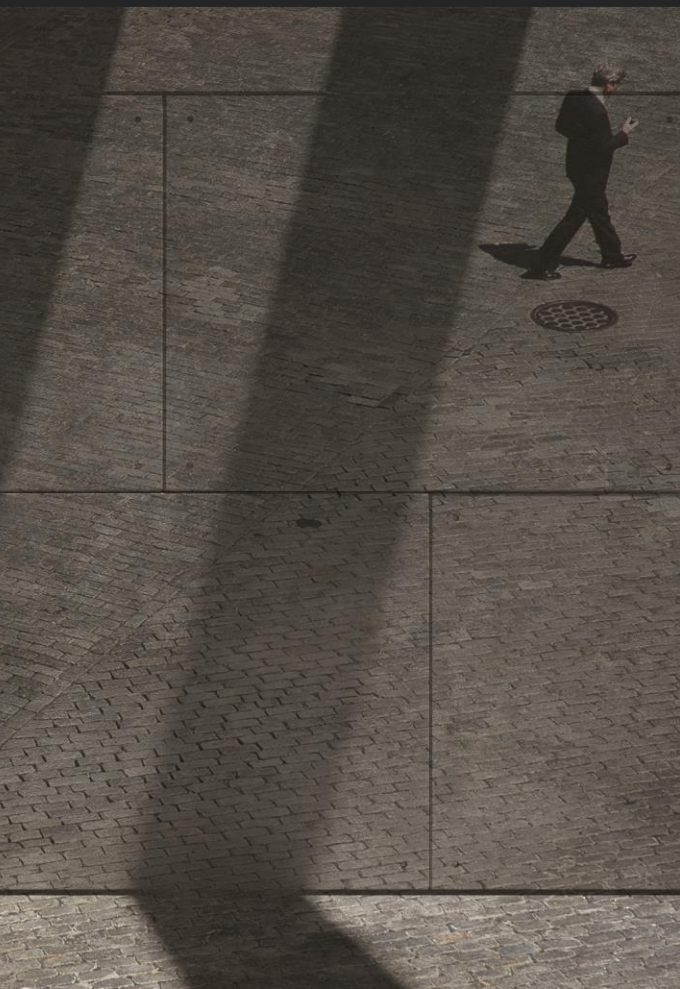




# IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION



PHASE 4 TWO-YEAR  
FOLLOW-UP REPORT:  
**Japan**



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This report, submitted by Japan, provides information on the progress made by Japan in implementing the recommendations of its Phase 4 report. The OECD Working Group on Bribery's summary of and conclusions to the report were adopted on 13 October 2021.

The Phase 4 report evaluated and made recommendations on Japan's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the 44 members of the OECD Working Group on Bribery on 27 June 2019.

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## Summary and Conclusions

### Summary of main findings<sup>1</sup>

1. In October 2021, Japan presented its two-year written follow-up report to the OECD Working Group on Bribery (“Working Group” or “WGB”), outlining the steps taken to implement the 51 recommendations and to address the follow-up issues contained in its June 2019 [Phase 4 report](#). Based on Japan’s follow-up report, the Working Group concludes that Japan has fully implemented 7 recommendations, partially implemented 23 recommendations and not implemented 21 recommendations.

2. Overall, the follow-up report highlights Japan’s continued lack of implementation of the OECD Anti-Bribery Convention, even though certain recommendations reflect issues that the Working Group has raised since Phase 2. In particular, the Working Group is concerned by Japan’s weak enforcement of its foreign bribery offence. The Phase 4 report raised substantial concerns that Japan’s enforcement rate was not commensurate with the size and export-oriented nature of its economy or the high-risk regions and sectors in which its companies operate, in particular with regard to the negligible number of legal persons sanctioned to date. These concerns remain valid at the time of this report. Since Phase 4, only two individuals have been sanctioned in two relatively minor cases. In total, since 1999 and as of July 2021, only 14 individuals and 2 legal persons have been convicted in 6 foreign bribery cases. With the exception of the two cases that resulted in sanctions, Japan did not provide information on foreign bribery investigations and prosecutions since Phase 4, despite the Working Group’s repeated requests in this regard, including in letters sent to relevant Ministers after Japan’s additional one-year written follow-up report in July 2020.<sup>2</sup>

3. While the Working Group acknowledges that Japan has taken some steps, for instance, updating METI’s Guidelines and amending the Whistleblower Protection Act, it remains seriously concerned that Japan did not fully implement the majority of its Phase 4 recommendations. Specifically, the four recommendations that the WGB identified as priority issues remain unimplemented. These concern key legislative measures to reform its statute of limitations for foreign bribery, to substantially increase the statutory maximum fines for natural and legal persons convicted of foreign bribery, or to ensure that Japan has nationality jurisdiction over Japanese companies for foreign bribery including where a non-Japanese employee pays a bribe in a foreign country. Despite the urgency, Japan has not taken any actions other than METI’s convening of a Study Group launched in January 2020 to consider whether legislative

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<sup>1</sup> The evaluation team for this Phase 4 two-year written follow-up evaluation of Japan was composed of lead examiners from **Australia** (Australia was represented by Detective Sergeant Colin Hunt, Australian Federal Police; Mr. Tim Postma, Principal Federal Prosecutor, Commonwealth Director of Public Prosecutions; and Ms. Marion Barraclough, Assistant Director, Criminal Law Section, Attorney-General’s Department. and **Norway** (Norway was represented by Ms. Mona Ransedokken, Senior Adviser, Ministry of Justice and Public Security, International Section and Ms. Sissel Gørrissen, Special Investigator, ØKOKRIM (National Authority for Investigation and Prosecution of Economic and Environmental Crime) as well as members of the **OECD Anti-Corruption Division** (Ms. Sandrine Hannedouche-Leric, Evaluation Coordinator and Senior Legal Analyst, Mr. Brooks Hickman and Ms. Lise Née Legal Analysts). See Phase 4 Procedures, paras 54-62 on the role of Lead Examiners and the Secretariat in the context of two-year written follow-up reports.

<sup>2</sup> The Chair of the Working Group has not received any official reply to the letters sent to the Minister of Economy, Trade and Industry, the Minister of Justice, the Chairperson of the National Public Safety Commission, and the Minister for Foreign Affairs.

reforms were necessary. As the METI Study Group did not find a consensus to make reforms, Japanese authorities are, at this stage, no longer seeking to implement the relevant Working Group's recommendations.

4. The Working Group is concerned that Japan deferred to the METI Study Group's conclusion that it was not necessary to implement the Working Group's four priority recommendations because it deemed them to be unfounded and irrelevant in Japan's context. While respecting the principle of functional equivalence and recognising the need for consultation, the WGB regrets that Japan has not implemented the priority recommendations. The Working Group calls on the Japanese authorities to implement these recommendations in order to bring its legal framework in line with the requirements of the Convention.

5. Other measures to respond to the Working Group's recommendations remain a work in progress. Just prior to submitting its responses to the evaluation team in late June 2021, the Supreme Public Prosecutors Office issued guidance (the SPPO guidance) to which Japan referred concerning updates for 12 Phase 4 recommendations (recommendations 6.a, 6.b, 6.d, 6.f, 7.a, 9.b, 12.b, 14.a, 14.c, 14.d, 15.b, and 16.c). Based on the abstracts provided, however, the SPPO guidance generally appears to be too generic to address the specific requirements in most of the relevant recommendations. As the SPPO Guidance was only released in late June 2021, its impact and concrete application on enforcement in practice is also unknown. The WGB will thus follow-up on its effect in practice.

6. Given Japan's limited implementation of its Phase 4 recommendations, in particular the fact that the four priority recommendations identified by the Working Group remain unimplemented, as well as Japan's continued weak enforcement record, the Working Group decided to organise the technical mission, first contemplated when the Phase 4 Report was adopted. It also decided to issue a public statement to explain the reasons for the mission. The mission would take place once it can be conducted in-person in light of the Covid-19 situation. In addition, the Working Group decided to invite Japan's Ambassador to the OECD to attend as soon as possible a Working Group plenary to discuss the Working Group's concerns and possible ways forward. It also decided to ask Japan to report back to the Working Group in March 2022 on the four priority recommendations. If Japan has not made sufficient progress at that time, the Working Group reserves the possibility of taking additional measures to address its concerns.

7. The Working Group's conclusions concerning the implementation of the recommendations covered in Japan's Phase 4 written-follow up report are presented below:

#### Regarding the detection of foreign bribery:

- ◆ *Recommendation 1.a – Partially implemented.* Regarding the detection of foreign bribery by Japanese overseas missions, Japan has revised the manual for its foreign attachés in Japanese overseas missions, which now expressly mentions that one of the main tasks of the attachés is to monitor local news to detect any potential cases. However, Japan has taken no measures to analyse why, at the time of Phase 4, its overseas missions had previously failed to report any potential foreign bribery allegations detected on its own initiative and take appropriate remedial action to address these failures. Since 2019, four reports, including one based on an article from the local media, were received from foreign attachés on potential foreign bribery allegations.
- ◆ *Recommendation 1.b – Not implemented.* Regarding the development of a clearer policy explaining the extent to which self-reporting will be considered in resolving and sanctioning foreign bribery cases, Japan reiterates its prior position that further guidance would be inappropriate because such determinations should be made on a case-by-case basis. Furthermore, it maintains that a cooperating suspect who concludes an agreement with prosecutors under the Agreement Procedure will, over the course of discussions with prosecutors, know the benefits that will be obtained in exchange for cooperation. This response does not address the recommendation

to develop a self-reporting policy to make the factors that will be taken into account public and transparent before the suspect reports in order to provide appropriate incentives for self-reporting. No new measures have thus been taken to implement the recommendation.

- ◆ *Recommendation 1.c – Partially implemented.* Japan reports that, in order to raise awareness and prevent fraud and corruption in ODA projects, its ODA agency, JICA, has been conducting training programs to improve the capacity of government officials in recipient countries to prevent foreign bribery; seminars to familiarise them with the terms and conditions of ODA-related contracts; and seminars for consultants who may participate in ODA projects. While these efforts should be recognised, they have not targeted employees of Japan’s ODA agencies or their contractors as recommended by the WGB. It is also unclear whether and how these may have contributed to achieve improvement in addressing foreign bribery risks, and raising awareness about foreign bribery red flags and the channels for reporting suspicions to Japan’s law enforcement authorities, with the exception of one online seminar which targeted JICA’s officials in Latin America and implementing partners in Peru. MOFA and JICA’s “Anti-Corruption Policy Guide”, which summarises MOFA and JICA’s anticorruption measures in ODA projects; “JICA Anti-Corruption Guidance”; and the “Consultation Desk on Anti-Corruption” remain unchanged since Phase 4.
- ◆ *Recommendation 1.d – Partially implemented.* The Working Group recommended that Japan’s export credit agencies, JBIC and NEXI, improve their ability to detect and report suspected acts of foreign bribery. As at the Phase 4 evaluation, neither has yet detected a foreign bribery matter. Both agencies now report that they have designated channels for reporting suspicions, and they have made efforts since Phase 4 to raise awareness about the need to report foreign bribery as well as the applicable procedures for doing so. Nonetheless, they did not develop criteria to help staff determine when to make a report, as they maintain that a decision would be reached on whether to report on a case-by-case basis. Furthermore, it is not entirely clear how such reports would be handled in practice within each agency before they are transferred to the national police and/or prosecutors.
- ◆ *Recommendation 1.e – Not implemented.* As no known foreign bribery investigations in Japan have begun based on a report from accountants or auditors, the Working Group recommended that Japan consider requiring auditors to report to law enforcement without first raising the issue with corporate management. Unlike its approach for other recommendations involving a legislative change Japan did not report forming a study group to examine the issue underlying this recommendation. It appears to have concluded that auditors’ existing confidentiality obligations prevented the consideration of any reforms at this time. Given that the auditors in at least one of Japan’s concluded cases had flagged, but not reported, the foreign bribery transaction as suspicious, the Working Group believes that Japan should have considered the substance of this recommendation on the merits before deciding that it would be too difficult to pursue.
- ◆ *Recommendation 1.f – Partially implemented.* Again with the goal of improving detection of foreign bribery by auditors and accountants, the Working Group recommended that Japan develop guidance clarifying when foreign bribery should be considered “material” for reporting purposes and to provide training to increase the profession’s awareness and capacity to report foreign bribery. Japan reports that the Japanese Institute of Certified Public Accountants (JICPA), a professional regulatory organisation, revised its guidelines in September 2019 on responding to illegal activities detected in the course of professional activities. Under the revised guidelines, auditors and accountants should take appropriate actions in response to such illegal activities, “including reporting to the authorities”. JICPA, to which all certified public accountants must be registered, has been conducting trainings on its new standard. While positive steps have been taken to train and raise auditors’ awareness about reporting violations, they do not directly address the issue of whether foreign bribery should be considered “material”.

- ◆ *Recommendation 1.g – Not implemented.* Japan has not taken any measures to ensure that laws relating to freedom of the press and equal access to information are fully applied in practice in respect of foreign bribery reporting.

#### Regarding anti-money laundering (AML) measures to enhance detection of foreign bribery:

- ◆ *Recommendation 2.a – Not implemented.* Japan has not taken any measures to require legal professionals and accountants to report suspected money laundering predicated on foreign bribery, without prejudice to professional secrecy or legal professional privilege.
- ◆ *Recommendation 2.b – Fully implemented.* Regarding anti-money laundering (AML) measures to enhance detection of foreign bribery, Japan has taken some steps to ensure that JAFIC is adequately resourced to effectively detect money laundering cases predicated on foreign bribery. JAFIC has set-up a specific unit to analyse foreign bribery red flags. A budget of JPY 290 million (equivalent to USD 2.57 million) was allocated to JAFIC for 2021. JAFIC reports that reports on suspicious transactions involving foreign bribery have been referred by JAFIC to law enforcement authorities. No information was provided regarding whether any foreign bribery investigation has since been initiated on this basis.
- ◆ *Recommendation 2.c. – Partially implemented.* The Working Group recommended that Japan develop typologies of money laundering that specifically address foreign bribery and use such typologies to train JAFIC staff and reporting entities specifically on detecting foreign bribery. Japan reports that JAFIC has issued three information notes on foreign bribery, including one identifying some red-flags. However, the notes are too succinct to implement the recommendation to develop typologies and do not cover the specific features of the laundering of proceeds of foreign bribery following the amendment to the AOCL in June 2017. The notes are not either directed to all reporting entities but only to law enforcement authorities and some financial institutions. Japan did not provide typology-based training to JAFIC staff and reporting entities on detecting foreign bribery.

#### Regarding whistleblower protection:

- ◆ *Recommendation 3.a – Fully implemented.* The Working Group recommended that Japan's Whistleblower Protection Act (WPA) should cover certain categories of individuals working for companies, such as officers, directors, and other managers who were previously not covered as they were not considered “workers” under Japanese employment law. Japan reports that the WPA was amended in 2020 to extend its coverage to officers, directors, and other corporate management. While the adopted law provides that its provisions will only enter into force in June 2022, the Working Group accepts Japan’s representation that this will happen automatically without any additional legislative or executive action.
- ◆ *Recommendation 3.b – Not implemented.* The Working Group observed that the WPA still does not provide any sanctions for retaliation, leaving whistleblowers with the obligation to bring a civil action to seek damages under employment or other legal frameworks. In its update, Japan reports that it is issuing new guidelines to reflect the 2020 amendment broadening the scope of protected employees and that it can impose sanctions on companies that do not create proper frameworks for handling whistleblower reports. While these measures may help prevent retaliation against whistleblowers, neither measure appears to improve the protections for whistleblowers who are seeking redress after having suffered retaliation or discrimination. Japan also reports that new Guidelines issued require employers to provide remedial measures, but it is not clear from Japan’s report what measures would be required or what remedies whistleblowers would have if the employer does not adhere to the Guidelines.



### Regarding enforcement of the foreign bribery offence:

- ◆ *Recommendation 4 – Fully implemented.* Regarding the foreign bribery offence, the new METI Guidelines (English translation provided by Japan) have now clarified that the advantage given to the official can be provided on a person’s own behalf or “on behalf of any other natural person or legal entity”, in line with Commentary 6 to the OECD Anti-Bribery Convention. Also, with the deletion of the sentence that was referring to “duress” in the 2017 version of METI Guidelines, the Guidelines no longer imply that economic harm to a company could be used as a defence for foreign bribery. Finally, the METI Guidelines are now quoting the language in Commentary 8 to the Convention – which recognises that no offence will occur if the advantage provided to the foreign official was permitted or required by written law, including case law – thus closing, what the Phase 4 report named “a major loophole”. However, it remains unclear where and how such exception may be grounded in the UCPL and the WGB should follow-up, as case law develops, how the exception based on Commentary 8 is interpreted and possibly applied by courts.
- ◆ *Recommendation 5 – Not implemented.* The revised METI Guidelines are still wrongly defining small facilitation payments as small bribes, i.e. payments made with the objective “to obtain a wrongful gain”, which, unlike small facilitation payments (as defined in Commentary 9 to the Convention) are covered under the UCPL. Based on this erroneous definition, Japan has thus not encouraged companies to stop paying small facilitation payments but to stop paying small bribes, which were already expressly forbidden under the UCPL as any bribe, regardless of their size.

### Regarding cooperation, resources and specialisation in foreign bribery cases:

- ◆ *Recommendation 6.a – Partially implemented.* The Working Group recommended that Japan continue to develop and maintain foreign bribery specialisation in the police and the prosecution service. In particular, it expressed concern that that such specialisation may be lost through personnel rotations. Japan reports that, since Phase 4, it has trained officers on foreign bribery investigations, including training sessions provided by the National Police Agency (NPA) for police investigators and police attachés in Japanese embassies. The NPA also reports that the police force assesses police officers’ skills before making rotations and that it ensures the successful transition of duties. For the prosecution service, the Ministry of Justice (MOJ) reports that it is making best efforts to raise awareness about foreign bribery. In addition, the Supreme Public Prosecutor’s Office (SPPO) issued guidance in June 2021 calling for the maintenance of specialisation upon the rotation of personnel by ensuring that case are appropriately transferred so that successor prosecutors are knowledgeable about the files. While recognising these efforts, the Working Group considers that it is premature to determine that the measures described will actually maintain and develop the necessary specialisation needed to conduct complex foreign bribery cases.
- ◆ *Recommendation 6.b – Partially implemented.* On the same specialisation theme, the Working Group recommended that Japan stagger rotations of police officers and prosecutors assigned to foreign bribery matters, particularly when a case approaches the end of the limitations period. In its update, Japan maintains that the prosecutor service considers a range of factors under the June 2021 SPPO guidance including the “state of the work” before making decisions on rotations, which would include consideration of the limitations period. For their part, the police report that they make assignments based on the officers’ competences. While these measures do not expressly address the idea of staggering personnel rotations, the Japanese authorities have taken some measures aiming to reduce the impact that personnel changes have on foreign bribery cases.
- ◆ *Recommendation 6.c – Not implemented.* In Phase 4, the Working Group recommended that Japan periodically review the police resources available for detecting and investigating foreign bribery. This recommendation follows findings that the prosecutors rarely requested the police to

investigate a foreign bribery matter that the police had not detected. In its written follow-up, Japan reports that the police will periodically consider its officers' competencies before making assignments to foreign bribery matters. This update, however, does not address whether the prosecution service is considering available police resources when it is leading a foreign bribery investigation.

- ◆ *Recommendation 6.d – Partially implemented.* In Phase 4, the Working Group sought to foster better use of police resources in foreign bribery matters by recommending that the prosecutors' offices consult with the NPA when beginning a new foreign bribery matter. In its update, Japan reports that the MOJ is raising awareness among prosecutors about this Working Group recommendations and that the SPPO June 2021 guidance also requires prosecutors to cooperate closely with the police concerning investigation plans and related matters for foreign bribery investigations. While acknowledging that Japan's prosecution service has taken some recent steps to foster cooperation with police, it is too early to conclude whether they will actually have the practical effect of ensuring that the prosecutors "routinely consult" with the police in foreign bribery matters.
- ◆ *Recommendation 6.e – Partially implemented.* In Phase 4, the Working Group recommended that Japan report back on specific instances where police and prosecutors cooperated in investigating foreign bribery matters and, for other foreign bribery matters, to explain why the police are not involved in such cases. For its update, Japan reports that the police has conducted the preliminary investigations, in consultation with the prosecutors, in all four investigations commenced since the Phase 4 evaluation. Japan did not, however, explain why the police conducted these investigations or how the police worked with the prosecutors in those investigations.
- ◆ *Recommendation 6.f – Partially implemented.* In Phase 4, the Working Group recommended that, regarding cooperation between law enforcement, tax authorities and JAFIC, Japan ensure that law enforcement authorities systematically seek information held by the tax authorities, JAFIC and other relevant agencies at the early stage of their investigations. Japan reports that the public prosecutors have been made aware of this recommendation during two general conferences in October 2019 and July 2021 and three training sessions in 2021. However, these were general awareness-raising events about Phase 4 WGB recommendations and the sharing of case examples. Additionally, Japan reports that the SPPO guidance mentions that public prosecutors should proactively consider using the information held by relevant organisations, such as the National Tax Authority and the Securities and Exchange Surveillance Commission in appropriate cases. However, the text of the SPPO Guidance does not refer to JAFIC and does not address the need for law enforcement authorities to systematically seek information held by these other authorities at the early stage of their investigations. Japan further indicates that the police has obtained useful information from JAFIC and other relevant agencies in foreign bribery investigations since Phase 4. However, Japan did not refer to any specific case and provided no information on actual cooperation between the NTA, and other relevant law enforcement authorities.

#### Regarding the investigation and prosecution of foreign bribery:

- ◆ *Recommendation 7.a – Not implemented.* The WGB recommended that Japan urgently take measures to achieve stronger enforcement of its anti-bribery legislation and report back to the Working Group on both these measures and enforcement results. As with other recommendations, Japan merely reports that the MOJ has made public prosecutors aware of this recommendation during the same general conferences and training sessions mentioned under recommendation 6.f. Japan also reports that the SPPO guidance now provides that the prosecutors "should make efforts to appropriately implement the relevant laws and regulations, to thoroughly conduct investigations and prosecution". Both measures appear too general in nature to trigger a genuine shift in law

enforcement practices and thus achieve a more proactive enforcement of foreign bribery. Japan also reports that, since Phase 4, it has trained officers on foreign bribery investigations as described under recommendation 6.a. Japan provided limited information on five cases sanctioned since Phase 4, three of which are not foreign bribery cases under Article 1 of the Convention. As a result, since Phase 4, only two additional natural persons have been sanctioned in two foreign bribery cases. Japan otherwise declined to provide information on foreign bribery cases investigation and prosecution since Phase 4 (whether newly initiated, terminated or still ongoing). The extremely limited measures taken and enforcement progress achieved both show that this recommendation was not granted priority by Japan and that two years after the Group identified it as urgent, it is yet to be implemented.

- ◆ *Recommendation 7.b – Not implemented.* The Working Group expressed concern about the lack of incentives for self-reporting. In addition, it noted the need to ensure that those who self-report are not automatically provided with immunity in a way that would prove an impediment to the effective enforcement of the foreign bribery offence. In its report, Japan insists that decisions about immunity should be made on a case-by-case basis, which may, as practice evolves, alleviate concerns of automatic immunity. Japan also claims that agreements made by suspects with prosecutors under the Agreement Procedure will spell out the benefits the suspects will obtain in exchange for their cooperation in the investigation and prosecution of other suspects. Despite these clarifications, Japan has not adopted any new measures since the Phase 4 evaluation to implement this recommendation. In addition, it is not clear that “self-reporting” is a form of cooperation recognised under the framework for the Agreement Procedure.
- ◆ *Recommendation 7.c – Not implemented.* This recommendation to take urgent steps to further extend the statute of limitations for the foreign bribery offence was identified as a priority issue by the WGB in Phase 4. Japan reports that, based on the majority opinion of the Study Group on Prevention of Bribery of Foreign Public Officials it conveyed in 2020, it has decided not to further extend the statute of limitations for the foreign bribery offence or to introduce the possibility to suspend the limitation period during the investigation. This priority recommendation thus remains unimplemented with no further prospect for implementation.

#### Regarding the evidentiary threshold for the foreign bribery offence:

- ◆ *Recommendation 8 – Partially implemented.* Regarding the need to raise awareness of the prosecutors and the police about the evidentiary threshold for the foreign bribery offence, as for other recommendations, Japan indicated that it has taken some steps to inform prosecutors of the WGB recommendation. The MOJ has made public prosecutors aware of this recommendation during the conferences and the training sessions mentioned under recommendation 6.f. Japan also reports that it provided training to the police. Japan reports that these conferences and training sessions raised awareness about the Convention, relevant WGB Phase 4 recommendations, foreign bribery case examples and the importance of enforcing the foreign bribery offence. However, it is not clear whether these events actually targeted the issues identified in the recommendation with respect to the evidentiary threshold for the foreign bribery offence. Other training efforts were already assessed and deemed insufficient in Phase 4, in particular for judges.

#### Regarding the investigative techniques available in foreign bribery investigations:

- ◆ *Recommendation 9.a – Not implemented.* Japan did not amend its legislation to allow investigators and prosecutors to subpoena natural and legal persons who do not voluntarily cooperate, to compel the production of relevant documents and the testimony of individuals from an early investigation stage. It also did not make wiretapping and other covert investigative means available in foreign

bribery investigations. Japan indicates that it will further consider legislative measures on investigative methods but this has yet to materialise.

- ◆ *Recommendation 9.b – Partially implemented.* The Working Group recommended that Japan urgently take steps to more pro-actively investigate foreign bribery cases and improve the gathering of evidence, in particular by (i) developing police-to-police cooperation in parallel to formal and informal MLA; (ii) developing coordinated investigative activities of both the prosecution and the police, including through setting investigation plans from the earlier stages of an investigation; (iii) using coercive measures including search and seizure powers, in particular in relation to legal persons from the early stages of an investigation. (iv) lowering the threshold to seek court warrants to proceed with search and seizure; and (v) conducting forensic audits where relevant. As with other recommendations, Japan reports that the MOJ has made public prosecutors aware of this recommendation during the general conferences and training sessions mentioned under recommendation 6.f. Japan also reports that, since Phase 4, it has trained officers on foreign bribery investigations as described under recommendation 6.a. No supporting material was provided to the evaluation team but Japan reports that one of the themes covered was “how to collect leads”. While these awareness raising efforts are welcome, none of these, including the more specific last one, specifically implement the sub-parts i. to v. of this recommendation. Japan indicates that the new SPPO guidance generally encourages the public prosecutors to cooperate with the police, including by discussing investigative plans (9.b.ii) and to collect evidence by conducting search and seizures on legal persons as necessary (9.b.iii). While the SPPO guidance points to the right direction, it lacks detailed and practical measures to improve the gathering of evidence in foreign bribery investigations and does not address the other parts of the recommendation (9.b.i; iv. and v.). Whether these still limited measures have allowed Japan to more proactively investigated foreign bribery cases could not be assessed absent information provided by Japan on foreign bribery investigations since Phase 4.

#### Regarding the Agreement Procedure:

- ◆ *Recommendation 10.a – Not implemented.* The Working Group found that Japan could set out a clearer framework on the benefit that companies implicated in foreign bribery can obtain from cooperating in the ensuing investigation and prosecution of the matter. Japan does not report taking any new measures since Phase 4 to clarify the framework for giving credit to companies that cooperate. As elsewhere in its report, Japan reiterates that such decisions should be made on a case-by-case basis. Thus, companies considering whether to self-report or to cooperate still cannot make an assessment of the benefits and risks before approaching prosecutors.
- ◆ *Recommendation 10.b – Not implemented.* As it has done with other countries’ non-trial resolution regimes, the Working Group called on Japan to make public certain basic details about the agreements reached with suspects under the recently introduced Agreement Procedure to enhance transparency about such agreements. In its update, Japan states that it is “impossible” to make the terms of such agreements public as it might hinder the investigation and prosecution of foreign bribery cases. In addition, Japan observes that prosecutors may sometimes need to present certain agreements to the court, for example, when a cooperating witness testifies. Japan’s response does not engage with the Working Group’s concerns for broader public transparency and overlooks the fact that other Working Group member countries have managed to find ways to publicise key details, at an appropriate time, about non-trial resolutions without harming foreign bribery investigations and prosecutions.
- ◆ *Recommendation 10.c – Not implemented.* Given that the first use of Japan’s Agreement Procedure in a foreign bribery case resulted in the cooperating company receiving *de facto* immunity from prosecution without having to forfeit any illicit proceeds that may have been obtained, the Working

Group recommended that Japan ensure that it can condition the decision to decline to prosecute a cooperating suspect on the voluntarily relinquishment of ill-gotten proceeds. Japan reports that its criminal law framework currently only foresees confiscation following conviction. While Japan expresses a willingness to consider ways to address this point in conformity with its fundamental legal principles, it has not taken any steps to amend its legislation in this regard. Japan also does not seem to have considered whether such arrangements could be made on a voluntary basis, whereby the cooperating suspect agrees to forfeit ill-gotten gains as part of the cooperation agreement.

#### Regarding the role of METI and the MOJ in the conduct of foreign bribery investigations:

- ◆ *Recommendation 11.a – Partially implemented.* The Working Group recommended that Japan take urgent steps to ensure that all foreign bribery allegations received by METI or other agencies are transferred immediately to police and prosecutors able to take appropriate investigative steps. Japan reports that METI will now provide information directly to the NPA and the MOJ. The Ministry of Foreign Affairs also reports that it would promptly provide any information it obtained to the MOJ. For its part, the MOJ now reports that it would immediately transfer such information to the relevant public prosecutor's office. In fact, it reports that since the Phase 4 evaluation, the MOJ has received one referral of a possible foreign bribery matter from METI and it forwarded it to the relevant Public Prosecution Office within days of receipt. While this is a welcome development, this recommendation is considered to be partially implemented as Japan did not provide any indication that this one referral occurred on the basis of an actual MOJ policy that will apply in the future.
- ◆ *Recommendation 11.b – Not implemented.* In order to ensure prosecutorial independence and to avoid the consideration of any factors prohibited by Article 5 of the Convention in investigating or prosecuting foreign bribery cases, the Working Group recommended that Japan ensure that the prosecution service performs its duties in such cases independently of the executive, in particular influential ministries such as METI. In its report, Japan merely states that prosecutors are independent both by law and in practice. Japan does not, however, indicate any new measures that have been taken since Phase 4.
- ◆ *Recommendation 11.c – Partially implemented.* The Working Group sought to limit the potential that METI or other executive branch agencies could improperly refer to factors prohibited by Article 5 of the Convention when assessing the application of the foreign bribery offence. Japan reports that METI does not seek to obtain information about the identity of the persons involved, which addresses a key consideration prohibited by Article 5. Japan, however, does not specify whether any restrictions governing the type of information that can be shared apply to the law enforcement agencies that seek interpretative guidance from METI.
- ◆ *Recommendation 11.d – Not implemented.* The Working Group recommended that Japan enhance the criminal law expertise of the Intellectual Property Policy Division within METI. This Division, which is responsible for administering the Unfair Competition Prevention Law (UCPL) in which Japan's foreign bribery offence is codified, can give interpretations of the scope of the foreign bribery offence in response to queries from private businesses and government officials, including police and prosecutors. While these interpretations are not binding, they have great persuasive weight. Japan reports that METI is considering whether to require personnel to take university classes on the Penal Code in future years. If such a requirement is ever introduced, it would be welcome, assuming that it would apply to all METI officials responsible for making interpretations of the scope of the foreign bribery component of the UCPL.

### Regarding sanctions and confiscation:

- ◆ *Recommendation 12.a – Not implemented.* This recommendation was identified as a priority issue by the WGB in Phase 4. The Working Group recommendation to substantially increase the statutory maximum fine for natural persons convicted of foreign bribery dates back from Phase 3 (10 years ago). Japan reports that, based on the majority opinion of the METI Study Group on Prevention of Bribery of Foreign Public Officials convened in 2020, it has decided not to increase the maximum statutory fine. To support this decision, Japan reiterates arguments that the WGB already considered in past evaluations, including that the statutory fines for foreign bribery are already more severe than for domestic bribery. As for the other three priority recommendations, this recommendation thus remains unimplemented with no further prospect for implementation at this stage.
- ◆ *Recommendation 12.b – Partially implemented.* The Working Group recommended that Japan (i) impose both prison sentences and monetary fines against natural persons, where appropriate, in foreign bribery cases, and (ii) take all necessary steps, including through guidance and training to law enforcement and the judiciary to ensure that the sanctions imposed in practice for foreign bribery against natural persons are effective, proportionate and dissuasive. The first part of the recommendation (12.b.i) remains unimplemented as Japan has yet to impose both prison sentences and monetary fines against natural persons. The sanctions imposed against 2 natural persons since Phase 4 have remained very low (fines only amounting to JPY 1 million and JPY 2.5 million, i.e. approximately USD 10 000 and USD 25 000). The second part of the recommendation (12.b.ii) is partially implemented with the SPPO general guidance for public prosecutors, which mentions that the public prosecutors should seek appropriate sentences, including both prison sentences and monetary fines against natural persons and the general conferences and training sessions mentioned under recommendation 6.f.). While these measures are welcome, the SPPO guidance lacks details about what an “appropriate” sanction should be and Japan’s awareness-raising efforts lack the necessary details to trigger a change and ensure that Japan better meets the criteria of Article 3 of the Convention.
- ◆ *Recommendation 12.c – Partially implemented.* The Working Group recommended that Japan develop guidelines and provide training for both the police and prosecutors on the new confiscation regime and on the identification and quantification of proceeds of foreign bribery for confiscation purposes. Japan reports that, since Phase 4, it has trained officers on foreign bribery investigations as described under recommendation 6.a. Japan reports that one of the themes covered during the trainings was “the confiscation of crime proceeds from foreign bribery”. Absent any training material provided to the evaluation team, the level of details covered on this topic during the trainings and their relevance to recommendation 12.c. could not be assessed. Japan further indicates that the SPPO guidance generally directs public prosecutors to appropriately pursue the confiscation of crimes proceeds. However, the text of the SPPO Guidance is too generic to help the police and prosecutors effectively identify and quantify the proceeds of foreign bribery for confiscation purposes. To support the lack of more detailed guidance, Japan reiterates arguments that the WGB already considered in past evaluations, including that the identification and quantification of crime proceeds should be done on a case-by-case basis. No training have been provided to prosecutors.

### Regarding judicial awareness:

- ◆ *Recommendation 13 – Partially implemented.* Regarding its efforts to train judges at the District and High Court levels to ensure a high level of awareness of the technicalities of the foreign bribery offence and the Convention, Japan only reports that courts encourage judges to participate in

UNAFEI (United Nations Asia And Far East Institute) UNCAC Training Program (about a month training), which was already reported in Phase 4 and deemed insufficient and only targeting a very small number of judges. Japan however emphasises that this training has been held again in October 2019 and was attended by overseas investigators, prosecutors and judges who shared expertise and experience with Japanese participants. The content of the training was in turn widely disseminated among judges at the district and high court levels through participants' reports posted on an internal website. No new steps have thus been taken since Phase 4 to implement this recommendation.

#### Regarding the liability of legal persons:

- ◆ *Recommendation 14.a – Partially implemented.* After finding that Japan's enforcement of corporate liability provisions in foreign bribery cases was "alarmingly low", the Working Group recommended that Japan strengthen its enforcement of corporate liability in such cases. As with other recommendations, Japan reports that the MOJ has raised public prosecutors' awareness about this recommendation during conferences and training sessions mentioned under recommendation 6.f. and that the SPPO's June 2021 guidance informed prosecutors that they should actively prosecute legal and natural persons involved in foreign bribery. Even though Japan's enforcement of corporate liability in foreign bribery cases still has to materialise. This recommendation can be deemed partially implemented given Japan's representation that prosecutors must follow the SPPO Guidance when relevant cases arise.
- ◆ *Recommendation 14.b – Not implemented.* This recommendation was identified as a priority issue by the WGB in Phase 4. Since Phase 2, the Working Group has closely examined Japan's jurisdictional basis for holding companies liable for foreign bribery for acts committed abroad. Given that Japan's jurisdiction over Japanese companies is tied to its jurisdiction over the natural person who commits the offence, the Working Group expressed concern that Japanese companies might escape liability when a foreign national engages in foreign bribery outside of Japan's territory on behalf of a Japanese company. It thus encouraged Japan to review its legislation to ensure that it could assert jurisdiction over companies in such circumstances. Japan reports that it referred the matter to the METI Study Group, but that the Study Group did not have a consensus on whether to change its jurisdictional laws. Japan reports that the Study Group concluded that no change was necessary because foreign bribery involving Japanese companies would likely involve acts by employees that are either Japanese nationals or based in the territory of Japan. This overlooks the Working Group's concern that a company could escape liability if a non-Japanese national engaged in bribery on its behalf without coordinating with a Japanese national or an employee based in Japan. Thus, Japan has not implemented this recommendation to review whether it can ensure jurisdiction over a Japanese company regardless of the nationality of the employees involved in a foreign bribery scheme.
- ◆ *Recommendation 14.c – Partially implemented.* Given concerns that Japan's jurisdiction over Japanese companies may have a loophole when non-nationals engage in foreign bribery on their behalf, the Working Group encouraged Japan to ensure that its prosecutors explore all possible jurisdictional bases, including seeking evidence of complicity of Japanese nationals in the foreign bribery scheme as well as evidence that an element of the scheme was committed in Japan. In its update, Japan reports that MOJ has raised awareness about this recommendation among prosecutors and that the SPPO's June 2021 guidance addresses this issue. While Japan reports that the SPPO guidance is binding on prosecutors, it is too early to say whether these limited steps ensure that prosecutors are in fact examining all possible jurisdictional bases over Japanese companies in foreign bribery matters.

- ◆ *Recommendation 14.d – Partially implemented.* In light of Japan’s low level of corporate enforcement in foreign bribery cases, the Working Group recommended that Japan ensure that its prosecutors always consider whether false accounting charges could be filed against the Japanese companies whose subsidiaries engage in foreign bribery, particularly when non-nationals commit the offence abroad. As with other recommendations, Japan reports that the MOJ has made public prosecutors aware of this recommendation during conferences and training sessions mentioned under recommendation 6.f. Furthermore, it reports that the new SPPO guidance encourages prosecutors to consider such charges in foreign bribery matters. Thus, Japan has made some effort since Phase 4 to implement this recommendation, even though they have not yet had a noticeable impact in actual prosecutions.
- ◆ *Recommendation 14.e – Fully implemented.* As METI had set up a “Consulting Desk” to field queries from companies about Japan’s foreign bribery offence, the Working Group recommended that METI analyse the requests received along with the survey data that it gathers about foreign bribery risks to ensure that its advice is tailored to the needs of Japanese companies operating abroad. In its update, Japan reports that METI has created an internal manual analysing the 160 consultation requests that it has received to date, which it can use to ensure consistency in METI’s advice as well as to identify issues that might need to be addressed in future legislation or guidance.

### Regarding sanctions for legal persons

- ◆ *Recommendation 15.a – Not implemented.* This recommendation was identified as a priority issue by the WGB in Phase 4. The Working Group recommended that Japan either raise the statutory fine for companies that engage in foreign bribery or enact alternative sentencing provisions to ensure that the fines imposed are sufficiently effective, proportionate and dissuasive. Japan reports that it has referred this question to the METI Study Group, but a majority considered that there was no need to raise the fines, even though members acknowledged that the fines imposed for foreign bribery were lower than those imposed for other financial offences. As a result, Japanese authorities do not appear to be considering any legislative proposals at this time..
- ◆ *Recommendation 15.b – Partially implemented.* Regarding the recommendation to urgently take steps to ensure that sanctions imposed in practice against legal persons in foreign bribery cases are effective, proportionate and dissuasive, as with other recommendations, while Japan reports that some steps have been taken, these fall short from addressing the WGB’s concerns that sanctions imposed to date against legal persons were too low. The MOJ has made public prosecutors aware of this recommendation during the general conferences and training sessions mentioned under recommendation 6.f. These measures are too generic to fully address the specific and urgent concerns expressed by the WGB. Japan further states that the SPPO guidance includes a general mention of the need to reach appropriate sentences against legal persons and to confiscate crime proceeds. This is also too generic to ensure that sanctions imposed in practice against legal persons in foreign bribery cases meet the criteria in Article 3 of the Convention. Additionally, Japan reports that, since Phase 4, it has trained officers on foreign bribery investigations as described under recommendation 6.a and that the training sessions covered the sanctioning of legal persons. Absent any training material, the level of details of the trainings on this topic could not be assessed. No specific steps have been taken to provide guidance and training to the judiciary. As no legal person has been sanctioned for foreign bribery since Phase 4, the possible impact of these measures remains to be seen.
- ◆ *Recommendation 15.c – Partially implemented.* Regarding sanctions for legal persons, the Working Group recommended that Japan ensure that the debarment regimes at the national and local levels are transparent so that companies will know the consequences that they can face if they engage in bribery. Japan reports that the MOFA and the Japanese International Corporation



Agency (JICA) in charge of ODA have published on their websites the debarment rules and decisions imposed against legal persons which have committed unlawful acts, including bribery of foreign public officials, in ODA funded projects. However, the other Japanese agencies with debarment regimes have not taken measures to make sure that their debarment regimes are transparent.

- ◆ *Recommendation 15.d – Not implemented.* Japan has not taken any measures to take into account the tax treatment applicable to confiscation measures in foreign bribery cases to ensure that overall, sanctions imposed on legal persons are effective, proportionate and dissuasive. As no legal person has been sanctioned since Phase 4, it is not possible to assess whether this issue has been taken into account in foreign bribery cases.

## Regarding other measures affecting implementation of the Convention

### Regarding tax measures:

- ◆ *Recommendation 16.a – Fully implemented.* Japan has taken some corrective measures to ensure that the identification of the bribe recipient(s) by the tax examiners is not required prior to reporting to law enforcement authorities. Japan reports that the revised instructions to tax examiners now stress that tax examiners need to report not only foreign bribery facts but also mere suspicions of bribery uncovered in taxpayers' returns.
- ◆ *Recommendation 16.b – Fully implemented.* Regarding training to tax inspectors on the detection of bribe payments, Japan indicates that the National Tax Agency provides annual trainings for the tax examiners in the 12 Regional Taxation Bureaus on the basis of the "Bribery and Corruption Awareness Handbook". In Phase 4, this training did not cover bribes concealed in taxpayers' books and records and in particular as "miscellaneous expenses". According to Japan, they now feature specific cases example where the bribe payments were disguised as miscellaneous expenses.
- ◆ *Recommendation 16.c – Not implemented.* Regarding encouraging law enforcement authorities to promptly inform the tax authorities of foreign bribery-related convictions and tax authorities to re-assesses the tax returns of taxpayers convicted of foreign bribery, Japan reports that the SPPO Guidance generally encourages public prosecutors to inform tax authorities of foreign bribery convictions but only if the prosecutor suspects that tax evasion has been committed. This places restriction on the enforcement of the non-deductibility of bribes as a taxpayer's tax returns should be systematically re-assessed upon a foreign bribery conviction and not just if a tax offence is suspected. Furthermore, Japan reports that the NTA intends to re-assess the tax returns of taxpayers convicted of foreign bribery when the Ministry of Justice or the Public Prosecutor's Office informs tax authorities of foreign bribery-related convictions. However, no formal system has been put into place to ensure that law enforcement authorities routinely inform the NTA that a taxpayer has been convicted of bribery. No steps were reported either to encourage law enforcement authorities to promptly inform the tax authorities of foreign bribery-related convictions.

### Regarding Official Development Assistance:

- ◆ *Recommendation 17.a – Fully implemented.* Regarding considering extending the policy Japan has initiated to enter into agreements and form joint committees for preventing corruption in Japanese ODA to the governments of countries with high corruption risk, Japan reports that it has continued to be active in working with recipient countries to prevent foreign bribery in its ODA projects and address it jointly when it happens. Japan extended the policy it has initiated to enter into agreements (486 documents, signed since 2019 with 123 ODA recipient countries, including a corruption prevention and reporting clause) but reports that it has not formed new joint committees

for preventing corruption in Japanese ODA to the governments of countries with high corruption risk. Given that this is a recommendation to consider such measures, it can be deemed fully implemented.

- ◆ *Recommendation 17.b – Partially implemented.* In Phase 4, the Working Group recommended that Japan ensure that JICA and MOFA verify the accuracy of the information provided by applicants, including the verification of debarment lists of national and multilateral financial institutions beyond the World Bank and consideration of an applicant’s corruption risk management system. Japan reports that JICA has adopted a system whereby companies or individuals cross-debarred by Multilateral Development Banks (MDBs), including the World Bank Group (WBG), are ineligible to participate in procurements of ODA loans projects. However, Japan’s consideration of compliance programs, only occurs in case of a wrongful act by a company in the course of an ODA funded project, which is a lot narrower in scope than what was recommended by the WBG.

### Dissemination of the Phase 4 Report

Japan reports that its Ministry of Foreign Affairs has posted the Phase 4 Report on its website, along with other information about the OECD Anti-Bribery Convention. In addition, Japan provided a Japanese translation of the Phase 4 Report’s Executive Summary as well as its recommendations for the OECD website.

### Conclusions of the Working Group on Bribery

Based on these findings, the Working Group concludes that of 51 Japan’s recommendations, 7 have been fully implemented (recommendations 2.b; 3.a; 4; 14.e; 16.a; 16.b and 17.a); 23 have been partially implemented (recommendations 1.a; 1.c; 1.d; 1.f; 2.c; 6.a; 6.b; 6.d; 6.e; 6.f; 8; 9.b; 11.a; 11.c; 12.b; 12.c; 13; 14.a; 14.c; 14.d; 15.b; 15.c and 17.b); and 21 have not been implemented (1.b; 1.e; 1.g; 2.a; 3.b; 5; 6.c; 7.a; 7.b; 7.c; 9.a; 10.a; 10.b; 10.c; 11.b; 11.d; 12.a; 14.b; 15.a; 15.d and 16.c ).

## Written Follow-Up Report by Japan

**Date of approval of Phase 4 evaluation report:** 27 June 2019

**Date of information:** 2 July 2021

### PART I: RECOMMENDATIONS FOR ACTION

*Regarding Part I, responses to the first question should reflect the current situation in your country, not any future or desired situation or a situation based on conditions which have not yet been met. For each recommendation, separate space has been allocated for describing future situations or policy intentions.*

#### Recommendations regarding detection of foreign bribery

##### **Recommendation 1(a):**

1. Regarding the **detection** of foreign bribery, the Working Group recommends that Japan:
- a. Analyse why Japanese overseas missions have failed to report any potential foreign bribery allegations and take appropriate remedial actions to address these failures. They further recommend that Japan ensure that its overseas missions actively monitor the local media with a view to detect foreign bribery. [2009 Recommendation III.iv. and IX.ii.]

##### **Action taken as of the date of the follow-up report to implement this recommendation:**

With the objective of sound implementation of the Anti-Foreign Bribery Convention, Ministry of Foreign Affairs installs anti-foreign bribery attaché in 225 overseas diplomatic establishment and delivers an official order twice a year to report the information to be concerned with a case suspected to have potential foreign bribery. The main tasks of the attaché are;

- i) to be a point of contact for Japanese nationals and enterprises that have information of potential and actual foreign bribery case, and,
- ii) to publicise the intent and purpose of the Anti-Foreign Bribery Convention among Japanese nationals and enterprises, and
- iii) to monitor local news to detect any potential cases.**

**If no action has been taken to implement recommendation 1(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 1(b):**

1. Regarding the **detection** of foreign bribery, the Working Group recommends that Japan:
  - b. Establish a clear policy explaining the extent to which self-reporting will be considered in resolving and sanctioning foreign bribery cases. [Article 3 of the Convention; 2009 Recommendation III.i.]

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

In what kind of cases and to what extent self-reporting will be considered should be decided by the public prosecutor on a case-by-case basis in light of the circumstances of the case and the evidence, and this is a matter not suitable for establishing guideline.

Article 42 of the Penal Code provides that the punishment of a person who committed a crime and surrendered himself/herself before being identified as a suspect by an investigative authority may be reduced.

In addition, the agreement procedure in Japan specifically stipulates what types of cooperation suspects/defendants may provide, and what types of favorable treatment public prosecutors may provide (Article 350-2 of the Code of Criminal Procedure). The agreement is clarified in writing (Article 350-3, Paragraph 2 of the Code of Criminal Procedure), and the implementation of the agreement is secured with punishment (Article 350-15 of the Code of Criminal Procedure) in the event where a suspect or defendant makes a false statement in violation of the agreement, thereby ensuring transparency to a large extent.

**If no action has been taken to implement recommendation 1(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 1(c):**

1. Regarding the **detection** of foreign bribery, the Working Group recommends that Japan:
  - c. Mobilise its agencies with potential for detecting foreign bribery, by (i) addressing foreign bribery risks through awareness-raising and training activities courses for employees of both ODA agencies as well as contractors; and (ii) continuing to provide MOFA and JICA's officials with clear and regular guidance and training on foreign bribery red flags and on the channels for reporting suspicions to Japan's law enforcement authorities. [2016 Recommendation, 6.iv.]

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

(i) JICA has been conducting training programs which improve capacities of government officials in recipient countries for preventing against fraud and corruption, as well as seminars which familiarize them with the terms and conditions of ODA-related contracts in order to raise awareness of preventing against fraud and corruption in ODA projects in recipient countries. In Japan, JICA has been holding seminars for consultants who may participate in ODA projects in order to raise awareness of preventing against fraud and corruption among related persons.

Furthermore, MOFA and JICA prepared “Anti-Corruption Policy Guide”, which summarizes MOFA and JICA’s anti-corruption measures in ODA projects, as well as appropriate actions when approached by corrupt offers, and JICA also prepared “JICA Anti-Corruption Guidance”. On their website, they make these documents public to inform the public about Japan’s system for preventing against fraud and corruption in ODA projects. They are open to external inquiries on matters related to corruption through measures such as setting up the “Consultation Desk on Anti-Corruption”.

(ii) With regard to the implementation of the guidance on bribery of foreign public officials for MOFA’s officials and JICA’s staff, MOFA made a leaflet on the measures to be taken against companies or other entities which have committed unlawful acts in ODA projects. They distributed it to all diplomatic missions abroad and JICA overseas offices. In addition, MOFA and JICA held online seminars for officials and staffs of diplomatic missions and JICA overseas offices to explain about the outline of the MOFA and JICA’s regulations and the procedures to be followed. The purpose of these efforts was to improve their understanding of the system and raise awareness of the prevention against fraud and corruption in ODA projects. They report the case to the police authorities if they believe that it constitutes a criminal act conducted by Japanese companies. It is implemented as one of measures against fraud or corruption cases.

**If no action has been taken to implement recommendation 1(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 1(d):**

1. Regarding the **detection** of foreign bribery, the Working Group recommends that Japan:

d. Have its export credit agencies (i) clarify the criteria for reporting suspected instances of foreign bribery; (ii) establish reporting channels to law enforcement authorities; and (iii) conduct training, in consultation with MOJ and METI as appropriate, in order to raise awareness and to ensure that their staff can detect foreign bribery, in particular when conducting enhanced due diligence. [2009 Recommendation IX.i. and ii.]

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

Regarding (i) and (ii): JBIC’s internal rule stipulates that if JBIC detects the possibility of bribery with respect to the export contract or other equivalent contract to which JBIC is considering providing or providing a loan, JBIC will inform appropriate law enforcement authorities according to whether the potential bribery act is bribery of a foreign or domestic public official.

Regarding (iii): Through implementing mandatory annual training for employees, JBIC familiarizes its employees with external and internal regulations and rules concerning bribery and points to consider when considering providing a loan.

Regarding (i) and (ii), NEXI confirmed in March 2020 that when we detect the possibility of bribery in the export contracts or other equivalent contracts that we are considering underwriting or we have underwritten, according to whether it’s foreign or domestic public official, we would report it to appropriate law enforcement authorities.

Regarding (iii), NEXI has been raising awareness of anti-bribery measures among its staff through activities such as holding seven internal seminars in accordance with the 2019 Recommendation. Additionally, NEXI uses an external database to check the records of insurance users related to bribery, corruption and prosecution. NEXI is considering further efforts, including staff training, to detect suspected instances of bribery and to share knowledge on how to deal with them.

**If no action has been taken to implement recommendation 1(d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 1(e):**

1. Regarding the **detection** of foreign bribery, the Working Group recommends that Japan:

e. Consider requiring auditors to report suspicions of foreign bribery directly to competent authorities without the need to first raise the issue to corporate management; provided that if Japan ultimately decides not to impose such a requirement, it should inform the Working Group how the decision was made and its rationale. [2009 Recommendation X.B. v.]

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

**If no action has been taken to implement recommendation 1(e), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Since certified public accountants (CPAs) and audit firms are required to strictly protect their customers' confidential information that they come to know throughout audit process, so that it would not be easy and would require further consideration whether to impose a direct reporting obligation to the authorities without prejudicing their professional confidentiality or privilege.

**Recommendation 1(f):**

1. Regarding the **detection** of foreign bribery, the Working Group recommends that Japan:

f. Develop guidance clarifying the circumstances when auditors and accountants should consider foreign bribery to be "material" for reporting purposes and provide training to raise the profession's awareness and capacity to detect and report instances of foreign bribery. [2009 Recommendation X.B.iii. and v.]

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

The Japanese Institute of Certified Public Accountants (JICPA), in its "Guidelines on Responses to non-compliance with laws and regulations" (revised in Sep 2019), calls for appropriate responses, including reporting to the authorities: JFSA, in the event that it becomes aware of illegal acts including foreign bribery or suspicion thereof.

As for training, the JICPA has held e-learning and in-person training sessions for all members on illegal acts including foreign bribery, and will continue to provide these opportunities as necessary.

**If no action has been taken to implement recommendation 1(f), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 1(g):**

1. Regarding the **detection** of foreign bribery, the Working Group recommends that Japan:

g. Ensure that laws relating to freedom of the press and equal access to information are fully applied in practice in respect of foreign bribery reporting. [Article 5 of the Convention and Commentary 27; 2009 Recommendation, Annex I.D.]

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

**If no action has been taken to implement recommendation 1(g) please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Regarding foreign bribery cases there is no infringement of freedom of the press.

**Recommendation 2 (a):**

2. Regarding **anti-money laundering (AML) measures to enhance detection** of foreign bribery, the Working Group recommends that Japan:

a. Require legal professionals and accountants to report suspected money laundering predicated on foreign bribery, without prejudice to professional secrecy or legal professional privilege. [Article 7 of the Convention; 2009 Recommendation III.i. and iv.]

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

- None.

Legal professionals and accountants are exempted from the obligation of suspicious transaction reporting (STR).

**If no action has been taken to implement recommendation 2(a) please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Legal professionals and accountants are required to keep their clients' secrets strictly. It is therefore difficult to impose the obligation on them without prejudice to professional secrecy or legal professional privilege. Further discussion is needed on this matter.

**Recommendation 2(b):**

2. Regarding **anti-money laundering (AML) measures to enhance detection** of foreign bribery, the Working Group recommends that Japan:

b. Take steps to ensure that JAFIC is adequately resourced to effectively detect money laundering cases predicated on foreign bribery. [Article 7 of the Convention; 2009 Recommendation III.i. and iv.]

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

- Set up a unit in charge of the analysis of foreign bribery
- Encourage active reporting of suspicious transactions of foreign bribery from megabanks
- Share cash courier information and other customs information

**If no action has been taken to implement recommendation 2(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 2(c):**

2. Regarding **anti-money laundering (AML) measures to enhance detection** of foreign bribery, the Working Group recommends that Japan:

c. Develop typologies of money laundering that specifically address foreign bribery, and use such typologies to train JAFIC staff and reporting entities specifically on detecting foreign bribery. [Article 7 of the Convention; 2009 Recommendation III.i. and iv.]

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

- Prepare documents about the typologies of foreign bribery and points worth noting for JAFIC staff and prefectural police officers, and use them to train them
- Prepare documents about the typologies of foreign bribery and points worth noting for banks and receiving entities of STRs, and provide the documents to banks and such entities to train them (provide trainings to megabanks on an individual basis)

**If no action has been taken to implement recommendation 2(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 3(a):**

3. Regarding **whistleblower protection**, the Working group recommend that Japan:

a. Broaden the scope of persons protected under the Whistleblower Protection Act to include officers, directors and other corporate management. [2009 Recommendation IX.iii.]

b. Ensure that additional measures are in place to protect whistleblowers who report suspected acts of foreign bribery from discriminatory or disciplinary action, such as (i) providing for criminal or administrative sanctions on companies that violate the WPA’s provisions, (ii) ensuring that whistleblowers do not exclusively bear the burden of proving retaliation or discrimination. [2009 Recommendation IX.iii.]

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

The 2020 amendment of the Whistleblower Protection Act (the “WPA”), which fully come into effect by June 2022, adds officers, directors and other corporate management into the scope of persons protected under the WPA.

**If no action has been taken to implement recommendation 3(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**



**Recommendation 3(b):**

3. Regarding **whistleblower protection**, the Working group recommend that Japan:

b. Ensure that additional measures are in place to protect whistleblowers who report suspected acts of foreign bribery from discriminatory or disciplinary action, such as (i) providing for criminal or administrative sanctions on companies that violate the WPA’s provisions, (ii) ensuring that whistleblowers do not exclusively bear the burden of proving retaliation or discrimination. [2009 Recommendation IX.iii.]

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

In accordance with the amendment of the WPA in 2020, new guidelines (the “Guidelines”) are to be created in 2021 and the Guidelines will expressly prohibit from taking any discriminatory or disciplinary action against whistleblowers, including but not limited to those who report suspected acts of foreign bribery. Moreover, the WPA allows to provide for administrative sanctions on companies that breach the obligation under the WPA to establish the appropriate framework for properly dealing with the reports.

**If no action has been taken to implement recommendation 3(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendations regarding enforcement of the foreign bribery offence****Recommendation 4:**

4. Regarding the **foreign bribery offence**, the Working Group recommends that Japan review the METI Guidelines to clarify: (i) that the foreign bribery offence covers bribes paid to obtain a gain not only ‘for oneself’, but also for “any other natural or legal entity, in line with Commentary 6 to the Convention; (ii) the scope and definition of duress likely to negate the “wrongful gain element” in certain cases to ensure that “economic harm to a company” could never justify bribery; and (iii) that any references to Commentary 8 to the Convention accurately describe its relevance to the UCPL and also reflect Commentary 8. [Article 1 of the Convention]

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

METI launched a Study Group on the Prevention of Bribery of Foreign Public Officials in January 2020, based on the recommendation of Japan’s Phase 4 report, and discussed revision of “Guidelines for the Prevention of Bribery of Foreign Public Officials” (hereinafter: METI Guidelines), creation of a guide for SMEs and a legal system related to the Unfair Competition Prevention Act (hereinafter: UCPA).

Through the Study Group, a draft revision of the METI Guidelines which includes the amendments of the following (1)-(3) to address the recommendation 4 (i)-(iii) was created. Then, after we heard opinions on the draft revision of the METI Guidelines with the guide and a draft report of the Study Group from the public, all revisions were published on our website as a final version. Please refer to the revised METI Guidelines and the summary of the report.

- (1) Since the intention to obtain a wrongful gain means the intention to obtain one’s or others’ gain in a manner running counter to public policy or principle good faith, the METI Guidelines clarified that bribes paid to obtain gain not only ‘for oneself’, but also for “any other natural or legal entity” in the Concept of “wrongful gain” is covered. In addition, the METI Guidelines, which were revised in September 2017 in English, provides one interpretation of a “wrongful gain” as ‘(b) any gain obtained “for oneself” through the giving, etc. of an improper benefit to a foreign public official etc., and having the said foreign public official, etc. commit an illegal act’. However, with regard to the second interpretation of a wrongful gain, there is no limitation and description corresponding to

such ‘for oneself’ in the METI Guidelines in Japanese. It is typo. Therefore, it was deleted in the revised METI Guidelines.

- (2) The sentence beginning with “In situations where..” in page 25 of the Guidelines (corresponding to page 23 of Annex IV of this document) which were revised in September 2017 was partially deleted to clarify that economic harm to a company could never justify bribery.
- (3) The METI Guidelines were revised to be in line with the words of Commentary 8 of the Convention and clarified the treatment under the UCPA.

**If no action has been taken to implement recommendation 4, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

### **Recommendation 5:**

Regarding **small facilitation payments**, the Working Group recommends that Japan: (i) Clarify the definition and scope of small facilitation payments in line with Commentary 9 to the Convention; and (ii) Encourage companies to prohibit the use of such payments in their internal company controls, ethics and compliance programmes or measures. [Article 1 of the Convention; 2009 Recommendation VI.]

### **Action taken as of the date of the follow-up report to implement this recommendation:**

Japan discussed the recommendation 5 (i) and (ii) in the METI Study Group mentioned in the above action for the recommendation 4. As a result of the discussion, the METI Guidelines were revised in terms of the following amendments in order to address the recommendation 5.

- It is essential for employees to be broadly aware of the prohibition of SFP in companies since even SFP may constitute the giving of advantage to obtain a wrongful gain in business. Stipulating this content in internal rules is effective, so we added a description related to SFP in the ‘Formulation of Internal Rules’ of the METI Guidelines. Also, we described the concept of SFP in a footnote to clarify what SFP means based on consideration of opinions that points to note should be mentioned in the METI Guidelines. Besides, we added a supplementary explanation about the treatment of FP in U.S. and U.K. to make it possible for companies to refer to the treatment in other countries.
- In order to clarify the treatment of SFP under the UCPA, we added how the so-called SFP is considered under the UCPA in ‘3.1 The Elements of the Offense of Bribery of Foreign Public Officials’ of ‘Chapter 3: SCOPE OF PUNISHMENT UNDER THE UNFAIR COMPETITION PREVENTION ACT ‘.

Please refer to the revised METI Guidelines to check the detailed descriptions.

In addition, METI has raised awareness on the report of the Study Group, the revised METI guidelines and the guide through a virtual seminar at Keidanren (approximately 300 participants), a virtual seminar at the Association of Corporate Legal Departments, which will be broadcasted for about 3 months for over 1,200 members, and an article in NBL issued on 1st July. In the activities, we highlighted that ‘it is desirable to mention “the prohibition of SFP basically” in internal rules’. Incidentally, there was an opinion that it was important to address the countries which demand bribes, that is, where bribe-takers are with regard to issues on bribery of foreign public officials in the seminar at Keidanren. METI heard similar opinions from the Study Group and through the public comment procedure. Thus, METI would like to mention that industry demands addressing the demand side of bribery in light of comments (※) by BIAC to OECD Working Group including ‘taking concrete steps to address the demand side of bribery’.

※ <https://biac.org/wp-content/uploads/2019/12/FIN-2019-12-Consultation-WGB1.pdf>

**If no action has been taken to implement recommendation 5, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 6(a):**

6. Regarding **cooperation, resources, and specialisation in foreign bribery cases**, the Working Group recommends that Japan:

a. Continue to develop and maintain specialisation both within the police force and the Public Prosecutors Offices in foreign bribery matters, including the recovery of the proceeds of crime and ensure that such specialisation is not dissipated through personnel rotations. [Article 5 of the Convention; 2009 Recommendation, Annex I.D.]

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

The Ministry of Justice has been making its best efforts to ensure that cases of foreign bribery are properly prosecuted and punished in various ways, including through informing public prosecutors, who are in charge of financial and economic crimes such as foreign bribery, of the recommendations from OECD, including this recommendation, at conference in which such prosecutors participate, as well as at training sessions for prosecutors.

In addition, the Supreme Public Prosecutors Office issued a guidance dated on June 23, 2021 to all Public Prosecutors Offices nationwide. It announced that the specialization cultivated thus far and continuity of investigations should be maintained upon the change of the public prosecutors in charge of financial and economic cases including foreign bribery, by handing over cases appropriately and inheriting knowledge to the succeeding prosecutor.

The National Police Agency provides necessary trainings for investigators of prefectural police who are engaged in foreign bribery investigations.

Make proper assessment of investigators of prefectural police who may be engaged in foreign bribery investigations prior to the periodic rotation, reflect the assessment results to personnel rotations and ensure the successful takeover of their duties

**If no action has been taken to implement recommendation 6(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 6(b):**

6. Regarding **cooperation, resources, and specialisation in foreign bribery cases**, the Working Group recommends that Japan:

b. Ensure that personal rotation within the police force and Public Prosecutors Offices is staggered to ensure continuity of foreign bribery investigations, particularly when the statute of limitations may lapse. [Article 5 of the Convention; 2009 Recommendation, Annex I.D.]

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

The Supreme Public Prosecutors Office issued a guidance dated on June 23, 2021 to all Public Prosecutors Offices nationwide. It announced that the specialization cultivated thus far and continuity of investigations

should be maintained upon the change of the public prosecutors in charge of financial and economic cases including foreign bribery, by handing over cases appropriately and inheriting knowledge to the succeeding prosecutor.

In addition, generally, various circumstances including the status of the work of those who are subjected to the routine human resources rotation within Public Prosecutors Office are taken into consideration at the time of such rotation.

Make proper assessment of investigators of prefectural police who may be engaged in foreign bribery investigations prior to the periodic rotation and reflect the assessment results to personnel rotations

**If no action has been taken to implement recommendation 6(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 6(c):**

6. Regarding **cooperation, resources, and specialisation in foreign bribery cases**, the Working Group recommends that Japan:

c. Periodically review the police resources available for detecting and investigating foreign bribery. [Article 5 of the Convention; 2009 Recommendation, Annex I.D.]

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

Make proper assessment of investigators of prefectural police who may be engaged in foreign bribery investigations prior to the periodic rotation and reflect the assessment results to personnel rotations

**If no action has been taken to implement recommendation 6(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 6(d):**

6. Regarding **cooperation, resources, and specialisation in foreign bribery cases**, the Working Group recommends that Japan:

d. Ensure that the Public Prosecutors Offices routinely consult with the National Police Agency's Second Investigative Division when beginning a potential foreign bribery matter to make full use of available police resources, including at the prefectural level and the network of police attachés abroad. [Article 5 of the Convention; 2009 Recommendation, Annex I.D.]

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

The Ministry of Justice has been making its best efforts to ensure that cases of foreign bribery are properly prosecuted and punished in various ways, including through informing public prosecutors, who are in charge of financial and economic crimes such as foreign bribery, of the recommendations from OECD, including this recommendation, at conference in which such prosecutors participate, as well as at training sessions for prosecutors.

In addition, the Supreme Public Prosecutors Office issued a guidance dated on June 23, 2021 to all Public Prosecutors Offices nationwide, in which it announced that the public prosecutors should not only cooperate closely with the police by discussing investigation plans and other related matters, but also

proactively consider using the information held by relevant organizations, such as the National Tax Authority and the Securities and Exchange Surveillance Commission, on appropriate cases.

The National Police Agency's Second Investigative Division detects information on foreign bribery, and provides necessary guidance to prefectural police forces taking into account concrete cases solved by other prefectural police forces.

The National Police Agency's Second Investigative Division seeks cooperation from foreign law enforcement authorities via police attachés abroad to assure necessary support depending on the offence.

Prefectural police forces consult with District Public Prosecutors Offices as necessary when conducting foreign bribery investigations.

**If no action has been taken to implement recommendation 6(d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 6(e):**

6. Regarding **cooperation, resources, and specialisation in foreign bribery cases**, the Working Group recommends that Japan:

e. Report to the Working Group specific examples of how the police and prosecutors cooperate in investigating pending and future foreign bribery matters and if the police is not involved in a particular matter, explain why not. [Article 5 of the Convention; 2009 Recommendation, Annex I.D.]

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

In 7a, we describe the results of our enforcement on foreign bribery cases which are made public since the follow-up in June 2020.

In all of these cases, the police initially conducted each investigation as the primary investigative body, and the prosecutor who received the cases from the police conducted the necessary supplemental investigations, prosecuted and obtained summary orders.

In Japan, the police are the primary investigative authority and prosecutors are the secondary and supplementary investigative authorities. In a practical investigation, when a police conducts a primary investigation, the police officer actively consults with the public prosecutor from an early stage of the investigation, and the public prosecutor and the police officer cooperate in the investigation.

It is impossible to report to the WGB any information about ongoing cases or cases subject to a possible future investigation, since the disclosure of specific information may hinder not only such cases but also the investigation and trial of other future cases.

Prefectural police forces consult with District Public Prosecutors Offices as necessary when conducting foreign bribery investigations. The coordination of investigation policies and investigation matters is made during the consultations.

**If no action has been taken to implement recommendation 6(e), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 6(f):**

6. Regarding **cooperation, resources, and specialisation in foreign bribery cases**, the Working Group recommends that Japan:

f. Ensure that law enforcement authorities systematically seek information held by the tax authorities, JAFIC and other relevant agencies at the early stage of their investigations. [Article 5 of the Convention, 2009 Recommendation, Annex I.D.]

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

The Ministry of Justice has been making its best efforts to ensure that cases of foreign bribery are properly prosecuted and punished in various ways, including through informing public prosecutors, who are in charge of financial and economic crimes such as foreign bribery, of the recommendations from OECD, including this recommendation, at conference in which such prosecutors participate, as well as at training sessions for prosecutors.

In addition, the Supreme Public Prosecutors Office issued a guidance dated on June 23, 2021 to all Public Prosecutors Offices nationwide, in which it announced that the public prosecutors should not only cooperate closely with the police by discussing investigation plans and other matters, but also proactively consider using the information held by relevant organizations, such as the National Tax Authority and the Securities and Exchange Surveillance Commission, on appropriate cases.

Police make inquiries to the tax authorities and other relevant agencies pursuant to the Code of Criminal Procedure to seek necessary information.

Police periodically receive information on suspicious transaction reports (STRs) held by JAFIC.

**If no action has been taken to implement recommendation 6(f), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 7(a):**

7. Regarding the **investigation and prosecution** of foreign bribery, the Working Group recommend that Japan:

a. Urgently take measures to achieve stronger enforcement of its anti-bribery legislation and report to the Working Group on both these measures and enforcement results. [Article 5 of the Convention; 2009 Recommendation III.ii. and V.]

**Action taken as of the date of the follow-up report to implement this recommendation:<sup>3</sup>**

With regard to the enforcement for foreign bribery cases, the Ministry of Justice has been announcing that the public prosecutors should properly investigate and prosecute foreign bribery cases, at conference in which prosecutors in charge of financial and economic crimes such as foreign bribery participate, as well as at training sessions for prosecutors.

<sup>3</sup> In responding to this question, please provide detailed information on ongoing and concluded foreign bribery cases. This should involve provision of at least the same level of detail as provided during the Phase 4 evaluation, including translated indictments and court decisions.

In addition, the Supreme Public Prosecutors Office issued a guidance dated on June 23 2021, on foreign bribery cases to Public Prosecutors Offices nationwide. In this guidance, it announced that public prosecutors should make efforts to appropriately implement the relevant laws and regulations, to thoroughly conduct investigations and prosecution and to realize heavier and more proper sentencing and so on.

Since the Follow-up Meeting in June 2020, the following cases have been publicly reported regarding the result of enforcement on foreign bribery cases in Japan.

○ Summary Order of June 25, 2020 (Kobe Summary Court)

The defendant (Vietnamese) was running a business in Japan, in which he assisted administrative procedure for Vietnamese clients in obtaining status of Japanese residency.

① In January 2018, the defendant provided 97,732 yen in cash to a consul at the Consulate-General of Socialist Republic of Vietnam in Japan, who had the authority to issue a certificate of legal capacity to contract marriage, etc. to a Vietnamese citizen residing in Japan, in return for receiving a certificate which is otherwise not lawfully issued to a Vietnamese citizen residing in Vietnam.

② In February of the same year, the defendant promised to the aforementioned foreign public official to provide 100,000 yen in cash in return for receiving a certificate of legal capacity to contract marriage which is otherwise not lawfully issued to Vietnamese citizen residing in Vietnam.

The defendant was fined 500,000 yen.

○ Case of Summary Order of July 1, 2020 (Tsu Summary Court)

The defendant (Vietnamese) was running a business in Japan, in which he assisted administrative procedure for Vietnamese clients in obtaining status of Japanese residency. Between April 2019 and May 2019, the defendant, offered to provide cash twice to a consul at the Consulate-General of Socialist Republic of Vietnam in Japan, who had the authority to issue a certificate of legal capacity to contract marriage, etc. to a Vietnamese citizen residing in Japan, in return for receiving a certificate of legal capacity to contract marriage which is otherwise not lawfully issued to illegal immigrants or temporary visitor.

The defendant was fined 500,000 yen.

The National Police Agency provides necessary trainings for investigators of prefectural police who are engaged in foreign bribery investigations and provides guidance/education to prefectural police forces on a continuous basis.

After the one year follow-up phase 4 evaluation in July 2020, police detected 2 cases of foreign bribery.

**If no action has been taken to implement recommendation 7(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 7(b):**

7. Regarding the **investigation and prosecution** of foreign bribery, the Working Group recommend that Japan:

b. Ensure that the provision of immunity to self-reporting offenders is not an impediment to the effective enforcement of the foreign bribery offence by developing clear and transparent guidelines on the level of cooperation expected from the person who make self-reports and the advantages that he/she may be granted in return, including immunity from prosecution if relevant. [2009 Recommendation III.iv. and Annex I.D.]

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

In what kind of cases and to what extent self-reporting will be considered, and in what kind of case the agreement procedure will be used, should be decided by the public prosecutor on a case-by-case basis in light of the circumstances of the case and the evidence, and this is a matter not suitable for establishing guideline.

In addition, the agreement procedure in Japan specifically stipulates what types of cooperation suspects/defendants may provide, and what types of favorable treatment public prosecutors may provide (Article 350-2 of the Code of Criminal Procedure). The agreement is clarified in writing (Article 350-3, Paragraph 2 of the Code of Criminal Procedure), and the implementation of the agreement is secured with punishment (Article 350-15 of the Code of Criminal Procedure) in the event where a suspect or defendant makes a false statement in violation of the agreement, thereby ensuring transparency to a large extent. Therefore, the agreement procedure in Japan ensures effective enforcement without establishing guideline.

**If no action has been taken to implement recommendation 7(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 7(c):**

7. Regarding the **investigation and prosecution** of foreign bribery, the Working Group recommend that Japan:

c. Take urgent steps to further extend the statute of limitations for the foreign bribery offence to an appropriate period to ensure the effective prosecution of the foreign bribery offence or to introduce the possibility to suspend the limitation period during the investigation with the aim of achieving the same goal. [Article 6 of the Convention, 2009 Recommendation III.ii. and V.]

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

Japan discussed whether Japan should take steps such as extending the statute of limitations for the foreign bribery offense and also discussed issues when taking legal action, based on the current status on the statute of limitations and the recommendation 7 (c) in the ‘Study Group on Prevention of Bribery of Foreign Public Officials’ (\*1) mentioned in the above action for the recommendation 4.

<Current Status>

The current statute of limitations for the foreign bribery offense is as follows.

Article 250 of the Code of Criminal Procedure (CCP) stipulates that the statute of limitations is determined based on statutory penalty and it is completed upon the lapse of the period. A sentence of imprisonment for foreign bribery offense is not more than 5 years, so the statute of limitations for a natural person is 5 years (Article 250 (2) (v) of the CCP) and the statute of limitations for a legal person is 5 years (Article 22 (3) of the UCPA). To add, the statute of limitations ceases to run on specific grounds and begins to run for the remaining period when the grounds are extinguished. The suspension of the statute of limitations due to the institution of prosecution (Article 254 of the CCP) and due to grounds other than the institution of prosecution (Article 255 of the CCP) is prescribed. As grounds other than the institution of prosecution, the CCP provides two cases where the offender is outside Japan and where the offender is in hiding, making it is impossible to serve a transcript of the charging sheet or notify the summary order (Article 255 (1)).



## &lt;Opinions in the Study Group&gt;

As a result of discussion based on the above current status and the recommendation 7 (c), we heard the following opinions.

- Most opinions stated that it is not appropriate to extend the upper limitation of the statutory penalty on foreign bribery offense in order to extend the statute of limitations because currently, the statute of limitations is determined based on the maximum statutory penalty under the CCP.
- With regard to “to introduce the possibility to suspend the limitation period” as the alternative recommendation included in the latter part of the recommendation 7 (c), some said that it is difficult to reach a conclusion only in light of the UCPA because it would have an impact on many other laws, such as laws with a dual criminal liability provision, although the METI Study Group considered whether or not it is possible to introduce a method of suspending the statute of limitations depending on the natural person’s suspension of the statute of limitations.

As stated above, most opinions in the METI Study Group were negative toward both taking steps to extend the statute of limitations and to introduce measures to suspend the limitation period during the investigation. Thus, as of now, we have reached a conclusion that it is difficult to proceed further in revising our laws.

Response to the request of Chair’s letter:

(i) detailed information on the terms of reference, objectives and recommendations of the groups consulted in the legislative process (including the METI Study Group and the subcommittee of the Industrial Council)

In many cases where we enact or revise laws as Cabinet Law in Japan, we proceed with the process of holding Study Groups or Councils which include experts and stakeholders and hearing their opinions on necessity of revision of the laws or direction of actions on legal systems. Regarding the UCPA, we decide necessity of revision of the UCPA through the Study Group, the Council and hearing from public comments. For instance, the latest revision of the UCPA in 2018 was conducted through the following process.

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## The revision of the UCPA in 2018

- From Oct. 2016 to April 2017  
The Study Group on The Intellectual Property System for the Fourth Industrial Revolution (\*1) (10 times in total)  
In the study group, we sorted out current systems and issues, considered the necessity of law revisions and recommended systems.
- From July 2017 to Jan. 2018  
The Unfair Competition Prevention Subcommittee of the Industrial Structure Council (\*2) (9 times in total)  
In the subcommittee, we discussed specific legal systems, (for example, what is subject to regulations, definitions and remedies) and discussed the matters to be addressed by governments in future with accordance with revision of laws. Through public comment procedure mentioned as follows, we formulated and published a report.
- From Nov. 2017 to Dec. 2017  
Public Comment Procedure(\*3)  
We heard opinions about law revisions from the public broadly.
- May 2018  
The 196<sup>th</sup> Diet passed and enacted “Bill to amend partially the Unfair Competition Prevention Act,

etc.”.

○ Jan. 2019

The “law to amend partially the Unfair Competition Prevention Act, etc.” came into effect.

(\*1) Study Group:

- There are cases in which we establish a Study Group and obtain opinions from experts in order to consider whether we need any actions on legal systems and legal issues when taking actions on legal systems as a preliminary step for the Industrial Structure Council to discuss specific contents on law revision. In many cases, the study group is closed to the public for hearing their candid opinions.
- As well as the latest revision of the UCPA, we established the Study group as a preliminary step for the Industrial Structure Council and discussed the necessity of actions on legal systems and legal issues when taking the actions.

(\*2) The Unfair Competition Prevention Subcommittee of the Industrial Structure Council:

- The Industrial Structure Council is an official organization established under the National Government Organization Act and the Act for Establishment of the Ministry of Economy, Trade and Industry. The council carries out investigations and deliberations of important matters with regard to ‘improvements in the industrial structures’ and ‘the economic and industrial developments that focus on improving the economic strength of the private sector and promoting smooth international economic relations’. Especially, the Unfair Competition Prevention Subcommittee is a committee for the purpose of discussing issues involved in the UCPA as a subordinate organization under the Industrial Structure Council.
- The members of the Industrial Structure Council are assigned by the chair of the subcommittee out of academics, lawyers and industry experts. The members of the Unfair Competition Prevention Subcommittee have a role for discussing specific contents on law revisions and approving the report which summarizes the discussions.

(\*3)Public Comment Procedure:

- It is a procedure under the Administrative Procedure Act. The Article 39 of this Act provides “Organs when Establishing Administrative Orders, etc., (for example, Cabinet Order, Ministerial Order and Regulations pursuant to Acts, Review standards, Disposition standards and Administrative Guidance guidelines) must make them public in advance and any relevant materials and must seek comments from the public, showing the address where the comments will be submitted and the period of time for the submission (which is basically 30 days or more)” and “the proposed Administrative Orders, etc., publicly notified must have concrete and clear content, and must show the title and the specific provisions of the laws and regulations which will be grounds for the anticipated Administrative Orders, etc.”. Thus, when amending laws, we must conduct the Public Comment Procedure under this Act.

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As well as the latest revision of the UCPA, we established the Study group as a preliminary step for the Industrial Structure Council and discussed the necessity of actions on legal systems and legal issues on taking the actions this time. However, as a result of the Study Group, most opinions were negative toward the revision of the law, so we decided that it is difficult to proceed further in revising our laws and decided not to hold the Unfair Competition Prevention Subcommittee of the Industrial Structure Council.

- (ii) an explanation of any other consultation procedures with the public concerning the possibility of, or actual proposals for, amending legislation;

As stated in the above (i), we typically decide whether or not we amend laws through the discussions

in the Study Group and the Council and public comment procedure when deciding whether or not the government submits the bills. After determining to submit the bills officially as the Cabinet, the bills will be submitted to the Diet. Then, the bills will be discussed in both of the House of Representatives and House of Councilors and will be passed with majority vote.

(iii) clarity regarding the requisite steps and timing for introducing or adopting legislative reforms; and  
(iv) an explanation of how the proposed reforms for implementing the Phase 4 recommendations compare with the normal timeframe for amending Japanese legislation in criminal law and related areas, such as the Unfair Competition Prevention Law.

Please refer to the above (i).

Most opinions in this Study Group were negative toward the amendment of the law, so we reached a conclusion that it is inappropriate to cope with the recommendations by the amendment of the UCPA immediately or that it would be difficult to draw a conclusion based on the UCPA solely. However, if we need to discuss the law revision again with considering the trend of cases in future and the trend of fines in courts (for example, the maximum fine will be imposed in several cases), we may resume to discuss it at the time when we will need it and decide the necessity and possibility of the law revision again based on the process mentioned in (i).

**If no action has been taken to implement recommendation 7(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 8:**

8. Regarding the evidentiary threshold for the foreign bribery offence, the Working Group recommends that Japan: (a) clarify by any appropriate means with investigators, prosecutors, and judges (whether separately or collectively) that (i) the criteria in the Convention and its Commentaries defining a foreign public official are to be interpreted broadly; (ii) and that no element of proof beyond those contemplated in Article 1 of the Convention is required; or (b) if such clarification proves insufficient in practice, amend its foreign bribery legislation with respect to the above issues, to make it more explicit. [Article 1 of the Convention, 2009 Recommendation, Annex I.D.]

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

The Ministry of Justice has been making its best efforts to ensure that cases of foreign bribery are properly prosecuted and punished in various ways, including through informing public prosecutors, who are in charge of financial and economic crimes such as foreign bribery, of the recommendations from OECD, including this recommendation, at conference in which such prosecutors participate, as well as at training sessions for prosecutors.

As for judges, courts take the approach written in Recommendation 13.

(a) The National Police Agency provides necessary trainings for investigators of prefectural police who are engaged in foreign bribery investigations and provides guidance/education to prefectural police forces on a continuous basis.

The actions mentioned above have been taken, so Japan has not considered amending the UCPA at this time.

**If no action has been taken to implement recommendation 8, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 9(a):**

9. Regarding the **investigative techniques** available in foreign bribery investigations, the Working Group recommends that Japan:

a. Review its legislation to (i) allow from an early investigation stage the National Police Agencies and the Public Prosecutors Offices to subpoena natural and legal persons who do not voluntarily cooperate, to compel the production of relevant documents (such as company emails or electronic accounting data) and the testimony of individuals; and (ii) make wiretapping and other covert investigative means available in foreign bribery investigations. [Article 5 of the Convention; 2009 Recommendation III.iv.]

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

The Code of Criminal Procedure of Japan provides that related documents (including e-mails and electronic accounting data used in a corporation) may be compulsorily searched and seized by a warrant issued by a judge even during the initial stages of an investigation if it is necessary to do so. Besides, when a person who is clearly found to have knowledge essential to a criminal investigation refuses to voluntarily appear or testify, the public prosecutor may request the judge to examine the witness and require witness to testify.

In Japan, in addition to the above, it is possible to collect evidence on foreign bribery cases by making full use of the secret investigation method. Yet, Japan will further consider legislative measures for other effective investigation methods.

**If no action has been taken to implement recommendation 9(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 9(b):**

9. Regarding the **investigative techniques** available in foreign bribery investigations, the Working Group recommends that Japan:

b. Urgently take steps to more pro-actively investigate foreign bribery cases and improve the gathering of evidence, in particular by: (i) developing police-to-police cooperation in parallel to formal and informal MLA; (ii) developing coordinated investigative activities of both the prosecution and the police, including through setting investigation plans from the earlier stages of an investigation; (iii) using coercive measures including search and seizure powers, in particular in relation to legal persons from the early stages of an investigation. (iv) lowering the threshold to seek court warrants to proceed with search and seizure; and (v) conducting forensic audits where relevant. [Article 5 of the Convention; 2009 Recommendation III.iv.]

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

- (i) When investigating foreign bribery cases, prefectural police forces seek necessary support from other prefectural police forces which dealt with similar cases before via the National Police Agency's Second Investigative Division or directly.
- (ii) Prefectural police forces consult with District Public Prosecutors Offices as necessary when conducting foreign bribery investigations. The coordination of investigation policies and investigation matters is made during the consultations.
- (iii) When investigating foreign bribery cases, prefectural police forces conduct search and seizure at the relevant places at the appropriate timing based on the evidence they obtained.

- (iv)(v) The National Police Agency provides necessary trainings for investigators of prefectural police who are engaged in foreign bribery investigations and provides guidance/education to prefectural police forces on a continuous basis.

The Ministry of Justice has been making its best efforts to ensure that cases of foreign bribery are properly prosecuted and punished in various ways, including through informing public prosecutors, who are in charge of financial and economic crimes such as foreign bribery, of the recommendations from OECD, including this recommendation, at conference in which such prosecutors participate, as well as at training sessions for prosecutors.

In addition, the Supreme Public Prosecutors Office issued a guidance dated on June 23, 2021 to all Public Prosecutors Offices nationwide.

With regard to recommendation 9b (ii), the guidance announced that the public prosecutors should cooperate closely with the police by discussing investigation plans and other related matters.

Also with regard to 9b (iii) and (iv), the guidance announced that the public prosecutors should sufficiently and appropriately collect evidence by conducting search and seizures, etc. on legal persons as necessary.

**If no action has been taken to implement recommendation 9(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 10(a):**

10. Regarding the **newly introduced Agreement Procedure**, the Working Group recommend that Japan:  
a. Develop a clearer framework setting out the credit that a company can earn by cooperating in the investigation and prosecution of foreign bribery cases. [Convention Article 3; 2009 Recommendation III.i.]

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

In what kind of cases the agreement procedure will be used and how to weigh the corporation for investigation and prosecution should be decided by the public prosecutor on a case-by-case basis in light of the circumstances of the case and the evidence, and this is a matter not suitable for establishing guideline.

In addition, the agreement procedure in Japan specifically stipulates what types of cooperation suspects/defendants may provide, and what types of favorable treatment public prosecutors may provide (Article 350-2 of the Code of Criminal Procedure). The agreement is clarified in writing (Article 350-3, Paragraph 2 of the Code of Criminal Procedure), and the implementation of the agreement is secured with punishment (Article 350-15 of the Code of Criminal Procedure) in the event where a suspect or defendant makes a false statement in violation of the agreement, thereby ensuring transparency to a large extent.

**If no action has been taken to implement recommendation 10(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 10(b):**

10. Regarding the **newly introduced Agreement Procedure**, the Working Group recommend that Japan:  
b. Ensure that the terms of non-trial agreements include (i) the identity of the suspect who received it, (ii)

the wrongdoing that occurred, (iii) the nature of the cooperation provided, (iv) the factors that influenced the outcome of the resolution or other benefits provided to the suspect; and (v) the sanctions imposed on the suspect are made available to the public as soon as appropriate while preserving the integrity of any pending investigations or trials. [Convention Article 3; 2009 Recommendation III.i.]

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

**If no action has been taken to implement recommendation 10(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

It is impossible to ensure that the terms of agreement in the particular cases are made available to the public, since it may hinder not only such cases but also the investigation and trial of other future cases.

**Recommendation 10(c):**

10. Regarding the **newly introduced Agreement Procedure**, the Working Group recommend that Japan:  
c. Amend its law so that prosecutors can condition any declination that may be given through the Agreement Procedure on the suspect's forfeiting the unlawful proceeds obtained from foreign bribery. [Convention Article 3, 2009 Recommendation III.]

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

It is important to deprive illegal proceeds of crimes. Although there are issues from the viewpoint of consistency with the principles of criminal laws in Japan, we will continue to consider effective measures for the confiscation of such illegal proceeds.

**If no action has been taken to implement recommendation 10(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 11(a):**

11. Regarding the **role of METI and the MOJ** in the conduct of foreign bribery investigations, the Working Group recommend that Japan:

a. Take urgent steps to ensure that all foreign bribery allegations are immediately and directly forwarded to the Prefectural Police or the District Public Prosecutors Office by the government agencies and private entities who uncover such allegations to allow the competent investigative authorities to take a leading role from the earliest pre-investigative stages. [Article 5 of the Convention]

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

When the Ministry of Economy, Trade and Industry (METI) receives information about foreign bribery, such information shall be provided to the National Police Agency and the Ministry of Justice in accordance with "Regarding the Treatment of Information on Cases of Bribery of Foreign Public Officials", notice issued by METI.

The Ministry of Foreign Affairs (MOFA) also provides the Ministry of Justice with information it receives about foreign bribery.

Based on the recommendation of the WBG, when the Ministry of Justice receives the information about

foreign bribery from METI or MOFA, Ministry of Justice promptly provides such information to the Public Prosecutors Office, which allows the competent investigative authorities to take a leading role from the earliest stage of investigation.

**If no action has been taken to implement recommendation 11(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 11(b):**

11. Regarding the **role of METI and the MOJ** in the conduct of foreign bribery investigations, the Working Group recommend that Japan:

b. Ensure that the prosecution's role in commencing investigations and prosecutions, as well as its role in the conduct of investigations, is exercised independently of the executive, and in particular the MOJ and the METI, to guarantee that foreign bribery investigations and prosecutions are not influenced by factors prohibited by Article 5 of the Convention, namely considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved. [Article 5 of the Convention]

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

In Japan, each public prosecutor has an independent authority to investigate and prosecute a criminal case as a government agency, and its independency is guaranteed both legally and operationally.

**If no action has been taken to implement recommendation 11(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 11(c):**

11. Regarding the **role of METI and the MOJ** in the conduct of foreign bribery investigations, the Working Group recommend that Japan:

c. Ensure that the MOJ and METI's role in providing interpretation of the foreign bribery offence and/or the conduct of investigations, in relation to actual cases, to law enforcement authorities and prosecutors be grounded on clear rules or guidelines to ensure (i) transparency on their exact scope and clarification of their non-binding value; (ii) that they cannot take into account considerations forbidden under Article 5 of the Convention and (iii) that any request for METI's interpretation in foreign bribery cases does not contain identifying information that could enable METI to consider any of the Article 5 factors. [Article 5 of the Convention]

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

The METI Guidelines on page 25 (corresponding to page 23 of Annex IV of this document) stipulate that 'As an additional note, readers are reminded that it is the criminal investigation and prosecution agencies that are actually in charge of the application of the Act with respect to each individual and specific case and that the final interpretation of the Act is left to the courts'. In addition, each written response to an inquiry of general legal interpretation of foreign bribery offense is sure to add a note that 'As an additional note, based on the facts described in the inquiry, this is a legal interpretation that is considered to be general with regard to application of Article 18 of the UCPA, however, courts must make judicial

decisions of specific cases considering various factors, meaning that we are not in a position to judge them.’ Furthermore, when METI receives inquiries of legal interpretation, neither information regarding the names of companies in question nor suspects are provided to METI. Therefore, METI can not specify them and also it is impossible for METI to take any relevant considerations into account.

In Japan, each public prosecutor has an independent authority to investigate and prosecute a criminal case as a government agency, and its independency is guaranteed both legally and operationally.

In conducting an investigation and prosecution of foreign bribery cases, investigative authorities in Japan are not required to obtain consent from, or to give notice to, administrative authority other than investigative authorities. There are no such operational practice. Moreover, interpretation of laws is finally judged by the court, which has the sole judicial authority in Japan.

The Ministry of Justice has been making its best efforts to ensure that cases of foreign bribery are properly investigated and prosecuted through informing public prosecutors of the recommendations from OECD, including this recommendation, at conferences in which prosecutors participate, as well as at training sessions for prosecutors

**If no action has been taken to implement recommendation 11(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 11(d):**

11. Regarding the **role of METI and the MOJ** in the conduct of foreign bribery investigations, the Working Group recommend that Japan:

d. Take steps to ensure that METI has sufficient criminal law expertise and training so that its interpretative guidance does not unduly limit the scope of Japan’s foreign bribery offence. [Article 5 of the Convention].

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

METI is considering taking classes on the Penal Code at university in order to acquire professional knowledge of the Penal Code from the next fiscal year onwards.

**If no action has been taken to implement recommendation 11(d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 12(a):**

12. Regarding **sanctions and confiscation**, the Working Group recommend that Japan:

a. Enact legislation to substantially increase the statutory maximum fine for natural persons convicted of foreign bribery. [Article 3(1) of the Convention; 2009 Recommendation III.ii.].

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

Japan discussed whether Japan should increase the statutory maximum fine for natural persons in the METI Study Group mentioned in the above action for recommendation 4, based on the current status of fines for natural persons convicted of foreign bribery and recommendation 12 (a).



## &lt;Current Status&gt;

The current fine for natural persons with regard to foreign bribery offense is as follows.

Article 21 (2) (vii) of the UCPA stipulates that a natural person who gave, promised or offered to give improper profit to foreign public officials, etc. with a violation of Article 18 (1) of the UCPA is subject to “imprisonment for not more than five years, a fine of not more than five million yen, or both”. Also, in actual cases of foreign bribery offense before July 2020, the maximum fine for a natural person has been one million yen (summary indictment). While the range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials (Article 3(1) of the Convention) under the Convention, the statutory penalties as mentioned above are comparable to or greater than the penalties applied to bribery of domestic public officials (imprisonment for not more than 3 years or a fine of not more than 2.5 million yen (Article 198 of the Penal Code)), which means that Japan fulfils its obligation under the Convention.

## &lt;Opinions in the METI Study Group&gt;

As a result of discussions based on the above current status and the recommendation 12 (a), we heard the following opinions in the METI Study Group.

- With regard to the statutory penalties for a natural person, most opinions were negative toward increasing the statutory maximum penalties because current statutory penalties are sufficient in comparison to those applied to the bribery of domestic public officials (Article 198 of the Penal Code).

To add, we heard relevant opinions as follows in the METI Study Group.

- Compared to the bribery of domestic public officials (Article 198 of the Penal Code), it is thought that the current statutory penalties are sufficient.
- There is no particular relationship between low fines imposed in actual cases and the statute maximum penalties. It means that even if the maximum penalties are increased, it would be unlikely that the amount of the fine imposed in actual cases will be immediately increased.
- Since it is supposed that a natural person commits bribery not for himself/herself but for company's benefit, it is unlikely that imposing excessive fines on the natural person would be dissuasive.
- In the current penalties, imprisonment can be imposed on the natural person cumulatively, which is a sufficient sanction for a natural person.

As described above, most opinions in the METI Study Group were negative toward taking step to increase the statutory maximum fine for natural persons. Therefore, as of now, we have reached the conclusion that it is difficult to proceed further in revising our laws.

**If no action has been taken to implement recommendation 12(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 12(b):**

12. Regarding **sanctions and confiscation**, the Working Group recommend that Japan:

- (i) Impose both prison sentences and monetary fines, where appropriate, in foreign bribery cases, and
- (ii) Take all necessary steps, including through guidance and training to law enforcement and the judiciary to ensure that the sanctions imposed in practice for foreign bribery against natural persons are effective, proportionate and dissuasive. [Article 3(1) of the Convention; 2009 Recommendation III.ii.]

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

The Ministry of Justice has been making its best efforts to ensure that cases of foreign bribery are properly prosecuted and punished in various ways, including through informing public prosecutors, who are in charge of financial and economic crimes such as foreign bribery, of the recommendations from OECD, including this recommendation, at conference in which such prosecutors participate, as well as at training sessions for prosecutors.

In addition, the Supreme Public Prosecutors Office issued a guidance dated on June 23, 2021 to all Public Prosecutors Offices nationwide. It announced that the public prosecutors should actively prosecute not only natural person but also legal person, and obtain appropriate sentences (including sentences of both imprisonment and fine for natural persons), and that the proceeds of crimes should be properly deprived by confiscation or collection of a sum of equivalent value.

As for judges, courts take the approach written in Recommendation 13.

**If no action has been taken to implement recommendation 12(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 12(c):**

12. Regarding sanctions and confiscation, the Working Group recommend that Japan:

c. Develop guidelines and provide training for both the police and prosecutors on the new confiscation regime and on the identification and quantification of proceeds of foreign bribery for confiscation purposes. [Articles 3(3) of the Convention; 2009 Recommendation III.i.]

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

The National Police Agency provides necessary trainings for investigators of prefectural police who are engaged in foreign bribery investigations and provides guidance/education to prefectural police forces on a continuous basis.

The identification and quantification of crime proceeds should be judged based on specific evidence in an individual case and is not suitable for developing specific standard such as guideline.

**If no action has been taken to implement recommendation 12(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 13:**

13. Regarding **judicial awareness**, the Working Group recommend that Japan reinforce its efforts to train judges at the District and High Court levels to ensure a high level of awareness of the technicalities of the foreign bribery offence and the Convention among the large range of nonspecialised judges, likely to handle foreign bribery cases. [Article 1 of the Convention; 2009 Recommendation, Annex I.D.]

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

Every year, courts encourage judges to participate in UNAFEI (United Nations Asia And Far East Institute) UNCAC Training Program (about a month training) which UNAFEI conducts for the purpose

of improving participants' expertise in foreign bribery offence and the Convention, and post their reports in the internal website viewed by judges at the District and High Court levels.

Also, judges participated give their reports at each court where they belong.

**If no action has been taken to implement recommendation 13, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

### Recommendations regarding liability of, and engagement with, legal persons

#### Recommendation 14(a):

14. Regarding **corporate liability**, the Working Group recommend that Japan:

a Strengthen its enforcement of corporate liability in order to effectively combat foreign bribery by prosecuting both natural and legal persons in foreign bribery cases whenever appropriate. [Articles 2 and 5 of the Convention; 2009 Recommendation III.ii. and V.].

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

Japan has punished legal persons by appropriately applying dual liability provisions in cases of providing bribe to Vietnamese public official and in cases related to Japanese ODA loan projects in Indonesia, Viet Nam and Uzbekistan.

The Ministry of Justice has explained to the public prosecutors at training sessions for them, the recommendation that says, "Strengthen its enforcement of corporate liability in order to effectively combat foreign bribery by prosecuting both natural and legal persons whenever appropriate", and told them to implement this recommendation. MOJ also announced that prosecutors should conduct appropriate and active investigation and trial taking this recommendation into consideration at conferences in which prosecutors in charge of financial and economic cases including foreign bribery participate.

In addition, the Supreme Public Prosecutors Office issued a guidance dated on June 23, 2021 to all Public Prosecutors Offices nationwide. It announced that the public prosecutors should actively prosecute not only natural person but also legal person, and obtain appropriate sentences (including sentences of both imprisonment and fine for natural persons), and that the proceeds of crimes should be properly deprived by confiscation or collection of a sum of equivalent value.

In 7a, we describe the results of our enforcement on foreign bribery cases which are made public since the follow-up in June 2020. However, as far as we know, no legal person is involved in these cases.

**If no action has been taken to implement recommendation 14(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

#### Recommendation 14(b):

14. Regarding **corporate liability**, the Working Group recommend that Japan:

b. Urgently review its legislation to ensure that Japan has nationality jurisdiction over foreign bribery offences including when bribes by Japanese companies operating abroad are paid by non-Japanese employees. [Article 4(2) of the Convention and 2009 Recommendation II, III.ii. and V.]

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

Japan discussed whether Japan should take steps to ensure its jurisdiction over the foreign employees and discussed issues when taking relevant legal measures in the METI Study Group mentioned in the above action for recommendation 4, based on the current jurisdiction and recommendation 14 (b).

<Current status>

The current jurisdiction over foreign bribery offenses is described as below.

Under the Articles 8 and 1 of the Penal Code, foreign bribery offenses under the UCPA are applied to any person who has committed the offenses in Japan (principle of territorial jurisdiction). The ‘has committed the offenses in Japan’ means that a fact constituting a necessary element has occurred in Japan. So, if an act constituting a necessary element of the offense has been committed in Japan, or the result constituting another necessary element of the offense has occurred in Japan, criminal laws of Japan will be applicable. In respect of the offense of bribery of foreign public officials, this can possibly lead to the conclusion that, for instance, if any improper benefit is offered or promised to a foreign public official via e-mail or fax, etc. from a location in Japan, then even if the benefit is subsequently given in a location overseas, the offense is considered to have been committed in Japan. Additionally, even if the act constituting a necessary element has been committed in a location overseas, if the conspiracy prior to the act took place in Japan, the offense is considered to have been committed in Japan.

Under Article 21 (8) of the UCPA, the principle of nationality jurisdiction is applied pursuant to Article 3 of the Penal Code to Japanese nationals who have committed an act of bribery outside of Japan, meaning that such Japanese nationals are punishable also, in addition to persons who have committed an act of bribery in Japan. Furthermore, Article 22(1)(iii) of the UCPA provides that where a representative, agent, employee or any other staff of a legal person has committed a violation with regard to an operation of the legal person, a fine of not more than three hundred million yen will be imposed on the legal person, which is in addition to punishment for the offender himself/herself.

Also, if the conspiracy between an overseas subsidiary employee and a main office employee took place in Japan, a necessary element of an offense by co-principals in conspiracy would be considered to have occurred in Japan. Therefore, the offense is considered to be committed in Japan even if the improper benefit was actually provided in a location overseas. In this case, the offense of bribery of foreign public officials would be applied to both of them.

<Opinions in the METI Study Group>

As a result of discussions based on the above current status and the recommendation 14 (b), we heard the following opinions in the METI Study Group.

- Most opinions were as follows:
- It is difficult to imagine Japanese cases of foreign bribery in which Japanese nationals or persons in Japan are not involved, so necessary punishments including those for legal persons are applicable if a conspiracy between non-Japanese employees and Japanese employees or persons in Japan is considered to take place, under the current laws. Therefore, there is no need to unconditionally extend jurisdiction to non-Japanese employees who are not involved in a conspiracy with them.
- Provisionally, we considered applying the ‘principle of protective jurisdiction’ or the ‘principle of universal jurisdiction’ (\*) to offenses of foreign bribery as an approach to expand the application of the law to non-Japanese employees who are not involved in a conspiracy. However, most opinions showed that it is not appropriate to adopt the concept and expand geographical scope of application immediately.

\*In general, the ‘principle of universal jurisdiction’ makes it possible to punish crimes in any country which the international community commonly considers to be important, meaning that it loses evacuation

area for offenders. The ‘principle of protective jurisdiction’ expands its jurisdiction to acts even outside of the nation’s territory that infringe on the important interests of the country. Examples where the ‘principle of universal jurisdiction’ is applied includes hijacking and terrorist acts, and examples where the ‘principle of protective jurisdiction’ is applied includes instigation of foreign aggression and counterfeiting of currency.

In addition, we heard relevant opinions as follows in the METI Study Group.

- In illegal acts outside Japan by non-Japanese persons who are not involved in a conspiracy with employees of Japanese corporations and who are not subject to special chain of command by Japanese corporations, it would be difficult to apply Dual Criminal Liability to the Japanese corporations, even given judicial precedents. Even if the jurisdiction covers offenders outside of Japan, cases where Japanese corporations may be punished are very limited. So, it is not considered reasonable to expand jurisdiction exceptionally with regard to only foreign bribery.
- It would be difficult to apply punishment of offender outside Japan to non-Japanese employees based on the concept of the ‘principle of protective jurisdiction’ because interests of Japan are not harmed in cases of foreign bribery outside Japan by non-Japanese persons who are not involved in a conspiracy with Japanese nationals and persons in Japan.
- The Penal Code provides punishment for crimes committed outside Japan governed by a treaty (Article 4-2). However, Article 4 of the OECD Convention requires punishment for crimes committed in Japan and crimes committed outside Japan by Japanese nationals while not requiring punishment for crimes committed outside Japan by non-Japanese employees. Therefore, the current Convention does not allow us to apply the punishment stipulated by Article 4-2 of the Penal Code.

As described above, most opinions in the METI Study Group were negative toward reviewing our legislations to expand its jurisdiction to non-Japanese employees who are not involved in a conspiracy with Japanese employees and persons in Japan. Therefore, as of now, we have reached a conclusion that it is difficult to proceed further in revising our laws.

**If no action has been taken to implement recommendation 14(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 14(c):**

14. Regarding **corporate liability**, the Working Group recommend that Japan:

c. Ensure that the prosecutors thoroughly explore all jurisdictional bases, when foreign bribery offences fully take place abroad and are committed by non-Japanese employees of Japanese companies or their foreign subsidiaries nationals. [Article 4(1) of the Convention]

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

The Ministry of Justice has been making its best efforts to ensure that cases of foreign bribery are properly prosecuted and punished in various ways, including through informing public prosecutors, who are in charge of financial and economic crimes such as foreign bribery, of the recommendations from OECD, including this recommendation, at conferences in which such prosecutors participate, as well as at training sessions for prosecutors.

In addition, the Supreme Public Prosecutors Office issued a guidance dated on June 23, 2021 to all Public Prosecutors Offices nationwide, in which it announced that the provisions of foreign bribery under Unfair Competition Prevention Act (UCPA) shall apply to cases which takes place ABROAD, where Japanese

nationals provide, offer or promise to provide to a foreign public officials, in accordance with article 21 Paragraph 8 of the UCPA which stipulates that article 3 of the Penal Code shall apply to offence of foreign bribery.

Furthermore, the guidance announced that public prosecutors should pay attention to the fact that the provisions of foreign bribery under UCPA can be applied in accordance with Article 1 of the Penal Code to cases where elements of the crime has occurred in Japan even though the offender is a foreign employee of a Japanese company or its local subsidiary. Such cases include ones where giving, offering or promising of bribe to a foreign public officials is done by remittance, phone call or e-mail from Japan to foreign country, or cases where conspiracy, inducement or accessoryship was done in Japan or across Japan and other countries even if act of bribery itself is conducted in a foreign country.

**If no action has been taken to implement recommendation 14(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 14(d):**

14. Regarding **corporate liability**, the Working Group recommend that Japan:

d. Ensure that the prosecutors always consider the feasibility of filing false accounting charges against the Japanese parent company for bribery that occurs within the context of its subsidiaries, in particular when they conclude that Japan lacks criminal jurisdiction over the foreign bribery offence because the act was committed entirely abroad by a non-Japanese national. [Article 8 of the Convention]

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

The Ministry of Justice has been making its best efforts to ensure that cases of foreign bribery are properly prosecuted and punished in various ways, including through informing public prosecutors, who are in charge of financial and economic crimes such as foreign bribery, of the recommendations from OECD, including this recommendation, at conferences in which such prosecutors participate, as well as at training sessions for prosecutors.

In addition, the Supreme Public Prosecutors Office issued a guidance dated on June 23, 2021 to all Public Prosecutors Offices nationwide, in which it announced that in dealing with foreign bribery cases where the case is related to foreign subsidiary of Japanese corporation, it is important to properly consider possibility of prosecuting Japanese parent corporation for, for example, possible accounting fraud by such parent corporation and confiscating the crime proceeds, etc.

**If no action has been taken to implement recommendation 14(d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 14(e):**

14. Regarding **corporate liability**, the Working Group recommend that Japan:

e. Ensure that METI analyses the consultation requests it receives, along with the survey data that it gathers on the foreign bribery risks that Japanese companies face, so that its advice is tailored to the needs of Japanese businesses operating abroad.

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

METI has a reporting desk and receives broad consultation requests from the public with regard to foreign bribery. Based on the recommendation 14 (e), in order to give advice to meet companies' needs, we created an internal manual for the reporting desk that analyzes and evaluates the contents of the requests regularly. From Dec. 2013 to May 2021, the total number of the consultations is 160. One-third or more of the requests is related to necessary elements of offenses of foreign bribery, for example, whether the acts of socializing falls under offenses of foreign bribery. To add, about one-third of the requests is related to Southeast Asia. We will continue to analyze and evaluate them like this, and give advice to meet companies' needs.

**If no action has been taken to implement recommendation 14(e), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 15(a):**

15. Regarding **sanctions for legal persons**, the Working Group recommend that Japan:

a. Raise the statutory maximum, or provide alternative grounds to impose higher fines, for example the amount of the bribe given or the unlawful benefit obtained, that can be imposed to ensure that the fine imposed will be effective, proportionate and dissuasive even in largescale corruption cases. [Article 3 of the Convention; 2009 Recommendation III.ii. and V.]

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

Japan discussed whether Japan should raise the statutory maximum fine for legal persons in the METI Study Group mentioned in the above action for recommendation 4, based on the current status of statutory fines for legal persons convicted of foreign bribery and recommendation 15(a).

<Current Status>

The current statutory penalty for legal persons convicted of foreign bribery is as follows.

Article 21 (2) (vii) of the UCPA stipulates that a natural person who violated Article 18 (1) of the UCPA and gave, promised or offered to give improper profit to foreign public officials, etc. is subject to “imprisonment for not more than five years, a fine of not more than five million yen, or both”. When a representative, agent, employee or any other staff of a legal person has committed a violation with regard to an operation of the legal person, a fine not more than three hundred million yen will be imposed on the legal person, which is in addition to punishment for the offender himself/herself (Article 22(1)(iii) of the UCPA). Also, in cases of the offense of foreign bribery before July 2020, the maximum fine for a legal person is ninety million yen.

<Opinions in the METI Study Group>

As a result of discussions based on the above current status and recommendation 15 (a), we heard the following opinions in the METI Study Group.

- Some stated that there is room to consider raising the statutory penalties for legal persons in comparison to those for natural persons in view of the fact that companies directly gain benefits through the acts of bribery. On the other hand, others said that it should be carefully considered taking into account other factors than the actual amount of the fine, such as the fact that the current statutory maximum fine is sufficiently dissuasive for SMEs, disqualification of bidders and impacts on reputational risks.

- With respect to “provide alternative grounds to impose higher fines, for example the amount of the bribe given or the unlawful benefit obtained” as an alternative plan shown in recommendation 15 (a), some pointed out that there would be the possibility to introduce a sliding scale for fines, which provides maximum fines based on business transaction amounts or improper benefits and which has already been introduced under other Acts including the Foreign Exchange and Foreign Trade Act and Income Tax Act. However, others pointed out that Japan needs to consider carefully whether it would be possible to find suitable standards for the grounds of such fines if a sliding scale for fines is introduced.

To add, we heard the following relevant opinions in the METI Study Group.

- Indeed, in comparison to other acts, it may be necessary to consider whether three million yen is suitable.
- We are aware that bribery is a serious problem as well as a violation of competition law. The current status is sufficiently dissuasive because if foreign bribery takes place, it will have serious impact on their business, for example as grounds for disqualification of bidders.
- For SMEs, the three hundred million yen of the current statutory maximum fine is expensive enough.
- For corporations, reputation is more of an issue than the amount of the statutory fine. Recently, markets are paying attention to corporate trends related to ESG and SDGs, so negative reactions of investors are to be expected if a case of bribery occurs.

As described above, most opinions in the METI Study Group were negative toward taking steps to raise statutory maximum fines for legal persons or introducing steps to provide alternative grounds to impose higher fines, for example the amount of the bribe given or the unlawful benefit obtained. Therefore, as of now, we have reached a conclusion that it is difficult to proceed further in revising our laws.

**If no action has been taken to implement recommendation 15(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 15(b):**

15. Regarding **sanctions for legal persons**, the Working Group recommend that Japan:

b. Urgently take all necessary steps, including through guidance and training to law enforcement and the judiciary, to ensure that sanctions imposed in practice against legal persons in foreign bribery cases are effective, proportionate and dissuasive. [Article 3 of the Convention; 2009 Recommendation III.ii. and V.]

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

The Ministry of Justice has been making its best efforts to ensure that cases of foreign bribery are properly prosecuted and punished in various ways, including through informing public prosecutors, who are in charge of financial and economic crimes such as foreign bribery, of the recommendations from OECD, including this recommendation, at conference in which such prosecutors participate, as well as at training sessions for prosecutors.

In addition, the Supreme Public Prosecutors Office issued a guidance dated on June 23, 2021 to all Public Prosecutors Offices nationwide. It announced that the public prosecutors should actively prosecute not only natural person but also legal person, and obtain appropriate sentences, and that the proceeds of crimes should be properly deprived by confiscation or collection of a sum of equivalent value.

As for judges, courts take the approach written in Recommendation 13.



The National Police Agency provides necessary trainings for investigators of prefectural police who are engaged in foreign bribery investigations and provides guidance/education to prefectural police forces on a continuous basis.

**If no action has been taken to implement recommendation 15(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 15(c) :**

15. Regarding **sanctions for legal persons**, the Working Group recommend that Japan:

c. Ensure that the debarment regimes at the national and local levels are transparent so that companies will know the consequences that they can face if they engage in bribery. [Article 3(4) of the Convention]

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

MOFA and JICA publish on their websites the rules and regulations on the measures taken against companies or other entities which have committed unlawful acts, including bribery of foreign public officials in ODA projects, as well as related documents on the systems of the measures. In addition, when some measures are taken, they disclose related information on their websites, such as the names of the companies concerned, details of the unlawful acts and the period of suspension for participation in bidding of ODA projects. Furthermore, they also share related information with officials of ministries, agencies and local governments which oversee government procurements, through a network established among them.

**If no action has been taken to implement recommendation 15(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 15(d):**

15. Regarding **sanctions for legal persons**, the Working Group recommend that Japan:

d. Take into account the tax treatment applicable to confiscation measures in foreign bribery cases to ensure that overall, sanctions imposed on legal persons are effective, proportionate and dissuasive. [Article 3 of the Convention; Recommendation III.ii.]

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

**If no action has been taken to implement recommendation 15(d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

According to the Japan's current tax treatment, in the event where assets obtained as a result of foreign bribery cases are confiscated by the judiciary authorities, there is no limitation on the tax deductibility of those confiscated assets' value; this is because the limitation of the tax deduction is considered as an excessive sanction when the unjust enrichment to be taxed has already disappeared. Japan will examine whether we need to change the current tax treatment, being mindful of the WGB's recommendation.

**Recommendations regarding other measures affecting implementation of the Convention:****Recommendation 16(a):**

16. Regarding **tax measures** to combat foreign bribery, the Working Group recommends that Japan:

a. Ensure that tax authorities receive appropriate guidance on reporting mere suspicions of bribery uncovered in taxpayers' returns and ensure that the identification of the bribe recipient(s) by the tax authorities is not required prior to reporting to law enforcement authorities. [2009 Recommendation VIII.i.; 2009 Tax Recommendation]

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

The National Tax Agency revised the guidance so that the information of the bribe recipients (their birth days, organizations to which they belong, and their positions) cannot be identified. As a result of this revision, it became easier for the tax examiners to report suspicions of bribery.

**If no action has been taken to implement recommendation 16(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 16(b):**

16. Regarding **tax measures** to combat foreign bribery, the Working Group recommends that Japan:

b. Provide regular training to tax inspectors on the detection of bribe payments disguised as legitimate allowable expenses, including as miscellaneous expenses. [2009 Recommendation, VIII.i.; 2009 Tax Recommendation]

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

Using the "Bribery and Corruption Awareness Handbook", The National Tax Agency regularly provides training for the tax examiners on the indicators which show the possibility of bribe payment, and so on.

In this training, we also give lectures on the specific cases where the bribe payments were disguised as miscellaneous expenses, and so on.

**If no action has been taken to implement recommendation 16(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 16(c):**

16. Regarding **tax measures** to combat foreign bribery, the Working Group recommends that Japan:

c. Encourage law enforcement authorities to promptly inform the tax authorities of foreign bribery-related convictions and tax authorities to re-assesses the tax returns of taxpayers convicted of foreign bribery to verify whether bribes were impermissibly deducted. [2009 Recommendation VIII.i.; 2009 Tax Recommendation I.i.]

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

The Ministry of Justice has been making its best efforts to ensure that cases of foreign bribery are properly prosecuted and punished in various ways, including through informing public prosecutors, who are in charge of financial and economic crimes such as foreign bribery, of the recommendations from OECD, including this recommendation, at conference in which such prosecutors participate, as well as at training sessions for prosecutors.

In addition, the Supreme Public Prosecutors Office issued a guidance dated on June 23, 2021 to all Public Prosecutors Offices nationwide. It announced that if a public prosecutor suspects tax evasion in relation to convicted foreign bribery cases, information about such judgment should be provided promptly to National Tax Authority.

The National Tax Agency is going to re-assess the tax returns of taxpayers convicted of foreign bribery to verify whether bribes were impermissibly deducted when the Ministry of Justice or the Public Prosecutor's Office informs us of foreign bribery-related convictions.

**If no action has been taken to implement recommendation 16(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 17(a):**

17. Regarding **Official Development Assistance**, the Working Group recommend that Japan:

a. Consider extending the policy it has initiated to enter into agreements and form joint committees for preventing corruption in Japanese ODA to the governments of countries with high corruption risk; provided that if Japan decides not to enter into such agreements, it should inform the Working Group how the decision was made and its rationale. [2016 Recommendation 6.]

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

MOFA has been working harder for governments of recipient countries to prevent fraud and corruption in ODA projects, through frameworks such as Policy Dialogue on Economic Cooperation. Agreed documents signed with recipient countries clearly state that recipient countries shall take measures to prevent corruption. In addition, JICA asks governments of recipient countries to take strict measures against unlawful acts in ODA projects implemented by JICA, in accordance with JICA's procurement guidelines. JICA itself monitors the procurements and checks if they follow the guidelines. When bribery practices have been found in ODA projects in a recipient country, the basic policy of the Japanese government is to establish joint committees with the governments of these countries, discuss with them related matters such as measures to prevent recurrence and clarification of the cases and do AOB with them. MOFA is still firmly maintaining this policy.

**If no action has been taken to implement recommendation 17(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

**Recommendation 17(b):**

17. Regarding **Official Development Assistance**, the Working Group recommend that Japan:

b. Ensure that JICA and MOFA verify the accuracy of the information provided by applicants, including the verification of debarment lists of national and multilateral financial institutions beyond the World Bank and consideration of an applicant's corruption risk management system, such as companies' internal controls, ethics and compliance programmes and measures, in particular where international business transactions are concerned. [2016 Recommendation 6].

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

JICA has adopted a system whereby companies or individuals cross-debarred by Multilateral Development Banks (MDBs), including the World Bank Group (WBG), are ineligible to participate in procurements of ODA loans projects. In terms of specific operations, when the WBG decides a debarment with a term more than one year against companies or other entities for the eligibility to participate in procurements, JICA, in conjunction with the WBG, takes some measures against the same companies or individuals. JICA follows sanction lists of MDBs, including WBG from this point of view. In addition, regarding ODA projects implemented by MOFA, MOFA generally handles them in conjunction with JICA.

Furthermore, MOFA and JICA carefully conduct fact-findings and surveys before deciding to take measures. In addition, a necessary condition for the termination of the measures against a company which has committed in unlawful acts in ODA projects is that the company shall formulate sufficient recurrence prevention measures or compliance programs. They have been strengthening their efforts to prevent the recurrence of unlawful acts, such as a continuation of the measures when they judge that the recurrence prevention measures reported are insufficient.

**If no action has been taken to implement recommendation 17(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

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

*Regarding Part II and as per the procedures agreed by the Working Group in December 2019, countries are invited to provide information with regard to any follow-up issue identified below where there have been relevant developments since the Phase 4 report. Please also note that the Secretariat and the lead examiners may also identify follow-up issues for which it specifically requires information from the evaluated country.*

18. The Working Group will follow up on the issues below as case law, practice, and legislation develops:

**Issue for follow-up:**

a. The number of foreign bribery allegations that METI receives and how they are handled, especially those from potential whistleblowers;

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

Since Dec.2018, METI has received one foreign bribery allegation and it was not reported from a whistleblower. METI provided its information to the law authorities quickly in accordance with “Regarding the Treatment of Information on Cases of Bribery of Foreign Public Officials”. METI cannot mention whether or not it has led to investigation/prosecution.

In addition, if METI receives reports regarding foreign bribery from whistleblowers, METI will introduce the whistleblower to the Prefectural Police with jurisdiction over the location of an offender or undertaking. Since an administrative organ to which a whistleblower must report is one with authority to impose a disposition and make a recommendation, etc. regarding the reportable fact (Article 2(1) of the Whistleblower Protection Act (WPA)), a whistleblower with regard to the UCPA stipulating foreign bribery offenses must report not to METI but to an investigation agency with jurisdiction over the location of an offender or undertaking. Additionally, Article 11 of the WPA provides that if a whistleblowing disclosure is erroneously made to an administrative organ that has no authority, this relevant administrative organ must inform the whistleblower of the administrative organ with the authority, so, if a whistleblower contacts METI, METI will tell him/her to contact the said Prefectural Police.

**Issue for follow-up:**

b. How Japan’s export credit agencies conduct anti-corruption due diligence across the various forms of support they provide, in particular when they acquire equity stakes in projects or other transactions;

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

In accordance with the "Recommendation of the Council on Bribery and Officially Supported Export Credits" adopted by the OECD Council in March 2019, JBIC updated its internal procedures concerning the bribery act related to export finance.

According to Section IV of the Recommendation, JBIC, on its website and application form, requires its customers to understand and comply with relevant laws and regulations prohibiting bribery.

According to Section V of the Recommendation, JBIC expanded the scope of declaration and information disclosure to be made by exporters and borrowers.

According to Section VI of the Recommendation, JBIC documented in its internal rule potential measures to be undertaken and external guideline which should be referred to during Enhanced Due Diligence (EDD) to make sure that EDD is properly done when necessary.

According to Section VII and VIII of the Recommendation, JBIC, in its application form or loan agreement, included antibribery clauses and clauses to enable JBIC to take necessary action when there is a case that bribery has been involved.

NEXI does not provide support such as acquiring equity stakes in projects or other transactions. NEXI applies the same anti-bribery due diligence process for other types of insurance.

**Issue for follow-up:**

c. Whether whistleblowers who report in good faith and on reasonable grounds can obtain redress;

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

In accordance with the amendment of the Whistleblower Protection Act in 2020, new guidelines (the “Guidelines”) are to be made in 2021 and the Guidelines will stipulate that employers take remedial measures for whistleblowers if any discriminatory or disciplinary action is taken against them due to reports.

**Issue for follow-up:**

d. The coverage of bribe payments to third party beneficiaries;

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

As far as the Ministry of Justice recognizes, there have been no cases of bribery to the third party ever prosecuted. This does not mean that such cases cannot be punished, as whether or not to prosecute a case it depends on specific circumstances of each cases.

**Issue for follow-up:**

e. The use of alternative offences to foreign bribery to ensure that foreign bribery related offences do not remain unpunished, in particular when the foreign bribery offence itself may be time-barred;

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

As far as the Ministry of Justice recognizes, there are no such cases. Generally, investigative authorities appropriately deal with cases in accordance with relevant laws and evidence.

**Issue for follow-up:**

f. The use of confiscation measures in foreign bribery cases;

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

As far as the Ministry of Justice recognizes, there are no such cases in which confiscation was sentenced as additional penalties.

**Issue for follow-up:**

g. The application of corporate liability regime in foreign bribery cases, and in particular (i) the imposition of a corporate fine in the absence of a prosecution or conviction against a natural person; (ii) the extent to which corporate compliance programmes or other measures to prevent corruption can either preclude liability or constitute a mitigating factor in foreign bribery cases as judicial practice develops; (iii) corporate liability for foreign bribery committed by both related and unrelated intermediaries; and (iv) successor liability where a company ceases to exist through a corporate merger or other transaction before being finally convicted of foreign bribery;

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

For example, in cases of providing bribe to Vietnamese public official, and in cases related to Japanese ODA loan projects in Indonesia, Viet Nam and Uzbekistan, the dual liability provisions were applied properly.

As far as the Ministry of Justice recognizes, there are no such cases regarding (i), (iii), (iv).

Regarding (ii), it all depends on the decision by the court, so it is hard to make a general statement. However, developing corporate compliance programmes and adopting recurrence prevention measures may be taken into consideration as a mitigating factor for a defendant corporation.

**Issue for follow-up:**

h. Whether the sanctions imposed in the context of the Agreement Procedure are effective, proportionate and dissuasive;

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

Public prosecutors in Japan utilize the agreement procedure when it is necessary to do so by considering various factors such as the importance of evidence obtained from cooperation of suspect or defendant, the gravity and circumstances of the offence concerned, the degree of relevance of the offence concerned, and other circumstances. The procedure is properly operated.

**Issue for follow-up:**

i. Japan's ongoing efforts to maintain and develop bilateral MLA relationships with its main trading partners and other countries in the region;

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

Japan has concluded ①bilateral MLA treaties or agreements with the major trading partners such as the US, China, the EU and so forth, and ②multilateral treaties such as UNCAC, UNTOC and Convention on Cybercrime. Based on these treaties, Japan is able to deal with requested and requesting MLA.

③With regard to other countries where Japan does not conclude such treaties or agreements, Japan actively deal with requested and requesting MLA as well in accordance with international comity and relevant domestic laws. Thus, Japan makes effort to maintain and develop MLA relationships with each country.

In addition, the formal negotiation for bilateral MLA treaty is underway with Viet Nam, one of the major trading partners.

Furthermore, Japan is considering negotiation to conclude such treaties with other countries, including those belonging to the main trade areas.

**Issue for follow-up:**

j. The extradition of Japanese nationals or any other suspect in foreign bribery cases;

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

While there are some examples of the extradition of Japanese nationals to other countries in crimes other than foreign bribery since the evaluation of Japan in June 2019, there have been no cases of the extradition of Japanese nationals or other suspects in relation to foreign bribery.

If Japan receives a request for extradition of a fugitive in a foreign bribery cases, Japan will deal with it in accordance with relevant treaties and domestic laws.

**Issue for follow-up:**

k. The application of dual criminality for the money laundering offence in the AOCL to ensure that the money laundering offence can always be prosecuted and sanctioned "without regard to the place where the bribery occurred".

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

As far as the Ministry of Justice recognizes, the offence of money laundering whose predicate offence is foreign bribery has never been prosecuted. Thus, as far as we recognize, there is no case in which money laundering offence is punished whose predicate offence consists of an act falling into the language in parenthesis "acts committed outside Japan that would, if be committed in Japan, constitute any of these



crimes and would also constitute a crime under the laws and regulations of that jurisdiction” prescribed in the chapeau of article 2(2)(i) APOC.

Phase 4 report for Japan in 2019 indicated a concern that existence of the language in parenthesis “including acts committed outside Japan that would, if be committed in Japan, constitute any of these crimes and would also constitute a crime under the laws and regulations of that jurisdiction” prescribed in the chapeau of article 2(2)(i) APOC would narrow the scope of money laundering offence of which foreign bribery constitutes predicate offence.

However, as explained again below, such concern is unnecessary and the money laundering offence is constituted irrespective of the location where the bribery occurred under Japanese domestic law.

The chapeau of article 2(2)(i) APOC(\*) clearly distinguishes “a criminal act” and “acts” in parenthesis.

“A criminal act” includes a criminal act which is punishable under the Japanese law even when it is committed outside Japan. Foreign bribery under UCPA has a provision of punishment for crimes committed outside Japan which makes foreign bribery committed outside Japan punishable (article 21(8) UCPA). Thus, foreign bribery committed outside Japan is included in “a criminal act” in the first paragraph of article 2(2)(i) APOC through the application of the provision of punishment for crimes committed outside Japan.

“acts” in the parentheses of the first paragraph of article 2(2)(i) APOC means an act which is not punishable under the Japanese law when it is committed outside Japan. The words in the parentheses “including acts ...” stipulate that “acts” constitutes a predicate offence of money laundering offence under two conditions, even though “acts” itself is not punishable under the Japanese law when it is committed outside Japan.

The two conditions above mentioned are:

- a) if the act were to be committed in Japan, the act would constitute any of offences listed in article 2(2)(i) APOC; and also
- b) the act constitutes an offence under the laws and regulations of the jurisdiction where the act is committed.

When both of these two conditions are met, “the act” constitutes the predicate offence of money laundering offence.

For example, transferring firearms is a crime when it is committed in Japan, but not punishable when it is committed entirely outside Japan under the Act for Controlling the Possession of Firearms or Swords and Other Such Weapons. The words “including acts ...” in the parentheses of the first paragraph of article 2(2)(i) APOC can be applied to such cases. As a result, transferring firearms committed entirely outside Japan can be a predicate offence of money laundering offence as long as such an act constitutes a crime under the laws and regulations of the jurisdiction where the act is committed.

In conclusion, foreign bribery committed outside Japan is not the matter of “including acts ...” in the parentheses of the first paragraph of article 2(2)(i) APOC through the application of the provision of punishment for crimes committed outside Japan, and in that case dual criminality is not required for foreign bribery related money laundering.

(\*) The article 2 of the Act on Punishment of Organized Crimes and Control of Crime Proceeds

(2) In this act, “proceeds of crime” means:

- (i) Any property produced by, obtained through, or obtained in reward for a criminal act that constitutes any of the crimes set forth in the following sub-items (including acts committed outside Japan that would, if be committed in Japan, constitute any of these crimes and would also constitute a crime under the laws and regulations of that jurisdiction) committed for the purpose of obtaining an unlawful economic benefit.

### **PART III: DISSEMINATION OF EVALUATION REPORT**

**Please describe the efforts taken to publicise and disseminate the Phase 4 evaluation report:**

Ministry of Foreign Affairs has posted and publicised the Phase 4 Report on Japan on its website as well as the detail information regarding the Anti-Foreign Bribery Convention and its background.

## ANNEX I - OECD Phase 4 follow-up Japan – Additional Information Provided by Japan to the Evaluation Team

### Dissemination of report:

- *Did MOFA publish a Japanese version or the original version of the full Phase 4 Report online? Is it still online?*

The original version of the full Phase 4 report and the Japanese version of the Executive Summary and the Recommendations on line.

### Recommendation 1c.

- *Details about JICA and MOFA training programmes (number of events, time period, scope, attendees) and whether they will be sustained efforts in future*

JICA has conducted seminars for officials of the implementing authorities on procurement supervision of ODA loan projects, at the JICA overseas offices or online. Approximately 560 people have attended these seminars since adoption of the recommendations in 2019. JICA has introduced the risks of fraud and corruption and JICA's efforts of the anti-corruption in these seminars. In addition, JICA has conducted pre-dispatching training, basically conducted every month, for the staff of the JICA overseas offices or the experts to introduce the same issues to them.

In order to strengthen the anti-corruption system of the recipient countries' governments, JICA has conducted training programs for high-ranking officials of their governments, and seminars mainly in countries where corruption cases have occurred. JICA's main efforts are as follows. JICA will continue to conduct actively training programs and seminars that meet the needs of relevant parties, while also utilizing online seminars, considering the constraints caused by the COVID-19 pandemic.

- Training programs in Japan mainly for high-ranking officials of the recipient countries' governments : Knowledge Co-Creation Program (Group and Region Focus)

Theme: Measures against Corruption (Criminal Justice)

Period: 6 October to 16 November 2019

Participants: 26 people from 25 countries

Outline:

This course was organized by the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFED), an institution known worldwide for its high-quality international training courses and seminars in the crime prevention and criminal justice sectors. The program targeted criminal justice practitioners such as police officers, prosecutors, judges and officials of anti-corruption committees responsible for detection, suppression and prevention of corruption. The participants shared best practices for combating corruption with each other. The course consisted of lectures from Japanese and foreign experts and visits to relevant institutions in Japan and presentations by the participants and discussions among them.

Theme: Crime Prevention and Criminal Justice (For high-ranking officials)

Period: 13 January to 15 February 2020

Participants: 15 people from 13 countries

Outline:

The seminar targeted high-ranking officials of ripe experience of crime prevention, criminal justice and corrections and rehabilitation. The participants shared knowledge, experience and challenges of each country's activities on topics following the current international trend of crime prevention and criminal justice with each other. They also looked for best practices for improvement in each country through group discussion and visits to relevant institutions. The seminar offered an opportunity to establish international networks between the officials.

NOTE: The training programs in FY 2020 were canceled due to the COVID-19 pandemic. About programs in FY 2021, JICA is considering to conducting them online.

- Seminar for JICA overseas offices

Date: 23 March 2021

Participants: About 130 people

Venue: JICA overseas office in Peru

NOTE: This seminar was aired simultaneously to JICA overseas offices in the Latin America region.

Outline:

The seminar targeted officials of the implementing agencies, consultants and contractors of the loan projects in Peru, officials of the relevant ministries and agencies of Peru and staff (representatives, project formulation advisors, national staff) of JICA offices in Peru and the other Latin America countries. A senior official of the Board of Audit of Peru was also invited as a lecturer. The seminar was held online to share measures of the government of Peru and JICA against wrongful acts, experiences in this field and other matters among the participants.

- Training course for JICA's staffs

Date: 12 November 2020

Participants: About 60 people

Venue: JICA head office

NOTE: This training course was aired simultaneously to JICA domestic and overseas offices.

Outline: This training course was held to show fraud and corruption cases and to enhance their compliance awareness of participants.

- ***Were there any updates to the JICA Anti-Corruption Guidance?***

The document explains the definitions of fraud and corruption, the efforts and measures of JICA, the recipient countries' governments, implementing authorities and companies related to ODA projects for prevention of fraud and corruption. JICA has not revised the document since the organization's approach to the matter has not significantly changed.

- ***Were there any updates to the JICA/MOFA Anticorruption Policy Guide?***

The document explains the set of measures against companies or other entities which have committed wrongful acts in ODA projects, the way to prepare and the actions to be taken when approached by corrupt offers. MOFA has not revised the document, because MOFA's approach to the matter has not significantly changed since 2019.

**Recommendation 1d.**

- *What steps did JBIC and/or NEXI take to clarify the criteria for reporting foreign bribery suspicions?*

NEXI has not set specific criteria at present and will make a case-by-case decision regarding at what stage we will report foreign bribery suspicions.

In a situation where JBIC will need to make a judgment as to whether or when to report to a law enforcement authority, we would seek advice from external experts, mainly lawyers. Therefore, our criteria would be more general or qualitative, rather than being a categorical one.

Specifically, if any foreign bribery suspicions were to arise to companies related to supported projects, regardless before or after the conclusion of the financial contract, JBIC would go through fact-finding process and assess situation. If JBIC were to detect the possibility of bribery which were not made public, during the process, JBIC would consider the necessity of the reporting based on advice from external experts, mainly lawyers.

- *What training did JBIC and/or NEXI give on detecting foreign bribery?*

NEXI updated its anti-bribery policy in April 2020 in accordance with the revised OECD Recommendation of the Council on Bribery and Officially Supported Export Credits. We have held seven internal seminars, one for each department, to train staff in our new anti-bribery flow such as screening, enhanced DD, evaluation and decision, post-final commitment, etc.

JBIC believe that the most important piece to detect bribery is to increase and maintain awareness of employees. JBIC focuses on raising awareness of employees on bribery by implementing mandatory annual training. In the training, JBIC familiarizes its employees with external and internal regulations and rules and points to consider when considering financing.

- *Are the external databases used by NEXI for due diligence a development since Phase 4 (or something that the evaluation was just not made aware of at the time)?*

We have started using the external databases for due diligence since Sep. 2020 after the phase 4 evaluation.

**Recommendation 1f.**

- *To what extent do the JICPA guidelines and training specifically address foreign bribery?*

- JICPA “Guidelines on Responses to non-compliance with laws and regulations” (revised in March 2019) provides guidance on how auditors should respond as professionals in the event they become aware of illegal acts or suspicions.
- While illegal acts are not necessarily limited to bribery, the guidance illustrates bribery as the foremost example of illegal acts.
- JICPA has conducted trainings eight times between December 2016 and April 2018 (before the revision of the Guidelines March 2019) and nine times after the revision. In these trainings, JICPA has touched on such issues related to bribery that laws against bribery should be considered to be in conformity with the guidelines.
- E-learning is also available to the JICPA members 24/7, any day of the year. In addition, JICPA has put articles on round tables and interpretation with regard to the guidelines on Accounting & Audit Journal (September 2018, October 2019 and July 2020).
- In addition to the above-mentioned trainings, JICPA has conducted discussion-based trainings using videos made by ICAEW, covering a case on bribery as one of the topics. The trainings have been held five times since December 2018. An article featuring these trainings was published on the April 2019 edition of Accounting & Audit Journal.

**Recommendation 2b.**

- *What personnel and financial resources are allocated to this JAFIC unit?*

Human resources: The Unit is composed of officers who are competent in analysis and have knowledge and expertise in investigation of bribery, tax audit, etc.

Financial resources: Resources are secured under JAFIC, separate from other agencies.

- *How does it operate in practice?*

Human resources: The Unit determines the number of officers and how they are deployed as needed. They use various analysis tools and systems to analyze STR.

Financial resources: The Unit can operate without the intervention of other agencies.

- *What training is provided on specific red flags for foreign bribery?*

JAFIC creates materials explaining MOs and red flag indicators concerning foreign bribery and they are used in typology study and hands-on training for analysts

- *Whether any analytical reports have been transferred to law enforcement?*

JAFIC always conducts comprehensive analysis of suspicious transactions using STR and other data. JAFIC provides analysis results to relevant law enforcement agencies every time.

- *How has Japan encouraged megabanks to report suspicious transactions concerning foreign bribery?*

In Japan, we visit each mega bank and explain to them the MO and red flags of foreign bribery using informative material that JAFIC has created. We encourage them to make use of the material to proactively report STR. We also distribute the material to other financial institutions.

- *What is the definition of a megabank? (Is this the same as a bank within a keiretsu structure?)*

JAFIC did not define what a megabank is. "Global Systemically Important Bank" specifies megabank as Mitsubishi UFJ Bank, Mitsui-Sumitomo Bank and Mizuho Bank.

**Recommendation 2c.**

- *Has Japan developed specific red flag typologies for foreign bribery?*

Yes. We have provided the information to law enforcement agencies and other relevant businesses through the publication of informative material that JAFIC has created.

- *What about other materials?*

New material is created and published when new information emerges from the analysis of STR.

- *If yes, can it please provide translations?*

Please refer to the attached informative material.

- *To whom were such documents circulated?*

They are distributed to law enforcement agencies such as Prefectural police forces and public prosecutors office, as well as all banks that manage deposits.

(Why other businesses are excluded: Because of sensitive contents such as MO)

### Recommendation 3a

- *Clarify that 2020 WPA amendment will come into force by operation of law without further executive, legislative, or other government action in June 2022.*

The amended WPA is fully adopted and will go into effect by June 2022 without any additional legislative or executive action.

### Recommendation 7a

- *More details on foreign bribery enforcement actions (12 investigations, 1 prosecution, plus any new items)*

Regarding MHPS case, in July 2020, one defendant who did not reach the judgment at the time of the Phase 4 evaluation was convicted for a fine of 2.5 million yen. For the two cases we reported at the 2-year follow-up, the contents of the indictment and the summary order are as shown in the attached document.

As for other cases, it is difficult to make a report to WGB, because disclosing specific information regarding the case under investigation may hinder not only that particular case but also the future investigations and trials of that kind. We clearly explained about Japan's position on confidentiality at the time of the Phase 4 evaluation. However, in the Phase 4 evaluation, despite Japan's dissenting opinions, the number of cases, their status, and the outline of those cases were described in the report and made public. Based on this history, we will refrain from submitting the information other than above.

- *Need details on trainings (Number, dates, scope, content, attendees) as relevant to this recommendation*

Training sessions held after the Phase 4 evaluation (June 2019)

Date of sessions: June, 2019 and August, 2021

Participants: Police officers in charge of foreign bribery cases in prefectural police forces and police attaché in Japanese embassies.

Contents: The essentials of foreign bribery investigation (past arrest cases, collecting leads, the way discussions are held with the public prosecutors office, how it is possible to confiscate the crime proceeds from foreign bribery, how a legal person can be subjected to punishment, etc.)

### Recommendation 8

- *Information on conferences/training events for police and prosecutors (Number, dates, scope, content, attendees) as relevant to this recommendation*

Training sessions held after the Phase 4 evaluation (June 2019)

Date of sessions: June, 2019 and August, 2021

Participants: Police officers in charge of foreign bribery cases in prefectural police forces and police attaché in Japanese embassies.

Contents: The essentials of foreign bribery investigation (past arrest cases, collecting leads, the way discussions are held with the public prosecutors office, confiscation of crime proceeds from foreign bribery, how a legal person can be subjected to punishment, etc.)

**Recommendation 9a**

- *Proof of subpoenas issued for documents from natural and legal persons early in investigation*
- *Confirm whether wiretapping is a “secret investigation method” available for foreign bribery*

Wiretapping is not available for foreign bribery cases.

**Recommendation 9b**

- *Details on trainings (Number, dates, scope, content, attendees) as relevant to this recommendation*

Training sessions held after the Phase 4 evaluation (June 2019)

Date of sessions: June, 2019 and August, 2021

Participants: Police officers in charge of foreign bribery cases in prefectural police forces and police attaché in Japanese embassies.

Contents: The essentials of foreign bribery investigation (past arrest cases, collecting leads, the way discussions are held with the public prosecutors office, confiscation of crime proceeds from foreign bribery, how a legal person can be subjected to punishment, etc.)

**Recommendation 11a**

- *Is the MOJ policy to forward information documented in a policy document?*
- *If yes, please provide a copy/translation.*

There is no policy document for MOJ policy. However, as we mentioned in the comment against summary on recommendation 11a, when MOJ received information, it actually promptly provides that information to the PPO.

**Recommendation 11b**

- *What specific information on steps or measures taken since Phase 4 to ensure that independence is “guaranteed both legally and operationally”?*

As we mentioned in comment against summary on recommendation 11b, the premise WGB stands on that that prosecution could be influenced by other ministries and agencies such as METI is a grave misunderstanding.

**Recommendation 11c**

- *Clarify what is new since Phase 4.*

There is no new matter since Phase 4.

- *Whether the conditions limiting info provided to METI are set by METI or MOJ or both and if are they in writing?*

Inquiries from law enforcement agencies to METI ask about general interpretations of the UCPA. Therefore, these authorities do not need to provide information that is able to specify a person or a legal person in question. Instead, these authorities have to keep information, such as its name, secret from METI that is not a law enforcement agency because the inquiries are involved with cases under investigation.



- *Are all Article 5 issues sufficiently addressed?*

As we mentioned in comment against summary on recommendation 11b, the premise WGB stands on that that prosecution could be influenced by other ministries and agencies such as METI is a grave misunderstanding.

Information provided to METI is limited and law enforcement agencies have been fully aware of the non-binding nature of METI's interpretations. Therefore, METI sufficiently addresses all Article 5 issues.

#### **Recommendation 12b**

- *Details on trainings (Number, dates, scope, content, attendees) as relevant to this recommendation*

#### **Recommendation 12c**

- *Details on trainings (Number, dates, scope, content, attendees) as relevant to this recommendation*

Training sessions held after the Phase 4 evaluation (June 2019)

Date of sessions: June, 2019 and August, 2021

Participants: Police officers in charge of foreign bribery cases in prefectural police forces and police attaché in Japanese embassies.

Contents: The essentials of foreign bribery investigation (past arrest cases, collecting leads, the way discussions are held with the public prosecutors office, confiscation of crime proceeds from foreign bribery, how a legal person can be subjected to punishment, etc.)

#### **Recommendation 13**

- *Were the training sessions mentioned here truly organized after Phase 4 such that they would constitute new measures?*

#### **Recommendation 15b**

- *Details on conferences/trainings (Number, dates, scope, content, attendees) as relevant to this recommendation*

Training sessions held after the Phase 4 evaluation (June 2019)

Date of sessions: June, 2019 and August, 2021

Participants: Police officers in charge of foreign bribery cases in prefectural police forces and police attaché in Japanese embassies.

Contents: The essentials of foreign bribery investigation (past arrest cases, collecting leads, the way discussions are held with the public prosecutors office, confiscation of crime proceeds from foreign bribery, how a legal person can be subjected to punishment, etc.)

#### **Recommendation 15d**

- *Clarify the meaning of “no limitation on the tax deductibility of those confiscated assets”*

According to the Japan's tax treatment, confiscated assets' value is deductible, based on the idea that a confiscation produces the same effect as a denial of the existence of unjust enrichment caused by foreign bribery. If the confiscated assets' value is not deductible while benefits caused by foreign bribery are taxable, tax will be imposed on a non-existing taxable object. Therefore, it is inappropriate to exclude confiscated assets' value from deductible expenses. Also, if solely

confiscated assets caused by foreign bribery are excluded from deductible expenses, such a treatment is not consistent with other kinds of confiscations.

### **Recommendation 16b**

- *Details on trainings (Number, dates, scope, content, attendees) as relevant to this recommendation – materials on bribes concealed as miscellaneous expenses.*

#### ➤ Criminal Investigation Division

The National Tax Agency (NTA) annually holds a conference of all 12 Regional Taxation Bureaus (RTBs) which gathers Deputy directors and Legal Officers of each Criminal Investigation Division (approximately 30 participants), and trainings for newly appointed investigators (approximately 260 participants from all 12 RTBs) and senior investigators (approximately 90 participants from all 12 RTBs). In these conference and trainings, NTA provides participants with information of the actual cases and the directive which specifies that tax investigators need to report even mere suspicions of bribery.

One example of the actual cases explained in the training is as follows;

The bribe recipient created a bank account in the name of a shell company in the third country in order to receive the bribe. The briber's employee working in that country drew up a fictitious lease contract and the briber sent money to the shell company's bank account. These payments were disguised as deductible expenses such as the rent and the fee.

#### ➤ Large Enterprise Examination Division

The NTA keeps tax examiners in the Large Enterprise Examination Division informed about the importance of tackling with bribery to foreign public officials in a conference of all 12 RTBs to share knowledge with respect to the international taxation (approximately 170 participants who are in charge of international taxation) and a training for senior tax examiners held once a year (approximately 50 participants from all 12 RTBs). The purpose of the training is improving practical skills for tax examination based on the actual cases and learning legislation and directives required. The NTA directs tax examiners that they should examine any kinds of deductible expenses including miscellaneous expenses with the possibility of bribery to foreign public officials in mind by the materials for the training.

#### ➤ Corporation Taxation Division

The NTA annually holds a conference for Deputy Directors of all 12 RTBs and a training regarding examination of international transaction for senior tax examiners (approximately 260 participants of corporation taxation group at tax offices). In the conference and the training, NTA provides participants with information of the directive which specifies that tax examiners need to report even mere suspicions of bribery and directs tax examiners that they should examine any kinds of deductible expenses including miscellaneous expenses with the possibility of bribery to foreign public officials.

\*Due to the spread of Covid-19, NTA had to downsize or cancel some of trainings and conferences mentioned above in the last two years.

### **Recommendation 17a**

- *More specific information on ODA-related steps taken since Phase 4*
- *Details about new agreements or joint committees (e.g. case- and country-specific information).*

Japan has asked the recipient countries to take measures to prevent corruption in ODA projects as a necessary condition of implementing the projects. The condition is clearly stated in the agreed

documents with the recipient countries' governments. It refers not to any particular country, but to all recipient countries.

Since fiscal year 2019, Japan has signed 484 documents (Exchange of Notes and annexes) with 123 countries on the implementation of ODA projects. It is clearly stated in all of the documents that the recipient countries have responsibilities to take measures to prevent corrupt practices (any offer, gift or payment and consideration or benefit) and to provide information on corrupt practice related to ODA projects to relevant authorities.

Furthermore, the Joint Committee is an opportunity to discuss matters such as the facts behind the bribery cases that occurred in ODA projects and measures to prevent similar cases. In this sense, it is hard to hold Joint Committees in countries where an individual case has not occurred yet, considering the relation between these countries. Due to that, Japan has taken up this issue as one of the topics in the meetings with these countries such as policy dialogues on economic cooperation. While we have been amid the COVID-19 pandemic, Japan has held such meetings with 5 countries since adoption of the recommendations in 2019. Therefore, MOFA believes that it is inappropriate to assess that the recommendations have not been implemented.

- **Details on conferences (referred in Recommendation 7a, 8, 9b, 12b and 15b)**

Regarding the conferences in question, they were held on October 3, 2019 and July 2, 2021, after phase 4 evaluation. Prosecutors from 50 DPPOs in charge of financial and economic crimes such as foreign bribery attended to each conference. At the conferences, prosecutors reported case examples including foreign bribery cases, which are supposed to be useful for a future reference, and shared information. At both conferences, the Criminal Affairs Bureau of the Ministry of Justice announced to the attendees;

- that foreign bribery offence under UCPA is established based on Convention on Combating bribery of Foreign Public Officials in International Business Transactions,
- that Japan received some recommendation from WGB regarding foreign bribery,
- the contents of recommendations
- and that it is important to investigate and prosecute foreign bribery cases appropriately and actively.

At the 2021 conference, Criminal Affairs Bureau distributed materials containing Japanese translations of 11 recommendations that are closely related to the operation of the Public Prosecutor's Office. It also redistributed SPPO guidance regarding foreign bribery issued in June of the same year to remind its importance. In this way, Criminal Affairs Bureau announced that appropriate and active investigation and trial against foreign bribery cases are strongly demanded.

- **Details on training sessions for public prosecutors (Recommendation 7a, 8, 9b, 12b and 15b)**

Regarding training sessions in question, the recent two sessions were held on June 8, 2021, and July 9, 2021, for a total of more than 100 prosecutors. The Ministry of Justice introduced and explained about a number of recommendations related to investigation and prosecution of the foreign bribery cases (including Recommendations 7a, 8, 9b, 12b and 15b), and announced that prosecutors should take appropriate and active measures against foreign bribery cases.

Prior to these two sessions, in February and March of the same year, a total of approximately 90 public prosecutors were trained on another two sessions. The Ministry of Justice explained about foreign bribery cases by presenting WGB's recommendations and so on and announced that prosecutors should take appropriate and active measures against foreign bribery cases.

- **Details on UNAFEI-UNCAC Training Programme held by UNAFEI(Recommendation 8,12b,13 and 15b)**

UNAFEI has held an international training course entitled the “UNAFEI-UNCAC Training Programme” annually since 1998. The information about the latest training is as follows;

Title:

The 22nd UNAFEI-UNCAC Training Programme

Duration:

9 Oct. - 15 Nov. 2019

Participants:

31 participants including 1 Japanese judge from Osaka District Court.

Programme Overview:

This programme dealt with the main theme of effective measures to detect, investigate, prosecute and adjudicate corruption cases involving high-profile persons, such as politically exposed persons, high-ranking public officials and managers of state-owned, state-controlled and multinational enterprises. In particular, under the main theme, the following three topics were discussed intensively in this programme: (1) detecting, investigating and prosecuting corruption of a highly secretive and complex nature, (2) collecting and analysing electronic data, and (3) overcoming political interference and ensuring integrity of criminal justice authorities.

Therefore, the training mentioned in the "Phase 4 follow-up: Summary and Conclusion on Japan's two-year written report" was not held in response to the phase 4 follow-up.

#### **Recommendation 11b and c**

As we mentioned in comment against summary on recommendation 11b, the premise WGB stands on that that prosecution could be influenced by other ministries and agencies such as METI is a grave misunderstanding.

## **ANNEX II – Translated Guidance of the Supreme Public Prosecutors Office (SPPO Guidance) dated June 23, 2021**

In order to adequately play Japan's role in the international community, each Public Prosecutors Office should make efforts to appropriately implement the relevant laws and regulations, to thoroughly conduct investigations and prosecution and to realize heavier and more proper sentencing and so on, while paying attention to the following descriptions.

### **Description**

#### **1. Dealing with foreign bribery cases which takes place abroad**

The provisions of foreign bribery under Unfair Competition Prevention Act (UCPA) shall apply to cases which take place abroad where Japanese nationals provide, offer or promise to provide to a foreign public officials, in accordance with article 21 Paragraph 8 of the UCPA which stipulates that article 3 of the Penal Code shall apply to offence of foreign bribery.

On the other hand, public prosecutors should pay attention to the fact that the provisions of foreign bribery under UCPA can be applied in accordance with Article 1 of the Penal Code to cases where a part of the elements of the crime has occurred in Japan even though the offender is a foreign employee of a Japanese company or its local subsidiary. Such cases include ones where giving, offering or promising of bribe to a foreign public officials is done by remittance, phone call or e-mail from Japan to a foreign country, or cases where conspiracy, inducement or accessoryship was done in Japan or across Japan and other countries even if act of bribery itself is conducted in a foreign country.

#### **2. Appropriate punishment of legal persons, sentences of both imprisonment and fine, deprivation of criminal proceeds, etc.**

The public prosecutors should actively prosecute not only natural persons but also legal persons, and obtain appropriate sentences (including sentences of both imprisonment and fine for natural persons), and that the proceeds of crimes should be properly deprived by confiscation or collection of a sum of equivalent value.

[ ] Therefore, on investigation and prosecution, the public prosecutors should assess necessity for punishment of legal persons and sufficiently and appropriately collect evidence by conducting search and seizures, etc. on legal persons as necessary. Besides, where the case is related to foreign subsidiaries of Japanese corporation, it is important to properly consider possibility of prosecuting Japanese parent corporation for, for example, possible accounting fraud by such parent corporation and confiscating the crime proceeds, etc.

#### **3. Role of the Public Prosecutor in charge of financial and economic crimes**

Regarding foreign bribery cases, pay attention to especially following (1) to (3).

##### **(1) Appropriate handing over cases and inheriting knowledge**

The specialization cultivated thus far and continuity of investigations should be maintained upon the change of the public prosecutors in charge of financial and economic cases including foreign bribery, by handing over cases appropriately and inheriting knowledge to the succeeding prosecutor

(2) Close communication and cooperation with relevant organizations

The public prosecutors should not only cooperate closely with the police by discussing investigation plans and other related matters, but also proactively consider using the information held by relevant organizations, such as the National Tax Authority and the Securities and Exchange Surveillance Commission, on appropriate cases.

(3) Providing information to the National Tax Authority where suspicion for tax evasion exists

If a public prosecutor suspects tax evasion in relation to convicted foreign bribery cases, information about such judgment should be provided promptly to the National Tax Authority.

## ANNEX III – Summary of the Report of the METI Study Group

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### CHAPTER.1 Background

Japan created offenses of bribery of foreign public officials by the amendment of the UCPA on concluding the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Since then, Japan has taken actions including the amendment of the METI Guidelines and laws to cope with recommendations of mutual examination by OECD. In 2019, Phase 4 examination was held and the Phase 4 report including 17 recommendations was published. Then, METI established a Study Group in order to discuss issues on the Convention and enlighten the industry, and then, METI had discussed revision of the METI Guidelines and issues of the recommendations related to the UCPA.

### CHAPTER.2 METI Guidelines

Based on the recommendation 5, we added definition and the treatment of SFP under the UCPA, etc. in the METI Guidelines.

In addition, we reviewed the METI Guidelines based on the recommendation 4 and updated information since the last big revision.

\* the UCPA: the Unfair Competition Prevention Act  
the CCP: the Code of Criminal Procedure  
the PC: the Penal Code

### CHAPTER.3 Penalties, etc.

In relation to recommendations, we discussed the following three issues involved in legal system.

Issues	Current Status	Phase 4 recommendations	Summary of discussions
Fines	<p><b>[Fines for “Foreign Bribery Offenses (FBO)”]</b>  <b>Natural person: ≤ 5 million yen</b> (Article 21(2)(vii) of the UCPA)  <b>Legal person: ≤ 0.3 billion yen</b> (Article 22(1)(iii) of the UCPA)  *Maximum fines in actual cases of FBO (until July 2020)  Natural person : one million yen, legal person : 90 million yen  <b>[Convention]</b>  Article 3-1 provides that <b>the range of penalties shall be comparable to that applicable to the bribery of Party’s own public official.</b> (Fines for bribery of domestic public officials: ≤ 2.5million yen (Article 198 of the PC))</p>	<p>12(a) : <b>Enact legislation to substantially increase the statutory maximum fine for natural persons</b> convicted of foreign bribery</p> <p>15(a) : <b>Raise the statutory maximum, or provide alternative grounds to impose higher fines, for example the amount of the bribe given or the unlawful benefit obtained,</b> that can be <b>imposed to ensure that the fine imposed will be effective, proportionate and dissuasive</b> even in largescale corruption cases.</p>	<ul style="list-style-type: none"> <li>Statutory penalties for a natural person: most opinions were <b>negative toward increasing the statutory maximum penalties because current statutory penalties are sufficient in comparison to those applied to the bribery of domestic public officials.</b></li> <li>Statutory penalties for a legal person: <b>it should be carefully considered based on factors other than the actual amount of the fine, such as the fact that the current statutory maximum fine is sufficiently dissuasive for SMEs, disqualification of bidders and impacts on reputational risks.</b> In terms of introduction of sliding scale for fines※, Japan needs to consider carefully whether it would be possible to find suitable standards for grounds of fines. ※ it can provide maximum fines based on business transaction amounts or improper benefits.</li> </ul>
Statute of Limitations	<p><b>[Statute of Limitation (SL)]</b>  <b>The SL is determined based on a statutory penalty and it is completed upon the lapse of the period</b> (Article 250 of the CCP)  <b>[Imprisonment of FBO]</b>  <b>≤ 5 years</b> (Article 21(2)(vii) of the UCPA)  <b>[SL of natural or legal person]</b>  <b>5 years</b> (Article 250(2)(V) of the CCP, Article 22(3) of the UCPA) ※the SL ceases to run on specific grounds and begins to run for the rest period when they are extinguished (Article 254, 255 of the CCP)</p>	<p>7(c) : <b>Take urgent steps to further extend the statute of limitations for the foreign bribery offence to an appropriate period</b> to ensure the effective prosecution of the foreign bribery offence or <b>to introduce the possibility to suspend the limitation period during the investigation</b> with the aim of achieving the same goal</p>	<ul style="list-style-type: none"> <li>Most opinions showed <b>it is not appropriate to extend the upper limitation of the statutory penalty on foreign bribery offense in order to extend the statute of limitations</b> because currently, the statute of limitations is determined based on the maximum statutory penalty under the CCP.</li> <li>With regard to suspend SL of legal person in accordance with a natural person, <b>it is difficult to reach a conclusion only in light of the UCPA because it would have impact on many other laws, such as laws having a dual criminal liability provision.</b></li> </ul>
Jurisdiction to Foreign Employees	<p><b>[Jurisdiction]</b>  <b>A person who has committed bribery in Japan</b> (Article 8, 1 of the PC)  <b>A Japanese national who has committed bribery outside Japan</b> (Article 21(8) of the UCPA, Article 3 of the PC)  <b>A legal person in case that employee, etc. has committed bribery with regard to an operation of the legal person</b> (Article 22(1)(iii) of the UCPA)  → <b>In case that a foreign employee</b> working abroad has committed bribery outside Japan, <b>if there is a conspiracy between him/her and a person in Japan or a Japanese national</b>, there is jurisdiction to the employee and its legal person (that is, they are punishable).</p>	<p>14(b) : <b>Urgently review its legislation to ensure that Japan has nationality jurisdiction</b> over foreign bribery offences <b>including when bribes by Japanese companies operating abroad are paid by non-Japanese employees</b></p>	<ul style="list-style-type: none"> <li>Most opinions were as follows:  It is too hard to imagine Japanese cases of foreign bribery in which Japanese nationals and persons in Japan are not involved, so <b>there is no need to unconditionally extend our jurisdiction to foreign employees who have no conspiracy with them.</b></li> <li>We considered concept of applying ‘principle of protective jurisdiction’ or ‘principle of universal jurisdiction’ to offenses of foreign bribery. However, most opinions showed that <b>it is not appropriate to adopt the concept and expand geographical scope of application immediately in light of the concepts of these principles so far.</b></li> </ul>

#### CHAPTER.4 Guidance of METI Guidelines

We formulated new guidance of METI Guidelines positioning between the pamphlet and the METI Guidelines to promote awareness-raising for SMEs.



**ANNEX IV – Revised Guidelines for the Prevention of Bribery of Foreign Public Officials**

**May 26, 2004**

**Revised: May, 2021**

**Ministry of Economy, Trade and Industry**

**Record of revisions**

Revised: May, 2006

Revised: January, 2007

Revised: September, 2010

Revised: July, 2015

Revised: September, 2017

Revised: May, 2021

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## CHAPTER 1: BACKGROUND AND OBJECTIVES OF THESE GUIDELINES

### 1.1 Background to these Guidelines

As corporate activities everywhere become increasingly global and extend beyond national borders, the volume of international commercial transactions that Japanese companies engage in is increasing steadily. In order to ensure the acquisition and maintenance of opportunities in the conduct of business in overseas markets, fair competition based on prices and quality of products and services should be the norm, and unfair competition through bribery of foreign public officials should be prevented.

This understanding is shared globally, which led to the development of the Anti-Bribery Convention (“Convention on Combating Bribery of Foreign Public Officials in International Business Transactions”<sup>4</sup>), which was adopted by the OECD (Organisation for Economic Co-operation and Development) in 1997. In accordance with this Anti-Bribery Convention, signatory countries, led primarily by developed nations, have been working in concert towards achieving mutually equivalent measures to prevent bribery of foreign public officials<sup>5</sup>.

#### Main Points of the Convention

##### (1) Elements of the Offence

The offence of bribery of foreign public officials is committed when the following elements apply:

- any person intentionally
- offers, promises or gives any undue pecuniary or other advantage, whether directly or through intermediaries,
- to a foreign public official,
- for that official or for a third party,
- in order that the official act or refrain from acting in relation to the performance of official duties,
- in order to obtain or retain business or other improper advantage in the conduct of international business.

##### (2) Definition of Foreign Public Official

<sup>4</sup> This Convention may hereinafter be abbreviated as the "OECD Convention" or, more simply, the "Convention." For information regarding the Convention and the Commentaries adopted together with the Convention in November 1997, refer to: <https://www.oecd.org/corruption/oecdantibriberyconvention.htm> (text of the Convention and that of its Commentaries). For the Japanese translation of the text of the Convention, refer to:

[https://www.mofa.go.jp/mofaj/gaiko/oecd/jo\\_shotori\\_hon.html](https://www.mofa.go.jp/mofaj/gaiko/oecd/jo_shotori_hon.html).

<sup>5</sup> This Convention is also open to non-OECD member countries, and the signatories as of July 2019 are 36 OECD member countries (Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States) plus the eight other countries of Argentina, Brazil, Bulgaria, Colombia, Costa Rica, Peru, Russia and South Africa (44 signatories in total).

"Foreign public official" means:

- any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected (including a local public entity in a foreign country);
- any person exercising a public function for a foreign country, including for a public agency (i.e. an entity constituted under public laws to carry out specific tasks in the public interest);
- any person exercising a public function for a foreign country, including for a public enterprise; and
- any official or agent of a public international organization.

(3) Sanctions

- The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties;
- The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials;
- Legal persons shall also be held liable for the bribery of foreign public officials;
- The bribe itself, the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, shall be subject to seizure and confiscation, or that monetary sanctions of comparable effect shall be applicable; and
- The imposition of additional civil or administrative sanctions shall also be considered.

(4) Jurisdiction

- Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory; and
- Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

(5) Money Laundering

- Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

(6) Miscellaneous

- In addition to the above, measures in such areas as accounting, mutual legal assistance, extradition, and follow-up on the implementation of the Convention by the signatory countries shall also be taken in conjunction in order to ensure the effect of the Convention.

In concluding the OECD Convention, Japan has been taking actions including a revision to the Unfair Competition Prevention Act in 1998 (which came into force in February 1999)<sup>6</sup> and each signatory country is also working on measures including the creation of criminal penalties for the bribery of foreign public officials<sup>7</sup>. (For the details of the measures taken in Japan, refer to Chapters 3 and 4.)

In recent years, worldwide concern for the problem of fraud and corruption including bribery of foreign public officials has been showing a rapid increase. Calls have been made for enhanced action to combat the problem of fraud and corruption, and the issue is specifically mentioned in summit-level documents, including those issued at the Evian Summit in June 2003 ("Fighting Corruption and Improving Transparency: A G8 Declaration"<sup>8</sup>), the APEC Leaders' Declaration in October 2003 ("Bangkok Declaration on Partnership for the Future"<sup>9</sup>), at APEC in November 2004 (approval of the "Santiago Commitment to Fight Corruption and Ensure Transparency" and "APEC Course of Action on Fighting Corruption and Ensuring Transparency"), at APEC in July 2007 (approval of "APEC Conduct Principles for Public Officials" and "APEC Code of Conduct for Business: Business Integrity and Transparency Principles for the Private Sector"), at G20 in November 2010 (adoption of "G20 Anti-Corruption Action Plan" by G20 Leaders<sup>10</sup>) and in the APEC Leaders' Declaration in November 2014 ("Annex H – Beijing Declaration on Fighting Corruption"<sup>11</sup>). A commitment to play a leading role in the global effort to prevent corruption was also clearly stated in the G20 Osaka Summit Leaders' Declaration in Japan in June 2019. As another initiative, the United Nations hosted, with extensive participation from developed countries and developing countries alike, the signing ceremony for the "UN Convention Against Corruption" (UNCAC) in December 2003, which, among other things, includes provisions requiring legal measures against the acceptance of bribes by domestic public officials, and against the bribery of domestic or foreign public officials. Japan is a signatory to UNCAC<sup>12</sup>.

In consideration of these changes in the surroundings, all stakeholders in Japan are requested again to make efforts to raise awareness regarding the issue of bribery of foreign public officials, etc.

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<sup>6</sup> A partial revision was made to the Unfair Competition Prevention Act in June 2001 in order to clarify the definition of foreign public official, etc. and in May 2004 to provide that a Japanese national who commits an offense of bribery of foreign public officials outside of Japan is punishable in Japan.

<sup>7</sup> For the discussion on the bribery of foreign public officials at the time of development of these Guidelines (2004), also refer to "Implementation of Measures for Effective Prevention of Bribery of Foreign Public Officials" (February 6, 2004; by the Subcommittee on Corporate Activities Related to International Commercial Transactions, of the Trade and Economic Cooperation Committee, of the Industrial Structure Council) at: <https://www.meti.go.jp/policy/economy/chizai/chiteki/pdf/03zowaihou.pdf>.

<sup>8</sup> Preliminary Japanese translation of the declaration is available at: [https://www.mofa.go.jp/mofaj/gaiko/summit/evian\\_paris03/fttk\\_z.html](https://www.mofa.go.jp/mofaj/gaiko/summit/evian_paris03/fttk_z.html).

<sup>9</sup> Preliminary Japanese translation of the declaration is available at: [https://www.mofa.go.jp/mofaj/gaiko/apec/2003/shuno\\_sen.html](https://www.mofa.go.jp/mofaj/gaiko/apec/2003/shuno_sen.html).

<sup>10</sup> Preliminary Japanese translation of "Action Plan" is available at: <https://www.mofa.go.jp/mofaj/gaiko/g20/seoul2010/annex3.html>.

<sup>11</sup> For the details of the declaration, please refer to: <https://www.mofa.go.jp/mofaj/files/000059616.pdf>. APEC member countries/economies have determined to strengthen practical cooperation with anti-corruption policies and through the use of anti-corruption mechanism and platform such as APEC Network of Anti-Corruption Authorities and Law Enforcement Agencies (ACT-NET), have committed to enhance cooperation with and arrangement of deportation and extradition of corrupt public officials as well as forfeiture and collection of proceeds from corrupt practices.

<sup>12</sup> In order to promote anti-corruption cooperation among signatory countries and to consider effective review process for the enforcement of the convention, a conference of the Parties to the United Nations Convention is held every two years. Please refer to <https://www.unodc.org/unodc/en/treaties/CAC/country-profile/index.html>.

## 1.2 Objectives behind the Development of these Guidelines

Bribing a foreign public official can constitute a bribery offense both in the country of that public official and can also violate the Unfair Competition Prevention Act of Japan. Whether criminal penalties apply or not, however, companies engaging in international commercial transactions are in any case expected to behave in a manner so as not to be mistaken for fostering fraud or corruption, from the standpoint of corporate governance.

Taking a preventative approach is extremely important in addressing the issue of fraud and corruption. Without this preventative approach, once a scandal has arisen, there is a likelihood that it will cause irreparable damage to the company's reputation.

In light of these concerns, **the objective behind the development of these Guidelines is to support companies involved in international commercial transactions to voluntarily take a preventative approach to the prevention of bribery of foreign public officials.** Specifically, these Guidelines provide information that can be useful as a reference when taking measures for the prevention of bribery of foreign public officials. It is our hope that companies can use this information as a tool to improve their understanding and raise their ability to predict the offense of bribery of foreign public officials.

Companies are expected to review existing measures and apply new measures as necessary with reference to these Guidelines, and to take specific actions such as dissemination of information and internal training on issues targeting its departments pertaining to international commercial transactions.

## 1.3 Structure of these Guidelines and Points to Note

In Chapter 2 of these Guidelines, the compliance system for the prevention of bribery of foreign public officials that companies should be aiming for will be presented. In order for the company to smoothly develop specific prevention measures as thus presented, the scope of punishable acts under the Unfair Competition Prevention Act will subsequently be discussed in Chapter 3, which is followed by basic information on relevant issues in and outside of Japan in Chapter 4.

Note that the internal control methodologies referred to in these Guidelines are based on the results of analysis of the current situation as it stood when these Guidelines were developed or revised. The level of internal controls required of a company necessarily is changing and evolving according to changes in the economic and social environment. Companies need to heed this fact and be continually reviewing internal measures for further refinement.

As there are also still very few court cases at this point in time that have ruled on the offense of bribery of foreign public officials under the Unfair Competition Prevention Act, details will have to be added later once there are more cases available to reference. For that reason, readers are asked to note that the interpretations, etc. of laws described in these Guidelines are based on judgments made at this point in time.

## CHAPTER 2: COMPLIANCE SYSTEM FOR PREVENTION OF BRIBERY OF FOREIGN PUBLIC OFFICIALS BY BUSINESS

This Chapter illustrates examples of measures, etc. that might be referred to for the purposes of augmenting the effect of preventative measures against bribery of foreign public officials at the level of the individual company and the company group and improving the effectiveness of compliance systems for prevention of bribery of foreign public officials ("**Preventive Systems**") as part of an internal control system<sup>13,14</sup>.

### 2.1 Basic Views

#### (1) Background

Social responsibility of business is becoming increasingly weighty as consumer awareness increases and business operations become more and more internationalized, etc. Companies across the board are making active efforts in the area of internal controls, in their attempt to ensure statutory compliance and to add more efficiency to their operations, etc.

Such efforts in the area of internal control are also extremely effective in the prevention of bribery of foreign public officials. This point is clearly shown by the agreement reached during the Evian Summit in June 2003 that governments should encourage the private sector to develop compliance programs in respect of bribery of foreign public officials<sup>15</sup> and by the adoption of the "APEC Code of Conduct for Business: Business Integrity and Transparency Principles for the Private Sector"<sup>16</sup> at the APEC Ministerial Meeting in September 2007 and by the inclusion of the "Good Practice Guidance on Internal Controls, Ethics, and Compliance"<sup>17</sup> in Annex II to the "OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions" adopted in November 2009.

#### (2) Necessity of Establishing and Operating a Compliance System for Prevention of Bribery of Foreign Public Officials

The system for detecting the offense of bribery of foreign public officials has been strengthened in

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<sup>13</sup> For the purpose of these Guidelines, the "internal control system" is used to mean the general term of the systems such as the information storage system and risk management system stipulated in Article 362, paragraph 4, item 6, Article 399-13, paragraph 1, item 1 (b) and (c) or Article 416, paragraph 1, item 1 (b) and (e) of the Companies Act, and Article 100, Article 110-4 or Article 112 of the Ordinance for Enforcement of the Companies Act, namely, a "system to secure the properness of operations."

<sup>14</sup> The measures illustrated in this chapter do not represent legal obligations and do not uniformly require all measures to be taken. However, it is expected that each company will promptly start examining and taking measures to establish and operate Preventive Systems appropriately, referring to the examples given.

<sup>15</sup> "Fighting Corruption and Improving Transparency: A G8 Declaration" sets out, "2. We will strengthen the enforcement of our Anti-Bribery Laws and will encourage the private sector to develop related compliance programs. We will ... 2.2 encourage the private sector to develop, implement and enforce corporate compliance programs relating to our domestic laws criminalizing foreign bribery."

<sup>16</sup> The gist of the APEC Joint Ministerial Statement is as follows: [https://www.mofa.go.jp/mofaj/gaiko/apec/2007/kaku\\_ksk.html](https://www.mofa.go.jp/mofaj/gaiko/apec/2007/kaku_ksk.html). The content of such norm is as follows: [https://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Task-Groups/~media/Files/Groups/ACT/07\\_act\\_codebrochure.ashx](https://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Task-Groups/~media/Files/Groups/ACT/07_act_codebrochure.ashx).

<sup>17</sup> The said guidance is described from pages 30 through 32: [https://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf).

Japan.<sup>18</sup> Also, a number of cases have been detected overseas especially in the United States and the United Kingdom, including cases in which a Japanese company was subject to punishment and a case in which a penalty of over 100 billion yen was imposed.

Further, if a company is actually charged with bribing foreign public officials, such company will not only face criminal punishment but also be burdened with enormous loss such as termination of business transactions with its customers or damage to its brand value.<sup>19</sup>

Bribery of foreign public officials concerns not only overseas companies. We should reaffirm that this is a material risk that Japanese companies now face in reality when conducting business overseas.

In Japan, directors of companies are required by judicial precedents to establish internal control systems to avoid fraudulent acts that are normally foreseeable<sup>20</sup> as a part of their duty to give the due care of prudent manager, and in light of this, if a company is engaged in any business in which there is an ordinarily foreseeable risk of bribery of foreign public officials ("**Bribery Risk**") it must establish Preventive Systems necessary to comply with domestic and foreign applicable laws and to protect its corporate value.

In addition, while establishment of Preventive Systems is positioned as part of internal control systems, it can be expected to be taken into consideration when imposing criminal punishment (dual criminal liability provision of juridical persons). That is, based on judicial precedents, a juridical person can potentially be punished on the ground of "presumed negligence on the part of the enterprise in that it did not exercise necessary care in selection and oversight or in the prevention of illegal acts" (so called "theory of presumptive negligence"<sup>21</sup>). Therefore, the establishment of Preventive Systems can serve as a piece of evidence to show that an enterprise has exercised such care.

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<sup>18</sup> A police officer in charge of measures to prevent bribery of foreign officials is designated at each prefectural police department. Also, each special investigation division in district prosecutors' offices with special responsibility for economic and financial crimes similarly has a public prosecutor in charge.

<sup>19</sup> For example, such company may be subject to sanctions such as suspension of transactions by international financial institutions, or placed on an exclusion list by multilateral development banks such as the World Bank, or refused trade insurance. Please refer to Chapter 4.2 ([page 51]) for further details.

<sup>20</sup> In relation to Japan System Techniques case (Supreme Court Ruling issued by the First Petty Bench on July 9, 2009; *Hanrei Jiho* No. 2055-147) where the representative director was defendant, the Supreme Court ruled, with respect to whether or not such representative director owed damages under Article 350 of the Companies Act, that the representative director cannot be said to have been in breach of his obligation to have a risk management system in place to prevent fraudulent acts that are normally envisaged, because a management system capable of preventing such fraudulent acts was established, and that, therefore, such fraudulent act can be said to have been conducted in a manner that cannot easily be envisaged, and there appear to be no special circumstance that might have made such fraud foreseeable.

<sup>21</sup> In this regard, attention should be paid to suggestions that "providing general and abstract warning is not sufficient for the non-existence of negligence exemption to be admitted; it is necessary to have actively provided specific instructions for the purpose of preventing breaches in an active endeavor to prevent the breach. Consequently, liability will be pursued strictly and it will be difficult in practice to obtain the exemption." Criminal law, General Part [2nd Ed.], page 41, by Atsushi Yamaguchi (in 2007, *Yuhikaku*).



In the case of both a director's liability under the Companies Act (civil liability) or the application of dual criminal liability provision of juridical persons (criminal liability), the company is not necessarily accountable for an employee's act of bribery.

### **(3) Internal Control Concept Applied in these Guidelines**

A variety of efforts are being undertaken both internally and externally to review methodologies of corporate internal control<sup>22</sup>. In particular, it is noteworthy that as part of a 2014 amendment to the Companies Act, provisions concerning improvement of internal control systems for corporate groups consisting of a stock company (*kabushiki kaisha*) and its subsidiaries, which were previously stipulated in the Ordinance for Enforcement of the Companies Act were upgraded to law and that it is also now required to provide an overview of the status of internal control systems in business reporting.

The internal control methodologies discussed in this Chapter provide an **illustration of the target approach when establishing and operating the Preventive Systems, focusing on the prevention of the bribery of foreign public officials**, by referring to and respecting existing achievements in various areas.

### **(4) Perspectives for Establishing and Operating Preventive Systems**

When establishing and operating Preventive Systems, it is particularly important to keep in mind (i) the importance of the attitude and message from top management, (ii) a risk-based approach, and (iii) the need to take action at a subsidiary<sup>23</sup> level based on the Bribery Risk.

#### **(i) Importance of the Attitude of and Message from Top Management**

Looking at cases of punishment in Japan and foreign countries, typically employees in the field have tended to "justify" their acts of bribery in terms of its benefit to the company. Then, only top management can prevent such wrongful perceptions from taking root. It is effective for the top management to clearly and repeatedly show the following to all employees:

- Not using wrongful means to obtain a profit but rather complying with the law without hesitation, is always the better choice for the company in the long run.
- Employees that earn profits for the company by wrongful means are not valued by the company; conversely, they will be subject to severe punishment.
- If there ever was a corporate culture of disrespect for compliance in the past, these 'old attitudes' must be weeded out.

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<sup>22</sup> One of the examples of such efforts is the "Study Group on Risk Management and Internal Control" of the Ministry of Economy, Trade and Industry. This Study Group formulated and published the "Internal Control in the New Era of Risks ~ Guideline for Internal Control That Function Together with Risk Management ~" in June 2003 to assist the efforts of companies and industry. The text of those guidelines and a summary thereof are available on the following website: <https://warp.da.ndl.go.jp/info:ndljp/pid/1368617/www.meti.go.jp/kohosys/press/0004205/index.html>

<sup>23</sup> For the purpose of these Guidelines, the term "subsidiaries" shall be used as a general term which includes third and fourth tier subsidiaries in line with the standard for de facto control under the Companies Act. For the definition of the subsidiaries under the Companies Act, refer to Article 2, item 3 of the Companies Act, Article 2, paragraph 1, Article 3, paragraph 1 and paragraph 3 of the Ordinance for Enforcement of the Companies Act.

**(ii) Risk-based Approach**

Business divisions, locations and business activities with a high Bribery Risk, should take measures to reduce risk with a focus on formulating and implementing approval rules for high-risk activities, educating employees and conducting internal audits\*, while business divisions, etc. with lower risk, may choose more simplified measures.

\* Note: These measures may include, for instance, requiring approval from progressively higher levels of management seniority as risk increases, or providing education, implementing audits or other similar measures with a higher frequency and more broadly targeted as risk increases.

The degree of Bribery Risk should be generally assessed with overall consideration of key points such as the Bribery Risk of the relevant country, the Bribery Risk of the relevant business area and the types of activities that have the potential to be used for offering bribery.

As to the degree of country risk, Asia, Middle East, Africa, South America, etc. are generally considered to have high Bribery Risk.<sup>24,25</sup>

As to business area, Bribery Risk is generally considered to be high when projects tend to foster close relationships with foreign public officials, such as in cases where projects require many permits and licenses from local governments, or involve multiple dealings with foreign governments or state-owned companies.

The following are examples of types of activities that are considered to have high Bribery Risk:

- (a) appointment and contract renewal of an advisor or negotiating enterprise (such as an agent or consultant) in relation to the obtaining of permits or licenses, or winning orders from a local government, or having dealings with a state-owned company;
- (b) selection of a joint venture partner or utilization of an SPC in a country or a business area that is considered high-risk;
- (c) M&A of a company (acquisition of shares, etc.) which has undertaken many government-related projects in the past, in a country or a business area that is considered high-risk;
- (d) participation in a public procurement that is assessed at high Bribery Risk considering the amount of the order or the type of contract, etc.; and

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<sup>24</sup> With respect to the assessment of the bribery risk for each country, an index such as, for example, the Doing Business Report (<https://www.doingbusiness.org/reports>) annually published by World Bank Group, The Worldwide Governance Indicators (<https://info.worldbank.org/governance/wgi/>), Corruption Perceptions Index of NGO/Transparency International (<https://www.transparency.org/research/cpi/>) will be used.

<sup>25</sup> On the other hand, a 2014 OECD Bribery Report analyzing 427 cases that occurred in signatory countries to the OECD Anti-Bribery Conventions between February 1999 and June 2014 reports that two thirds of cases covered in the report were cases in which payments were made to public officials of so-called developed nations, etc. (public officials in 24 out of 41 of the said signatory countries, or 15 of 19 member countries of the G20 were involved in bribery). In response to this, Secretary-General Gurría stated that this dispelled the myth that corruption is confined to developing countries: <https://www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm>.

- (e) socializing with direct or indirect payments to foreign public officials, etc.

In order that measures can be introduced effectively under a risk-based approach, it is necessary for companies to collect sufficient information relating to applicable foreign laws (including laws and regulations relating to the offense of bribery and practices and handling thereof) and to take appropriate actions<sup>26</sup> and to obtain as much information as possible in advance concerning any country in which international commercial transactions will be newly commenced.

### **(iii) Necessity of Taking Action at Subsidiaries Level Based on the Bribery Risk**

Should a subsidiary (including an overseas subsidiary) be punished for the offense of bribery of foreign public officials under applicable laws, whether domestic or foreign, its parent company is likely to incur great loss that will affect not only the value of the shares of the subsidiary (its assets), but also damage the credit of the parent company itself, often leading to damage to the corporate value of the corporate group through a decline in brand power and trust<sup>27</sup>, or worse, cause it to face criminal punishment.\*

Therefore, parent companies need to ensure that subsidiaries within the corporate group establish and operate Preventive Systems as appropriate to the degree of risk.<sup>28</sup>

\* Note: Although it is often the case that it is the overseas local entity that actually engages in or perpetrates the act of bribery, if an employee or officer, etc. of the parent company was involved, then that employee or officer, etc. is likely to be culpable as an accomplice to an offense of bribery of foreign public officials, and moreover, as stated in Section (2) above, the parent company as a juridical person is likely to be subject to punishment pursuant to dual criminal liability provisions of juridical persons.

### **(5) Other Points to Note**

It should not be forgotten that effectively functioning Preventive Systems are not only well structured but also well operated and evaluated at an appropriate frequency and by appropriate approach.

Another point to note is that the status of establishment and operation of internal control systems, including Preventive Systems, that are generally required of a company may be evaluated differently depending on the company size, business category, and the surrounding economic and social circumstances, and the historical background, etc., and it is accordingly difficult to define uniform criteria. Therefore, companies are required to make constant efforts to regularly examine whether

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<sup>26</sup> If it is difficult to collect and process information on foreign laws, regulations, conventions and customs at an individual company level, it is recommended that multiple companies operating in the same foreign country to collectively conduct research and process information through, for instance, the use of the local chamber of commerce and industry that is well versed in affairs specific to that country.

<sup>27</sup> Refer to 4.1 of "Practical Guidelines for Group Governance Systems" (Ministry of Economy, Trade and Industry; June 28, 2019).

<sup>28</sup> If a parent company needs to secure the legal means to promote development/operation of the Preventive Systems at its subsidiaries, there are means at its disposal. For example, the parent company and the subsidiary could enter into a specific agreement aside from leveraging shareholder voting to appoint or remove officers of subsidiaries.

the level of Preventive Systems that they have developed and are using are sufficient at that point in time, and work to improve these systems with reference to those of its domestic and overseas companies in the same industry, and guidelines issued from time to time by foreign authorities<sup>29</sup>.

## **2.2 Desirable Preventive Systems Methodologies for Business<sup>30</sup>**

The following sections illustrate desirable methodologies for Preventive Systems that companies engaged in international commercial transactions should aim for in order to prevent bribery of foreign public officials<sup>31</sup>. These illustrations do not constitute statutory requirements but companies are expected to refer to these illustrations and promptly start the process of examining and taking measures to properly structure and operate Preventive Systems.

Company officers, etc. have broad discretion in establishment and operation of specific Preventive Systems at each company, taking into consideration the degree of assessed risk based on the actual situation in its business and the likelihood of having the desired effect.

In doing so, it is expected that companies will establish and operate a system that is objectively considered highly effective with the support of external experts to an appropriate extent, by supplementing their own experience and know-how, which can often be inadequate within a single company. However, it must be noted that the goal is for companies to establish and operate highly effective system at their own initiative, and this cannot be achieved simply by putting in place a superficial framework such as the introduction of rules or establishment of contact desks, or leaving the matter to experts.

By reference to the following examples, it is expected that measures will be implemented with different intensity for each business division, location and business activity depending on the risk inherent therein. These efforts could reduce the possibility of a company being punished or its corporate value being greatly damaged under domestic or foreign laws.

### **(1) Basic Components of Preventive Systems**

Although the specific details will greatly vary depending on the size or corporate structure of a company, among other factors, the following six elements are generally considered to be desirable.<sup>32</sup>

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<sup>29</sup> For example, a resource guide that provides interpretation, etc. of the U.S. Foreign Corrupt Practices Act (hereinafter referred to as "U.S. FCPA") (<https://www.justice.gov/criminal-fraud/file/1292051/download>) and guidance that provides interpretation, etc. of the U.K. Bribery Act 2010 (hereinafter referred to as "U.K. UKBA") (<https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>) have been published.

<sup>30</sup> Of the Preventive Systems, methodologies for individual company responses to emergency are described in Chapter 2.4 below.

<sup>31</sup> The internal control methodologies illustrated here follow the sequence of "development of a policy, etc. (= plan)", "implementation of specific measures (= do)", "audit of the state of implementation and management of the measures (= check)" and "review existing policy, etc. based on the outcome of the audit (= act)." As management methods of this type tend to result in continual improvements in internal control management, it is also used as a standard method by the International Organization for Standardization (ISO) and has already been applied by a large number of companies as well.

<sup>32</sup> The U.S. FCPA resource guide illustrates, as the hallmarks of effective compliance programs, commitment from senior management and a clearly articulated policy against corruption, code of conduct and compliance policies and procedures, oversight, autonomy, and resources, risk assessment, training and continuing advice, incentives and disciplinary measures, third-party due diligence and payments, confidential reporting and internal investigations, continuous improvement (periodic testing and review), etc. <https://www.justice.gov/criminal-fraud/file/1292051/download>

Incidentally, when establishing specific Preventive Systems suitable for a particular company, the COSO (Committee of Sponsoring Organizations of the Treadway Commission) framework<sup>33</sup> is also a useful reference:

- Formulation/announcement of Basic Policies<sup>34</sup> (described in Section (2) below);
- Formulation of Internal Rules (approval rules for high-risk activities such as act of socializing or appointment of agency or rules for disciplinary punishment or censure, etc.) (described in Section (3) below);
- Development of organizational frameworks (described in Section (4) and Chapter 2.4 below);
- Implementation of educational activities in the company (described in Section (5) below);
- Audit, etc. (described in Section (6) below);
- Review by the management, etc. (described in Section (7) below)

## **(2) Formulation/announcement of Basic Policies**

Basic Policies incorporating the following factors should be formulated in order to prevent acts of bribery of foreign public officials which violate domestic or foreign laws. In this case, it is desirable to achieve accountability for the on-site employees of the subsidiary by clarifying the policy common to the corporate group.<sup>35</sup>

- (As stated in Chapter 2.1 Section (4) Part (i) above) Have a fundamental attitude of the management clearly, "compliance over immediate profit".
- Avoid engaging in any acts of bribery of foreign public officials, etc. that could constitute the offense of bribery under the laws of the relevant country or constitute the offense of bribery of foreign public officials under the Unfair Competition Prevention Act (or applicable laws of third countries such as the United States and the United Kingdom).
- Establish an internal system to prevent bribery and make efforts based on such a system.

It is important that a company's Basic Policies and Internal Rules are shared internally and thoroughly enforced, along with corporate ethics that support prevention of bribery of foreign public officials. From this perspective, it is effective if not only the management but also the Compliance Supervisors<sup>36</sup> at each business division and location, etc., who are closer to employees in the field, send messages to the same effect over and over from the same eye-level as those from management.

In addition, it is desirable to announce the Basic Policies that have been formulated for expressing the company's intention to prevent bribery within and outside the company, and also translate such

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<sup>33</sup> COSO framework was published in 1992 as a guideline for assessing the structure, development and effectiveness of internal controls. Thereafter, in response to reflecting changes in business and the environment in which businesses operated, and to the expansion of businesses and the purposes of reporting, etc., "financial reporting" was redefined simply as "reporting" in 2013 in order to effectively apply to not only to the disclosure of financial information, but also the practices of reporting purposes, operational purposes, compliance purposes pertaining to non-financial information.

<sup>34</sup> Indicates policies, codes of conduct, and compliance policies.

<sup>35</sup> Refer to 2.3.3 of "Practical Guidelines for Group Governance Systems" (Ministry of Economy, Trade and Industry; June 28, 2019).

<sup>36</sup> For a definition of "Compliance Supervisor," refer to Section (4) Part (i) below.

policies where necessary so that they may be used not only when thoroughly informing foreign employees of the company in and out of Japan, but also when seeking understanding from foreign governments, foreign investors and business partners and customers.

### **(3) Formulation of Internal Rules**

Internal Rules incorporating the following factors should be formulated in order to ensure careful consideration of high-risk business activities within the company:

- After putting together or organizing the cases in which contacts with foreign public officials, etc.<sup>37</sup> take place, compile internal procedures and judgment criteria<sup>38</sup>, etc. for each case in a manual. In preparing the manual, it should be noted that contact with foreign public officials can occur not only overseas but also in Japan, and that in recent years, in addition to the risk of direct bribery by companies, the risk of indirect bribery through other third parties such as agents has been increasing.

In particular, using a risk-based approach, it is desirable to establish rules regarding approval requirements, decision-making procedures and recording methods, etc. for the following high-risk activities:

- (i) Any activity that could be suspected as providing an improper benefit to foreign public officials, etc. such as paying for business meals or travel expenses for visits:
  - Internal Rules consisting of approval requirements, approval procedures, recording and after-the-fact verification procedures should be formulated for each type of activity (the specific approval procedures should be ultimately decided by a person of the appropriate level of management seniority depending on the risk of the activity); and
  - When it is externally announced and widely known that payments to foreign public officials, etc. are recorded in detail at a company, this could be expected to act as a warning also to foreign public officials, etc. who may otherwise wish to demand bribes from the company's employees.
- (ii) The types of activities with high risk listed in Chapter 2.1 Section (4) Part (ii) above<sup>39</sup>

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<sup>37</sup> Contacts with foreign public officials include the welcoming or seeing off of arriving or departing officials, dining occasions, inspection trips, golfing and other entertainments, gift exchanges, hiring of persons associated with foreign officials such as children of them, and speech occasions, etc.

<sup>38</sup> Internal procedures include prior inquiries with authorized personnel such as a Compliance Supervisor (including management and appropriate departments such as the Legal Department and the Accounting Department), and notification from overseas subsidiaries to the consultation desk (hotline) or reporting desk in the main office. Possible judgment criteria might take the form of, for example, a prior decision on the amount and frequency of appropriate gift offering (for ceremonial occasions, etc.) to and entertainment of foreign public officials, etc. within the scope of law, or common sense of the respective countries, the establishment of limits to entertainment applicable at each specific stages of negotiation in respect of international commercial transactions, and clarification of the stance taken towards foreign public officials, etc. as well as their family members and family-run companies.

<sup>39</sup> Taking into account the fact that using a capable agent, etc. that does not engage in act of bribery at all in a high risk country/region will lead to strengthening the competitiveness of a company, it is desirable to discover and educate appropriate agents. In addition, in relation to appointment/contract renewal of an agent, it is desirable to keep records of the facts regarding

- Pre-contract confirmation procedures (representations and warranties, covenants and due diligence ("DD")) and procedures during the term of contracts, etc. (audit, requests for reference documents, cancelation without warning or suspension of payment) should be provided.
- For example, in appointing agents, etc., the following may be considered. \*
  - In DD, the following items should be investigated: (i) the country where the agent, etc. is located or the country in which the transaction takes place, (ii) contacts and relationship with foreign public officials, etc. in the transactions, (iii) maintenance of and compliance with Internal Rules on anti-bribery by the agent, etc., (iv) past and present bribery risks, and (v) expenditures in transactions with government agencies, etc.
  - The contract clauses should incorporate provisions such as (i) representations and warranties of compliance with laws regarding bribery by agents, etc., (ii) authority to investigate and audit agents, etc., (iii) obligations to provide materials and information such as invoices, (iv) obligations to preserve records of transactions, etc., and (v) the right to terminate the contract and claim damages if a breach of representations and warranties is found.
  - Confirm that the amount to be paid is reasonable in relation to the content of the work to be outsourced.

\* For points to note when conducting M&A, refer to page 20 below.

- It should be clearly ruled that employees who have engaged in the act of bribery or violated Internal Rules will incur personnel sanctions (including, disciplinary measures)<sup>40</sup>. When a company has related Internal Rules such as employment rules, decision-making rules or rules on request for decision already in place, one option for the company is to stipulate that these rules apply to the act of bribery, in order to clarify they apply to payments to and dealings with foreign public officials, etc.
- Small Facilitation Payments (SFP)<sup>41</sup> themselves may constitute the giving of advantage “to

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the reasons (necessity) for appointment/contract renewal of the agent, the agent's quality/aptitude, appropriateness of fees, etc. have been fully considered.

<sup>40</sup> In the event of a violation, personnel sanctions are necessary to deal with the matter strictly and in accordance with the prescribed rules.

<sup>41</sup> Although there is no unique definition of Small Facilitation Payments, for example, they may be considered as payments only aiming at smooth procedure related to regular administrative services. Whether or not small facilitation payments violate the Unfair Competition Prevention Act is determined based on the presence of the intention "to obtain a wrongful gain in business". In addition, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, it does not violate the Unfair Competition Prevention Act as described in p.28. Regarding treatment of facilitation payments in foreign countries, the U.S. FCPA unlike Japan has a statutory exception of facilitation payments which are made in relation to routine government action of foreign public officials, etc. without their discretion. However, whether payments are considered as such facilitation payments is determined based on not the size of the payment but substantial factors, such as the purpose of each payment. (15 U.S.C. §§78dd-1 (b), 78dd-2 (b), 78dd-3 (b), please refer to pp 25-26 in "A Resource Guide to the U.S. Foreign Corrupt Practices Act": <https://www.justice.gov/criminal-fraud/file/1292051/download>).

With regard to the U.K. UKBA, the guidance ("Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions") issued by the U.K. prosecution authorities shows the factors on considering prosecution by the authorities in terms of facilitation payments, however, there is no statutory exemption of facilitation payments

obtain a wrongful gain in business”, so it is desirable that internal rules specify that SFP are basically prohibited<sup>42</sup>.

#### **(4) Development of Organizational Frameworks**

An organizational framework for internal control purposes that is commensurate with the company size, etc. should be established, so that duties within the company and the authority and responsibility of relevant personnel are clearly delineated. When doing so, the following points should be noted, in particular:

##### **(i) Appointment of a Compliance Officer or Compliance General Supervisor to Oversee Compliance Personnel**

- A compliance officer or a compliance general supervisor should be appointed to oversee the whole company (collectively referred to as "**Compliance Supervisor**")<sup>43</sup>. In addition to properly comprehending and understanding applicable laws and regulations as well as various information from the government such as these Guidelines, the Compliance Supervisor should sort out as is found appropriate the issues arising in the conduct of business.
- The Compliance Supervisor should regularly report to the management and the board of directors.
- In order to ensure the effectiveness of the Preventive Systems, it would be effective to appoint a Compliance Supervisor at each large-scale business location or each regional division with management oversight.

##### **(ii) Establishment of Internal Consultation Desks (Hotlines), Reporting Desks, etc.**

- A consultation desk (help line) should be set up to deal with cases where a judgment needs to be made on a particular case, such as in the face of a demand for a bribe from a foreign public official or a request from an agent or consultant for additional expenses that suggests a possible bribe.<sup>44</sup>
- In addition to a consultation desk, a reporting desk should also be set up to receive whistle-blower reports, etc.<sup>45</sup>
- Confidentiality should be ensured for the consultation and reporting desks. In addition to that, anonymous reporting should be thoroughly allowed and retaliatory actions against informants should be thoroughly prohibited. Also, advice from external specialists including lawyers, etc. should be actively utilized.
- Content and status of consultations and reports should be appropriately reported to the

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under the legislations as well as Japan. (<https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and>)

<sup>42</sup> For the establishment and operation of the Preventive Systems of subsidiaries, refer to "2.3 Parent Company's Assistance and Guidance with the Preventive Systems of Subsidiaries."

<sup>43</sup> Some companies have a system of coordination between compliance staff in operational, management and financial divisions, etc., or set up a "compliance committee."

<sup>44</sup> Depending on whether the risk is high or low, a consultation desk that specializes in cases of bribery of foreign officials is expected to be set up, though in some cases utilization of an existing internal consultation desk might be adequate (such as a desk where the legal division or internal audit division or other divisions receive consultation).

<sup>45</sup> On the subject of safeguards against unfair treatment such as removal of employees who disclose information in the public interest, including whistle-blowing, the Whistleblower Protection Act was enacted on April 1, 2006.



- Compliance Supervisor and decisions on handling policy or improvements to the consultation and reporting desks function should be sought as needed.
- Opportunities to keep adequate mutual communication among persons involved in those desks should be ensured.
  - Face-to-face consultation on reports and investigation by hearing, etc. should also be available where appropriate.

**(iii) Development of a Follow-Up System after Suspicion, etc. is Brought to Light**

As stated in "Chapter 2.4 Response in an Emergency Situation"

**(iv) Other Points to Note**

- In the operation of the Preventive Systems, "openness" should be maintained within the organization which allows personnel in the field to casually consult with the Compliance Supervisor so that any sign of bribery in the field could be dealt with at an early stage.
- Consideration should be made for avoiding giving the sales division or sales personnel including those of subsidiaries any incentive to engage in acts of bribery by demanding unrealistic sales targets, etc.

**(5) Implementation of Educational Activities in the Company**

Appropriate educational activities should be conducted within the company to promote the improvement of employees' ethical awareness toward prevention of bribery and to enhance the effectiveness of the operation of internal control with attention to the following:

- Officers and employees involved in international commercial transactions should be thoroughly versed in and aware of the purpose and contents of the Basic Policies and the Preventive Systems.
- Education should be offered to employees, etc. involved in international commercial transactions at the time of hiring or transfer to a relevant department.
- In offering education and training, the company should make efforts to offer effective education considering the possibility of future contact with foreign public officials and training methods (such as lecture-based training and education using written information and e-mail, etc.).
- Education should be provided in relation to specific points that employees should pay attention to, such as how to respond in the case of receiving a demand for bribes, taking into consideration the local circumstances, after organizing not only the contents of the relevant laws and regulations but also previous cases of gift exchanges and entertainment, etc.
- As another awareness-raising effort, it is also useful to cause employees involved in international commercial transactions who have received the education or training discussed above to submit a written oath not to engage in act of bribery of foreign public officials.

**(6) Audit, etc.**

Regular or irregular audits should be conducted to assess whether the Preventive Systems are actually functioning, including the status of compliance with Internal Rules, and the results of audits should be reflected in the reviews described in Section (7) below as needed.

- Corporate officers and employees, etc. in charge of audit, such as the Compliance Supervisor

and persons in charge of legal affairs/accounting, should regularly audit whether the Preventive Systems are effectively functioning or not and evaluate the status of implementation<sup>46</sup>. In doing so, it is desirable that the corporate officers and employees in charge of the audit evaluate the information subject to the audit with skepticism<sup>47</sup>.

- Efforts should be made to have audit results shared widely among the management, Compliance Supervisor, the responsible persons at legal, accounting and audit division and related employees.

### **(7) Review by the Management, etc.**

In order to facilitate continual and effective measures and operation, the effectiveness of the Preventive Systems should be evaluated and reviewed based on the results of regular audits, where appropriate, with the involvement of the management or Compliance Supervisor, etc.

## **2.3 Parent Company's Assistance and Guidance with the Preventive Systems of Subsidiaries<sup>48</sup>**

A parent company should encourage its subsidiaries within the group of companies under its direct or indirect control to establish and operate necessary Preventive Systems based on Chapter 2.1 and 2.2 above and confirm the status thereof on a regular or irregular basis. In particular, in recent years, there has been an increase in the number of cases where overseas companies have been made subsidiaries through M&A. As companies with diverse backgrounds and values are included in the same corporate group, it can be said that a higher level of risk management is required. In doing so, the following key factors should be kept in mind:

### **(1) General remarks**

- Risk-based approach should be applied to the scope and details of subsidiaries that a parent company should encourage establishment and operation of Preventive Systems. As to the

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<sup>46</sup> In recent years, the importance of a three-line defense consisting of business units (first line), management units and internal control units (second line), and internal audit units (third line) has been pointed out when considering internal control. In 4.6.2 to 4.6.4 of "Practical Guidelines for Group Governance Systems" (Ministry of Economy, Trade and Industry; June 28, 2019), the following matters are described:

- "In order to ensure compliance at the first line (business units), it is important to work on both the hardware (rule establishment and IT infrastructure, etc.) and the software (fostering and spreading compliance awareness in the field)."
- "In order to ensure the effective functioning of the second line (management units), independence from the first line (business units) should be ensured, and inserting horizontal channels between the parent company and subsidiaries, such as direct reporting, should be considered."
- "In order to ensure the effective functioning of the third line (internal audit units), independence from the first line (business units) and the second line (management units) should be substantially ensured. With regard to the internal audit of subsidiary operations, it should be appropriately determined whether (1) the implementation status of the subsidiary should be monitored and supervised, or (2) the parent company should implement it centrally, depending on the situation of each subsidiary."

In addition to the audits by the second and third lines described in the text, independent risk management by the first line is also considered important.

<sup>47</sup> Although it is in the case of an accounting audit, the "emphasis on professional skepticism" under the Standards to Address Risks of Fraud in an Audit (Business Accounting Council, Financial Services Agency) will serve as a useful reference, in terms of its three step process: maintaining, exercising and increasing skepticism.

<sup>48</sup> Parent company's response in the case of Emergency Situation of subsidiaries is described in Chapter 2.4 below.

scope of applicable subsidiaries, it is desirable that Preventive Systems are established for the following subsidiaries<sup>49</sup>:

- (i) subsidiaries considered important in light of not only current and future corporate value but also the degree of Bribery Risk or the nature of its business; and
  - (ii) subsidiaries that carry out projects for which the parent company is substantially involved by giving approvals with regard to important matters on the projects, etc.
- As a rule, each subsidiary should autonomously establish and operate its own Preventive Systems<sup>50</sup>. However, if a subsidiary lacks the ability or experience to do so in reality, the parent company should supplement insufficient resources and if necessary, take a leading role in establishing and operating such subsidiary's Preventive Systems\*.

\*Note: Many overseas subsidiaries of Japanese companies may lack the ability or experience to prevent bribery of foreign public officials due to limited human resources and other reasons. For this reason, in many cases where it is difficult for a subsidiary to autonomously establish and operate its own Preventive Systems, the parent company, etc. needs to assist those subsidiaries.

When confirming the status of Preventive Systems in the subsidiaries, it is important that the parent company confirm not only the status of the introduction of rules<sup>51</sup> but also whether the Preventive Systems including such rules are really functioning in the field or not. Depending on the circumstances, the parent company may exchange opinions with the subsidiary's employees in the field or confirm how the rules have been operated in the past (sample checking, etc.). In addition, in order to effectively operate the Preventive Systems, expenditures for public officials can be approved by higher-level personnel<sup>52</sup>, depending on the situation of the subsidiaries.

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<sup>49</sup> In 2.3.3 of "Practical Guidelines for Group Governance Systems" (Ministry of Economy, Trade and Industry; June 28, 2019), it is pointed out that "particularly, when there are many subsidiaries, uniform management is not effective, and it is reasonable to classify the risks (size and characteristics) of each business segment and subsidiary, and then determine the strength and method of the parent company's involvement according to each risk."

<sup>50</sup> In 4.6.1 of "Practical Guidelines for Group Governance Systems" (Ministry of Economy, Trade and Industry; June 28, 2019), it has been pointed out that overseas subsidiaries acquired through M&A are at a higher risk of misconduct due to the lack of attention from the head office. In order to conduct effective management based on the premise of different cultures and values, it is considered effective to specify and clarify the reporting standards to the group headquarters and to use IT to visualize management information in a unified manner.

<sup>51</sup> There are some subsidiaries that just "copy" rules of their respective parent companies on an as is basis. It is desirable, however, that each subsidiary structure functional regulations addressing risks, with respect to the decision and approval process, etc., depending on the organization/system, manpower, business category of the relevant subsidiaries, while based on its parent company's rules.

<sup>52</sup> In subsidiaries in countries with a high bribery risk, there have been cases where the person in charge of business (e.g., immediate superior) has been asked to approve small expenditures on public officials. However, even if the case can be rejected without hesitation by the management, there is a risk that the person in charge of business will be under intense pressure from the field and approve it. The decision makers for direct and indirect expenditures on public officials can be raised to the management level, for example, the president of the subsidiary, the director in charge of business, or the director in charge of accounting.

The following factors should also be noted depending on the type of risk:

- A corporate group should jointly offer educational programs for employees in relation to prevention of bribery or jointly operate audit or whistle-blower systems<sup>53,54</sup>, etc.
- The aforementioned joint program or joint operation is effective in that it is expected to ensure a certain standard in terms of content and operation, and in that it will enable quick and better response in an emergency situation.
- In the case of a joint venture within a corporate group over which a company does not have direct or indirect control, the company should make reasonable efforts to try to establish and operate necessary Preventive Systems to a possible extent.

## **(2) Points to note in M&A**<sup>55</sup>

- Based on the risk-based approach, when acquiring another company that is considered to have a high risk of bribery, the company should conduct DD on the target company to examine whether the target company has any problems with violations of bribery-related laws.<sup>56</sup>
- Since there may be non-cooperation of the target company and time constraints in pre-acquisition DD, for example, verification and audit of the risks faced by the acquired company that could not be confirmed in the prior DD should be conducted as early as possible, immediately after the acquisition.
- In the pre-acquisition DD, investigation including the following points can be conducted:<sup>57</sup>
  - Whether the business scheme itself of the target company has a high bribery risk (e.g., whether it involves a lot of transactions with government agencies, whether it involves a lot of transactions in high-bribery risk areas, whether it involves business in which obtaining government permits is important).

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<sup>53</sup> In the case of overseas subsidiaries, there is another measure to set up a local desk and have it provide feedback to the main office regarding the current state of affairs. However, EU GDPR (REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC) restricts the transfer of personal data to a third country. Attention must be paid to relevant laws and regulations such as this when processing information about whistle-blower reports within the entire corporate group.

<sup>54</sup> On the other hand, the importance of a mechanism to “absorb” local information, such as a global whistleblower system, is also stated at page 85 of “Report on Discussion Results of the Study Group for Japanese Companies’ M&A Overseas” (Ministry of Economy, Trade and Industry; March, 2018). In order to make the whistleblower system function, it may be possible to establish, if necessary, a system that allows employees to report directly to the competent department at the head office, or a system that allows the head office to directly manage the receipt of reports by using an outside contractor.

<sup>55</sup> In actual M&A, it is expected that the measures to be taken will differ depending on the negotiations with the target company in each case. Therefore, it is expected that appropriate measures will be taken according to each individual case, referring to the examples given here, rather than uniformly requiring these measures in all cases.

<sup>56</sup> At page 35 of “Report on Discussion Results of the Study Group for Japanese Companies’ M&A Overseas” (Ministry of Economy, Trade and Industry; March, 2018), the importance of compliance DD is described. It is also stated that it is noted that the need for compliance DD using experts is high in M&A in emerging countries because the risk of violating bribery-related laws (so-called corruption risk) is particularly high in emerging countries and FCPA violations are likely to occur.

<sup>57</sup> At page 34 of “Report on Discussion Results of the Study Group for Japanese Companies’ M&A Overseas” (Ministry of Economy, Trade and Industry; March, 2018), it is pointed out that “it is necessary to categorize each question, whether it is a “Must Have” question that could lead to a deal break or a “Nice to Have” question that should be obtained as reference information, depending on the content of the answer, and clarify the priority of the investigation. ” Also it is pointed out that “in legal DD, investigation related to compliance with anti-corruption laws, etc. is a “Must Have” item.”

- Status of development and implementation of internal rules related to anti-bribery in the target company. For example, (i) maintenance of compliance manuals, (ii) implementation of internal training, (iii) implementation of risk assessment, (iv) implementation of risk-based audit, (v) evaluation and updating of agents, etc., (vi) education and management of agents, etc., and (vii) disciplinary and corrective actions in the event of compliance violation.
- Past and present bribery risks perceived by the target company (e.g., past reports to internal reporting desks and bribery cases identified as a result of audits).
- Whether there are any unnatural expenditures in transactions with government agencies, etc. (for example, whether large payments to agents, etc. are recognized in contracts related to transactions with government agencies, etc., or whether accounting books, etc. show expenditures for items that are different from actual expenditures).
- o If sufficient information cannot be obtained through pre-acquisition DD<sup>58</sup>, the use of a representations and warranties clause, etc., may be considered in the M&A contract, but note that even if such a clause is established, the risks described in footnote 57 will not be immediately eliminated.
- o If, as a result of DD, bribery risks are identified in the target company, specific measures (review of the acquisition deal, review of the post-acquisition management integration (PMI) schedule, etc.) should be considered<sup>59</sup>, including decision not to acquire the company.
- o If unexpected problems or risks become apparent through post-acquisition verification, etc., promptly consider countermeasures and, if necessary, take corrective measures<sup>60</sup>, including reporting to the relevant authorities.
- o The parent company should support the subsidiary as described in (1) General remarks, as necessary, so that the acquired company can appropriately establish and operate Preventive System after the acquisition.

\* The above points were made with a particular focus on the case where a company acquires an existing company and makes it its own group company, such as a subsidiary, etc. In the case where a

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<sup>58</sup> According to page 25 of "Report on Discussion Results of the Study Group for Japanese Companies' M&A Overseas" (Ministry of Economy, Trade and Industry; March, 2018), in the DD that requires information disclosure as a formal process (especially data room materials), it should be noted that the information that can be obtained may be limited and it may be difficult to detect defects. In addition, DD generally has severe time constraints, and unless the questions and issues are clarified in advance, it is difficult to make effective use of time.

<sup>59</sup> Should an acquired company commit an act of bribery, the acquiring company may succeed to the criminal or civil liability for the bribery committed by the acquired company, depending on the type of acquisition. Even in cases where the company does not legally succeed to the liability for the bribery of the acquired company, it is possible that the company will bear the financial loss associated with the decline in the corporate value of the acquired company, the practical costs associated with responding to the authorities, and reputational risks, etc.

<sup>60</sup> According to pages through 59 and 60 of "Report on Discussion Results of the Study Group for Japanese Companies' M&A Overseas" (Ministry of Economy, Trade and Industry; March, 2018), in the management of overseas subsidiaries by Japanese companies, those companies are often troubled by local fraud and scandals. It has been pointed out that there may be a considerable number of cases, including those that are not made public, where serious irregularities and compliance violations such as off-balance-sheet debts and fictitious inventories are discovered within a few years after an acquisition. Post-closing DD and internal audits immediately after an acquisition can be meaningful for early detection of such fraud risks.

company establishes a joint venture (JV) with another company, for example, the above points are basically also applicable to the relationship with the company that will be the JV partner.

## 2.4 Response in an Emergency Situation

If a foreign public official, etc. does demand (solicit or extort) bribes in reality or it is found by an internal audit or a whistle-blower report that local staff may have paid bribes to a foreign public official, etc. (collectively, referred to an "**Emergency Situation**"), it is necessary to strictly comply with applicable laws and regulations and to expeditiously take action to minimize any harmful effect including economic damage to the company (and ultimately to its shareholders).

In the case of an Emergency Situation at a subsidiary that lacks the ability to cope with the situation, one of the likely options for the parent company is to get actively involved in order to ensure appropriate response, as is commensurate with the impact such an event would have on the parent company. If necessary, the parent company is expected to take the lead in investigating the cause of the incident, converging the situation, and formulating preventive measures.<sup>61</sup>

In particular, it should be also noted that, in the case of an Emergency Situation, a conflict of interest may arise between the subsidiary and its officers, etc. in which case, there is a risk of a breakdown in appropriate internal investigation or in reporting to the parent company (for instance, given that the corporate officers, etc. at the subsidiary are at risk of being dismissed by the parent company if the act of bribery is revealed, they may fail to investigate or report the matter to protect themselves).

In relation to systems for dealing with an Emergency Situation, the following matters should be noted:

- Rules should be put in place in advance with regard to selection of responsible directors/persons in charge, cooperation with company auditors, establishment of investigation team, reporting systems for information on an Emergency Situation between the parent company and subsidiaries, and other systems necessary to cope with an Emergency Situation. In particular, a system to expeditiously pass on information regarding any Emergency Situation to the Compliance Supervisor or the management should be established in advance.
- In the case of a demand for bribes from a foreign public official in particular, the process for handling such situations should be established in advance, such as the first action to take in the field and establishing an emergency response team at the head office, etc., as appropriate corresponding to the severity of the situation, etc.
- Independent outside directors should also be appropriately provided with necessary information regarding any Emergency Situation. They should appropriately supervise conflicts of interest between the company and the management from a position independent from management.
- Upon preservation of relevant evidence including circumstances that are disadvantageous to the company and the corporate group, interviewing those involved, and other related research

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<sup>61</sup> Refer to 4.10.3 of "Practical Guidelines for Group Governance Systems" (Ministry of Economy, Trade and Industry; June 28, 2019).

or investigation, if it appears highly likely that the act of bribery did take place, consulting with a lawyer, reporting to criminal investigation agencies or surrender, and requesting to apply the Agreement Procedure<sup>62</sup> to the prosecutor should be considered.

- After the situation comes to an end, the causes should be investigated and recurrence preventive measures should be considered by the corporate group as a whole.<sup>63,64</sup>
- Not only examine preventive measures, but also monitor the status of responses in the subsidiary. In addition, restore and strengthen the governance function as a corporate group, including pursuing responsibility of the management and confirming the effectiveness and implementation status of preventive measures.

When companies consider introduction or conduct a major review of Preventive Systems with reference to the suggestions above, the company may run into difficulties implementing it across the board. In such cases, the company should, at its own responsibility and as a provisional extraordinary measure, give preference to measures that it finds particularly necessary upon considering its company size and business category, existing systems, relevance to its international commercial transactions, and effectiveness, etc. as well as consideration of the extent of risk that the company may be charged with the offense of bribery of foreign public officials<sup>65</sup>.

## 2.5 Other Matters

In many cases, it is difficult for a single company to cope with issues of bribery of foreign public officials by, for example, accepting risk of being treated disadvantageously by refusing continuous demands (solicitation or extortion) for bribery by foreign public officials, etc.

In such cases, it can be fruitful to consult with the business support desk for Japanese companies at the local Japanese Embassy or consular office, Japan External Trade Organization (JETRO) or local chamber of commerce, etc., or leveraging such organizations to demand the local government stop explicitly or

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<sup>62</sup> The Agreement Procedure (Article 350-2 of the Code of Criminal Procedure) is a procedure in which, for specific financial and economic crimes and drug firearm crimes, the prosecutor and the suspect or accused can make an agreement on the following contents with the consent of the defense counsel:

- The suspect or accused will cooperate with the prosecutor, such as by making statements about criminal cases of others or submitting the evidence.
- The prosecutor will treat the case of the suspect or accused in an advantageous manner, such as not prosecuting the case, prosecuting the case with a light count, or making a light sentence.

It is up to the investigative authorities to decide how to gather evidence, including the application of the Agreement Procedure, but in any case, if a company provides the investigative authorities with facts and other information uncovered through internal investigations, etc., it may contribute to the investigation of the cause of the case, which may lead to the early resolution of the situation.

<sup>63</sup> As described in Case (4) of the offense of bribery of foreign public officials at page 46 in this guideline, it is important to consider preventive measures because, in a judicial precedent, the fact that "the company reviewed its compliance system and took preventive measures, etc." was a factor to be taken into consideration in determining punishment.

<sup>64</sup> The establishment of a third-party committee or internal investigation committee is also worth considering when investigating the facts and causes of the incident and considering preventive measures. For a third-party committee, refer to "Guideline for Independent Committees relating to Company Scandals" (Japan Federation of Bar Associations, July, 2010. Revised in December, 2010).

<sup>65</sup> A survey conducted by the Quality-of-Life Policy Bureau of the Cabinet Office indicates that the ratio of companies which introduce a whistle-blower system is on the increase, showing a mounting awareness of the importance of such systems.

implicitly demanding bribes through specified or unspecified public officials. This can be done both before and after the fact. The Ministry of Foreign Affairs designates an officer in charge of the OECD Anti-Bribery Convention at each of its 225 diplomatic missions to serve as a point of consult for bribery cases of foreign public officials.

Further, in relation to development cooperation projects, there is an option to consult with the consultation desk for information on fraud and corruption established within the Ministry of Foreign Affairs of Japan and Japan International Cooperation Agency (JICA) or to have such institutions negotiate with the local government based on information provided<sup>66</sup>.

On the other hand, in the light of assisting Japanese companies, the Japanese government is expected to promptly propose to the local government if requested by a local Japanese company and to consider with the relevant governmental agencies disclosing the status of such proposals and the status of action taken for each country so that Japanese companies may assess country risk.

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<sup>66</sup> Information about the fraud and corruption information consultation desk of Ministry of Foreign Affairs of Japan can be found here: <https://www3.mofa.go.jp/mofaj/gaiko/oda/fusei/>. Information about the fraud and corruption information consultation desk of JICA can be found here: <https://www2.jica.go.jp/ja/odainfo/index.php>.



## CHAPTER 3: SCOPE OF PUNISHMENT UNDER THE UNFAIR COMPETITION PREVENTION ACT

The action that Japan has taken in connection with the acceding to the OECD Convention is implementing the offense of bribery of foreign public officials, among other things, through a revision to the Unfair Competition Prevention Act in 1998<sup>67</sup>.

This Chapter provides an article-by-article explanation of the relevant articles of the Unfair Competition Prevention Act from the perspective of further understanding and better predictability regarding the bribery of foreign public officials.

As an additional note, readers are reminded that it is the criminal investigation and prosecution agencies that are actually in charge of the application of the Act with respect to each individual and specific case and that the final interpretation of the Act is left to the courts.

### 3.1 The Elements of the Offense of Bribery of Foreign Public Officials (in Respect of Article 18(1) of the Act)

- Article 18(1) of the Unfair Competition Prevention Act

No person shall give, or offer or promise to give, any money or other benefit to a Foreign Public Official, etc. in order to have the Foreign Public Official, etc. act or refrain from acting in relation to the performance of official duties, or in order to have the Foreign Public Official, etc., use his/her position to influence another Foreign Public Official, etc. to act or refrain from acting in relation to the performance of official duties, in order to obtain a wrongful gain in business with regard to international commercial transactions.

#### **(1) Overview (the subscript numbers in bracket each refer to the Items where the terms are explained in the following 3.1 (2))**

Article 18(1) of the Unfair Competition Prevention Act provides, "(i)No person shall (vii)give, or offer or promise to give, any (vi) money or other benefit, to a (refer to "3.2 Definition of Foreign Public Official, etc.") Foreign Public Official, etc., in order to have the Foreign Public Official, etc. (v)act or refrain from (iv)acting in relation to the performance of official duties, or in order to have the Foreign Public Official, etc., use his/her position to influence another Foreign Public Official, etc. to act or refrain from acting in relation to the performance of official duties, (iii)in order to obtain a wrongful gain in business with regard to (ii)international commercial transactions."

This paragraph is intended to assure the provisions of paragraph 1 of Article 1 of the Anti-Bribery Convention. In other words, it prohibits the giving, offering or promising of any improper benefit in

<sup>67</sup> The Preamble of the Convention sets out, "achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention," and, in line with this view, requires, for example, that measures be taken including the criminalization of the bribery of foreign public officials.

order to cause an act of commission or omission, etc. in relation to the performance of official duties of foreign public officials, etc., committed in order to obtain a wrongful gain in business with regard to international commercial transactions.

Incidentally, as stated in the Commentary 8<sup>68</sup> of the OECD Anti-Bribery Convention, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law, it is not a violation of the Unfair Competition Prevention Act because the advantage is not considered as any money or other benefit which are given to a foreign public official, etc. in order to obtain a wrongful gain under Article 18(1) of the Unfair Competition Prevention Act.

● **Typical Behaviors subject to Punishment**

1. giving a benefit to an official of the Ministry of Health of Country A with the intention of obtaining minimum bid price information that is not released in advance, in order to win a bid for a national hospital construction project in Country A;
2. giving a benefit to an official of the inspection agency of Country B with the intention of obtaining a license to install equipment at a chemical plant constructed in Country B that does not satisfy environmental standards;
3. giving a benefit to an official of the customs agency of Country C with the intention of obtaining an illegal reduction of import duty on building materials; and
4. giving a benefit to a public official of Country D with the intention of getting preferential treatment in commodity export approval procedures with an aim of gaining an advantage over competitors.

**(2) Interpretation of Terms**

**(i) "No person"**

If someone commits the whole or part of an act subject to this offense in Japan, the Act will apply irrespective of the nationality (in other words, whether the person is Japanese or a non-Japanese). If a Japanese national commits a prohibited act outside of Japan, the Act will also apply to that person.

→[Refer to "**(3) Geographical Scope of Application**" in Chapter 3.3: Penalties.]

**(ii) "International commercial transactions"**

This offense is to prohibit bribery to foreign public officials in the conduct of international business (Article 1-1 of the Convention).

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<sup>68</sup> The Commentary 8 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions sets out, "It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law."

Within this paragraph, "international commercial transactions" means the act of economic activity beyond national borders such as trade and foreign investment. Concretely, "international" means (i) "international relations"<sup>69</sup> among the trading parties, or (ii) "international relations" in the content of business activities.

- **Specific examples regarding "international commercial transactions"**
  1. Where a trading company of Japan bribes a public official of Country A in order to win an order for bridge construction under an ODA project in Country A:  
→ **As international relations exists between trading parties, this would be considered to be the "international commercial transactions."**
  2. Where a Japanese-run construction company located in Country B bribes a public official of Country B in Japan in order to win an order for repair work for the embassy of Country B in Tokyo:  
→ **As international relations exists in the business activity, this would be considered to be the "international commercial transactions."**

**(iii) "Wrongful gain in business"**

○ **Concept of "gain in business"**

Judicial precedents have, in light of the legislative intent to secure fair competition among enterprises, defined the term "business (*eigyō*)" to mean not only activities conducted simply for profit but also any activities that involve economic calculations of income/expenditure more broadly (such as hospital management, etc.).

Therefore, it is understood that the term "gain in business" refers to a tangible or intangible economic value or any other gain in a general sense that an enterprise can gain in carrying out such "business."

○ **Concept of "wrongful gain"**

The term "wrongful gain" means any gain obtained in a manner running counter to public policy or principle of good faith. Specifically, it is interpreted as referring to:

- (a) any gain obtained for oneself, any other natural or legal entity through the giving, etc. of an improper benefit to a foreign public official, etc., and having the said foreign public official, etc. exert his/her discretion in a manner favorable to oneself, or
- (b) any gain obtained through the giving, etc. of an improper benefit to a foreign public official, etc., and having the said foreign public official, etc. commit an illegal act.

○ **Cases where the existence of the intention to obtain a wrongful gain in business can be an issue**

**(I) Acts of Socializing**

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<sup>69</sup> "International relations" means relations beyond national borders.

- Burden of expenses such as expenses for travel or meals or gift-giving for a foreign public official, etc. can be a typical form of bribery. However, if it is purely for general socializing or for fostering understanding of the company's products or services and not for any unjust purpose such as for preferential treatment from the relevant foreign public official, etc. in the course of his/her duties, such acts may not be necessarily considered an act of bribery aimed at obtaining a "wrongful gain in business".
- Specific examples of this might be gift-giving, paying for travel expenses or the provision of entertainment in small amounts that, in light of the timing, type of item, amount of money, frequency or other factors, be regarded as purely for the purpose of socializing or for fostering understanding of the company's products or services. As stated in Chapter 2.2 Section (3) above, it is desirable that these acts are made only after careful consideration based on the company's internal standards, which themselves are formulated from the perspective of ensuring careful internal consideration and with consideration for local laws and regulations, and that the outcome is appropriately recorded to allow for later audit.\*

\*Note: Unofficial approval procedures or false records would be indicative of a payment to obtain a "wrongful gain in business".

(i) The following are highly likely to be considered payments to obtain a "wrongful gain in business":

- providing a sports car to a foreign public official, etc.;
- providing gifts, even those of low cost, frequently to a foreign public official, etc.;
- giving a merchandise coupon that is cash convertible to a foreign public official, etc.;
- a group company preferentially employing the family member or relative of a foreign public official, etc.;
- inviting the family members of a foreign public official to a resort that has little relationship with the company's products or services;
- engaging a company associated with a foreign public official, etc. as agent or consultant; and
- paying money or providing goods immediately before public bidding regardless of the amount or economic value thereof.

(ii) The following may not be necessarily always considered payments to obtain a "wrongful gain in business":

- giving promotional giveaways or commemorative gifts for general distribution, such as publicity calendars;
- providing appropriate refreshments or simple food and drink at a business meeting;

- riding with a foreign public official in a company car when it is necessary to visit the company's office due to transportation conditions;
- providing an appropriate seasonal gift of low cost in accordance with legally accepted case law;
- in cases where presenting of the company's products or services at an exhibition only is inadequate to understand the company's products or services, and a visit to the company's factory/laboratory (including any local one and those in Japan or a third country) is required, paying the cost of travel expenses of foreign public officials, etc. who are selected under certain internal standards (actual cost based on the company's internal standards formulated in accordance with the local laws and regulations); and
- providing reasonable and appropriate meals (if any anti-corruption laws exist in the country of visit or the country of the relevant foreign public officials that stipulates standards regarding the amount, then with reference to the cost stipulated in such standards) and sightseeing during spare time in connection with the foregoing visit.

## (II) Acts of Donation

There may be cases where an enterprise makes a donation; however, it should be noted that any payment to a foreign public official, etc. is in most cases payment to obtain "a wrongful gain in business", i.e. a typical act of bribery. Even if it appears to take the form of a donation to a non-profit organization, if such donation is in fact made to a foreign public official, etc., then it would also constitute a typical act of bribery.

In fact, even a donation made to a non-profit organization purely for the purpose of fulfilling the company's corporate social responsibility as a "good corporate citizen" can constitute an act of bribery.

For these reasons, it is necessary to confirm prior to making a donation whether any officer of the recipient, or any family member or relative thereof, is related to a foreign public official, etc. involved with the company's project, and on top of that, to confirm that money donated is not flowing back to any person related to the foreign public official, etc.\* to a reasonable extent, such as inspection of the accounting books of the recipient after donation.

\*Note: Unofficial approval procedures or false records would be indicative of payment to obtain a "wrongful gain in business".

## (III) Others

- Since there is no exceptional provision with regard to Small Facilitation

Payments (SFP)<sup>70</sup> explicitly under the Unfair Competition Prevention Act, the giving of any money or other benefit to a foreign public official, etc. in order to ‘obtain a wrongful gain in business’, even if the amount is small, is a violation of the Unfair Competition Prevention Act. Therefore, it is impossible to escape punishment solely on the basis of being a so-called SFP.

- In case of receiving unreasonably disadvantageous discriminative treatment<sup>71</sup>. There are cases where, in a customs setting for instance, an enterprise has taken all the necessary procedures under local laws and regulations, yet will experience delays or other unreasonably disadvantageous discriminative treatment by the local government, effectively until money or goods are provided<sup>72</sup> to the local government officials.
  - (i) An official who simply receives an application form from a company but who is not actually in charge of the examination refuses to affix a seal of receipt on the application despite there being no inadequacies with the form.
  - (ii) An enterprise is entitled to a tax refund under the local laws and regulations, but the tax office fails to process the refund without giving any reasonable grounds.
  - (iii) An enterprise has an obligation to have its fire protection equipment inspected by the fire department under the local laws and regulations, but the fire department is not willing to cooperate and conduct the inspection.

Any payment, whether it is for the purpose of avoiding discriminatory disadvantages such as the above, is itself likely to be considered to be the giving of money or other benefit "to obtain a wrongful gain in business" for oneself. Moreover, whatever the purpose, once such a payment has been made to a foreign public official, etc., the practice is likely to persist as a convention, so the fundamental principle should always be to refuse such demands for money, etc.

From the perspective of preventing the further encouragement of payment demands, it is desirable to clearly convey the intention of refusal, either independently or through the local Japanese Embassy, consular office or the local chamber of commerce, etc. as stated in Chapter 2.5 above.

Being compelled to give, etc. a benefit for the purpose of avoiding danger to one’s own life or body may, in some cases, be determined as not given with the intention

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<sup>70</sup> For the details of Small Facilitation Payments, please refer to footnote 38 in p.15.

<sup>71</sup> Even if no imminent danger to human body/life exists, if, for example, security is poor and personal protection, etc. by local police or armed force is needed, rather than providing money, etc. directly to an individual police officer or individual military personnel, it might be possible to execute a service agreement for personal protection, etc. with the police or military organization itself, to the effect that expenses will be covered. Naturally, however, the giving of improper benefit to the police, etc. on the pretense of executing an agreement would be considered to constitute the giving of "improper benefit".

<sup>72</sup> It is the so-called Small Facilitation Payments and please refer to footnote 38 in p.15 for the details.

to obtain a "wrongful gain."

**(iv) "Acting in relation to the performance of official duties"**

"Acting in relation to the performance of official duties" naturally includes any act within the scope of official authority of the said Foreign Public Official, etc., but also includes acts closely connected to his/her official duties.

Note that the definition of "official duty (*shokumu*)" here is the same as that for "official duty (*shokumu*)" in the provision of Article 197 (Acceptance of Bribe) of the Penal Code.

Judicial precedents concerning acts closely connected to official duties in the context of the offense of giving or taking bribes under the Penal Code include cases in which it was found that acts conventionally taken by a public official or acts preliminary to legitimate official duty were acts closely connected to official duties.

**(v) "...act or refrain from (acting in relation to the performance of official duties), or in order to have the Foreign Public Official, etc. use his/her position to influence another Foreign Public Official, etc. to act or refrain from (acting in relation to the performance of official duties)..."**

The requirement here is that the purpose of the giving, etc. of an improper benefit should be the commission or omission of a certain act by a Foreign Public Official, etc., or causing the commission or omission of a certain act by another Foreign Public Official, etc.

As stated in Section (iv) above, acts by a Foreign Public Official, etc. himself/herself refer to an act within the scope of official authority of the said Foreign Public Official, etc. and an act closely connected to his/her official duties.

Also, to "influence ~ to act (*assen*)" includes having the said Foreign Public Official, etc. use his/her position, influence upon another Foreign Public Official, etc. to act in relation to the performance of official duties, even if that action is beyond the scope of official authority of the former official, etc.

**(vi) "any money or other benefit"**

The term "any money or other benefit" can mean not only economic benefit, but any benefit that serves to satisfy a demand or desire of a person. Accordingly, it would be considered to cover, naturally, money and property, as well as any economic benefit such as financial benefit, free renting of a house or building, entertainment and paid dining, offering of a collateral or guarantee, but also cover any and all other tangible and intangible benefits including non-economic benefits such as a sexual relationship or occupational position.

**(vii) "...give, or offer or promise to give (to a Foreign Public Official, etc.)"**

To "give (*kyoyo*)" does not only mean simply providing any money or other benefit as a bribe, but also must be accompanied by the acceptance of such benefit by a Foreign Public Official, etc. on the other side.

To "offer (*moshikomi*)" is an act of prompting a Foreign Public Official, etc. to accept any money or other benefit in a situation where it can be recognized as a bribe, and does not need to be accompanied by any reaction on the part of that official, etc.

To "promise (*yakusoku*)" means an agreement on the giving/acceptance of any money or other benefit between parties of bribery.

In the case of giving, or offering or promising to give any money and other benefit to a third party other than a Foreign Public Official, etc., it would constitute an offense of bribery of Foreign Public Officials as well, if:

- there is a conspiracy between the said Foreign Public Official, etc. and the said third party;
- it is obvious that the money or benefit has been given to the said Foreign Public Official, etc., such as where it is directed to a relative of that official, etc.; or
- the Foreign Public Official, etc. has used the third party as a tool and had him/her receive the money or benefit.

### **(3) Averting Present Danger**

- In the case of acts that are found to be averting present danger as stipulated in Article 37 of the Penal Code, illegality will be rejected and no penalty will be imposed\*.

\*Reference: The requirement for "averting present danger" is met if "an act is unavoidably performed" (there is no realistic other way to preserve legal benefit) to "avert" (intention of averting is required) a "present danger" (infringement of legal benefit to be preserved actually exists or is pressing) to "the life or body of oneself or any other person" (legal benefit to be preserved), etc. "only when the harm produced by such act does not exceed the harm to be averted" (the relative merits of legal benefits should be determined based on conventional wisdom depending on specific case).

- In a relation to foreign public officials, etc., for instance, the aforesaid requirement for averting present danger may be met when a person is in danger of being assaulted if he/she fails to make payment and has no choice but to make a minimum payment necessary to avert actual infringement of life or body.
- An example of when the requirement for averting present danger may be met:
  - When a person pays money to a policeman carrying a gun on regular duty who expressly or implicitly demands payment and refuses to leave his/her office, with the imminent threat of physical restraint.



### 3.2 Definition of Foreign Public Official, etc. (in Respect of Article 18(2) of the Act and the Government Ordinance)

- Article 18(2) of the Unfair Competition Prevention Act
- 2. The term "Foreign Public Official, etc." as used in the preceding paragraph means any of the following persons:
  - (i) any person who engages in public service for national or local foreign government;
  - (ii) any person who engages in the business affairs of any entity established under foreign special laws to carry out specific business affairs in the public interest;
  - (iii) any person who engages in the business affairs of an entity in which one or more of the national or local governments of foreign states directly owns a number of voting shares or an amount of capital subscription that exceeds 50 percent of that enterprise's total issued voting shares or total amount of capital subscription, or in which the majority of the Officers (meaning directors, auditors, council members, inspectors, liquidators, and other persons engaged in management of the business) are appointed or designated by one or more of the national or local foreign governments, and to which special rights and interests are granted by the national or local government of the foreign states for performance of its business, or a person specified by Cabinet Order as an equivalent person;
  - (iv) any person who engages in public service for an International Organization (meaning an international organization which is formed by governments or intergovernmental international organizations); or
  - (v) any person who engages in the business affairs under the authority of the national or local government of a foreign state or an International Organization and is delegated by them.

#### **(1) Purposes**

A definition of a "Foreign Public Official, etc." who can be a party to bribery is provided in Article 18(2) of the Unfair Competition Prevention Act and the "Government ordinance to define 'such person as defined in the government ordinance as a Foreign Public Official, etc.' provided for in Article 18(2) (iii) of the Unfair Competition Prevention Act".

Foreign public officials, etc. subject to the application of this Act can be divided into the following five categories:

- (i) Any person who engages in public services for a national or local foreign government (Item 1)
- (ii) Any person who engages in services for an agency affiliated with a foreign national government (Item 2)
- (iii) Any person who engages in services for a foreign public enterprise (Item 3)
- (iv) Any person who engages in public services for an International Organization (Item 4)
- (v) Any person who exercises a public function on behalf of a foreign national government, etc. as delegated (Item 5)

Note that those countries which Japan has not recognized as countries are also covered by the concept of "foreign."

**(2) Item 1: Person who engages in public services for a national or local foreign government (Foreign Public Official)**

A person who engages in public services for a national or local foreign government refers to a person who occupies a position in an administrative or legislative body, or a judicial agency.

\* Note that political party officials and candidates for public office are not subject to the application of this Act because they are not included in the definition of foreign public official under the Convention.

**(3) Item 2: Person who engages in services for an agency affiliated with a foreign national government**

An agency affiliated with a foreign national government refers to an organization constituted under special laws to carry out specific tasks concerning public interest, which is the equivalent of a public corporation (*tokushu hojin*) or special company (*tokushu gaisha*) in Japan.

Note that an organization constituted under special laws does not include any corporation organized under civil law, such as a public interest corporation or a commercial company, that can, under the rule-based (as opposed to permission-based) principle, be constituted if certain requirements are met.

A "person who engages in services" refers to a person who is determined, in terms of the function fulfilled by him/her, to perform services for the said agency.

● **Examples of agency affiliated with a foreign national government**

Government corporations in the United States:

Specific examples include Tennessee Valley Authority and National Railroad Passenger Corporation (a.k.a. Amtrak).

Établissements publics in France:

Specific examples include *Bibliothèques nationales*, and university.

**(4) Item 3: Person who engages in services for a foreign public enterprise**

A "public enterprise" in this Item covers any enterprise for which:

- (i) a majority of its voting shares are owned by;
- (ii) a majority of its total capital is contributed by; or
- (iii) a majority of its officers are designated or appointed by;

one or more national or local foreign government (including public interest corporations), and such enterprise equivalents as defined by government ordinance.

An enterprise defined by government ordinance as equivalent to any of the foregoing refers to an enterprise:

- (i) a majority of the voting rights of all shareholders of which are owned by;
- (ii) which is under the control of, through the holding of golden shares that require permission, license, approval or consent, etc. in order for all or some resolutions at general shareholders' meetings cannot be effective; or
- (iii) which is under the control of, via indirect ownership of a majority of its stock, etc; one or more national or local foreign governments.

Any person engaging in services for such "public enterprises" as are given special privileges by national or local foreign governments to do the public enterprises' business falls under the definition of foreign public official, etc. under the Unfair Competition Prevention Act.

● **Example of "public enterprise" 1: Control through golden shares**

The articles of incorporation of Company B in Country A, a private company that was formerly state-owned, had provisions requiring the consent of the government, *i.e.*, the golden share owner, for a resolution of a general shareholders' meeting to amend certain articles to take effect, including articles such as:

- (i) No one may own 15% or more shares or exercise 15% or more voting rights, either separately or jointly; and
- (ii) No non-citizen of Country A may serve as the chairman of the Company or the chief executive of the Company.

In this case, Company B would be considered to be a "public enterprise" under this Item.

● **Example of "public enterprise" 2: Indirect control**

Companies D<sub>1</sub> and D<sub>2</sub> are both 70%-owned subsidiaries of Company D, a state-owned electricity power company in Country C (the government owns 80% of its shares). Company D<sub>1</sub> generates power mostly in the northern part of Country C while Company D<sub>2</sub> conducts the same operation mostly in the southern part of Country C.

In this case, Companies D<sub>1</sub> and D<sub>2</sub> would each be considered to be a "public enterprise" under this Item.

- **The government ordinance to define “such person as defined in the government ordinance as Foreign Public Official, etc.” provided for in Article 18(2) (iii) of the Unfair Competition Prevention Act**
  1. Such person as defined in the government ordinance as Foreign Public Official, etc. provided for in Article 18(2) (iii) of the Unfair Competition Prevention Act (hereinafter, referred to as the “Act”) means any person engaging in services for any of the following enterprises (excluding the enterprises stipulated in Article 18(2) (iii) of the Act) which are given special privileges by national or local foreign governments to do its business:
    - (i) any enterprise of which one or more national or local foreign governments directly own more than half of all the shareholders’ rights to vote;
    - (ii) any enterprise which requires permission, approval, consent of, or other similar acts by any national or local foreign government in order for all or part of the resolutions of general meetings of shareholders cannot be effective, or whose such resolutions can be invalidated by a national or local foreign government; or
    - (iii) any enterprise (excluding any enterprise described in 1(i) of this government ordinance), of which one or more foreign governments, whether national or local, or public enterprises directly own more than half of (a) the total issued shares with the right to vote, (b) the total subscribed capital, or (c) all the shareholders’ voting rights , or the majority of whose Officers (meaning directors, auditors, council members, inspectors, liquidators, and other persons who engaged in management of the business; “Officers” in the next paragraph shall mean the same) are designated or appointed or named by one or more foreign governments, whether national or local or public enterprises.
  2. “Public enterprise” stipulated in 1(iii) of this government ordinance shall mean any enterprise stipulated in Article 18(2) (iii) of the Act and those described in 1(i) and (ii) of this government ordinance. In this case, any enterprise of which one or more foreign governments, whether national or local, or public enterprises directly own more than half of (a) the total issued shares with the right to vote, (b) total subscribed capital, or (c) all the shareholders’ voting rights, or the majority of whose Officers are designated or appointed by one or more foreign governments, whether national or local, or public enterprises, shall be deemed to be a public enterprise.

**(5) Item 4: Person who engages in public services for an International Organization**

An "International Organization" in this Item refers to an international organization organized by a nation state, government or any other public body, irrespective of the organizational form or the scope of authority.

Incidentally, it does not include international organizations constituted by a private body, such as the IOC (International Olympic Committee).

- Examples of International Organizations  
United Nations, UNICEF (United Nations International Children's Emergency Fund), ILO (International Labour Organization), WTO (World Trade Organization), etc.

**(6) Item 5: Person who exercises a public function on behalf of a foreign national government, etc. as delegated**

This refers to a person to whom privileges are delegated by national or local foreign governments or an international organization and who engages in services as delegated. In other words, it is intended to mean a person to whom privileges are delegated by a foreign national government, etc. or an International Organization over services that fall under the competence of the said foreign national government, etc., such as inspection and testing services, etc., and who engages in the said services.

It does not include those persons who process some work ordered by a foreign national government, etc. without any delegation of authority, such as staff, etc. of construction companies contracted for public works projects.

- Example of person who exercises a public function on behalf of a foreign national government, etc. as delegated  
  
"Foreign public officials, etc." includes staff of a designated inspection agency or designated testing agency delegated to conduct inspections and testing operations, etc. for a chemical plant construction to check in advance if it meets environmental criteria for permission, etc. for equipment installation, etc. pursuant to the laws of the country in which the construction takes place.

### 3.3 Penalties (in Respect of Articles 21(2) (vii), 21 (8) and 22)

- Articles 21 and 22 of the Unfair Competition Prevention Act (abbreviated)

Article 21 (omitted)

2. Any person who falls under any of the following items shall be punished by imprisonment with work for not more than five years, a fine of not more than five million yen, or both:

(i) to (vi) (omitted)

(vii) a person who violates any provision of Article 16, 17, or 18, paragraph (1).

3. to 7. (omitted)

8. The offence prescribed in paragraph (2), item (vii) (limited to the part under Article 18, paragraph (1)) shall be governed by Article 3 of the Penal Code (Act No. 45 of 1907).

9. to 12. (omitted)

Article 22

1. When the representative of a juridical person, or the agent, employee, or other worker of a juridical person or of any person has committed the violation listed in any of the provisions of following items with regard to the business of said juridical person or said person, in addition to the offender being subject to punishment, said juridical person shall be punished by the fine prescribed in said items, and said persons shall be punished by the fine prescribed in the relevant Article:

(i) and (ii) (omitted)

(iii) paragraph (2) of the preceding Article - fine not more than three hundred million yen.

2. (omitted)

3. The period of prescription for the punishment by fine to which a juridical person or person is subject pursuant to the provisions of paragraph (1) in regard to violation under (omitted) paragraph (2) (omitted), is the same as that for the offences referred to in the provisions of the same Article.

#### **(1) Penalties for Perpetrators (natural person)**

- Article 21(2) (vii) of the Unfair Competition Prevention Act provides that a person who gave, etc. an improper benefit to a foreign public official, etc. in violation of Article 18(1) shall be subject to **imprisonment with work for a period not exceeding five years or for a fine not exceeding 5,000,000 yen.**
- By imposing a penalty at least equal to "imprisonment with work for not more than three years or for a fine of not more than 2,500,000 yen" provided as imposable in the case of a bribery offense committed with respect to a public official of Japan (Article 198 of the Penal Code), this provision fulfills a requirement under the Convention regarding the severity of penalty,

which sets out that "the range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials" (Article 3-1).

- (iii) Also, the provision of Article 21(8) sets out that the offense of bribery of foreign public officials is subject to Article 3 of the Penal Code.

As Article 3 of the Penal Code provides that Japanese nationals who have committed certain offenses outside of Japan shall be punishable under the Code, this forms the basis for punishment of a Japanese national for an offense committed outside of Japan with regard to the offense of bribery of foreign public officials as well (*i.e.*, a Japanese national who has given an improper benefit to a foreign public official, etc. outside of Japan will also be punishable)<sup>73</sup>.

→**[Refer to "(3) Geographical Scope of Application" in this Chapter 3.3: Penalties.]**

- (iv) Note that a person who has been convicted of a bribery offense in the country of offense may still be punishable under the offense of bribery of foreign public officials, as provided for in Article 5 of the Penal Code<sup>74</sup>.

If, however, the person has actually served a sentence either in whole or in part in that foreign country, execution of a sentence in Japan will be mitigated or discharged pursuant to the provision of the said Article.

- (v) The statute of limitation is five years<sup>75</sup>. Under Article 255(1) of the Code of Criminal Procedure, however, the statute of limitation does not run during the period for which the offender is outside of Japan.

## **(2) Penalties for Juridical Persons**

### **(i) Dual Criminal Liability Provision**

Article 22 of the Unfair Competition Prevention Act provides that where a representative, agent, employee or any other staff, etc. of a juridical person<sup>76</sup> has committed a violation in connection with an operation of the said juridical person, a fine not exceeding 300,000,000 yen will be imposed on that juridical person, which is in addition to punishment for the offender himself/herself.

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<sup>73</sup> The "Bill for Partial Revision of the Unfair Competition Prevention Law," by which punishment of a Japanese national for an offense committed outside of Japan is established with regard to the offense of bribery of foreign public officials, was passed by the Diet on May 19, 2004 and came into force as of January 1, 2005.

<sup>74</sup> Article 5 of the Penal Code: Even when a final and binding decision has been rendered by a foreign judiciary against the criminal act of a person, it shall not preclude further punishment in Japan with regard to the same act; provided, however, that when the person has already served either the whole or part of the punishment abroad, execution of the punishment shall be mitigated or remitted.

<sup>75</sup> As provided for in Article 250 of the Code of Criminal Procedure; further, the statute of limitations for penalties to be imposed on the juridical person was amended to five years under the "Bill for Partial Revision of the Design Act, etc. (Act No. 55 of 2006)" (came into force on January 1, 2007).

<sup>76</sup> The dual criminal liability provision may also be applied to sole proprietor businesses. However, the fine is limited to 5,000,000 yen.

This article was created because the Convention requires that juridical persons that engage in international commercial transactions should also be held liable for the foreign bribery offense.

**(ii) Presumption of Negligence on the Part of a Juridical Person**

The Supreme Court has previously ruled that the legislative intent with respect to a provision of penalties for juridical persons is that the business proprietor cannot be discharged from criminal liability because of a presumption of negligence of the juridical person in its failure to appoint and oversight of the perpetrating employee, etc. and to exercise other caution necessary to prevent violation unless it is found that such caution was exercised<sup>77</sup>.

While this ruling is not about the Unfair Competition Prevention Act, in order for the exemption from the dual criminal liability of juridical persons to be applicable on the basis of non-existence of negligence, it is also likely that the Act also requires that such caution be exercised as necessary to prevent violation, not just simply in the form of general and abstract advice but in the form of proactive and specific instruction.

From this perspective also, it is necessary to augment the effect of measures for preventing bribery of foreign public officials and to improve the effectiveness of internal controls by, for instance, establishing and operating a system capable of appropriate prevention of bribery of foreign public officials as illustrated in Chapter 2 and conducting dissemination of knowledge and education activities, regarding the offense of bribery of foreign public officials, using these Guidelines, etc.

Whether the dual criminal liability provision will be applied to the main office of a Japanese company where a Japanese employee of its overseas subsidiary gave an improper benefit to a foreign public official, etc. would be judged in light of the individual and specific circumstances, including the degree of involvement of the main office in the regular business activities of the bribe-giver (the Japanese employee), and the state of appointment and oversight of the bribe-giver (the Japanese employee) by the main office. If the bribe-giver (the Japanese employee) can be considered to be virtually an employee of the main office in Japan, then the dual criminal liability provision should be applicable to the main office in Japan.

**(3) Geographical Scope of Application of Penalties**

- (i) The geographical scope of application means the scope in terms of exercise of jurisdiction within which cases that have occurred in a given geographical area can be governed by criminal laws of that country and be treated pursuant to those laws.
- (ii) The Penal Code of Japan applies the "principle of territorial jurisdiction" in Article 1 under which the criminal legislations of Japan apply to offenses committed within the territory of Japan, irrespective of the nationality of the offender; however, it applies the "principle of nationality jurisdiction" to certain offenses, including murder, assault and fraud, etc., in Article 3, under which the criminal legislation of Japan also applies to, in addition to offenses

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<sup>77</sup> Supreme Court Ruling on March 26, 1965. Supreme Court Criminal Case Reports, Volume 19, Issue 2, page 83 (for a case of violation of the Foreign Exchange and Foreign Trade Control Act).



committed within the territory of Japan, offenses committed by Japanese nationals when outside Japan.

As the principle of nationality jurisdiction is applied to the offense of bribery of foreign public officials pursuant to Article 3 of the Penal Code, Japanese nationals who have committed acts of bribery outside of Japan are also punishable, in addition to those who have committed acts of bribery in Japan.

- (iii) Under the principle of territorial jurisdiction, the criminal laws of Japan will be applicable to an offense if any "act" constituting a necessary element of the offense, has been committed in Japan, or the "result" constituting another necessary element of the offense, has occurred in Japan.

In respect of the offense of bribery of foreign public officials, this can possibly lead to the conclusion that if any improper benefit is offered or promised to a foreign public official via e-mail or fax, etc. from a location in Japan, then even if the benefit is subsequently given in a location overseas, the offense as a whole is considered to have been committed in Japan.

- (iv) In the case of non-Japanese corporations, the dual criminal liability provision in Article 22 of the Unfair Competition Prevention Act would be applicable to, for instance, a foreign company (*gaikoku gaisha*) as defined under the Companies Act<sup>78</sup>.

#### **(4) Giving of an Improper Benefit Using an Overseas Subsidiary (Branch) or Agent**

It is common practice to use an overseas subsidiary (branch) or agent in the conduct of international business such as foreign trade and overseas investment.

As an accomplice to an offense of bribery of foreign public officials is also subject to punishment according to the Convention, companies should be aware of the potential for complicity of an employee of the company's main office in Japan in cases where an employee of an overseas subsidiary (branch) or agent has committed act of bribery to a Foreign Public Official<sup>79</sup>.

The applicability of the Unfair Competition Prevention Act is summarized below with respect to typical examples of bribing a foreign public official by an employee of an overseas subsidiary (branch) or agent where an employee of the company's main office in Japan is or is not involved.

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<sup>78</sup> Article 823 of the Companies Act provides, "With regard to application of other acts, a foreign company shall be deemed to be the same kind of company or the most similar kind of company in Japan." See "Organization Criminal Liability Theory" by Kensuke Ito, page 76-79, (2012, *Seibundo*).

<sup>79</sup> Article 1-2 of the Convention sets out, "Each Party shall take any measures necessary to establish that complicity in, including inducement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offence." The respective provisions for co-principals, inducement and aiding and abetting, etc. in Articles 60 through to 65 of the Penal Code are applied to these matters.

**(i) Case of co-principals in conspiracy<sup>80</sup>, based on the existence of conspiracy between an overseas subsidiary (branch) employee and a main office employee**

If the conspiracy between an overseas subsidiary (branch) employee and a main office employee took place in Japan, one necessary element of an offense by co-principals in conspiracy would be considered to have occurred in Japan; therefore, the offense is considered to be committed in Japan even if the improper benefit was actually given in an overseas location.

Therefore in this case, both the overseas subsidiary (branch) employee and the main office employee would be culpable of the offense of bribery of foreign public officials. (In such cases, that chargeability against the employee of the overseas subsidiary (branch) would not be limited only to Japanese nationals.)

**(ii) Case of a main office employee inducing<sup>81</sup> or aiding and abetting<sup>82</sup> the offense and an overseas subsidiary (branch) employee perpetrating the act**

In case the principal offender perpetrated the act (such as the giving of an improper benefit) outside of Japan, but the inducement, or aiding and abetting took place within Japan, then the Japanese employee of the overseas subsidiary (branch) should, as with the main office employee who induced or aided and abetted the act, also be culpable of the offense of bribery of foreign public officials.

**(iii) Case of an overseas subsidiary (branch) employee giving an improper benefit at his/her own decision or upon instruction from that overseas subsidiary (branch) alone**

The perpetrating Japanese employee of the overseas subsidiary (branch) who gave improper benefits and the Japanese employee of the overseas subsidiary (branch) who gave the instruction thereof would be culpable of the offense of bribery of foreign public officials. On the other hand, the overseas subsidiary (branch) employee and any employee of the main office in Japan who has no involvement in the giving of the improper benefit would not be culpable of the offense of bribery of foreign public officials.

**(iv) Case of giving an improper benefit through the use of an overseas agent**

Cases where an employee of an overseas agent, rather than an overseas subsidiary (branch), gave an improper benefit are as with the cases under (i) and (ii) that involve an overseas subsidiary (branch) employee.

Examples aside, the question of whether there is a conspiracy with an employee from the main office in Japan falls to a judicial decision based on the particular facts and circumstances of each case.

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<sup>80</sup> Co-principals (Article 60 of the Penal Code) are "two or more persons who have jointly committed an offense." A "person who had no role in the act of actual perpetration of an offense where several persons had conspired to commit the offense and some of them actually perpetrated it" may also be punished as a principal offender, which constitutes a case of co-principals in conspiracy.

<sup>81</sup> Inducement (Article 61 of the Penal Code) is the "act of inducing another person to decide to perpetrate an offense."

<sup>82</sup> Aiding and abetting (i.e. "accessoryship (*houjo*)" per Article 62 of the Penal Code) is the "act of assisting a principal offender in a manner other than perpetration of an offense."

Even when an employee from an overseas subsidiary (branch) or from an overseas agent is not culpable of the offense of bribery of foreign public officials, he/she may not be exempt from being charged for a bribery offense under the criminal law of the country of his/her location, which is a matter left to judicial decision of that country based on the facts of each case.

### **3.4 Cases of the Offense of Bribery of Foreign Public Officials**

Cases that have been prosecuted so far since the establishment of the offense of bribery of foreign public officials under the Unfair Competition Prevention Act in 1998 are as follows (as of June 2020):

**(1) Case of giving improper benefits to Filipino public officials (Fukuoka Summary Court, March 2007)**

The case: Two employees who had been loaned to a local corporation of a Japanese stock company in the Philippines gave improper benefits such as golf club sets (equivalent to approximately 800 thousand yen) to two senior officials of the National Bureau of Investigation (Philippines) (NBI) in order to promptly conclude a contract for a business which NBI was planning.

In this case, the two defendants received fines of 500,000 yen and 200,000 yen, respectively.

**(2) Case giving improper benefits to a Vietnamese public official (Tokyo District Court, January and March 2009)**

The case: Four persons who had been employees, etc. of the defendant company whose head office is located in Tokyo gave improper benefits on two separate occasions, worth around US\$600,000 and US\$200,000, respectively, with the intention of mainly expressing their gratitude for having been able to receive an order for the consulting business related to main roads construction project in Ho Chi Minh City in Vietnam to a senior official in charge of this project.

In this case, the four defendants were sentenced to imprisonment with work for two years and six months, two years, one year and six months, and one year and eight months, respectively (each with a suspension of execution of the sentence for three years; however, for one of them, including separate charge of fraud). The defendant company received a fine of 70 million yen. This was the first case where dual criminal liabilities provision applied for the offense of bribery of foreign public officials.

\* The prosecutors, on the day on which this case was prosecuted, requested a change in the count to exclude cash worth US\$600,000 that had been accounted for as consignment fees such as designing from tax deductible expense in accordance with the Act on Special Measures concerning Taxation in relation to a case of violation of the Corporate Tax Act against the defendant company, etc. for which prosecution had already been instituted, and increase the evaded income and the evaded tax for the year ended in September 2004 by approximately 66 million yen and 20 million yen, respectively.

**(3) Case of giving improper benefits to a Chinese local government official (Nagoya Summary Court, October 2013)**

The case: The former executive director of a stock company engaged in the manufacturing of automobile parts, etc. with its head office in Aichi gave money (in Hong Kong dollars) equivalent to approximately 420,000 yen and a ladies' handbag (approximately 140,000 yen in value) to a senior official of the local government in order to have illegal operations of its local factory in China overlooked.

A fine of 500,000 yen was imposed on the defendant in this case.

**(4) Cases of giving improper benefits surrounding yen-loan projects in Indonesia, Vietnam and Uzbekistan (loan assistance projects) (Tokyo District Court, February 2015)**

The case: The former president, the former international division manager and the former accounting director of a stock company engaged in railway consultancy business with its head office in Tokyo gave money to persons related to public railway corporations in relation to ODA projects in Indonesia, Vietnam and Uzbekistan.

Specifically, with the aim of gaining advantages for themselves, the defendants gave around 70 million yen (in Japanese yen) to persons related to Vietnam Railways in connection with a yen-loan to Vietnam for "Hanoi City Urban Railway No.1 Construction Project", and around 20 million yen (in Japanese yen and rupiah) in total to persons related to Directorate General of Railways of Indonesia's Department of Transportation in connection with a yen-loan to Indonesia for "Railway Double Tracking on Java South Line Project", and around 54.77 million yen (in US dollar) to persons related to The Uzbekistan Railways in connection with a yen-loan to Uzbekistan for "Karshi-Termez Railway Electrification Project".

In this case, the three individual defendants were sentenced to imprisonment with work for two years (with a suspension of execution of the sentence for three years), three years (with a suspension of execution of the sentence for four years) and two years and six months (with a suspension of execution of the sentence for three years), respectively, and the defendant company received a fine of 90 million yen.

In sentencing, the court gave the following facts as favorable to the defendant company: (i) the company was socially punished (it was forced to withdraw from overseas operations and was also excluded from the nomination in nominated competitive tenders for a certain period of time by many local governments, etc. in Japan), (ii) the company incurred a huge loss due to non-payment of completed construction as a result of becoming unable to continue the contract, (iii) the company had declared the paid bribery as expenditure for a secret purpose and had paid tax thereon, and (iv) the company reviewed its compliance system and took preventive measures, etc.

**(5) Case of giving improper benefits to a Thai public official (Tokyo District Court, March 2019)**

The case: Two former officers (Senior Vice President, Senior General Manager of Procurement & Sourcing Division; and Director, Executive Vice President, Head of Engineering Headquarters) and the former General Manager of the then-existing Logistics Division of a company whose business activities are related to research, development, design, procurement, and manufacture of boilers, gas turbines, and other equipment and devices that constitute facilities or equipment for thermal power

generation systems, etc. with its head office in Yokohama gave money to a Thai public official through a person sent from its local subcontractor. The Agreement Procedure<sup>83</sup> was applied.

Specifically, with the aim of gaining convenience and advantages for not being prohibited from using a temporary jetty and unloading cargoes while giving tacit approval of violation of permission conditions without undertaking official procedures to get authorization to use the jetty, the defendants gave 11 million Thai baht equivalent to 39.93 million yen at that time to a public official in Thailand through a person sent from its local subcontractor.

In this case, the two defendants were sentenced to imprisonment with work for one year and six months (with a suspension of execution of the sentence for three years), one year and four months (with a suspension of execution of the sentence for three years). As a result of applying the Agreement Procedure to this case, the company has not been prosecuted.

**(6) Case of giving improper benefits to a Vietnamese public official (Kobe Summary Court, December 2019)**

The case: A Vietnamese living in Japan gave money (total 150,000 yen) to a then-existing consul at Consulate-General of Vietnam in Fukuoka to issue the necessary documents for application of Vietnamese residence status.

A fine of 500,000 yen was imposed on the defendant in this case.

**(7) Case of giving improper benefits to Vietnamese customs officers (Nagoya Summary Court, January 2020)**

The case: The then-existing President of a local corporation that sells electronic products as its business gave 1.5 billion Vietnamese dong (approximately 7.35 million yen) to two senior officials in Hai Phong City Customs Department with the aim of gaining advantages for reducing surcharges by customs violations.

A fine of 1,000,000 yen was imposed on the defendant in this case.

**(8) Case of giving improper benefits to a Vietnamese public official (Kobe Summary Court, June 2020)**

The case: A Vietnamese living in Japan gave money (approximately 100,000 yen) and promised to give money to a then-existing consul at Consulate-General of Vietnam in Osaka to issue the necessary documents for submitting marriage registration.

A fine of 500,000 yen was imposed on the defendant in the case.

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<sup>83</sup> It was introduced with the amendment of the Code of Criminal Procedure on May 24th 2016, and it was enforced in June 2018.

**(9) Case of promising to give improper benefits to a Vietnamese public official (Tsu Summary Court, July 2020)**

The case: A Vietnamese living in Japan promised to give money (total 140,000 yen) to a then-existing consul at Consulate-General of Vietnam in Osaka to issue the necessary documents for submitting marriage registration.

A fine of 500,000 yen was imposed on the defendant in the case.

## CHAPTER 4: OTHER MATTERS OF RELEVANCE

This Chapter provides information on measures taken in Japan with regard to the bribery of foreign public officials other than the Unfair Competition Prevention Act, and relevant information from other countries. The information provided here is also expected to be utilized as basic information, etc. for companies to refer to in examining its measures.

### 4.1 Relevant Measures Taken to Implement Obligations under the OECD Convention

In implementing the obligations under the OECD Anti-Bribery Convention, statutory measures have been taken through other laws and regulations, etc. in addition to those under the Unfair Competition Prevention Act. The overview of the measures taken in accordance with articles of the OECD Convention is as follows:

#### **(1) Notification (Article 1 of the Convention)**

Article 1 of the Convention states the measures should be taken to punish bribery of foreign public officials under their own country laws.

Regarding the measures, the Unfair Competition Prevention Act is listed among the laws which the law for Whistleblower Protection Act<sup>84</sup> is applied. The Whistleblower Protection Act protects the employee who provided whistle-blowing appropriately from disadvantageous treatment such as dismissal by the Japanese company, so that the offense of bribery of foreign public officials can be discovered.

#### **(2) Confiscation of Proceeds (Article 3 of the Convention) - Money Laundering (Article 7 of the Convention)**

Article 3.3 of the Convention sets out, "Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable."

In Japan in addition to monetary sanctions under the dual criminal liability provision in the Unfair Competition Prevention Act mentioned above, Article 2(2)(i)(a) of the "Act on Punishment of Organized Crimes and Control of Crime Proceeds" (hereinafter referred to as the "Organized Crime Punishment Act") sets out that the property which is produced by a criminal act which is punishable by imprisonment with work for a maximum period of four years or more, obtained through the crime act, or acquired as a reward for the criminal act will be considered "proceeds of crime" subject to confiscation under article 13 of the Organized Crime Punishment Act.

Article 21(2)(vii) of the Unfair Competition Prevention Act sets out that a person who have interfered with a bribery to public official shall be punished by imprisonment with work for five years or less, so property acquired by bribe-giver's side will be considered "proceeds of crime" and subject to confiscation.

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<sup>84</sup> Please refer to the Whistleblower Protection website for details ([https://www.caa.go.jp/policies/policy/consumer\\_system/whistleblower\\_protection\\_system/](https://www.caa.go.jp/policies/policy/consumer_system/whistleblower_protection_system/)).

Article 2(2)(iii)(b) of the Organized Crime Punishment Act sets out that the "property given" to a foreign public official, etc. (which is property given to the bribe-taker's side) will be considered "proceeds of crime" subject to confiscation

Article 7 of the Convention sets out that "Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred." Article 10 of the Organized Crime Punishment Act sets out that a person who have concealed proceeds of crime shall be punished.

### **(3) Accounting (Article 8 of the Convention)**

Article 8 of the Convention requires signatories to take such measures as may be necessary regarding inadequate and false entries in books and records, and financial statements, etc. for the purpose of, for example, hiding the giving of an improper benefit to a foreign public official.

In Japan, false entries, etc. are prohibited under the general principles of the "Accounting Principles for Business Enterprises" and Article 5 of the "Ordinance on the Terminology, Forms and Preparation Methods of Financial Statements, etc." In addition, violations may be subject to civil damages under Articles 18, 21, 22 and 24-4 of the Financial Instruments and Exchange Act, or administrative or criminal sanctions under Article 976 of the Companies Act, Articles 10, 24-2, 172, 172-2, 172-3, 172-4, 197, 197-2 and 207 of the Financial Instruments and Exchange Act, and Articles 30, 31-2, 34-21 and 34-21-2 of the Certified Public Accountants Act.

### **(4) Mutual Legal Assistance (Article 9 of the Convention) and Extradition (Article 10 of the Convention)**

Article 9 of the Convention lays down a requirement for mutual legal assistance such as the provision of prompt and effective legal assistance to other signatory countries.

This requirement can adequately be met through the relevant procedures provided in the "Act on International Assistance in Investigation and Other Related Matters" and the "Act on Assistance Based on Commission by Foreign Courts".

Article 10 of the Convention requires that bribery of a foreign public official should be included as an extraditable offense under the internal laws of each country and the criminal extradition treaty of the signatory countries<sup>85</sup>, the country's own nationals should be extraditable or, when the country declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national, the case should be submitted to its competent authorities.

As the offense of bribery of foreign public officials under the Unfair Competition Prevention Act falls under an offense punishable by imprisonment with work for three years or longer, it is an extraditable offense under the "Act of Extradition".

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<sup>85</sup> According to the Convention, any signatories where the extradition of a criminal is conditional upon the existence of a criminal extradition treaty may deem the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions to be the legal grounds for the extradition of a criminal in connection with the bribery of foreign public officials (Article 10-2 of the Convention).



## **(5) Monitoring and Follow-Up (Article 12 of the Convention)**

Based on the awareness of the need to achieve equivalence among the measures to be taken by signatory countries, Article 12 of the Convention requires cooperation among signatory countries for the purpose of monitoring and promoting the full implementation of the Convention.

In response to this requirement, the OECD Working Group on Bribery in International Business Transactions has been conducting a sequenced series of evaluations after the Convention came into force in February 1999, *i.e.*, the evaluation of the consistency of signatory countries' implementation of the Convention by reference to their relevant laws (Procedure of Self- and Mutual Evaluation - Phase 1), the follow-up evaluation on the issues pointed out in the Phase 1 evaluation (Phase 1 bis), and the evaluation of the state of operation (effectiveness) of the relevant laws (Procedure of Self- and Mutual Evaluation - Phase 2), and follow up on the Phase 2 evaluation and the evaluation with emphasis on the aspect of enforcement (Procedure of Self- and Mutual Evaluation - Phase 3), and thereby continually monitors the systems and applications of all signatory countries.

Further, the Phase 4 evaluation (which is related to the main cross-cutting problem in the OECD Working Group on Bribery in International Business Transactions, and the progress about matters pointed out between Phase 1 and Phase 3) was started in 2016.

For Japan, the Phase 1 evaluation was conducted in October 1999, the Phase 1 bis evaluation in April 2002, Phase 2 evaluation in December 2004 and January 2005, Phase 2 bis evaluation in June 2006, Phase 2 follow-up evaluation in October 2007, Phase 3 evaluation in December 2011, Phase 3 follow-up evaluation in February 2014 and Phase 4 evaluation in June 2019<sup>86</sup>.

## **4.2 Other Relevant Actions in Japan**

In addition to the measures in accordance with the OECD Convention, the Japanese government and governmental agencies have taken actions that contribute to preventing corruption, including prevention of bribery of foreign public officials. Among these actions, the following two are of particular relevance.

### **(1) Actions in relation to Export Credits**

The OECD Export Credit Group adopted the "Action Statement on Bribery and Officially Supported Export Credits" (December 2000, OECD Working Party on Export Credits and Credit Guarantees (OECD-ECG)), which stipulates, among others, that appropriate steps be taken to deter bribery in officially supported export credits and, in the case that bribery was involved in the award of the export contract, appropriate measures be taken. Subsequently, as means to further promote the efforts stipulated in this Action Statement, the OECD Council adopted the "OECD Council Recommendation on Bribery and Officially Supported Export Credits" in December 2006 and later its revised recommendation ("**New OECD Recommendation**"<sup>87</sup>) in March 2019. As a result,

<sup>86</sup> <https://www.oecd.org/daf/anti-bribery/japan-oecdanti-briberyconvention.htm>

<sup>87</sup> The New OECD Recommendation covers the bribery of foreign and domestic public officials and bribery between private sectors if the bribery between private sectors involved in export contracts and other equivalent contracts is prohibited under national laws. Also, bribers may include not only exporters and companies which apply for insurance, but also borrowers and other relevant parties.

agencies of the OECD member countries that are involved in officially supported export credits are required to take equivalent action.

In Japan, Nippon Export and Investment Insurance ("**NEXI**") and Japan Bank for International Cooperation ("**JBIC**") have been making efforts in the following matters with regard to companies applying for an insurance contract and exporters, etc. in compliance with the said New OECD Recommendation since April 2020<sup>88</sup>.

**(NEXI)**

- When applying for insurance, companies, etc. applying for an insurance contract are required to take an oath that "such companies, their officers, employees and agents involved in the transaction covered by the insurance contract" (hereinafter, "**companies, etc. applying for insurance**") have not previously been and will not be involved in foreign bribery in violation of the Unfair Competition Prevention Act.
- When applying for insurance, said companies, etc. are required to declare any of the following matters, if applicable.
  - "Companies, etc. applying for insurance" are currently under prosecution or formally under investigation in any country for a crime in violation of laws, including foreign laws, against bribery.
  - Within a five-year period preceding the application, "companies, etc. applying for insurance" have been convicted in any court for violation of laws against bribery of any country, including foreign laws, been subject to equivalent measures which include deferred prosecution and administrative punishment but are not limited to them, or been found as part of a publicly-available arbitral award to have engaged in bribery
- If the above matters are applicable, more strict due diligence than usual, which is defined as Enhanced Due Diligence by the New OECD Recommendation, is conducted and it will be confirmed that appropriate internal corrective measures and preventive measures are taken and maintained, and that rules are documented and so on because the risks associated with bribery which is involved in the transaction covered by an insurance contract need to be confirmed more carefully.
- If there is doubt of involvement of bribery in a transaction covered by an insurance contract prior to its conclusion, its conclusion shall be withheld, and if it is later found that "companies, etc. applying for insurance" are indeed involved in bribery, then the transaction is not underwritten.
- If it is concluded that "companies, etc. applying for insurance" is involved in bribery after the conclusion of an insurance contract, appropriate measures shall be taken, such as rejection of insurance claims, return of paid insurance or cancellation of the insurance contract.

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<sup>88</sup> NEXI: <https://www.nexi.go.jp/international/measures/index.html>,

JBIC: <https://www.jbic.go.jp/ja/support-menu/export/prevention.html>

**(JBIC)**

- In considering loan, etc., exporters are required to take an oath or get confirmation about the following matters:
  - Exporters and the exporters' representatives, executives, agents, employees and other workers ("**export relevant parties**") have not previously been and will not be involved in the bribery of foreign public officials against the Unfair Competition Prevention Act with regard to this agreement such as export agreements or sales agreements.
  - Exporters and export relevant parties are required to provide relevant information if they have been indicted as suspects of the bribery involved in their domestic and foreign business, if they have been subject to investigation as far as they know, if they have been convicted or been subject to equivalent measures (including punishment based on confession/self-declaration and plea bargaining) within a five-year period preceding the application or if they have been found as part of a publicly-available arbitral award to have engaged in bribery.
- In case the relevant information is provided, appropriate measures are taken, for example, more strict due diligence than usual, which is defined as Enhanced Due Diligence by New OECD recommendation, is conducted because the risk associated bribery which is involved in the transaction on the agreement need to be confirmed more carefully.
- If it is recognized that they have been involved in the bribery concerning the agreements, take the following action:
 

(Before execution of loan) Appropriate measures such as provision of information to law enforcement authorities, the refusal of loan, suspension of loan and cancellation of the undrawn loan amounts are taken.

(After execution of loan) Appropriate measures like provision of information to law enforcement authorities and mandatory payment before maturity are taken.

**(2) Actions in relation to ODA (Official Development Assistance)**

The "Development Cooperation Charter" which was decided by the Cabinet in February, 2015, also refers to "Prevention of fraud and corruption" as one of the general rules for development cooperation, as shown below. Bribery of foreign public officials is one of the key items in that policy.

**(1) Implementation Principles**

B. Principles for securing the appropriateness of development cooperation

(g) Preventing fraud and corruption

It is necessary to prevent fraud and corruption in implementing development cooperation. While taking measures to encourage establishment of a compliance system by bid winners, Japan will work with recipient countries to create an environment conducive to preventing fraud and corruption, including the strengthening of governance in these countries. In this context, Japan will ensure adherence to appropriate procedures and strive to ensure transparency in the implementation process.

The government and relevant governmental agencies, including the Ministry of Foreign Affairs of Japan and Japan International Cooperation Agency (JICA) are committed to taking disciplinary actions against persons involved in bribery of foreign public officials in relation with development cooperation, on a case-by-case basis within a predetermined scope.

With the implementation of these measures, attention is paid so that no bribery of foreign public officials should take place in connection with development cooperation by the Japanese government.

**[Reference 1]**

"Toward Preventing a Recurrence of Corruption Related to Official Development Assistance (ODA)" (September 2009)

As a result of the occurrence of cases of giving improper benefits in relation with a yen-loan-financed project<sup>89</sup>, the following main proposals were made by the "Study Panel for Preventing a Recurrence of ODA-Related Corruption"<sup>90</sup> comprised of outside specialists, set up by the Minister of Foreign Affairs:

1. Efforts that have been taken by the Ministry of Foreign Affairs of Japan and JICA
  - (i) Strengthening rules on punitive measures for businesses
  - (ii) Making good use of points of contact for information on corruption
  - (iii) More involvement of JICA in the selection and contract processes
  - (iv) Closer monitoring of ODA projects
2. Measures for firms
  - (i) Recommendations for enhancing compliance
  - (ii) Recommendations for familiarizing firms with international competition standards
3. Measures for recipient countries
  - (i) ODA policy for recipient countries where a corruption case has occurred
  - (ii) Recommendations for enhancing governance
  - (iii) Recommendations for capacity building
4. Efforts towards an International Framework
5. Follow-up on Recommendations

**[Reference 2]**

"Guidelines/Rules on measures in Ministry of Foreign Affairs and JICA and bribery of foreign public officials"

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<sup>89</sup> See Chapter 3.4, Section (2)

<sup>90</sup> [https://www.mofa.go.jp/mofaj/gaiko/oda/seisaku/f\\_boushi.html](https://www.mofa.go.jp/mofaj/gaiko/oda/seisaku/f_boushi.html)

MOFA and JICA have taken measures against fraudulent persons or entities to be excluded from approval of the contracts or bid participation, which is based on "Guidelines on measures against Persons, etc. Engaged in Fraudulent Practices in Japan's ODA Projects", "Rules on Measures against Fraudulent Practices, etc. in Projects of ODA loan and Grant Aid" and "Rules on Measures against Fraudulent Practices in Contracts Awarded by JICA".

In February 2011, MOFA extended the upper limit of the period of measures involved in the bribery of foreign public officials in the Guidelines from 12 months to 36 months as a part of actions with aim of strengthening rules on punitive measures for businesses in response to the recommendations by the Study Panel mentioned in the above Reference 1.

**[Reference 3]**

"Anti-Corruption in Official Development Assistance (ODA) Projects (Strengthening of Preventive Measures)" (October 2014)<sup>91</sup>

As a result of revelation of cases of giving improper benefits surrounding ODA projects in Indonesia, Vietnam and Uzbekistan<sup>92</sup>, it has been decided to take the following actions with an aim to further strengthening the foregoing preventive measures in order to inhibit similar cases from happening in the future:

1. Improvement of the Consultation Desk on Anti-Corruption
  - (i) Improvement of "consultation" function and online receipt of reports in English and in the local language;
  - (ii) Introduction of a system whereby companies that voluntarily report fraudulent practices can benefit from a reduction in or exemption from the measures of exclusion from bidding for a certain period
2. Further strengthening of the Measures against companies engaged in fraudulent practices;
3. "JICA Anti-Corruption Guidance"<sup>93</sup>;
4. Measures for strengthening compliance by companies;
5. Further encouragement to the government of partner countries; and
6. Strengthening of partner countries' system of governance and support for the improvement of their capabilities to prevent fraud and corruption

**(3) The Agreement Procedure (Article 350-2 of the Code of Criminal Procedure)**

The Agreement Procedure was introduced by the amendment of the Code of Criminal Procedure in May 2016, which came into force in June 2018.

An offense under the Unfair Competition Prevention Act is an offense subject to the Agreement Procedure. Under the Agreement Procedure, a public prosecutor may enter an agreement with the

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<sup>91</sup> [https://www.mofa.go.jp/mofaj/gaiko/oda/kaikaku/f\\_boshi/201410\\_kyouka.html](https://www.mofa.go.jp/mofaj/gaiko/oda/kaikaku/f_boshi/201410_kyouka.html)

<sup>92</sup> See Chapter 3.4, Section (4)

<sup>93</sup> <https://www2.jica.go.jp/ja/odainfo/pdf/guidance.pdf>

suspect/defendant upon consent of his/her counsel with regard to offenses under the Unfair Competition Prevention Act. The Agreement Procedure stipulates that the suspect/defendant cooperates the prosecutor with regard to the criminal case against the third person by making statements, in return for the favorable treatment by the prosecutor such as non-prosecution, seeking lighter sentence to the court with regard to the criminal case against the suspect/defendant.

### **4.3 Trends of Legal Systems and Applications in Foreign Countries**

#### **(1) Overview of Legal Systems and Applications in Foreign Countries**

As legal systems of and the state of applications in signatory countries to the Convention are followed up on by the OECD as required, information on countries of interest can be obtained via the OECD<sup>94</sup>.

Additionally, the Ministry of Foreign Affairs of Japan conducted an investigation on the relevant legal systems of several countries in June 2003. As a result, it was found that indictments had been reported in five countries, namely, the United States, Korea, Poland, Canada and Sweden<sup>95</sup>.

#### **(2) OECD Guidelines for Multinational Enterprises<sup>96</sup>**

In May 2011, the "OECD Guidelines for Multinational Enterprises" was adopted by the governments of the 42 member countries that participate in the "OECD Declaration and Decisions on International Investment and Multinational Enterprises" at the 2011 OECD Ministerial Council Meeting. The OECD Guidelines also refer to seven items of action that multinational enterprises should take to prevent bribery.

For example, the OECD Guidelines set out the following matters as recommendations which can serve as reference for enterprises in their attempt to combat bribery:

- Not offer, promise or give undue pecuniary or other advantage to public officials or the employees of business partners. Likewise, enterprises should not request, agree to or accept undue pecuniary or other advantage from public officials or the employees of business partners. Enterprises should not use third parties such as agents and other intermediaries, consultants, representatives, distributors, consortia, contractors and suppliers and joint venture partners for channelling undue pecuniary or other advantages to public officials, or to employees of their business partners or to their relatives or business associates.

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<sup>94</sup> For information on the evaluations by the OECD, refer to:

<https://www.oecd.org/investment/anti-bribery/anti-briberyconvention/phase1countrymonitoringoftheoecdanti-briberyconvention.htm> (Phase 1 evaluation)

<https://www.oecd.org/investment/anti-bribery/anti-briberyconvention/phase2countrymonitoringoftheoecdanti-briberyconvention.htm> (Phase 2 evaluation)

<https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase3countrymonitoringoftheoecdanti-briberyconvention.htm> (Phase 3 evaluation)

<sup>95</sup> According to this study, they include 45 indictments in the United States, two in Korea, one in Sweden and one in Canada (as of March 2003 for Korea and January 2002 for the rest).

<sup>96</sup> <https://www.mofa.go.jp/mofaj/gaiko/csr/housin.html>. The provisional translation of the said policy is available at: [https://www.mofa.go.jp/mofaj/gaiko/csr/pdfs/takoku\\_ho.pdf](https://www.mofa.go.jp/mofaj/gaiko/csr/pdfs/takoku_ho.pdf).

- Develop and adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting bribery, developed on the basis of a risk assessment addressing the individual circumstances of an enterprise, in particular the bribery risks facing the enterprise (such as its geographical and industrial sector of operation). These internal controls, ethics and compliance programmes or measures should include a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of bribing or hiding bribery. Such individual circumstances and bribery risks should be regularly monitored and re-assessed as necessary to ensure the enterprise's internal controls, ethics and compliance programme or measures are adapted and continue to be effective, and to mitigate the risk of enterprises becoming complicit in bribery, bribe solicitation and extortion.

[www.oecd.org/daf/anti-bribery](http://www.oecd.org/daf/anti-bribery)

