerations of national economic interest, two regional prosecutors explained that they personally would not consider whether a prosecution could have an impact on the Japanese economy. Thus they would not take into account whether the potential damage to reputation caused by the prosecution of a very large well-known Japanese company might be harmful to the economy. In contrast a lawyer who participated in the on-site visit stated that although prosecutors are not legally obliged to consider the impact on the economy of a prosecution, it cannot be denied that this factor could have a substantial impact on prosecutorial decision-making.¹³²

Commentary

In order to increase the priority given to foreign bribery cases in Japan, the lead examiners recommend that the Supreme Public Prosecutors Office should consider instructing prosecutors to be more attentive to foreign bribery cases, and placing more emphasis on foreign bribery cases in the context of meetings in which bribery cases in general are discussed.

In addition, the lead examiners recommend that the Working Group follow-up, once there has been sufficient practice, developments in Japanese law with respect to the recommendations of the Consultative Committee, including the recommendation to undertake a study of the appropriateness of including the foreign bribery offence in the UCPL. The study should consider the effectiveness of territorial and nationality jurisdiction, in particular where the domestic market has not been affected. The lead examiners further recommend that Japan report the findings of the study to the Working Group.

3. Sanctions for Foreign Bribery

177. Bribing a foreign public official is punishable by a penalty of not more than 3 years imprisonment or a fine of not more than 3 million yen (22 200 Euros or 27 300 USD) for natural persons and by a fine of not more than 300 million yen (2.2 million Euros or 2.7 million USD) for legal persons. In the absence of foreign bribery convictions, an analysis of the sanctions to determine whether they are effective, proportionate and dissuasive is not possible. The Japanese authorities nevertheless provided information on the sanctions imposed for domestic bribery and other economic crimes. They also discussed the Bill amending the AOCL provisions on confiscation, and the administrative sanctions available in the framework of development aid and export credit.

a. Sanctions in Practice

(i) Natural Persons

178. The Ministry of Justice provided statistical information on the sanctions imposed in cases of domestic bribery and other economic offences for the year 1998.¹³³ Of the 93 persons convicted for domestic active bribery in 1998, the majority (58) were sentenced to imprisonment for a period of between 1 and 2 years with suspension. Only 5 were sentenced to more than 2 years (with suspension), and no

¹³² The prosecutors pointed out that injured parties as well as anyone who makes an accusation have the right to challenge a prosecutor's decision to not prosecute. Prosecutors are required to inform complainants of decisions to not prosecute along with the reasons for not prosecuting.

¹³³ The Japanese authorities indicated that the Supreme Court stopped publishing statistics after 1998.

person was sentenced to less than 6 months. The sentences available for passive bribery (punished by a maximum of 5 or 7 years) are slightly more severe, but the average sanction was the same as for active bribery.

Suspended Sentences

179. In 1998, 98% of the persons convicted of active bribery obtained a suspension of sentence, and 86% in cases of passive bribery. These figures are higher than the average of 67% for all crimes,¹³⁴ but correspond to other economic crimes, for which the suspension rate is also very high. The 2002 statistics show that the suspension rate was 73% for breach of trust, 93% for income tax offences, 98% for corporate tax offences, and 95% for offences against the *Law Regulating Capital Investment*.¹³⁵ The rate is 100% for anti-cartel offences in 1990-1998.¹³⁶

180. Pursuant to article 25 of the *Penal Code*, suspended sentences are available where a person is sentenced to imprisonment for not more than 3 years or a fine of not more than 500 000 yen (3 710 Euros or 4 540 USD). This means that a suspended sentence is always available for the offence of bribing a foreign public official where a sentence of imprisonment is imposed. The conditions of eligibility are very broad, as only recidivists are excluded. Furthermore a probation order is not mandatory in cases of suspended sentences.

Level of Monetary Sanctions

181. If the 1998 statistics are generally representative of the sentences imposed for active bribery in other years, monetary sanctions have rarely been imposed for bribery, except through summary procedures.¹³⁷ From 1998 to 2002, 17% of the prosecutions for the active bribery of Japanese public officials were dealt with by summary procedure. The Ministry of Justice did not provide the figures or statistics of the sanctions pronounced for these cases¹³⁸ but since the maximum fine under summary procedure is 500 000 yen (3 710 Euros or 4 540 USD), this means that in at least 17% of the cases the monetary sanctions imposed were very low.

Confiscation

182. Currently only the confiscation of the bribe is available pursuant to article 19 of the *Penal Code*.¹³⁹ In Phase 1 the Japanese authorities underscored that quantifying the proceeds of active bribery

¹³⁴ In 1998, 66 290 defendants were sentenced to imprisonment, of whom 42 031 received suspension of the execution of sentence. [*Criminal Justice in Japan* (United Nations Asia and Far East Institute, 2000)]

¹³⁵ The rate was 90% for active and passive bribery offences in 2002.

¹³⁶ In the six criminal prosecutions since 1990 a total of 66 persons were prosecuted, and all of the defendants received suspended sentences. No executive was fined. *The Role of Prosecutors in Japanese Antimonopoly Law Criminal Cases (Antitrust, Spring 2003, vol. 17, #2)*

¹³⁷ Pursuant to article 461 of the *Code of Criminal Procedure*, a suspected person may agree to pay a fine instead of undergoing a trial. In such cases the summary court may impose a fine of not more than 500 000 yen or a “minor fine”.

¹³⁸ The Japanese authorities simply mentioned that in the 110 cases where fines have been imposed for bribery in 1998, fines were 500 000 yen or below in all cases.

¹³⁹ In addition confiscation of the bribe is available pursuant to article 197-5 of the Penal Code, in respect of domestic bribery, and article 13 of the Anti-Organised Crime Law (AOCL), in respect of foreign bribery. However, in both cases the bribe can only be confiscated in the hands of the public official (i.e. the bribe “received” by an offender under article 197-5 of the Penal Code, and property “given” to a foreign public

was too difficult to have made it available as a sanction. Since Phase 1 the Japanese Government changed its position, at least in part due to the recommendation in this respect in the February 2004 *Report on Measures for Effective Prevention of Bribery of Foreign Public Officials* by the Consultative Committee. In response to the *Report*, a Bill amending the *Anti-Organised Crime Law* (AOCL) has been submitted to Parliament in which the definition of “crime proceeds” is enlarged to include “any property produced by, obtained through, or obtained in reward for” the foreign bribery offence under article 11(1) of the UCPL. The lead examiners consider this a positive development, but are unable to assess the effectiveness of the Bill until it has been tested in practice. In view of the failure of Parliament to pass the Bill two times already, the lead examiners remain concerned that the confiscation of the proceeds of bribery may not be available anytime soon. Moreover given that Japan does not currently confiscate the proceeds of bribery because of the difficulty in quantifying them, it remains to be seen whether the Japanese authorities will in practice be able to quantify them if this sanction becomes available.

(ii) Sanctions for Legal Persons

183. Since legal persons are not liable for the bribery of Japanese public officials under the *Penal Code*, it is not possible to predict the possible sanctions for legal persons convicted of bribing foreign public officials. The Ministry of Justice provided statistics on the number of prosecutions and convictions of legal persons from 1998 to 2002—on average 1 747 prosecutions and 259 convictions in trial per year. However no indication was given concerning the offences involved or the type and level of the sanction pronounced.

184. The Japanese authorities explained that the level of the fines for foreign bribery is not perceived by corporations as merely the cost of doing business. In Japan a criminal conviction for such an offence would attract substantial media coverage and criticism and would result in serious financial losses for a corporation as a result of the harm done to its reputation.

185. In addition it is noted that the maximum available fine does not necessarily have a bearing on the fine that is imposed in practice. For instance under the *Antimonopoly Act* which provides a maximum fine for legal persons of 100 million yen (740 000 Euros or 910 000 USD), the fines pronounced between 1990 and 2000 have been in the 4-130 million yen range, with more than 75% of the fines in the 4-9 million yen range (The 130 million yen fine exceeded the statutory maximum because two offences were merged). The fine under the *Antimonopoly Act* was raised to 500 million yen (3.71 million Euros or 4.54 million USD) in June 2002, and the fine for an untrue statement under the *Securities and Exchange Law* is 500 million yen.

186. Moreover it is not clear that the confiscation provisions in the Bill to amend the AOCL cover the confiscation of the proceeds of the offence of bribing a foreign public official upon conviction of a legal person.

Commentary

At this time, due to the absence of convictions, it is not possible to assess the effectiveness of the criminal penalties for the offence of bribing a foreign public official under the UCPL. However in view of the statistical material regarding domestic bribery, the level of sanctions available under the UCPL for natural as well as legal persons, and the current non-availability of confiscation for natural and legal persons, the lead examiners recommend that this issue be followed-up once there has been sufficient practice under the UCPL. Furthermore the lead

official in violation of the UCPL under article 13 of the AOCL). See also discussion concerning the Bill to amend the *AOCL* to expand the availability of confiscation to include confiscation of the proceeds of bribery above under A. 5. (ii) on “Proposed Confiscation Amendments”.

examiners recommend that the follow-up includes consideration of whether the sanctions for foreign bribery are effective, proportionate and dissuasive taking into account the following: 1. the impact of suspended sentences and the summary procedure, and 2. the monetary sanctions as a whole, including application of the new provision for confiscating the proceeds of bribing a foreign public official under the Bill to amend the AOCL.

The lead examiners also recommend that for the purpose of making a complete assessment of Japan's implementation of article 3 of the Convention, Japan compiles statistical information on the sanctions imposed for violations of the UCPL, including confiscation of the bribe, suspension of sentences and use of the summary procedure.

b. Administrative Sanctions

187. Effective administrative sanctions, including disqualification from participating in public procurement as well as official development assistance (ODA) and export credit programmes, can represent an important tool to combat the bribery of foreign public officials. Japan does not directly provide administrative sanctions upon conviction of the foreign bribery offence for either natural or legal persons (e.g. automatic disbarment from participation in public procurement). For this reason the on-site visit included an assessment of the policy approach of certain key agencies--the Japan Bank for International Co-operation (JBIC), the Nippon Export and Investment Insurance Agency (NEXI) and the Japan International Co-operation Agency (JICA)¹⁴⁰--involved in providing contracting and financing opportunities to Japanese firms, where their clients have been involved in the bribery of foreign public officials. Japan's public procurement authorities were not available during the on-site visit to discuss such policies in relation to the public procurement process.

(i) Official Development Assistance

Japan Bank for International Co-operation

188. Pursuant to the *Implementation Rules for Sanctions against a Party Engaged in Corrupt or Fraudulent Practices under a Contract Funded by JBIC ODA Loan*, a participant/contractor, Board member of the participant/contractor or employee of the participant/contractor will be disqualified from participating in ODA loan-financed contracts where bribery of a foreign public official contrary to the UCPL or bribery contrary to article 198 of the *Penal Code* is committed¹⁴¹ in relation to interested persons in the borrower's country or JBIC employees and staff. The disqualification period ranges from two to twelve months, depending on the level of authority of the individual responsible for the bribery offence.

189. So far no disqualification has been imposed for foreign bribery. However representatives of JBIC were able to share information about one major company against which there had been recent allegations concerning the bribery of a domestic public official. They explained that the company in question had had many ODA operations, but that the bribery allegations at issue did not involve ODA operations. JBIC therefore did not have the authority to disqualify the company, but instead the Ministry of Foreign Affairs requested that it not bid on projects related to ODA for three months.

¹⁴⁰ See description of responsibilities of JBIC, NEXI and JICA in footnotes under B.1.a.(iii) on "Agencies indirectly involved in the Implementation of the Convention and Revised Recommendation".

¹⁴¹ JBIC's representatives stated that it is not necessary to have a conviction in order to disqualify a company. No concrete procedure has been established for cases where a company is under investigation. Cases where charges have been laid would be addressed on a case-by-case basis.

190. Whether sanctions can be effectively applied by JBIC depends in large part on whether it has access to information about applicants' involvement in foreign bribery. Since JBIC is responsible for ODA and export credit, it is important that both sides of its operations share information about companies involved in foreign bribery. JBIC's representatives stated that internally all relevant information is shared between the two operations, but there did not appear to be a systematic way of doing this. They indicated that the export credit side has never disqualified a company blacklisted by the ODA side and vice-versa. They added that clear criteria have not been developed on how to address such cases.

Japan International Co-operation Agency (Technical Co-operation for Development Activities)

191. Pursuant to the *Sanction Bylaw of the Japan International Co-operation Agency*, representative executives, and employees are subject to disqualification from participating in JICA's activities where they have been arrested or prosecuted for bribery of JICA personnel or other public organisations. The disqualification period ranges for one month to nine months depending on the level of authority of the person who bribes.

192. Representatives of JICA believe that theoretically the *Bylaw* applies to cases involving the bribery of a foreign public official, although there is no express language to this effect and no cases have occurred so far. A revision to clarify the *Bylaw* would have to be submitted to the governing Board of JICA.

(ii) Export Credit

Japan Bank for International Co-operation

193. With respect to the export credit side of JBIC's operations, as provided in the responses of JBIC to the *2002 Survey (of the OECD Working Party on Export Credits and Credit Guarantees) on Measures taken to Combat Bribery in Officially Supported Export Credits (as of 14 May 2004)*, some measures are available before and after support is provided. JBIC officials explained that further measures have not been developed.

194. Before the decision to provide support has been made, certain actions are available¹⁴² but not required where there is sufficient evidence of bribery or a legal judgement of bribery.¹⁴³ It is however the practice to withhold support for the transaction in question where there is a legal judgement of bribery. The situation is essentially the same after support has been provided.¹⁴⁴

¹⁴² The available actions are: 1. the withholding of support for the transaction in question, and 2. the denial of access to official support for all business.

¹⁴³ In this respect the *Action Statement (of the OECD Working Party on Export Credits and Credit Guarantees) on Bribery and Officially Supported Export Credits* states as follows: "If there is sufficient evidence that such bribery was involved in the award of the export contract, the official export credit or export credit insurance provider shall refuse to approve credit, cover or other support".

¹⁴⁴ In this respect the *Action Statement (of the OECD Working Party on Export Credits and Credit Guarantees) on Bribery and Officially Supported Export Credits* states as follows: "If, after credit, cover or other support has been approved, an involvement of a beneficiary in such bribery is proved, the official export credit or export credit insurance provider shall take appropriate action, such as denial of payment or indemnification, refund of sums provided and/or referral of evidence of such bribery to the appropriate national authorities".

195. NEXI's responses to the 2002 Survey cited above are essentially the same as those of JBIC. Thus according thereto NEXI would in practice withhold support for the transaction in question where there is a legal judgement of bribery before support is provided and after. However at the on-site visit the representatives from NEXI indicated that NEXI would continue to deal with a company if it were convicted of foreign bribery because officially they have no right to reject insurance. They added that they might request an internal compliance programme, but a concrete policy has not been established in this regard.

Commentary

*In light of the absence of additional administrative penalties upon persons and entities convicted of the bribery of a foreign public official, the lead examiners recommend that the Japanese authorities encourage agencies such as JBIC, NEXI and JICA and its public procurement authorities to revisit their policies on dealing with applicants convicted of foreign bribery, to determine whether these policies are a sufficient deterrence.*¹⁴⁵

4. Statute of Limitations

196. During the on-site visit the lead examiners raised questions about the adequacy of the limitations period that applies to foreign bribery. Under article 250 of the *Code of Criminal Procedure*, the limitations period for an offence is determined according to the maximum sentence of imprisonment that can be imposed. With respect to the active domestic and foreign bribery offences, the limitations period is three years.¹⁴⁶ The running of the limitations period is not suspended or interrupted by the initiation of an investigation. Since investigations of foreign bribery can be expected to be long-running--due to the complexity of the cases, the difficulty in identifying perpetrators, and the need for mutual legal assistance in most cases--the three-year limitations period could represent a serious obstacle to the effective implementation of the Convention.

197. The prosecutors met during the on-site visit were frustrated that they sometimes were not able to prosecute active bribery cases because of the expiration of the limitations period. On the other hand they were able to prosecute the corrupted official, since the limitations period for passive bribery is five years. They believe that the limitations period should be lengthened for active bribery. However the representatives of the Ministry of Justice indicated that no initiative was planned to address this concern.

198. In the *Report on Measures for Effective Prevention of Bribery of Foreign Public Officials* the Consultative Committee acknowledges that the statute of limitations for the foreign bribery offence "may need to be longer than in the case of a crime committed in Japan" considering that legal assistance from another country will normally be requested in order to punish a Japanese national who commits an offence abroad. However the Consultative Committee does not make any recommendation in this respect, and

¹⁴⁵ This Commentary shall not be interpreted as a suggestion that the policies of JBIC and NEXI do not meet the standards set out in the *Action Statement* (of the OECD Working Party on Export Credits and Credit Guarantees) on *Bribery and Officially Supported Export Credits*, or the *Recommendations of the OECD Development Co-operation Directorate (DAC Recommendations)*.

¹⁴⁶ During the Phase 1 round of examinations of certain countries, including Japan, the Working Group agreed that the statute of limitations is a general issue for a comparative analysis that should be taken up at a later stage. In the Phase 2 examination of Korea the lead examiners stated that such an analysis should be carried out by the Working Group as a matter of priority.

instead states that the issue “should be further examined by the Working Group on Bribery” since Japan is not the only country facing this “concern”.

199. Since the lead examiners did not receive a translation of the *Report* until following the on-site visit, they did not have an opportunity during the on-site visit to question the Japanese authorities about the appropriateness of the Consultative Committee’s recommendation.

Commentary

It is the view of the lead examiners that the 3-year statute of limitations for the offence of bribing a foreign public official does not allow an adequate period for the investigation and prosecution of the offence because: 1. Japanese prosecutors have encountered problems in meeting the deadline for the limitations period in the context of the active bribery of domestic public officials, which carries the same limitations period, and 2. Investigations of foreign bribery cases can be expected to be more complicated than for domestic bribery cases, in particular given the need in most cases for mutual legal assistance.

The lead examiners therefore recommend that Japan 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.

D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

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

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

I. Recommendations

Recommendations for Ensuring Effective Prevention and Detection of Foreign Bribery

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

- (a) Consider establishing, notwithstanding the secrecy provisions under the National Public Service Law and the Local Public Service Law, an obligation for all public officials; and establishing procedures requiring all employees of relevant entities including JBIC, NEXI and JICA, to report as a matter of course to the law enforcement authorities any payments suspected of being bribes to foreign public officials; (Revised Recommendation, Paragraph I)
 - (b) Establish as a matter of priority a formal system to enable METI to effectively process allegations of foreign bribery and pass them on to the law enforcement authorities, given its role as the government agency responsible for the implementation of the UCPL, which includes the foreign bribery offence, and the METI Guidelines and the resulting likelihood that it will receive allegations; (Revised Recommendation, Paragraphs I and II)
 - (c) Clarify that external auditors are required to report indications of possible illegal acts of bribery to management and, as appropriate, to corporate monitoring bodies, and consider providing an exception to the duty of confidentiality by requiring external auditors to report indications of a possible illegal act of bribery to competent authorities;¹⁴⁷ (Revised Recommendation Paragraph V.B.iii)and iv))
 - (d) In applying its legislation in the field of whistle-blowing, improve the protection of persons who report directly to the law enforcement authorities; and pursue its efforts to make such measures more widely known among companies and the general public; (Revised Recommendation, Paragraph I) and
 - (e) Consider establishing a centralised mechanism for the purpose of facilitating the sharing of information and co-ordination of investigations and prosecutions of transnational bribery cases.
10. With respect to the prevention and detection of foreign bribery through accounting requirements, external audit and internal company controls, the Working Group recommends that Japan:
- (a) Ensure that all of the activities listed under article 8.1 of the Convention are prohibited, including the establishment of off-the-books accounts and the recording of non-existent expenditures, for the purpose of bribing foreign public officials or of hiding such bribery, and ensure the provision of effective, proportionate and dissuasive penalties for such omissions and falsifications; (Convention, Article 8) and
 - (b) Encourage the development and adoption of adequate internal company controls, including standards of conduct, and provide companies with more guidance concerning the establishment of effective internal auditing and supervisory mechanisms (including how to respond to solicitation from foreign public officials). (Revised Recommendation, Paragraph V.B.)
11. With respect to the detection and prevention of foreign bribery through money laundering legislation, the Working Group recommends that the Government of Japan encourage the *Diet* (Parliament) to pass as a matter of priority the Bill to amend the *Anti-Organised Crime Law* in order to include the proceeds of bribing a foreign public official in the definition of “crime proceeds” for the purpose of the application of the money laundering offences. (Convention, Article 7)

¹⁴⁷

The Working Group notes that this is a general issue for many Parties.

Recommendations for Ensuring Effective Prosecution and Sanctioning of Foreign Bribery Offences

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

II. Follow-up by the Working Group

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

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