



IMPLEMENTING THE OECD ANTI BRIBERY CONVENTION

PHASE 4 REPORT:
Japan

This Phase 4 Report on Japan by the OECD Working Group on Bribery evaluates and makes 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.

The report is part of the OECD Working Group on Bribery's fourth phase of monitoring, launched in 2016. Phase 4 looks at the evaluated country's particular challenges and positive achievements. It also explores issues such as detection, enforcement, corporate liability, and international cooperation, as well as covering unresolved issues from prior reports.

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

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EXECUTIVE SUMMARY

This Phase 4 report by the OECD Working Group on Bribery (WGB) evaluates and makes recommendations on Japan's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. It details Japan's particular achievements and challenges in this regard, including with respect to enforcement of its foreign bribery laws, as well as the progress Japan has made since its Phase 3 evaluation in 2011.

Twenty years after the Convention's entry into force, the WGB remains concerned that Japan has still not given full effect to its foreign bribery offence. Overall, Japan has only detected 46 allegations of foreign bribery, half of which the WGB brought to Japan's attention. Japan has investigated 30 of the 46 known allegations, resulting in the conviction of 12 individuals and 2 legal persons in 5 foreign bribery cases. This is particularly low given the size of Japan's economy and the high-risk regions and sectors in which its companies operate. The police and the prosecution lack proactivity in their foreign bribery investigations. The MOJ's role in transmitting or clarifying certain allegations may have contributed to unnecessary delays (between 1 to 9 years) in the opening of investigations. The WGB remains concerned by the police's continued lack of involvement in foreign bribery cases. While welcoming the prosecutors' decision to send MLA requests early in their investigations, the WGB is concerned that Japan's law enforcement agencies do not routinely use available coercive measures, including search and seizure, in foreign bribery investigations. Japan should reduce its overreliance on voluntary measures and confession to a more proactive approach for gathering evidence in foreign bribery cases. Additionally, METI's role in interpreting the foreign bribery offence and the MOJ's involvement in specific foreign bribery cases raise concerns regarding the potential for undue influence based on considerations prohibited by Article 5 of the Convention.

The WGB welcomes Japan's June 2017 amendment enabling the confiscation of the proceeds of foreign bribery and criminalising the laundering of such proceeds. Japan also introduced a new "Agreement Procedure" in June 2018, which could potentially enable Japan to more effectively investigate and conclude foreign bribery cases by encouraging those with first-hand knowledge of the scheme to provide evidence or otherwise cooperate with authorities in resolving the matter. Certain legislative defects, however, remain. Nationality jurisdiction over Japanese companies only exists if the individual who paid the bribe is a Japanese national or is a non-Japanese who conspired with an individual in Japan or with a Japanese national. Japan should extend its limitation period as several foreign bribery cases have been discontinued as time-barred. Finally, the WGB is concerned that Japan's sanctions for foreign bribery, both in law and in practice, do not sufficiently meet the standard under Article 3 of the Convention for either natural or legal persons. Japan has also shown progress in certain areas. METI's efforts to engage with the private sector to promote awareness of Japan's foreign bribery offence have been well received by Japan's private sector, but more work is still needed for SMEs in particular. Whistleblowing is becoming more prevalent, though Japan needs to further align its law with the 2009 Recommendation and do more to minimise the risk of retaliation. Finally, Japan's ODA and export credit agencies are responsive when corruption issues arise, but could be more proactive in preventing and detecting foreign bribery.

The report, including its recommendations, reflects the findings of experts from Australia and Norway based on information provided by Japan, the evaluation team's own research, and discussions held with Japanese officials, the private sector, and civil society during an on-site visit to Tokyo in January 2019. The report was adopted by the WGB on 27 June 2019. Japan will submit a written report to the WGB in two years (i.e. in June 2021) on its implementation of all recommendations as well as detailed information on its foreign bribery enforcement. It will also submit a written report in one year on key recommendations 7.c., 12.a., 14.b. and 15.a. Unless Japan has demonstrated sufficient progress at that time, the WGB will organise a technical mission to explore solutions for enhancing Japan's enforcement of its foreign bribery offence.

INTRODUCTION

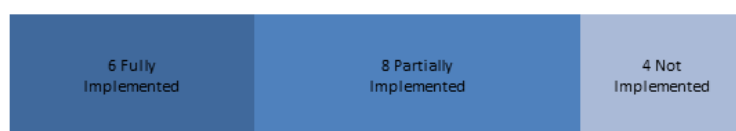
1. In June 2019, the Working Group on Bribery (Working Group or WGB) completed its fourth evaluation of Japan's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention), the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Recommendation), and related instruments.

Previous Evaluations of Japan by the Working Group on Bribery

2. Monitoring of Working Group members' implementation and enforcement of the Convention and related instruments takes place in successive phases through a rigorous peer-review system. The monitoring process is subject to specific, agreed-upon principles. The process is compulsory for all Parties and provides for on-site visits (as of Phase 2), including meetings with non-government actors. The evaluated country has no right to veto the final report or recommendations. All of the OECD Working Group on Bribery evaluation reports and recommendations are systematically published on the OECD website.

3. Japan's last full evaluation – Phase 3 – dates back to December 2011. The Working Group first evaluated Japan's implementation of its Phase 3 recommendations in December 2013. At that time, the Working Group concluded that 6 of Japan's 18 Phase 3 recommendations were implemented, 8 were partially implemented, and 4 were not implemented (see Figure 1 and Annex 2).

Figure 1. Japan's Implementation of its Phase 3 Recommendations
(As of the 2013 Written Follow-Up Report)



Phase 4 Process and on-Site Visit

4. Phase 4 evaluations focus on three key cross-cutting issues – enforcement, detection, and corporate liability. They also address progress made in implementing outstanding recommendations from previous phases, as well as any issues raised by changes to domestic legislation or the institutional framework.¹ Phase 4 takes a tailor-made approach, considering each country's unique situation and challenges, and reflecting positive achievements and good practices. For this reason, issues which were not deemed problematic in previous phases or which have not arisen in the course of this evaluation may not have been fully re-assessed at the on-site visit or reflected in this report.

Box 1. Previous Working Group on Bribery Evaluations of Japan

March-June 2017: Additional Reports

December 2016: Letters to Ministers

June 2016: High Level Mission and [Public Statement](#)

2014 – 2016: Additional Reports

2013: June 2014: [Public Statement](#)

February 2014: Letters to Ministers

From 2014 to March 2017: Action Plan developed by Japan

December 2013: [Follow-up to Phase 3 Report](#)

September 2013: Technical Mission

June 2012: Letters to Ministers

2011: [Phase 3 Report](#)

2007: [Follow-up to Phase 2 Report](#)

2005: 2006: [Phase 2bis Report](#)

2005: [Phase 2 Report](#)

2002: Phase 1bis Report

1999: [Phase 1 Report](#)

¹ See [Phase 4 Evaluation Procedures](#).

5. The evaluation team for Japan's Phase 4 evaluation was composed of lead examiners from Australia and Norway, as well as members of the OECD Anti-Corruption Division.² Pursuant to the Working Group's Phase 4 evaluation procedures, after receiving Japan's responses to the Phase 4 questionnaire and supplementary questions, the evaluation team conducted an on-site visit to Tokyo on 29 January-1 February 2019. The team met with representatives of the Japanese public sector, including government agencies, law enforcement authorities and the judiciary; the private sector, including business organisations, companies and lawyers; and civil society, including non-governmental organisations, academia and the media.³ The evaluation team expresses its appreciation to these participants for their contributions to these discussions. The evaluation team is also grateful to the Japanese government, particularly the Ministry of Foreign Affairs (MOFA), Ministry of Justice (MOJ) and to the Ministry of Economy, Trade and Industry (METI) for their level of engagement and their cooperation throughout the evaluation, the organisation of a well-attended on-site visit, and the provision of additional information following the on-site visit. The Japanese government also demonstrated its commitment to the Phase 4 process through the participation of Mr. Kiyoto Tsuji, Parliamentary Vice-Minister for Foreign Affairs, during the opening session of the on-site visit.

Japan's Foreign Bribery Risk in light of its Economic Situation and Trade Profile

A major actor in the global economy with strong economic ties with Asian neighbouring countries

6. Japan is one of the largest economies in the world, accounting for 4.2% of the world's exports in 2017.⁴ Japan ranked second among Working Group members in term of real gross domestic product (GDP), with an estimated GDP of USD 5.36 trillion in 2019. It is ranked third in terms of exports at current prices and fifth in terms of outward foreign direct investment (FDI) stock at current prices at the end 2017.⁵ Japan is also the fourth largest donor of official development assistance (ODA), and the largest in Asia (see section D.6. on ODA measures). Over the past years, Japan's economic growth has been supported by internal structural reforms. However, a high level of government debt and Japan's declining and ageing population remain major challenges.⁶ In addition, the economic and financial crisis of 2008, as for most economies, and the tsunami and related major nuclear accident in 2011, have also had an impact on Japan's trade over the past decade. Since then, the growth of exports has regained ground, but with some contractions.⁷

7. International trade plays a key role in Japan's economic development and Japan is party to several bilateral, regional and plurilateral economic partnership agreements.⁸ Most of Japan's exports are

² Australia was represented by Detective Sergeant Colin Hunt, Australian Federal Police; Mr. Tim Postma, Principal Federal Prosecutor, Commonwealth Director of Public Prosecutions; Mr. Branko Ananijevski, Director, Criminal Law Section, Attorney-General's Department and Ms. Marion Barraclough, Assistant Director, Criminal Law Section, Attorney-General's Department. 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). The OECD was represented by Ms. Sandrine Hannedouche-Leric, Coordinator of the Phase 4 Evaluation of Japan and Senior Legal Analyst; Mr. Brooks Hickman, and Ms. Lise Née, both Legal Analysts, all from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

³ See Annex 4 for a list of participants.

⁴ OECD (2018), [Data on enforcement of the Anti-Bribery Convention](#); See also Nikkei Asian Review (April 2015), "[Japanese companies should take anti-bribery laws more seriously](#)"

⁵ IMF (2018), [World Economic Outlook Database](#), April 2018. The World Bank, [Data, GDP \(current US\\$, 2017\)](#). UNCTAD, [General Profile: Japan](#), and [Data Centre, International Trade in Goods](#). UNCTAD, [Data Centre, Foreign Direct Investment](#)

⁶ OECD (2017), [Economic Survey – Japan](#), pp. 14 and 18.

⁷ OECD (2017), [Japan – Trade and Investment Statistical Note](#), p. 2.

⁸ Ministry of Foreign Affairs of Japan, [Free Trade Agreement \(FTA\) and Economic Partnership Agreement \(EPA\)](#).

directed towards Asian countries, including the People’s Republic of China (hereafter “China”), the members of the Association of South East Asian Nations, and newly industrialised economies in Asia.⁹ In 2017, the main destinations of Japan’s exports were the United States; China; the European Union; Korea; Chinese Taipei; and Hong Kong, China.¹⁰ In turn, the United States, the United Kingdom, the Netherlands and Australia are the main destinations for Japan’s outward investments, accounting for 55% of Japan’s total outward FDI.¹¹ FDI in China are also significant, according to Japan.

An economic development largely supported by the Keiretsu

8. The *keiretsu* groups are a key feature of Japan’s corporate structure and economic system. They are large conglomerates with a financial institution at the core of the corporate group. The *keiretsu* groups operate either within one industry (vertical *keiretsu*) or across several industries (horizontal *keiretsu*). World-wide known Japanese groups operate as vertical *keiretsu* in the automobile industry, such as Toyota Group, Nissan Group and Honda Group as well as in the electronics industry, with Hitachi, Toshiba and Sony. The six largest horizontal *keiretsu* in Japan are the Mitsui Group, the Mitsubishi Group, Sumitomo Group, Fuyo Group, Sanwa Group and the DKB Group.¹²

9. While SMEs also play an important role in the Japanese economy, they only generate slightly more than 50% of value added.¹³

Japan’s exposure in sectors known to be at risk of bribery

10. Japanese companies have a relatively high exposure to the risk of bribery of a foreign public official. As reflected in the foreign bribery allegations that have surfaced to date, Japanese companies trade with a number of high-risk jurisdictions in South East Asia and neighbouring Asian countries.¹⁴ Japanese companies also operate in sectors known to be at risk of bribery. In particular, Japan has launched major infrastructure projects worth approximately USD 200 billion for infrastructure investments in Asia, Africa and the South Pacific from 2016 to 2020 under the Partnership for Quality Infrastructure together with the Asian Development Bank. Similarly, in 2017, Japan agreed to develop a maritime route in the context of the Asia-Africa Growth Corridor. Several allegations have surfaced in the construction – infrastructure sectors. At least two of Japan’s concluded foreign bribery cases have involved infrastructure projects funded through ODA in Vietnam.

11. Japanese companies are also very active in manufacturing, particularly in electronics, automotive, semiconductors and chemicals sectors. Japan is one of the world’s top three car-producing countries. Automotive is Japan’s largest manufacturing sector and a crucial sector for Japan’s economic development.¹⁵ In proportion, the manufacturing of automotive related manufacturing accounts for 89% of Japan’s transportation machinery industry.¹⁶ Japan is also known for its high-tech economy. Japanese

⁹ OECD (2017), [Economic Survey – Japan, p. 25](#).

¹⁰ WTO, [Trade Profiles, Japan](#); UNCTAD, [General Profile: Japan](#).

¹¹ OECD Foreign Direct Investment statistics database, [FDI positions by partner country BMD4: Outward FDI stocks of Japan by partner country](#).

¹² Japan Phase 2 Report, para. 23. See also ThoughtCo (January 2018) “[An Economic Introduction to the Japanese Keiretsu System](#)”; Smithsonian (September 2016) “[How Eight Conglomerates Dominate Japanese Industry](#)”; The Economist (2009), “[Keiretsu](#)”; Institute of Developing Economies, Japan External Trade Organisation (March 2006) “[Keiretsu groups: Their role in the Japanese economy and a reference point \(or a paradigm\) for other countries.](#)” and San Jose University “[The Keiretsu of Japan](#)”.

¹³ OECD (2019), OECD Economic Surveys: Japan 2019, OECD Publishing, Paris, pages 46 & 50-51.

¹⁴ Investvine (March 2017) “[Vietnam Holds Record For Bribery In Southeast Asia](#)”; Investvine (January 2017) “[Corruption Keeps Plaguing Southeast Asia](#)”.

¹⁵ METI (October 2018), [Automotive industry](#); EU-Japan Center for industrial cooperation “[EU Business in Japan](#)”

¹⁶ Japan Industry News (March 2016), “[The Japanese Automotive Industry](#)”.

multinationals dominate the IT & Communications sector and have become an essential supplier of industrial electronics and robotics.¹⁷ In 2016, Japan spent 3.1% of its GDP in Research and Development against a total of 2.3% in all OECD countries.¹⁸

Summary of foreign bribery enforcement situation in Japan

Overview of Japan's foreign bribery enforcement actions since 1999

12. In prior evaluations, Japan declined to provide detailed information and statistics on the number of cases or allegations involving foreign bribery that had come to the authorities' attention.¹⁹ During the drafting of this report, Japan also indicated that the information it provided on enforcement should not be considered as complete and that other cases may exist. As a result, the numbers of foreign bribery cases referenced in this report may not reflect the full list of foreign bribery allegations involving Japanese companies and nationals since the Convention entered into force in Japan in 1999. In Phase 4, the evaluation team is aware of 46 foreign bribery allegations involving Japanese companies and nationals that have surfaced in the over 20 years since the Convention entered into force in Japan. In comparison, there were 10 identified allegations in Phase 3.²⁰ This is particularly low for an economy as significant as Japan.²¹

13. Of these 46 allegations, 30 allegations have been investigated (65%). At the time of finalising this report, 5 cases (11% of all allegations) have been prosecuted and successfully concluded against at least one defendant. In one of those cases, part of the case was resolved against one legal person without conviction and without sanction through the first non-trial agreement concluded in Japan. In that same case, charges were still pending against one individual while two other individuals were convicted in March 2019. This means that since Phase 3, eight years ago, Japan has only prosecuted and successfully concluded three more cases, one of which is still partially pending regarding one individual.

14. Twelve foreign bribery cases were under formal investigation as of June 2019, including three cases referred by the MOFA (26% of all allegations). Of these investigations, one has been ongoing for over six years, 6 investigations were initiated right before this evaluation and 5 investigations were opened after the on-site visit after confirmation of the alleged acts by the MOJ.

15. The remaining 16 allegations have not been formally investigated by law enforcement authorities (35 %). Of these, three allegations dating back from Phase 2 were not investigated.²² Five allegations referred in the Matrix were handled by the MOJ and did not lead to an investigation by the police or the district public prosecutors. Three of the four allegations received through METI's reporting desk were reported to the NPA/MOJ but no investigation was initiated. In one instance, the matter was deemed time-barred by the NPA. In two other instances, the NPA indicated that it could not identify the basic elements of the offence.

16. The status of 5 of the 16 allegations is unknown. Information on these allegations was provided to Japan by the Working Group on Bribery through the Matrix of alleged cases.²³ In these cases, Japan did

¹⁷ The New York Times (May 2018), "[Japan Seeks Its Economic Mojo in the Stuff That Makes the Stuff](#)"

¹⁸ [OECD Science, Technology and R&D Statistics: Main Science and Technology Indicators](#)

¹⁹ [Japan Phase 2 Report](#), para.12; [Japan Phase 2bis Report](#), paras. 8-9

²⁰ At the time of Phase 2, 3 allegations did not lead to any investigation (see Phase 2 Report para.9). In Phase 2bis, 4 non-filed foreign bribery investigations were no longer in progress mainly because of the absence of nationality jurisdiction for the foreign bribery offence (see Phase 2bis report para. 9). Finally, in Phase 3, one additional investigation was closed due to insufficient evidence (see Phase 3 Report para. 14).

²¹ By way of comparison, one Party to the Anti-Bribery Convention, which is of a relatively comparable economic size, has uncovered and investigated a total of 121 foreign bribery cases in six years, since its Phase 3 evaluation (i.e. between 2011 and December 2017). See [Phase 4 Report of Germany](#) para.18.

²² See [Japan Phase 2 Report](#), para. 9.

²³ The matrix is a collation of allegations of foreign bribery prepared by the OECD Secretariat based on public sources. It is used by the WGB to track case progress. While the inclusion of allegations in the Matrix does

not indicate whether the MOJ, the DPPO, the NPA or the Prefectural police has dealt with these cases or whether they have led to the opening of criminal proceedings.

Figure 2: Japan’s foreign bribery cases as of June 2019



Note: *One case is only partly concluded with a legal person resolving the matter through a non-trial agreement without sanctions in June 2018 and two individuals having been convicted in March 2019. The prosecution of a third defendant was still ongoing at the time of this evaluation.²⁴

17. Based on the information provided by Japan and as shown in the flow chart, Japan opened investigations or preliminary investigations in two-third of the 46 known potential foreign bribery allegations that have arisen since the Convention’s entry into force (65%). Of the 30 cases investigated, only 5 progressed to prosecution and were concluded with sanctions. This is a small proportion of all investigations (17%) and an even smaller proportion of all allegations (11%). Thirteen investigations were discontinued without sanctions. As a result, at the time of finalising this report, only 12 investigations and 1 prosecution were still ongoing.

A particularly low number of concluded cases since the entry into force of the Convention

18. Japan continues to demonstrate a particularly low level of enforcement of its foreign bribery offence. Since the Convention’s entry into force over 20 years ago, 12 individuals and 2 legal persons have been held liable in only 5 foreign bribery cases. This is particularly low for a major economy like Japan’s. While several *keiretsu* are named in foreign bribery allegations, none has been convicted in Japan for foreign bribery to date. In contrast, major Japanese companies have been sanctioned by foreign authorities in foreign bribery cases.

19. Already in Phase 3, the WGB considered that the number of investigations and prosecutions was particularly low. In the Japan Phase 3 Follow-up report in 2013, the Working Group found that “the implementation of the Anti-Bribery Convention is not given adequate priority by the Japanese authorities” and that this translates into “the lack of targeted resources for the purpose of detecting,

not prejudice the issue of whether the allegations are, in fact, an offence under any applicable law, it is sometimes used as a source of detection by member countries. It should not be relied on as the sole or even primary detection source because countries are expected to maintain their own proactive detection efforts.

²⁴ In the Mitsubishi (Thailand) case.

investigating and prosecuting foreign bribery cases”.²⁵ Concerns over Japan’s particularly low level of enforcement have been echoed by Transparency International Japan, which recently found that Japan is “lenient on bribery compared to international standards”.²⁶

Description of foreign bribery cases concluded since Phase 3

20. By Phase 3 (in 2011), Japan had successfully concluded two cases resulting in six natural and one legal persons being held liable for foreign bribery, in the *Kyudenko (Philippines) Pacific Consultants International* – and *PCI (Vietnam) cases* in March 2007 and January 2009, respectively.²⁷ Both cases related to bribery in foreign public procurement contracting processes, of which one related to a substantial infrastructure project that was financed in part by ODA from Japan. Since Phase 3, Japan has concluded 3 cases resulting in 6 individuals and 1 legal person being held liable for foreign bribery. The three cases are described below.

i. Case - Futaba Industrial Co. (China)

21. A former senior executive of Futaba Industrial Co., a major Japanese car-parts manufacturing company, paid cash and a woman’s handbag (worth approximately USD 5°464) to a Chinese official to avoid administrative sanctions for an illegal operation detected by the Chinese Customs.

22. The case was detected by the Aichi prefectural police in the course of another criminal proceeding against the company for other white collar offences. The police consulted with METI to get legal interpretations on the application of the foreign bribery offence in the case and in particular on the international business nexus. The foreign bribery investigation was initiated in January 2013. To the knowledge of the WGB, this is the only foreign bribery investigation in which the police has been involved since Phase 3. The police carried out voluntary investigative measures, such as interviewing witnesses. It also carried out compulsory investigative measures such as accessing electronic evidence as well as obtaining a court warrant to conduct searches. The police ultimately referred the case to the Nagoya District Public Prosecutors Office (DPPO), which continued the investigation with the police. The Japanese authorities secured the confession of the accused person and voluntary cooperation from the company.

23. The company was, ultimately not prosecuted, because the offence was time-barred. The senior executive, however, could still be prosecuted because he had been located abroad, which suspended the limitations period for one year. In October 2013, the defendant was convicted by way of a summary order by the Nagoya Summary Court to pay a fine of JPY 500°000 (approx. USD 4°403).

ii. Case - Japan Transportation Consultants, Inc. (Vietnam, Indonesia and Uzbekistan)

24. Japan Transportation Consultants (JTC) paid a total of USD 1.6 million in bribes between 2008 and 2014 to foreign public officials in Vietnam, Indonesia and Uzbekistan to secure contracts related to railway construction projects funded by the Japan International Cooperation Agency (JICA).²⁸ In Vietnam, JTC paid JPY 69.9 million (approx. USD 690°000) in bribes to various government officials between 2009 and 2014 to secure consulting contracts worth JPY 4.2 billion (approx. USD 42 million). These projects were also funded by JICA.

25. The Tokyo DPPO initiated an investigation in March 2014 after JTC self-reported the suspicious payments. The police was not involved in the investigation. The prosecutor secured the confessions of all

²⁵ [Japan Follow-up to the Phase 3 report](#), p. 4.

²⁶ Nikkei Asian Review (December 2018) “[Asian export nations soft on corporate bribes of foreign officials](#)”

²⁷ The *PCI case*, known in Phase 3 as Case #2, involved Pacific Consultants International. The *Kyudenko case* was known in Phase 3 as Case #1. See case descriptions in [Japan Phase 3 Report](#) paras. 12-13.

²⁸ FCPA Blog (April 2015), “[Japan to Vietnam: give back our bribe money](#)”.

accused, including the corporate entity itself and three high-level company executives. MLA requests were also sent to countries affiliated with the alleged foreign public officials.

26. In July and August 2014, the accused persons were indicted on foreign bribery charges. In February 2015, JTC and three executives were convicted at trial after admitting guilt by the Tokyo District Court. In addition, JTC was debarred from ODA funded contracting by MOFA and JICA for 36 months.

iii. Case - Mitsubishi Hitachi Power Systems Inc. (Thailand)

27. In February 2015, three executives of Mitsubishi Hitachi Power Systems Inc. (Mitsubishi) allegedly bribed a senior official of the Thai Transport Ministry who had demanded a bribe to speed up the clearance of cargo related to a local power plant project. The executives allegedly paid 11 million Thai baht in bribes (approximately JPY 39 million or USD 357 000).

28. The Tokyo DPPO initiated an investigation in 2015 after Mitsubishi self-reported the allegations. The company itself learned of the payments through an internal investigation prompted by a whistleblower report. In July 2018, Mitsubishi entered into a non-trial agreement with the Tokyo DPPO whereby the prosecutor decided not to prosecute the company in exchange for the company's cooperation with the investigation of the natural persons involved, including by ensuring that its officers and employees were available to meet with prosecutors and by providing documents located in Thailand, as well as by ensuring that its personnel testified at trial regarding the results of the internal investigation. As a result, the company was not sanctioned. The agreement concluded with Mitsubishi was not public at the time of the on-site visit, but it was produced in court during the trial stage. Nevertheless, Japan maintained that the agreement could not be provided to the evaluation team for confidentiality reasons.

29. The materials provided by Mitsubishi were ultimately used to indict three former executives in July 2018 for allegedly conspiring to bribe a foreign public official. In December 2018, two of the three defendants had pleaded guilty during the case's first hearing before the Tokyo District Court. In March 2019, the two former executives were convicted at trial by the Tokyo District Court and received suspended prison sentences of 18 months and 16 months respectively.²⁹ The senior executive, who was then managing the power plant project, denied the charges. His prosecution was still ongoing at the time of finalising this report.

A particularly low number of on-going investigations into potential foreign bribery

30. Japan's limited ability to detect foreign bribery cases has directly affected the number of foreign bribery investigations currently ongoing in Japan (see section A. on detection sources). The number of on-going investigations in Japan is very small given the size of Japan's economy as well as its exposure to high-risk countries and sectors. The Tokyo DPPO has handled most of the foreign bribery cases in Japan. At the time of this report, Japan has only 12 foreign bribery cases under investigation, of which 3 were referred by MOFA. The remaining 9 cases came from the WGB Matrix of alleged cases. All these investigations were initiated during the first stages of this evaluation or after the on-site visit. However, some of these cases had been in the Matrix for several years already. According to Japan, the only investigative step in these cases has been to send MLA requests to the foreign public officials' countries. Japan's foreign bribery enforcement actions are described in detail in Annex I.

The role played by the Ministry of Justice in foreign bribery cases

31. At the pre-investigative stage, the MOJ's Criminal Affairs Bureau can assume different roles in the processing of foreign bribery allegations. First, the MOJ merely serves as a conduit for other government agencies (e.g. MOFA or METI) to refer allegations to the prosecutors. In total since Phase 3, of the 46 allegations identified in this report, 33 allegations were referred to the MOJ, 29 of which were referred

²⁹ The Japan Times (March 2019), "[Ex-Mitsubishi Hitachi Power Systems executives convicted of bribes after company struck Japan's first plea bargain](#)"

by MOFA and 4 by METI. Right before the adoption of this report, Japan disclosed that the 12 cases under investigation at the time of this report had also all been referred to the MOJ before the prosecutors initiated an investigation.

32. Second, the MOJ, in certain cases, may seek to clarify the allegations, before or after transmitting them to the prosecutors, to gather sufficient information to open an investigation. The MOJ indicated that at least 10 allegations were clarified by the MOJ before an investigation was opened by the prosecutors. In turn, the NPA sought to clarify the 4 allegations referred by METI. Of the 10 allegations clarified by the MOJ, 5 are subject to an ongoing investigation while the other 5 did not result in any investigation. During the on-site visit, the MOJ was still clarifying 1 allegation. In this case, the MOJ determined that the alleged facts were not clear and asked MOFA to provide additional elements. (The scope and impact of the MOJ's role in foreign bribery cases is discussed under section B.4.a.) Yet, the MOJ indicated that the Criminal Affairs Bureau has never conducted any such measures in relation to other alleged offences to date. Against a background of the currently serious lack of enforcement of the foreign bribery offence, in particular regarding legal persons, this raises concerns regarding at least the potential for undue influence, in contravention with Article 5 of the Convention.

33. Five additional foreign bribery allegations have been referred to the MOJ based on the WGB Matrix but did not lead to an investigation. In its responses to the questionnaire, Japan indicated that "the MOJ dealt with these cases". Japan later stated that the MOJ transmitted all five allegations to the public prosecutors' office. However, the cases were determined to be time-barred or to lack sufficient evidence without an investigation being initiated by law enforcement authorities. In addition, no consideration was given in these cases to investigate foreign bribery related offences (e.g. money laundering/false accounting).

Discontinued foreign bribery investigations.

34. Since Phase 3, seven investigations have been discontinued before any charges were filed. The investigation of three cases was discontinued, mainly because the limitation period for the foreign bribery offence had lapsed. In one additional case, the limitation period prevented the prosecution of one legal person and only the related individual could be prosecuted. Three additional cases were discontinued for lack of evidence and one case led to other charges being laid. All seven cases were investigated by the Tokyo DPPO without the involvement of the police. In general, the prosecutors appear to have only taken limited investigative steps in these cases. This raises questions with respect to the proactivity of Japanese law enforcement authorities in the investigation of foreign bribery allegations involving their nationals and companies abroad. The investigative techniques used in foreign bribery cases are described under section B.4.d.

Foreign bribery allegations that have not yet led to investigations

35. Five additional allegations involving Japanese companies and nationals are known to the evaluation team from the WGB Matrix of alleged cases. However, the Japanese authorities did not indicate whether an investigation was opened in any of these cases. They all involve widely known Japanese companies respectively in the medical, entertainment, electronic or engineering sectors, for alleged bribery committed mainly in China and Latin America.³⁰ In some instances, proceedings have started in other Parties to the Convention and it is unclear why Japan has yet to initiate an investigation.

Sanctions imposed by foreign authorities against Japanese companies and their foreign subsidiaries

36. Foreign subsidiaries of Japanese companies have been sanctioned abroad by foreign authorities in at least three cases in which Japanese authorities have yet to initiate proceedings. In 2012, Marubeni entered into a deferred prosecution agreement (DPA) for having violated FCPA provisions and agreed to

³⁰ See media sources in Annex I.

pay a fine of USD 54.6 million to the US Department of Justice (DOJ).³¹ As a result, the Japanese authorities acknowledged the plea and debarred the company from ODA funded contracts (debarment is discussed under section C.3.f. and D.4.d). In 2014, Marubeni entered into a plea agreement for conspiracy to violate the anti-bribery provisions of the FCPA and agreed to pay a fine of USD 88 million to the US DOJ.³² In 2016, one foreign subsidiary of Olympus entered into a DPA with the US DOJ and agreed to pay USD 22.8 million for FCPA violations in South and Central America.³³ In 2018, a subsidiary of Panasonic entered into a DPA and agreed to pay USD 137.4 million for violating the FCPA accounting provisions.³⁴ To date, no proceedings have been initiated in Japan against the Japanese parent companies, either for foreign bribery or false accounting related offences.

Commentary

The lead examiners are concerned that twenty years after the entry into force of the Convention, Japan has still not given full effect to its foreign bribery offence in the Unfair Competition Prevention Law (UCPL). Enforcement of the foreign bribery offence remains particularly low in Japan, in particular with regard to the negligible number of legal persons sanctioned to date. In total, since 1999, only 12 individuals and 2 legal persons have been convicted in 5 foreign bribery cases. This is particularly low in regard to Japan's prominent weight in the global economy, its level of exports and Japanese companies' exposure to high risks of foreign bribery, both in terms of economic sectors and countries of operation.

In addition, the lead examiners are concerned that Japan has not been able to provide comprehensive information on all the foreign bribery investigations and prosecutions that are carried out in Japan. They recommend that Japan compile comprehensive information on the enforcement of the foreign bribery offence under the UCPL across the different prefectures relevant for the monitoring and follow-up of Japan's implementation of the Convention.

As further developed in this report, Japan demonstrates a general lack of detection of potential foreign bribery cases. As a result, the number of foreign bribery cases under investigation is small. In addition, the initial clarification of foreign bribery allegation by government agencies with no investigative or prosecuting powers may create unnecessary delays in transmitting information to the prefectural police and the district public prosecutors' offices, which are best placed to carry out investigations. These agencies' roles before an investigation is opened have also created delays in certain cases, emphasising the concern over Japan's limitations period. Moreover, law enforcement authorities lack proactivity in their foreign bribery investigations. Of the cases reaching the investigative stage, a significant number do not progress to prosecution. Of the 46 allegations that have surfaced to date, only 30 cases have been investigated to date, of which only 5 were prosecuted since 1999. The lead examiners recommend that Japan 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.

A. DETECTION OF THE FOREIGN BRIBERY OFFENCE

37. The difficulty in obtaining investigative leads is one of the most significant impediment to the effective investigation and prosecution of the foreign bribery offence in Japan. Only 46 foreign bribery allegations involving Japanese nationals and companies have been uncovered since the entry into force of the Convention twenty years ago. This is particularly low in view of the size and export-oriented nature

³¹ United States of America vs. Marubeni Corporation (January 2012), [Case 4:12-cr-00022](#).

³² United States of America vs. Marubeni Corporation (May 2014), [Case 3:14-cr-00052-JBA](#).

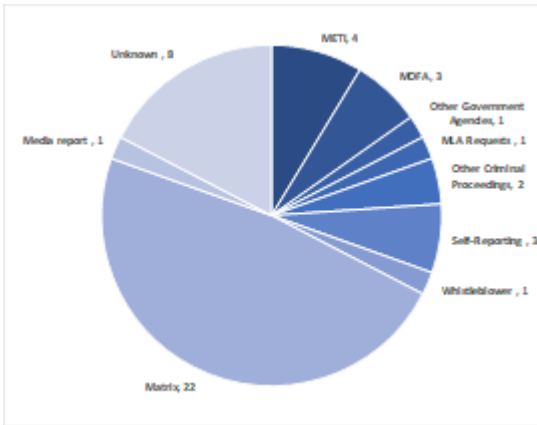
³³ [United States of America vs. Olympus Latin America, Inc.](#) (March 2016).

³⁴ United States of America vs. Panasonic (April 2018), [Case 1:18-cr-00118-RBW](#).

of the Japanese economy as well as the geographical regions and industrial sectors in which Japanese companies operate.³⁵

38. Of the 46 allegations of foreign bribery that have surfaced since 1999, information on half of these allegations have been provided to Japan through the WGB Matrix of alleged cases. Against this background, less than 20% of the allegations were uncovered independently by Japanese government agencies. Since Phase 3, METI and MOFA together have provided information on seven foreign bribery allegations in total to the MOJ and/or NPA. Law enforcement authorities have also detected two foreign bribery cases in the course of other criminal proceedings. Both cases were prosecuted and concluded with sanctions.

Figure 2. Source of Japan’s Foreign Bribery Cases



Commentary

The lead examiners are concerned that overall, Japan demonstrates a lack of detection of foreign bribery cases. The number of foreign bribery cases uncovered in Japan since the entry into force of the Convention in 1999 is particularly low given the size of Japan’s economy and its exposure to high risk countries and sectors. Only 46 allegations have emerged over the last 20 years, of which half were brought to the attention of Japan by the WGB. This suggests a concerning lack of efforts and capacity to detect foreign bribery. Japan needs to be more proactive in its detection processes and methods, including through closer engagement with government agencies.

A.1. The Ability of the Ministry of Foreign Affairs (MOFA) to Detect and Report Foreign Bribery

39. Foreign diplomatic missions have important roles to play in preventing, detecting, and reporting foreign bribery connected with Japanese natural and legal persons conducting business abroad. To date, MOFA has not uncovered any allegations of foreign bribery on its own initiative including through the monitoring of foreign and local media reports. The designated contact points within Japanese overseas diplomatic missions set-up at the time of Phase 3 are still in place.³⁶ Since Phase 3, MOFA has increased their number and committed to circulate instructions to overseas missions twice a year. The most recent instruction was circulated in April 2019.³⁷ Additionally, MOFA has taken steps to raise its staff’s

³⁵ By way of comparison, one Party to the Anti-Bribery Convention, of a relatively comparable economic size, has uncovered and investigated a total of 121 foreign bribery cases in six years, since its Phase 3 evaluation (i.e. between 2011 and December 2017). See [Phase 4 Report of Germany](#) para.18.

³⁶ [Japan Phase 3 report](#) paras. 111-112.

³⁷ [DAF/WGB\(2017\)11](#) Additional follow-up report by Japan : Progress implementing Action Plan.

awareness about the foreign bribery offence. A training manual was developed in July 2013 (last revised in September 2016) for MOFA staff based abroad to enhance these officials' ability to report suspicions of foreign bribery. The manual provides general information on the Anti-Bribery Convention, the foreign bribery offence and instructs foreign-based officials to collect and report information from the media related to alleged foreign bribery committed by Japanese individuals and/or companies, including joint ventures and foreign subsidiaries.³⁸ MOFA and Japanese diplomatic and consular missions overseas have also been equipped to report information on allegations provided to them by third parties, which needs to be distinguished from their role to detect and report cases on their own initiative. In this regard, MOFA's website lists the designated officials in each of Japan's foreign missions to whom members of the public can report suspicions of foreign bribery.

40. Since Phase 3, Japanese embassies received information on three alleged foreign bribery cases in 2017 and 2018. During the on-site visit, MOFA representatives explained that all three allegations received were subsequently reported to MOFA headquarters, which, in turn, reported to the MOJ's Criminal Affairs Bureau and the NPA. At the time of the on-site visit, one allegation was handled by the MOJ and requests for clarifying details on the facts had been sent back to MOFA. Although MOFA indicated during the on-site visit that it had reported two additional allegations in 2017 to the MOJ and the NPA, Japan later explained that the matters only reached the MOJ and the NPA after the on-site visit (i.e. in February 2019) due to miscommunication between the MOFA, the MOJ and the NPA. The three allegations have since been referred to the relevant public prosecutors.

Commentary

The lead examiners are concerned that MOFA's efforts to raise awareness of its staff in overseas missions have not led to actual detection of foreign bribery cases despite several allegations involving Japanese individuals and companies being reported in the foreign press. They note that to date, the only three allegations reported by MOFA were not detected by officials but rather as a result of third party reporting.

Therefore, they recommend that Japan analyse why Japanese overseas missions have failed to detect any allegations of foreign bribery on its own initiative including through the monitoring of foreign and local media reports and take appropriate remedial action 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.

A.2. Japan's Capacity to Detect Foreign Bribery through its Anti-Money Laundering (AML) Framework

41. An effective system designed to detect and deter money laundering may uncover underlying predicate offences such as foreign bribery and thus trigger investigations. Japan's measures to prevent, detect and report money laundering are set out in the Act on Prevention of Transfer of Criminal Proceeds (Act on Prevention).³⁹ Japan Financial Intelligence Center (JAFIC) is Japan's financial intelligence unit (FIU) and is located within the Criminal Affairs Bureau of the National Police Agency (NPA). JAFIC is mainly responsible for the collection, analysis and dissemination of information on suspicious transaction reports (STRs) that it receives from entities subject to AML reporting requirements. JAFIC is also responsible for the dissemination of information to foreign FIUs. STRs are submitted to JAFIC either through the entities' respective supervisory authorities or directly to JAFIC through an online government web portal (e-gov).⁴⁰ JAFIC has reported that 97,9% of the STRs it received in 2017 were filed through e-gov.⁴¹ In accordance with article 8 of the Act on Prevention, STRs should be filed if there

³⁸ [Japan Phase 3 Follow-up report](#)

³⁹ The Act on Prevention of Transfer of Criminal Proceeds (Act No. 22 of 2007).

⁴⁰ 2017 [JAFIC Annual Report](#), p.46 and FATF (2008), [Mutual Evaluation Report](#), para.612.

2017 [JAFIC Annual Report](#), p. 51.

is any suspicion that assets could be criminal proceeds or that the customer could commit acts that constitute crimes under article 10 of the same Act. No monetary threshold applies to reporting suspicious transactions.

42. The obligation to report suspicious financial transactions applies to financial institutions, including *inter alia* banks, insurance and trust companies, agricultural and fishery cooperative and the Development Bank of Japan (Article 8 of the Act on Prevention). Financial institution within the *keiretsu* are also subject to AML reporting obligations. In Phase 2, the WGB questioned the potential conflict the financial institutions may face in light of their AML reporting obligation, should one of the *keiretsu* companies use the financial institution within the *keiretsu* to launder the proceeds of bribery. During the on-site visit, JAFIC indicated that it is not aware of any reporting delays caused by this sort of conflict. Nonetheless, foreign bribery allegations involving *keiretsu* companies that have surfaced to date have not been detected through Japan's AML system. The same reporting obligation extends to certain designated non-financial businesses and professions including real estate agents and dealers in precious metals and stones. Japan indicated that the Act on Prevention will be amended to impose AML reporting obligations on casino business operators by no later than July 2021, following the July 2018 legalisation of the operation of casino resorts.⁴² In contrast, legal professions (e.g. lawyers, notaries, other independent legal professionals) and accountants are still not subject to AML reporting obligation.

43. Upon receiving STRs, JAFIC first automatically cross-checks the STRs information against its internal database on STRs and then uses the NPA databases as well as publicly available information.⁴³ JAFIC disseminates in parallel both the individual STRs and analytical reports to relevant law enforcement authorities, including the NPA, the prefectural police, the DPPOs, the tax authorities, and the Security Exchange Agencies. For the purpose of foreign bribery, the NPA indicated during the on-site visit that JAFIC reports to the Second Investigative Division of the NPA, which will analyse the report and subsequently refer the individual STRs and analytical reports to the prefectural police for investigation. In practice, the total number of STRs received has known a relative increase from 364 366 in 2012 to 417 465 in 2018 (12,7%). During the on-site visit, JAFIC indicated that it does not disclose the breakdown per predicate offence. JAFIC also reported that financial institutions file the vast majority of reports (over 96% in 2017).⁴⁴ In its latest evaluation of Japan in 2008, the FATF found that approximately 60% of all STRs received were disseminated to law enforcement authorities.⁴⁵ The number of reports sent by JAFIC to law enforcement authorities for criminal investigations has also increased from 281 475 to 460 745 between 2012 and 2018 (39%). Since 2014, based on JAFIC statistics, the number of individual STRs that JAFIC sent to law enforcement authorities annually exceeds the number of STRs received over that same year. In 2018 alone, JAFIC indicated that it received 417 465 STRs and disseminated 460 745 individual STRs to the NPA and other law enforcement authorities. Of the 460 745 STRs disseminated in 2018, Japan explained that 84 568 originated from STRs received in 2017. In turn, JAFIC sent 8 259 analytical reports to law enforcement authorities in 2018.

44. To date, no foreign bribery cases have been detected and referred by JAFIC to law enforcement authorities, either as a result of information uncovered from STRs or from information sent to JAFIC by foreign FIUs. Japan claims that a number of STRs (exact number not provided at Japan's request for confidentiality reasons) related to a politically exposed person (PEP) were disseminated to law enforcement authorities. However, while the identification of a foreign PEP constitutes a red-flag, this is

⁴² Under the Act on Promotion of Development of Specified Complex Tourist Facilities Areas (July 2018); Nikkei Asian Review, (July 2018), "[Five things to know about Japan's new casino law](#)"; FATF Mutual para. 83. Under the Act on Promotion of Development of Specified Complex Tourist Facilities Areas, casino operators are defined as entities that have established and operated specified complex tourist facilities and are licensed by the Casino Administration Committee to operate casino business.

⁴³ FATF (2008), [Mutual Evaluation Report](#), paras. 345-348

⁴⁴ JAFIC Annual Report 2017, p. 50

⁴⁵ FATF (2008), [Mutual Evaluation Report](#), para. 346.

not, as such, an indication of foreign bribery. This, together with the absence of cases detected so far, raises questions about the adequacy of its typologies for foreign bribery.

45. The lack of foreign bribery cases detected may also arise from a lack of specific guidance for both reporting entities and JAFIC's staff specifically addressing foreign bribery as a predicate offence since Phase 3, Japan amended the Act on Punishment of Organised Crimes and Control of Crime Proceeds (AOCL) – which contains Japan's substantive provisions criminalising money laundering in June 2017 – to make it an offence to launder the proceeds of bribing a foreign public official (see discussion under section D.3.) Some measures have been taken to raise awareness of JAFIC's staff and AML reporting entities of the red flags associated with the laundering of the proceeds of foreign bribery. Japan indicates that the National Risk Assessment covers the amendment of the AOCL. In October and November 2017, the NPA and the Financial Services Agency (FSA) jointly organised 14 workshops on suspicious transaction reporting for financial institutions, which covered case studies of actual investigations using STR information and provided advice on filing STRs. However, the recent amendment to the AOCL in June 2017 and specific features of the laundering of proceeds of foreign bribery were not addressed.⁴⁶ Japan indicated after the on-site visit that JAFIC's staff has been informed that the notion of crime proceeds in the AOCL was extended, but no specific typologies have been developed on money laundering predicated on foreign bribery. Japan amended the Act on Prevention in October 2016 and developed guidance in February 2018, to require financial institutions to undertake enhanced customer due diligence on transactions with foreign PEPs and their families.⁴⁷ At the time of finalisation of this report, Japan indicated that the FSA has also developed guidance on foreign PEPs. Japan further indicated that reporting entities would verify whether customers or beneficial owners are foreign PEPs using commercial databases and publicly available information on the internet and self-declaration made by the customers.

46. JAFIC provides some feedback to reporting entities, but more focused training is needed to improve the quality of reporting. JAFIC does not provide feedback on specific reports transferred to law enforcement authorities. Instead, JAFIC provides general feedback on a quarterly basis to financial institutions on the general trend and quality of STRs. General training has also been organised jointly with METI to discuss best practices in AML related matters. (Coordination between JAFIC and law enforcement authorities is discussed under section B.4.e.)

Commentary

The lead examiners are concerned that Japan has not detected any foreign bribery cases through its AML system. They regret that the recent amendment to the AOCL has not been accompanied by specific typologies on money laundering predicated on foreign bribery to increase JAFIC's ability to detect proceeds deriving from foreign bribery.

Consequently, the lead examiners recommend 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; (b) ensure that JAFIC is adequately resourced to effectively detect money laundering cases predicated on foreign bribery, and (c) develop typologies of money laundering that specifically address foreign bribery, and use such typologies to train JAFIC staff and reporting entities on detecting foreign bribery.

A.3. Detection and Reporting Foreign Bribery by Japan Tax Authorities

47. The National Tax Agency (NTA) is Japan's national tax administration. The NTA comprises the Head Office in Tokyo as well as 12 Regional Taxation Bureaus and 524 tax offices across the country.

⁴⁶ 2017 [JAFIC Annual Report](#), p. 39.

⁴⁷ Japan amended the Act on the Prevention of the Transfer of Criminal Proceeds in September 2015 but the amendment only entered into force in October 2016. Transparency International, (2015) "[Japan Beneficial Ownership Transparency](#)".

Tax crime investigators, known as the *Sasatsukan*, are based in the Criminal Investigation Department (CID) within the Regional Taxation Bureaus. The Criminal Investigation Divisions of the NTA Head Office in Tokyo supervises the CID in the regional bureaus.⁴⁸ The tax officials responsible for administering and assessing taxes have yet to uncover foreign bribery allegations. The onus to prove the illegality of the expense is on the tax authorities in cases of re-assessment (Article 24 of the Act on General Rules for National Taxation).

a. Detection of foreign bribery

48. In Phase 3, the Working Group was concerned that bribes paid to foreign public officials could be concealed in companies' books and records as an allowable expense, and in particular as "miscellaneous expenses", and recommended that Japan take steps to address this (recommendation 11).⁴⁹ In the Phase 3 Follow-up report, the WGB found that Japan had not implemented this recommendation. Since Phase 3, steps have been taken to raise awareness of tax auditors, as part of Japan's Action Plan.⁵⁰ Japan has translated the "Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors" into Japanese and disseminated it online on the NTA's website together with METI's guidelines. Training sessions were organised by the NTA to raise awareness of its staff of the foreign bribery offence and enhance the capacity to detect bribe payments under the UCPL. However, none of these general awareness-raising measures specifically covered the detection of bribes in "miscellaneous expenses".

49. In June 2017, the Act on Prevention was revised to enable the tax authorities, both at the NTA Head Office and in the Regional Taxation Bureaus to receive STRs from JAFIC for the purpose of tax assessments. Previously, JAFIC only shared information with tax authorities upon request, in the context of a criminal tax investigation. This could assist tax authorities in detecting suspicions of bribery when assessing taxpayers' returns.

b. Reporting of foreign bribery

50. Tax officials are under a mandatory obligation to report suspicions of foreign bribery to law enforcement authorities.⁵¹ As for other government agencies, the tax authorities do not report directly to the police and district prosecutors in charge of enforcing the foreign bribery offence. The NTA indicated during the on-site visit that, upon uncovering suspicions of foreign bribery, tax authorities would report to the NTA Head Office, which would in turn report to the MOJ.

51. Instructions were provided to tax examiners in 2013 and 2014 on how to report suspicions of foreign bribery to the NTA Head Office.⁵² The instructions contain a standard form that tax examiners should complete and send to law enforcement authorities. The form requires tax authorities to identify the foreign public officials on the receiving end as well as any potential intermediaries. As such, the form appears to suggest that tax examiners should provide extensive information on the bribe recipient (*e.g.* name, address, date of birth, affiliated institution and title). In contrast, limited information is required on the Japanese tax payers. By requiring its tax authorities to identify the bribe recipient(s) abroad, Japan fails to adequately comprehend the role that its tax authorities should play in uncovering misconducts by Japanese taxpayers. While the instructions require tax authorities to report suspicious transactions, the need for the tax authorities to identify the bribe recipient extends beyond the requirements of the 2009 Tax Recommendation, which provides that tax authorities should report "mere" suspicions of foreign

⁴⁸ OECD (2017), "[Effective Inter-Agency Co-Operation in Fighting Tax Crime and Other Financial crimes](#)" Third Edition, p. 348.

⁴⁹ See [Japan Phase 3 Report](#), paras. 84 and 100.

⁵⁰ [DAF/WGB\(2017\)11](#) on progress implementing the Action Plan.

⁵¹ Article 239(2) of Code of Criminal Procedure and Article 155 of the Act on General Rules for National Taxes.

⁵² Phase 3 Additional Written Report, December 2014, [DAF/WGB\(2014\)68](#), pp. 7-8; Japan's Updated Action Plan, Room Document n°5 WGB October 2016, Phase 3 Follow-up of Japan: Japan's revised action plan [DAF/WGB/WD\(2016\)61](#); [DAF/WGB\(2017\)11](#)

bribery arising out of the performance of their duties. The need for the tax authorities to identify the bribe recipient may in part explain why they have not reported any foreign bribery suspicions to date.

Commentary

The lead examiners are concerned that tax authorities have not detected a single foreign bribery case over the twenty years since the entry into force of the Convention in Japan. They note that the instructions to tax authorities to identify the bribe recipient when reporting suspected foreign bribery extends beyond the requirements of the 2009 Tax Recommendation and may act as an impediment to detection. They recommend that Japan 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.

The lead examiners note that Japan took some measures to raise awareness and train tax authorities on the detection and reporting of foreign bribery. However, these measures did not specifically address how to uncover bribes concealed in taxpayers' books and records and in particular as "miscellaneous expenses". As a result, they recommend that Japan provide regular training to tax inspectors on the detection of bribe payments disguised as legitimate allowable expenses, including as miscellaneous expenses.

A.4. Detection of Foreign Bribery by METI

a. Overview of METI's role in fighting foreign bribery.

52. METI is the agency responsible for the implementation of the UCPL, including its foreign bribery provision.⁵³ While it has no direct law enforcement role, METI's Intellectual Property Policy Division is responsible for interpreting the existing law, developing amendments to the law, conducting outreach activity to raise companies' awareness about foreign bribery, and fielding private-sector queries about the law. Given the agency's various responsibilities, the Working Group previously concluded that METI could play an important role in preventing and detecting foreign bribery.⁵⁴ While METI has not detected any of Japan's concluded foreign bribery cases, it has forwarded four allegations to Japan's law enforcement authorities. This represents 9% of the 46 total allegations that have arisen in Japan since Phase 3. (METI's role in engaging with the private sector to prevent foreign bribery is discussed under section C.4 below.)

b. METI's reporting desk now receives foreign bribery allegations but has not yet contributed to the detection of an actual foreign bribery case.

53. METI's Intellectual Property Policy Division maintains a "reporting desk" that companies can contact with questions about Japan's foreign bribery offence or to report suspected instances of foreign bribery. By Phase 3, METI had not received any whistleblower reports or other allegations of foreign bribery.⁵⁵ Thus, the Working Group recommended that METI enhance the visibility of information about its "reporting desk" on its website (recommendation 9.i.). The Working Group also recommended that METI assess why its "reporting desk" had not yet received any allegations and to establish guidance on how METI should refer any allegations received to law enforcement (recommendation 9.v.). Japan had partly implemented these recommendations by its Phase 3 follow-up report.

54. Previously, the Working Group concluded that METI's placement of information on its "reporting desk" within the section on "Intellectual Property Protection" might have hindered METI's outreach efforts to the public.⁵⁶ In Phase 4, the intellectual property section on METI's website still contains

⁵³ Japan Phase 3 para. 30; See also Japan Phase 2 para. 50 ; Japan Phase 2bis para. 106.

⁵⁴ Japan Phase 3 paras. 30-35 & Commentary.

⁵⁵ Japan Phase 3 para. 31.

⁵⁶ Japan Phase 3 para. 30.

information about the foreign bribery offence and the “reporting desk”. METI’s website, however, now maintains an additional webpage on the “Prevention of bribery of foreign public officials” under its list of policy areas for the “External economy”.⁵⁷ In addition, METI has raised awareness about its “reporting desk” through consultations with the private sector in preparing the September 2017 revision of METI’s Guidelines.

55. According to Japan, METI’s “reporting desk” has received four allegations potentially related to foreign bribery since Phase 3. The METI representatives explained that they promptly referred all four allegations to the MOJ and the NPA pursuant to METI’s 2012 policy.⁵⁸ The police opened a formal investigation based on one of the reports, but ultimately determined that the evidence did not establish foreign bribery or any other offence. The other three reports did not lead to an investigation, either because it appeared that the statute of limitations period had elapsed or there were insufficient grounds to examine the allegation further. Nonetheless, while Japan did not assess the reasons why it had not received reports historically, the public increasingly refers questions and even suspected allegations to METI’s “reporting desk”.

56. During the on-site visit, METI representatives asserted that privacy considerations prevented them from sharing details about the sources of the four reports. They surmised, however, that the sources were most likely third parties (e.g. competitors) rather than whistleblowers. Indeed, according to Japan’s Phase 4 questionnaire responses, METI would refer any whistleblowers to the law enforcement authorities. In prior evaluations, METI had indicated that it would actually accept information from whistleblowers and provide copies to Japan’s law enforcement authorities.⁵⁹

Commentary

The lead examiners welcome the steps METI has taken to raise awareness about the existence of its “reporting desk” for foreign bribery. Japan has implemented Phase 3 recommendation 9.i. as relevant information can now be found on METI’s website. Although METI did not assess why its “reporting desk” had not received allegations in the past, METI has begun receiving them. The Working Group should follow up on the number of foreign bribery allegations that METI receives and how they are handled, especially those from potential whistleblowers.

A.5. Reports of Foreign Bribery from Whistleblowers and the Adequacy of Japan's Whistleblower Protections

a. Whistleblowing so far has not had a major role in Japan’s foreign bribery cases

57. Only one of Japan’s concluded foreign bribery cases has originated from a whistleblower report made directly to law enforcement (the *Kyundenko case* discussed in Phase 3).⁶⁰ Whistleblowing played an indirect role in the *Mitsubishi case*, as the company self-reported the alleged bribery scheme after conducting an internal investigation in response to an internal whistleblower report.⁶¹ MOFA has also received a whistleblower report concerning a potential foreign bribery allegation. Thus, from the information obtained during this evaluation, whistleblowing has directly or indirectly contributed to detecting 3 of the 46 foreign bribery allegations (7%) that Japan has received. Notably, whistleblowing has helped detect 2 of the 5 cases (40%) in which Japan has sanctioned at least one person for foreign bribery. In comparison, a Working Group study of all foreign bribery cases concluded with sanctions

⁵⁷ METI website on “Prevention of bribery of foreign public officials”, available at: http://www.meti.go.jp/policy/external_economy/zouwai/index.html.

⁵⁸ METI’s 2012 guidance on “Regarding the Treatment of Information on Cases of Bribery of Foreign Public Officials”; see Japan Phase 3 Follow-up Report, page 16.

⁵⁹ Japan Phase 3 Follow-Up Report page 16.

⁶⁰ [Japan Phase 3 Report](#) para. 12 (described as “Case #1” in Phase 3).

⁶¹ Mitsubishi Hitachi Power Systems, (July 2018) “[Notice Regarding Charges Filed against Former Officers and Employee for Violation of the Unfair Competition Prevention Act](#)”.

between 1999 and 2017 found that only 2% were detected through whistleblowing, though it may have indirectly contributed to some of the 22% of the cases detected by self-reporting.⁶²

b. Japanese businesses are frequently establishing whistleblower channels, but they are rarely used for reporting criminal violations such as foreign bribery

58. Japan's Whistleblower Protection Act (WPA) provides a comprehensive, but non-exclusive, framework for protecting qualified whistleblowers.⁶³ In Phase 3, the Working Group recognised that the WPA prohibits the dismissal or other disadvantageous treatment of qualified whistleblowers who report allegations of foreign bribery in both the public and private sectors.⁶⁴ However, as the WPA does not provide for sanctions, qualified whistleblowers who suffer retaliation must bring a civil action for reinstatement or damages. Thus, the whistleblower bears the burden of proof to establish that the retaliation was intentional. In Phase 3, the Working Group recommended that Japan provide any publicly available research on the WPA's effectiveness as well as updates on jurisprudence interpreting the law (recommendation 13). At the time of the Phase 3 Written Follow-up Report, Japan had only partially implemented this recommendation.⁶⁵

59. As the Cabinet Office body responsible for the WPA's implementation, the Consumer Affairs Agency (CAA) has periodically surveyed public- and private-sector entities about their whistleblower channels.⁶⁶ In its questionnaire responses, Japan reports that approximately 99% of large companies had an internal reporting mechanism in 2016, up from 97% in 2012. In contrast, approximately 40% of small-and-medium enterprises (SMEs) had such channels in 2016, basically unchanged since 2012. Despite their prevalence, whistleblower channels are not often used to report legal violations. Following the on-site visit, Japan reported that a FY2016 CAA survey found that 42% of the respondents reported that their companies had not received any complaints, while 31% had received between one and five reports. Finally, 18% of reports concerned violations of law. More recent private surveys confirm this pattern.⁶⁷ During the on-site, representatives from larger companies reported that whistleblower channels were now used somewhat more frequently.

60. In the past, the Working Group observed that Japan's corporate culture stigmatised whistleblowing as a form of disloyalty.⁶⁸ Since Phase 3, however, whistleblowers have brought a number of major scandals to light at companies like Olympus and Toshiba. According to media reports, a whistleblower may have prompted an ongoing investigation into Nissan's executive compensation and accounting practices. On-site participants agreed that whistleblowing is now more common and acceptable than it was a decade ago. Several tied this development to the increasing mobility of Japan's labour force and to media coverage of the scandals uncovered by whistleblowers. Nonetheless, Japan reported after the on-site visit that, according to the FY2016 CAA survey, half of the 63 self-identified whistleblowers surveyed reported experiencing retaliation, including dismissal. In addition, 20% of persons who did not report corporate fraud indicated that they did not blow the whistle because they feared retaliation. Similarly, during the on-site visit, participants from business and civil society reported that whistleblowers were still often subject to retaliation. Several also reported that whistleblowers have difficulty enforcing their rights because of lengthy court proceedings in Japan. Navigating through the

⁶² OECD (2017), "[The Detection of Foreign Bribery](#)", page 10.

⁶³ The Whistleblower Protection Act (Act No. 122 of 2004) was adopted on 18 June 2004. It entered into force on 1 April 2006.

⁶⁴ Japan Phase 3 paras. 113.

⁶⁵ Japan Phase 3 Follow-up Report at pages 5 & 21-23.

⁶⁶ Peter Coney & Christopher Coney, "The Whistleblower Protection Act (Japan) 2004: A critical and comparative analysis of corporate malfeasance in Japan," *Monash University Law Review*, Vol. 42, No. 1 (2016), page 47.

⁶⁷ *Nikkei Asian Review* (Feb. 2018) "[Japan seeks firmer protections for corporate whistleblowers: Fear of retaliation perpetuates poor internal controls](#)"

⁶⁸ [Japan Phase 2 Report](#) para. 43.

various appeals can take an emotional and financial toll, even when whistleblowers finally prevail. For this reason, civil society representatives called for sanctions to deter WPA violations. Other private-sector participants also supported enhancing measures to ensure confidentiality and discourage retaliation. Expert commissions formed by the CAA and the Cabinet Office (CAO) issued reports at the end of 2016 (CAA) and 2018 (CAO) examining potential reforms to the WPA, including the possibility of introducing administrative or criminal sanctions. There is not yet consensus for amending the law, including the issue of whether any form of sanctions should be imposed for violations of the WPA. Moreover, there is no foreseen date for presenting a bill to the Diet for consideration.

c. Since Phase 3, Japan has witnessed a growing number of cases asserting whistleblower claims

61. Whistleblowers have increasingly sought compensation or other remedies in court. For the Phase 4 evaluation, Japan provided summaries of 11 cases (none related to foreign bribery), between 2014 and 2016 in which whistleblowers sought reinstatement or damages. As the WPA does not exclude other remedies, some cases reflect claims brought on other legal grounds, such as labour law protections against abusive dismissal.⁶⁹ According to these summaries, the plaintiffs fully or partly prevailed in 6 of the 11 cases (55%). A 2016 academic paper identified 29 final court actions resolving whistleblower complaints, with the WPA being applied in approximately 10 cases. This study found that the whistleblowers prevailed in 65% of the 29 cases.⁷⁰ Most notably, in 2012, Japan's Supreme Court ruled for the first time in favour of a whistleblower who had suffered a retaliatory transfer in 2007 after reporting about his bosses' abusive hiring practices. Though the Supreme Court ruled that the transfer was unlawful, the whistleblower continued to suffer other forms of retaliation. Eventually, the whistleblower brought a second lawsuit, which the parties ultimately settled in February 2016. As a result, the whistleblower obtained JPY 11 million (USD 110,000) after spending nearly a decade to enforce his rights.⁷¹

d. Japan's whistleblower framework should be enhanced to better reflect the 2009 Recommendation

i. Scope of protected individuals

62. In Phase 3, the Working Group observed that the WPA only applied to "workers" as defined under Japanese labour law. For this reason, it expressed concern that employees of Japanese companies working overseas would not be covered.⁷² Subsequent developments, have shown that the WPA definitely excludes other types of employees, even those based in Japan. This is notably the case for corporate executives, who are not considered "workers" under Japanese law, as demonstrated by the 2011 Olympus accounting scandal when a newly appointed CEO was dismissed after raising concerns about potential financial irregularities. This is not in line with Section IX (iii) of the 2009 Recommendation on Further Combating Bribery of Foreign Public Officials, which refers to "employees" without reference to their role in the company.

ii. Disclosures made in good faith

63. Under the WPA, "whistleblowing" occurs when a "worker" reports a "Reportable Fact" to the business, a relevant administrative authority, or to any person when "necessary to prevent" the "Reportable Fact" or to minimise the damage that it will cause.⁷³ Under the WPA, a disclosure will not

⁶⁹ WPA Article 6.

⁷⁰ Peter Coney & Christopher Coney, "The Whistleblower Protection Act (Japan) 2004: A critical and comparative analysis of corporate malfeasance in Japan," *Monash University Law Review*, Vol. 42, No. 1 (2016), page 61.

⁷¹ Japan Times (Feb. 2016), "[Olympus settles with whistleblower over 'abuse of authority'](#)".

⁷² [Japan Phase 3 Report](#) para. 113.

⁷³ WPA Article 2.

be protected if made with the purpose of “obtaining a wrongful gain”, “causing damage to others”, or “any other wrongful purpose”.⁷⁴ This would appear to be in line with Section IX (iii) of the 2009 Recommendation, which requires the Parties to the Anti-Bribery Convention at a minimum to protect whistleblowers who report “in good faith”. The WPA, however, also requires whistleblowers to “make efforts not to damage the justifiable interests of others and the public interest”.⁷⁵ Given the lack of available jurisprudence, it is not clear whether this provision could be interpreted to impose additional conditions on the manner in which whistleblowers must make reports in order to be protected under the WPA beyond the 2009 Recommendation’s “good faith” standard.

iii. Reasonable Grounds

64. The WPA protects qualified whistleblowers from dismissal or “other disadvantageous treatment”.⁷⁶ Whether a particular disclosure will be covered depends on how it is made. A disclosure made within the enterprise will be covered so long as the worker “considers” that the Reportable Fact exists.⁷⁷ In contrast, disclosures made to a responsible administrative agency are only covered if the worker has “reasonable grounds to believe” that a Reportable Fact exists.⁷⁸ Finally, disclosures to a third party to whom the disclosure is “considered necessary” to prevent or limit the damage caused by the Reportable Fact will be protected when the worker has “reasonable grounds to believe” that a Reportable Fact exists; provided that (i) the worker has a justifiable reason to not go first to the company or responsible administrative agency, such as having “reasonable grounds” to fear disadvantageous treatment or (ii) the worker has “reasonable grounds” not to report to the company, including (but not limited to) the potential the loss of evidence. While complex, this hierarchy of protected disclosures appears consistent with Section IX (iii) of the 2009 Recommendation, which requires the Parties to the Anti-Bribery Convention to protect whistleblowers who report to “competent authorities” on “reasonable grounds”. Indeed, Japan’s law seems to provide greater protections in two situations. First, it appears that whistleblowers who report internally within their company only need to have a subjective belief that the Reportable Fact exists to be covered by the WPA. Second, the WPA can even protect whistleblowers who make qualified disclosures to a third party instead of a “competent” authority.

65. In practice, however, it is not clear that the “reasonable grounds” standard sufficiently protects whistleblowers. While Japan provided brief summaries of eleven whistleblowing cases, courts have apparently dismissed whistleblower claims on the grounds that there was no retaliatory intention. The courts apparently reached this conclusion relying on a number of factors, including that the Reportable Fact was not true. Further observation may thus be needed to ensure Japan’s courts are evaluating whether whistleblowers had adequate reasons to make their reports in line with the 2009 Recommendation rather than the accuracy or pertinence of the whistleblowers’ disclosures.

Commentary

Overall, the lead examiners are encouraged by the widespread establishment of whistleblower systems, at least among large businesses. They also welcome the increasing number of whistleblower reports made in Japan, while taking cognisance of the reportedly high risk of retaliation and the difficulties that whistleblowers can face when enforcing their rights through civil actions.

For this reason, the lead examiners recommend that Japan broaden the scope of persons protected to include officers, directors and other corporate management. Given that whistleblowers currently must

⁷⁴ WPA Article 2. The same article further provides that a worker cannot make a disclosure to a third party if so doing “might cause damages to the competitive position or any other legitimate interest of the whistleblower’s employer”. As the 2009 Recommendation’s whistleblowing standard only concerns reports made to the “competent authorities”, this condition is not relevant for the Working Group’s analysis.

⁷⁵ WPA Article 8.

⁷⁶ WPA Article 3-5.

⁷⁷ WPA Article 3(i).

⁷⁸ WPA Article 3(ii).

prove that they have suffered retaliation in order to obtain redress under the WPA, the lead examiners also recommend that Japan 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. Finally, the Working Group should follow up to see whether whistleblowers who report in good faith and on reasonable grounds can obtain redress.

A.6. Prevention and Detection of Foreign Bribery through Official Development Assistance (ODA) and Export Credits

a. Japan's agencies involved in the distribution of Japanese Official Development Assistance should more specifically target foreign bribery in their prevention and detection efforts

i. Policy guidance, consulting desk and risk assessment

66. The Ministry of Foreign Affairs (MOFA) and the Japan International Corporation Agency (JICA) are respectively involved in the distribution of Japan's bilateral and multilateral Official Development Assistance (ODA).⁷⁹ In 2014, in response to a widespread corruption case (*JTC*), JICA issued a detailed Anti-Corruption Guidance, which describes various anti-corruption measures, including JICA's anti-corruption consultation desk and required actions by governments, partner countries, executing agencies and companies. (The impact of the Guidance is discussed under Section D.4. below.) In 2016, in collaboration with MOFA, JICA also issued a more succinct Anti-Corruption Policy Guide, which lists various anti-corruption measures, including JICA's anti-corruption consultation desk as well as MOFA's desks and contact points. JICA's anti-corruption consultation desk provides a consultation service for information related to fraud and corruption in Japan's ODA projects.⁸⁰ The Guide is widely disseminated among partner countries' governments, executing agencies and companies to enhance understanding and to facilitate the necessary actions against fraud and corruption.⁸¹

67. However, both MOFA and JICA indicate that they do not assess corruption risks associated with the ODA projects/activities *per se* (e.g. region, sector etc.). In its questionnaire responses, Japan indicates that JICA provides training sessions specifically targeting anti-corruption issues as a part of the training for JICA Japanese staff before dispatching them to overseas offices. This training does however not cover foreign bribery specifically. Additionally, the codes of conduct of JICA and MOFA do not establish which practices should be followed to combat foreign bribery (beyond the ethics rules to combat corruption within the agency).

ii. Reporting and whistleblowing mechanisms within bodies administering ODA

68. The "Japan's ODA Consultation Desk on Fraud and Corruption" is the primary reporting and whistleblowing mechanism used at MOFA. JICA has put in place three different reporting/whistleblowing mechanisms: 1) the Whistleblowing Report, 2) the Outsider Report, and 3) its own Consultation Desk on Anti-Corruption. The "Consultation Desk on Anti-Corruption" is a consultation service that receives information related to fraud and corruption in Japan's ODA projects. Whistleblowers in Japan's ODA agencies are protected under Japan's Whistleblower Protection Act. However, while JICA is required to keep up with the standards in the Act, the Act does not directly apply to JICA. Japan indicates that JICA's Compliance Rules thus ensure that whistleblowing reports, outsider

⁷⁹ [Japan Phase 3 Report](#) paras. 119-121.

⁸⁰ For more details, see the following website: https://www.jica.go.jp/english/our_work/compliance/index.html and <https://www3.mofa.go.jp/mofaj/gaiko/oda/fusei/>

⁸¹ See https://www.jica.go.jp/english/our_work/compliance/index.html and <https://www3.mofa.go.jp/mofaj/gaiko/oda/fusei/>

reports and other related matters are made and are protected in line with standards provided under the Act.

69. There have not been any notable successes in detecting foreign bribery through these whistleblower mechanisms and policies to date. However, JICA's whistleblowing mechanism has been functioning for other forms of wrongdoing, as it has received over 350 reports for the last 5 years. Although cases of foreign bribery were not found through this mechanism, 10 fraudulent practices (fraudulent billing by producing false receipts, issuance of false statements etc.) were detected based on the reports of whistleblowers.

70. Furthermore, in 2014, Japan/JICA introduced a leniency policy, under which companies that voluntarily report their misconduct may receive a reduced sanction period. This measure encourages companies to voluntarily disclose fraudulent practices in return for potential leniency.

iii. Investigations by JICA and MOFA in cooperation with prosecutors

71. Under JICA's General Conditions and Terms for both Japanese Loans and Grants and the procurement of goods and services directly contracted by JICA, if JICA becomes aware of suspected corrupt or fraudulent practices committed by a borrower or a contractor, the borrower or the contractor must provide JICA with all information that is reasonably requested. When MOFA and/or JICA detect suspicions of foreign bribery involving ODA-funded projects, MOFA reports to law enforcement authorities directly, while JICA reports to the law enforcement authorities upon consultation with MOFA. If JICA suspects foreign bribery, it will conduct an investigation in consultation with MOFA. It will seek to collect evidence from other agencies, informants, witness interviews, or by asking an external party to conduct an investigation. The Board of Audit of the Japanese government audits the operations of MOFA and/or JICA annually. As part of this process, JICA may also conduct internal investigations into the operations of its contractors, and may even conduct on-site investigations at the contractor's premises pursuant to the provisions of JICA's contract.

Japan states that while JICA does not have investigative powers *per se*, it cooperates with prosecutors in the conduct of investigations involving contracts financed with ODA money. Japan reports a case where prosecutors were able to collect evidence with the assistance of JICA (*JTC case*). Japan indicated that the case was detected as a result of a voluntary disclosure by the company. It was thus not detected by JICA. In response to this serious instance of corruption, both the Anti-Corruption Guidance and the Anti-Corruption Policy Guide were issued, the function of the consultation desks on anti-corruption, including JICA's, was enhanced, and a leniency mechanism providing for reduced sanctions in case of voluntary disclosure was introduced. These measures are intended to enhance JICA's detection and better prevent foreign bribery offences.

72. Since the businesses that JTC aimed to acquire were JICA's ODA-loan-financed projects, JICA's headquarters voluntarily cooperated with the prosecutors in this investigation.

73. Mechanisms developed by JICA to detect and report foreign bribery, and more generally implement the 2016 Recommendation for Development Cooperation Actors on Managing Risks of Corruption, are further discussed under Part D.4. below.

Commentary

The lead examiners recognise the steps taken by Japan to develop mechanisms for the prevention, detection and reporting of foreign bribery by its public agencies. The lead examiners also welcome JICA's demonstrated cooperation with the prosecution in the collection of evidence in one now concluded foreign bribery case.

Nevertheless, the lead examiners are concerned by the lack of detection of foreign bribery cases by these agencies in spite of the high risk of corruption in the countries in which they operate. The lead examiners therefore recommend that Japan 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 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.

b. Japan’s export credit agencies could enhance their efforts to play a more active role in preventing and detecting foreign bribery

74. As discussed in Phase 3, Japan has two agencies providing export credit, insurance cover, or other assistance to Japanese businesses operating or exporting abroad. These are the Japan Bank for International Cooperation (JBIC) and the Nippon Export and Investment Insurance (NEXI). Both agencies are members of Japan’s delegation to the OECD Working Party on Export Credits and Credit Guarantees and apply the procedures specified in the 2006 OECD Recommendation on Bribery and Officially Supported Export Credits (the 2006 Recommendation).⁸² So far, neither agency has detected a foreign bribery case.

i. Promoting internal controls and prevention

75. In terms of prevention, both agencies report that they encourage companies seeking export credit support to adopt and implement effective internal controls to prevent bribery. JBIC explained that it encourages its exporters to establish and document anti-bribery management controls in line with the 2006 Recommendation. For its part, NEXI reports that it asks its applicants to certify and declare that they have not engaged and will not engage in bribery of foreign public officials with respect to the relevant transaction and that they are not currently being prosecuted for foreign bribery and have not been convicted for foreign bribery in the past five years. During the on-site visit, representatives from both agencies confirmed that they would rely on international debarment lists to identify potential red flags. They do not, however, check debarment decisions by Japanese or other national authorities.

76. Both agencies will also conduct enhanced due diligence if there is a heightened bribery risk in order to ensure that adequate internal controls are in place. NEXI, for instance, suspended the provision of export credits to one exporter that reported that Japanese prosecutors were prosecuting it for foreign bribery concerning an unrelated transaction. NEXI then conducted enhanced due diligence by reviewing company documents and interviewing company personnel. The entire process took approximately one-and-a-half months. Ultimately, NEXI resumed the support, after concluding that the exporter had taken appropriate measures to prevent future wrongdoing. Both agencies report that they apply the METI Guidelines and the 2006 Recommendation when assessing whether applicants have adequate internal control systems in place.

77. Japan’s export credit agencies have started providing other forms of support beyond traditional export credits. In 1955, for example, 98% of JBIC support was made in the form of export loans. By 2017, only 3% of JBIC’s commitments took this form. Nearly two-thirds of its support commitments came in the form of overseas investment loans. JBIC has also provided support through direct equity participation, though this is currently only 7% of its total commitments.⁸³ It is not clear whether the export agencies apply different approaches for anti-corruption due diligence based on the form in which their support is given. As this evaluation report was being finalised, JBIC and NEXI both reported that no matter what form of support they provide, they will conduct anti-corruption due diligence at the same level required for exports credits.

⁸² In March 2019, the 2006 Recommendation was replaced by the new Recommendation of the Council on Bribery and Officially Supported Export Credits. As this Recommendation was adopted after the on-site visit to Japan in January 2019, this evaluation is based on the 2006 Recommendation that was then in force, in accordance with WGB’s past practice.

⁸³ JBIC, “JBIC Profile: Role and Function” (2018), page 7, available at: <https://www.jbic.go.jp/ja/about/role-function/images/jbic-brochure-english.pdf>.

ii. *Detecting and reporting foreign bribery*

78. During the on-site visit, representatives of both agencies reported that they did not have experience dealing with a credible allegation of foreign bribery. If one arose, the JBIC and NEXI representatives assumed that they would first seek more information from the company directly. They would then alert the Tokyo DPPPO, if they found credible evidence of bribery. It did not appear that either agency had a formal policy setting forth when potential allegations should be conveyed to law enforcement, or any procedures explaining how such information should be conveyed.

79. In the case where NEXI suspended its support until it concluded its enhanced due diligence, the agency only learned of the red flag because the exporter reported that it was under investigation. Though it was not clear during the on-site visit discussion whether the company had had an obligation to report that it was under investigation, during the finalisation of this evaluation report both JBIC and NEXI reported that their applicants have a continuing obligation to investigate potential foreign bribery issues and to report their findings to the relevant agency.

Commentary

The lead examiners consider that Japan’s export credit agencies have made efforts to conduct due diligence when aware of potential bribery risks, but could be more active in searching for information about such risks. The lead examiners are pleased that Japan’s export credit agencies have subjected their applicants to a continuing obligation to inform the export credit agencies about foreign bribery concerns that may arise after their application for export credit support is approved.

Still, the lead examiners recommend that Japan’s export credit agencies (i) clarify the criteria for reporting suspected instances of foreign bribery and (ii) establish reporting channels to law enforcement authorities. They should also 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.

Finally, the lead examiners recommend that the Working Group should follow up on 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.

A.7. Self-Reporting by Companies

a. *Self-reporting has enabled Japan to conclude nearly half of its foreign bribery cases*

80. Self-reporting has played a noticeable role in Japan’s effort to detect foreign bribery allegations. To date, there have been three instances in which a company has reported potential wrongdoing to law enforcement. This represents 7% of the 46 foreign bribery allegations that Japan has uncovered since 1999. Ultimately, prosecutors initiated prosecutions in two of the three cases, bringing charges against six natural persons and one company.⁸⁴ Overall, self-reporting has been one of Japan’s more effective sources of detection, playing a role in two of the five cases in which Japan has imposed sanctions on at least one participant for foreign bribery. For comparison, for the Working Group as a whole, self-reporting led to the discovery of just over one-fifth of the foreign bribery schemes detected between 1999 and 2017.⁸⁵

b. *Japan has few express incentives for suspects to make self-reports*

81. While self-reporting has played a role in Japan’s foreign bribery cases so far, there are few express incentives for self-reporting. Under article 42 of the Penal Code (PC), an offender can receive a reduced sentence by surrendering to authorities before being identified as a suspect. According to Japan, this

⁸⁴ The *JTC* and *Mitsubishi* cases both originated through self-reports. A self-report was also made in the *Marine Hose* case, but that matter did not lead to a prosecution.

⁸⁵ OECD (2017), “[The Detection of Foreign Bribery](#)”, page 10.

provision would apply equally to natural and legal persons, though there is no jurisprudence confirming this interpretation. Moreover, in light of prosecutors' broad discretion, Japan also suggests that self-reporting could justify the decision not to prosecute the offender. In its questionnaire responses, Japan maintains that the business community is aware of this incentive and that companies are more willing to make self-reports after recent foreign bribery enforcement actions.

82. During the on-site visit, lawyers and business representatives were more sceptical. While aware that some companies have received credit for making a self-report, they surmised that the companies probably only came forward once it seemed that the story would become public anyway. They believed that other companies would simply wait to see if they are detected. In their view, there was too much uncertainty about the consequences a company would face in Japan if it self-reported. In their experience, Japanese companies' internal investigations typically focus on exposure to US Foreign Corrupt Practices Act or to the UK Bribery Act, sometimes without even seeking advice on potential liability under Japanese law. As discussed in section B.5.c. below, it is not yet clear whether the new Agreement Procedure might change this calculus in the foreign bribery context.

Commentary

Based on the data provided by Japan, the lead examiners observe that self-reporting has only occurred in a small number of foreign bribery cases. At the same time, they observe that two-thirds of the self-reports received ultimately led to prosecutions, while self-reporting has contributed to nearly half of Japan's foreign bribery prosecutions that resulted in sanctions. Nonetheless, during the on-site visit the lead examiners heard business representatives and legal practitioners express reluctance to make self-reports, absent particular circumstances, given the uncertainty about the consequences.

They therefore recommend that Japan's Public Prosecutors Office establish a clearer policy explaining the extent to which self-reporting will be considered in resolving and sanctioning foreign bribery cases.

A.8. The Ability of Japanese Accountants and Auditors to Detect and Report Foreign Bribery

83. As accountants and auditors examine companies' financial records and internal accounting controls, they are well positioned to detect and report foreign bribery that might be disguised as false expenses or kept off the books altogether. In Phase 3, Japan had not detected foreign bribery by enforcing its accounting or auditing standards or by reviewing companies' financial statement disclosures. The situation remains unchanged in Phase 4.⁸⁶ According to law enforcement officials during the on-site visit, however, one company's external auditors reportedly detected irregular transactions that ultimately were related to foreign bribery. It is not clear whether the auditors raised the issue internally or if they considered making an external report to the FSA or another authority.

84. Under article 397 of the Companies Act, an accounting auditor who detects "misconduct or material facts in violation of laws and regulations" must report the matter to the company's committee of statutory auditors (or analogous internal oversight body).⁸⁷ As discussed in Phase 3, auditors also have obligations in certain circumstances to report wrongdoing to external authorities.⁸⁸ Under article 193-3 of the Financial Instruments and Exchange Act (FIEA), external auditors must first report possible illegal acts to the company and provide suggestions for rectifying the situation.⁸⁹ If the company fails to rectify the situation, the external auditor must then submit an opinion to the FSA, if "necessary in order to prevent" a "material impact" on the company. The auditor would also have to warn the company before

⁸⁶ [Japan Phase 3 Report](#) para. 87.

⁸⁷ Companies Act (Act. No. 86 of 26 July 2005), Article 397.

⁸⁸ [Japan Phase 3 Report](#) paras 90-93.

⁸⁹ FIEA Article 193-3.

making the external disclosure.⁹⁰ Any person who contravenes article 193-3 faces a fine of up to JPY 300 000.

85. In its questionnaire responses, Japan reports that its law enforcement agencies have not received any reports from auditors concerning foreign bribery. During the on-site visit, FSA representatives confirmed that auditors are in fact making reports pursuant to FIEA article 193-3, but the reports have concerned other potential forms of wrongdoing. Japan has not sanctioned any auditor for not reporting an offence under FIEA article 193-3. During the on-site visit, auditors observed that foreign bribery, even if detected, may not be “material” and thus would not need to be reported to the FSA under FIEA article 193-3, even though foreign bribery should be reported to the company without regard to materiality. The “materiality” assessment would depend on whether the amounts involved would have an impact on the accuracy of the company’s financial statements. According to on-site visit participants, the seriousness or pervasiveness of the offence might influence the assessment, at least for public companies, because a pattern of small bribes might signal internal controls issues or other problems. During the on-site visit, practitioners reported that the FSA has provided explicit guidelines for assessing the materiality of foreign bribery. After the on-site, the FSA reported that, according to a December 2007 document that it published, a violation of laws, including foreign bribery, would be material if it would likely have a serious impact on the company’s financial statements if the company failed to correct the matter. For its part, JICPA reports that it published its own guidance in the form of questions and answers in November 2008.

Commentary

The lead examiners observe that auditors and accountants have not yet contributed to Japan’s efforts to detect foreign bribery, despite the fact that in one case the auditors actually flagged suspect transactions that were ultimately proven to be related to foreign bribery.

The lead examiners thus recommend that Japan 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.

They also recommend that the FSA or other applicable supervisory authorities develop guidance clarifying the circumstances when auditors and accountants should consider foreign bribery to be “material” for reporting purposes and provide training to the profession in order to raise awareness and improve its capacity to detect and report instances of foreign bribery.

A.9. Other Sources of Foreign Bribery Allegations including Investigative Journalism

a. Other criminal proceedings

86. To date, two of the foreign bribery cases that have surfaced were detected in the course of investigating other economic offences. In Phase 3 already, the Japanese authorities stated that they are more likely to detect a foreign bribery case in the course of searches and seizures in the investigations of other offences, such as tax crimes.

87. The first case, already concluded at the time of Phase 3, was detected in the course of a joint criminal investigation over alleged tax fraud conducted by the tax inspectors and the public prosecutors (*PCI case*).⁹¹ Since Phase 3, a second case was detected in the course of another criminal proceeding. In the *Futaba case*, the Aichi Prefectural Police detected the foreign bribery offence in the course of a criminal investigation for other white collar offences. The bribery was uncovered in January 2013 as a result of searches at one of the company’s sites in Aichi Prefecture.

⁹⁰ FIEA Article 193-3(2).

⁹¹ See [Japan Phase 3 Report](#), paras. 13, 47, and 98-99 (discussing Pacific Consultants International, described in Phase 3 as Case #2); and OECD (2017), “[The detection of Foreign bribery](#)”, p. 81.

b. Foreign authorities

88. Another avenue to detect potential foreign bribery cases is through incoming requests for mutual legal assistance (MLA). One foreign bribery investigation was opened based on the documentation sent in support of an incoming MLA request. The case was ultimately closed for lack of evidence and because the facts were time-barred (case not named in this report at Japan's request for confidentiality reasons).

c. Media

i. The use of media reports and the Working Group Matrix of Foreign Bribery Allegations

89. In Japan, media reports can be sufficient to open a formal criminal investigation if law enforcement authorities deem that the information is reliable. Japan indicates that the prosecutors and the police monitor both Japanese and foreign media sources on a voluntary and daily basis both at national and prefectural levels. Mainstream media outlets are also circulated within the PPOs. Allegations published in foreign media must be confirmed with Japanese overseas missions. The scope and intended purpose of having MOFA foreign-based staff confirming allegations from foreign media is not clear.

90. To date, Japanese law enforcement authorities have only initiated one foreign bribery investigation based on media reports that they themselves detected. In another instance, media reports indirectly led to an investigation after triggering a government agency to report to the Tokyo DPPO (case not named in this report at Japan's request for confidentiality reasons).

91. In contrast, Japan relies heavily on media information contained in the Working Group's Matrix of alleged foreign bribery cases. Half of Japan's alleged foreign bribery matters that have surfaced to date were identified through this channel. The Japanese prosecutors have opened ten investigations based on information from the Matrix (cases not named in this report at Japan's request for confidentiality reasons). Six of these investigations were opened right before this evaluation. In five matters, the MOJ endeavoured to informally obtain additional information on the allegations, including from foreign authorities in at least four cases, but ultimately, no investigation was commenced because the allegations were deemed time-barred or lacking grounds. Finally, the status of five allegations in the Matrix is unknown.

92. Japan indicates that the NPA and the prosecutors have access to the Matrix and that law enforcement authorities would verify the media information through other sources before launching a formal investigation. The NPA would check whether the information is reliable by cross-checking with the information retained by the Second Investigative Division, JAFIC and other relevant authorities. The NPA would then refer the Matrix and any supporting material gathered during its cross-checking to the prefectural police. Japan explains that this intermediate involvement of the NPA is necessary to refer the allegations to the right prefectural police and assist with the handling of press articles in foreign languages. However, to date, the police has only been marginally involved in foreign bribery investigations as discussed under section B.3.a.

ii. Investigative Journalism in Japan

93. The WGB has recognised media reporting as an essential source of detection in foreign bribery cases, as well as an important tool for public awareness-raising on corruption.⁹² Japan ranks 67 out of 180 countries in Reporters without Borders' World Press Freedom Index in 2019.⁹³ Japanese investigative journalists may not be operating in an environment conducive to the reporting of potential bribery allegations involving Japanese companies, including the *keiretsu*, which play an important role in Japan's economy. In April 2016, the U.N. Special Rapporteur on Freedom of Expression expressed

⁹² OECD (2017), "[The Detection of Foreign Bribery](#)", Chapter 4
⁹³ Reporters without Borders: [2019 World Press Index](#).

“deep and genuine concern” about declining media independence in Japan.⁹⁴ Recent media articles report “alarming signs of deteriorating media freedoms in Japan” and an increasing form of self-censorship and restrained coverage by the media.⁹⁵ These comments were echoed during the on-site visit; one investigative journalist stating that “journalism is not really being exercised freely in Japan”.

94. Another limitation to investigative journalism in Japan, and therefore to the potential uncovering of foreign bribery allegations involving Japanese nationals and companies, may be linked to the structure and relationship with the government through the so-called Press Clubs (also called *Kisha clubs*).⁹⁶ Media reports that “the extreme emphasis on access to inside information via the press clubs” is one of the biggest structural weaknesses in the Japanese media.⁹⁷ The press clubs are voluntary arrangements that mainly give large national newspapers preferential access to government officials. Freelancers are reportedly not allowed to take part in the press clubs.⁹⁸ Media organisations deemed too critical are reportedly also excluded from the press clubs.⁹⁹ Access to privileged information through the press club system has resulted in heightened competition between media organisations in Japan.¹⁰⁰ During the on-site visit, one investigative journalist explained that Japan’s Press Clubs restrict access to information for reporters who are not part of a Club and stated that investigative journalists would be dependent on Press Club members to share information. The lack of solidarity among media organisations has been cited by the U.N. Special Rapporteur on Freedom of Expression as a reason for “Japanese media’s apparent inability to resist political pressure”.¹⁰¹ Against this background, Japan believes that freedom of expression is fully guaranteed by Article 21 of the Constitution of Japan and cannot be restricted, even by law, without justifiable grounds.

Commentary

The lead examiners note that half of the foreign bribery cases uncovered to date have been referred to Japan through the WGB Matrix of alleged cases. While it is, to some extent, positive that Japan takes steps regarding some of the cases listed therein, Parties to the Convention are expected to proactively detect foreign bribery allegations in the media and not just rely on the Matrix.

The lead examiners further note the important role of investigative journalism in developing serious, vigorous and high profile reporting of foreign bribery issues. While they also note that the Japanese Constitution guarantees freedom of the press, they recommend that Japan 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.

⁹⁴ Foreign Policy (May 2016), “[The Silencing of Japan’s Free Press](#)”

⁹⁵ Foreign Policy (May 2016), “[The Silencing of Japan’s Free Press](#)”; The Japan Times, (February 2016), “[Sanae Takaichi warns that government can shut down broadcasters it feels are biased](#)”.

⁹⁶ Togufu (February 2014), “[The Secret World Of Kisha Clubs And Japanese Newspapers](#)”

⁹⁷ Foreign Policy (May 2016), “[The Silencing of Japan’s Free Press](#)”

⁹⁸ Togufu (February 2014), “[The Secret World Of Kisha Clubs And Japanese Newspapers](#)”; [Reporters without borders: Japan country profile.](#)

⁹⁹ Foreign Policy (May 2016), “[The Silencing of Japan’s Free Press](#)”

Ibid.

¹⁰¹ Foreign Policy (May 2016), “[The Silencing of Japan’s Free Press](#)”

B. ENFORCEMENT OF THE FOREIGN BRIBERY OFFENCE

B.1. The Foreign Bribery Offence

a. *Placement of foreign bribery offence under the UCPL*

95. The offence of bribing a foreign public official is placed under article 18(1) of Japan's UCPL. Japan indicates in its questionnaire responses that no change has occurred in the offence since Phase 3.¹⁰²

i. *A long-standing issue throughout the different phases of Japan evaluations by the WGB*

96. Since Phase 1, the Working Group has closely examined Japan's choice to place its foreign bribery offence in its law regulating unfair competition, which largely concerns intellectual property violations. In Phase 3, the Working Group noted that its "Phase 2bis recommendation to move the foreign bribery offence from the UCPL – legislation under the responsibility of METI – to the Penal Code [had] been reconsidered by the Working Group,¹⁰³ which consider[ed] it unfortunate that the offence is not in the Penal Code, but at this stage [had] chosen to focus on making concrete recommendations on how to improve METI's role as the lead ministry on the implementation of the Anti-Bribery Convention".¹⁰⁴ The WGB thus decided that the best way forward was not to insist that Japan move the foreign bribery offence to the Penal Code, mainly because the Group was persuaded by Japan's arguments to maintain the *status quo* since the UCPL had been associated with the foreign bribery offence for 12 years. However, the Working Group stated that it "intend[ed] to revisit the issue of placement of the foreign bribery offence in the UCPL if enforcement of the offence [had] not significantly increased by the time of Japan's two-year Written Follow-up report in December 2013".¹⁰⁵

ii. *Persistence of the status quo*

97. In the Phase 4 questionnaire, Japan was asked to indicate whether consideration has been given since Phase 3 to move the foreign bribery offence from the UCPL to the Penal Code. In response, Japan explained that the purpose of the foreign bribery offense rule is to ensure a level playing field in international commercial transactions, whereas the purpose of the bribery offense law in the Penal Code is to protect fairness of public official's duty and public confidence thereto. According to Japan "[i]t shows that foreign bribery offenses do not belong to the same category as bribery offenses in the Penal Code." Additionally, Japan emphasises that the penal provisions in the UCPL belong to a category known as "special penal laws" under Japanese law and that no differences exist in the way special penal laws and the Penal Code are enforced in practice. Japan hence affirms that no grounded or persuasive reasons justify that the foreign bribery offense be transferred to the Penal Code.

98. Given its prominence in former phases, this issue was revisited in Phase 4, in particular based on enforcement developments, which, if too limited for a large economy like Japan, still tend to show that this offence can be prosecuted and sanctioned as a criminal offence in spite of its placement under the UCPL. It was discussed with panellists who, irrespective of their professional background and role, were unanimously of the view that this is not an issue in any respect. Government representatives invoked functional equivalence to justify the option taken almost 20 years ago now by their government as well as its increased enforcement in recent years. Moreover, following Japan's reasoning on why the foreign bribery offence should be placed under the UCPL, i.e. that its purpose radically differs from the purpose

¹⁰² The UCPL was last amended in 2015. The offence was originally placed under article 10bis(1) of the Law. For relevant background, see Paragraphs 24-35 of Japan's Phase 3 Report.

¹⁰³ Phase 2bis recommendation 2.a. that Japan "enhance the visibility and enforcement of the foreign bribery offence as a matter of priority, notably by moving the foreign bribery offence from the UCPL to the Penal Code"

¹⁰⁴ First paragraph introducing the WGB Phase 3 recommendations.

Third paragraph introducing the WGB Phase 3 recommendations.

of the domestic bribery offence, leads to similarly nuance the impact that jurisprudence on domestic bribery may have on a foreign bribery offence.

Commentary

The lead examiners are of the view that this is a sensitive issue for which functional equivalence can legitimately be invoked by Japan, especially in the absence of clear impediment to enforce the law. They recommend that based on recent enforcement efforts and given the time elapsed since this issue was first raised, the Working Group focus its recommendation on other more specific issues analysed in this report.

b. Bribes that benefit third parties

99. In Phase 3, the Working Group decided to follow up as case law and practice develops on the implementation of the foreign bribery offence in the UCPL, whether in practice the foreign bribery offence covers the case where a bribe has been transferred with the agreement of the foreign public official to a third party, such as a political party, business partner, charity, or family member (follow-up issue 15.a.).

100. Japan Phase 4 questionnaire answers indicate that “there is no update on any case law where the bribe is transferred to a third party”. From the information Japan provided, no case involving a bribe payment to a third party has been investigated to date, and no such allegations have been received. However, METI Guidelines appear to clarify the issue as follows: “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: (i) there is a conspiracy between the said Foreign Public Official, etc. and the said third party; (ii) 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 (iii) the Foreign Public Official, etc. has used the third party as a tool and had him/her receive the money or benefit”.¹⁰⁶ At the on-site visit, while representatives from the legal professions and relevant governmental agencies appeared reasonably satisfied that the METI Guidelines provision clarifies this issue, they also admitted that METI Guidelines have limited legal authority.

Commentary

The lead examiners welcome the clarifications introduced in METI’s Guidelines regarding payments to third parties and they hope that these will play a preventive role in the future. However, given the limited legal value of the guidelines, they believe that in the absence of development in case law, and given the further affirmed specificity of the foreign bribery offence in Japan legal system, this long-standing issue should continue to be followed up by the Working Group.

c. METI’s interpretation of a “wrongful gain” and “duress”

101. Article 18(1) UCPL provides that, in order to fall within the scope of the offence, the bribe should be paid “in order to obtain wrongful gains in business with regard to international commercial transactions.”¹⁰⁷ METI’s interpretation of a “wrongful gain” as reproduced in Japan’s answer is : “(i) 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. exert his/her discretion in a manner favourable to oneself, or (ii) 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.”

102. This interpretation raises concerns as it introduces a limitation that does not exist in Article 1 to the Convention: the requirement that the bribe be paid to obtain a gain “for oneself”. It is too narrow and does not comply either with the consistent interpretation of the Working Group that the bribe could be paid by

¹⁰⁶ METI Guidelines, para. 9, page 29.

¹⁰⁷ These “wrongful gains” under article 18(1) UCPL and in the METI Guidelines correspond to what the Convention more broadly describes as “business or other improper advantage”.

an individual or a legal person for another related (e.g. a subsidiary or a parent company) or unrelated legal person. Limiting the offence to the gains obtained for oneself is also in contradiction with Commentary 6 to the Convention that provides that “The conduct described in paragraph 1 is an offence whether [...] the pecuniary or other advantage is given on that person’s own behalf or on behalf of any other natural person or legal entity.”

103. At least equally concerning, METI’s Guidelines interpret “wrongful gain” in a manner that is in breach of the Convention. The Guidelines start by stating that a “wrongful gain” means “any gain obtained in a manner running counter to public policy or the principle of good faith”. Thus, it is interpreted as giving, offering or promising a bribe in order to have the foreign official either (i) exercise “discretion in a manner favourable to [the bribe-giver]” or (ii) “commit an illegal act”. The METI Guidelines recognise that duress may negate the “wrongful gain element” in certain cases – for example, if compelled to give a bribe to avoid “danger to one’s own life or body”. However, METI further suggests that even economic harm to a company could justify bribery. After the on-site, METI acknowledged that this interpretation was not supported by statute or Supreme Court jurisprudence. Moreover, this interpretation is not compatible with the Convention and would constitute a major loophole.

d. METI’s interpretation of the exception in the law of the bribe recipient under Commentary 8 to the Convention

104. The METI Guidelines list the different elements of the foreign bribery offence under section 3.1, which elaborates on article 18(1) UCPL. In its introductory overview the Guidelines conclude with the following caveat: “Incidentally, this paragraph does not intend to punish any conduct of offering any benefit that is not prohibited under the local law (meaning statutory laws and case law)”.¹⁰⁸ This caveat explicitly refers to Commentary 8 to the Convention, which is quoted in a footnote: “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.”

105. While the quote in the footnote is correct, the caveat in the METI Guidelines is wrong *per se* and in contradiction with Commentary 8, which specifies that it is not an offence if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law. It would require that the prosecutor prove that the law of the foreign public official prohibits the benefit, which would also be against the requirement that the foreign bribery offence be autonomous from the law of the public official’s country. On the contrary, Commentary 8 requires that the defendant establishes the proof that the foreign official’s country’s law explicitly permits or requires the advantage granted to the foreign public official. During the on-site visit, MOJ representatives argued that the Guideline’s objective was simply to refer to Commentary 8 to the Convention. They however admitted that a defendant could possibly argue to negate any wrongful intent based on this provision in the Guidelines, and that it would create an expectation that a tangible law should be provided by the prosecutor to respond to an attempt of the defendant to defend himself. Adding to the potential confusion, METI informed the evaluation team after the on-site that the UCPL did not actually contain a provision that would exempt a “payment permitted or required under the local law”, so it was not clear whether Commentary 8 would have any direct relevance to the interpretation of Japan’s foreign bribery offence.

¹⁰⁸ METI Guidelines, p. 23.

Commentary

The lead examiners recommend that Japan review the METI Guidelines to clarify that: (i) 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) any references to Commentary 8 to the Convention accurately describe its relevance to the UCPL and also reflect Commentary 8’s actual text, which provides that “[foreign bribery] 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.”

e. Use of alternative or related offences in foreign bribery cases

106. As noted in other Phase 4 reports, in many foreign bribery cases, the perpetrators will have committed additional offences, such as false accounting or money laundering, in an attempt to conceal their crime. In such cases, prosecutors could bring charges for these offences alongside foreign bribery charges. This possibility was encouraged by the Working Group in other country reports to avoid that the foreign bribery offence remain unpunished, in order to either fast track or secure the conclusion of a case for instance to avoid that foreign bribery offences become statute barred. This is particularly true in countries where, as in Japan, the period of limitations is short (see discussion under section B.4.c.).¹⁰⁹

107. In Japan, whether the use of alternative offences is considered when all the elements of the foreign bribery offence are not present or may be too difficult to prove has been discussed with the MOJ representatives, prosecutors and judges during the onsite visit and they unanimously confirmed that due consideration is given to such alternatives in each case. To date, this assertion is supported by limited practice but the lead examiners were encouraged by the approach that prosecutors took in one case (*Construction case*) to alternatively prosecute the offender for the violation of the Foreign Exchange and Foreign Trade Act.

Commentary

The lead examiners recommend that the Working Group follow up as case law develops the use made by Japan of alternative offences to foreign bribery to ensure that foreign bribery related offences do not remain un-punished, in particular when the foreign bribery offence itself may be time-barred.

f. Small facilitation payments

108. Japan Phase 3 report notes that Japan’s offence of bribing a foreign public official in the UCPL does not provide a defence or exception for small facilitation payments, as permitted by Commentary 9 on the Anti-Bribery Convention.

109. Phase 3 recommendation 8 provides that Japan should “periodically review its policies and approach on small facilitation payments and urgently take steps to encourage companies to prohibit the use of such payments in their internal company controls, ethics and compliance programmes or measures.”¹¹⁰ At the time of Phase 3 Written Follow-up report, recommendation 8 was deemed partially implemented because METI’s Guidelines continued to contain unclear information on the legality of facilitation payments under Japanese law, as well as on what comprises a facilitation payment. Beyond the specific small facilitation payments issue, this raised heightened concerns about the suitability of METI’s interpretive role.

110. The Phase 4 questionnaire responses indicate that “small facilitation payments” were never included in the UCPL and that “the Act has prohibited what should be prohibited, in other words, any act of obtaining improper business advantage in international business.” This response is problematic in the

¹⁰⁹ Germany 2011 [Phase 3 report](#), and 2018 [Phase 4 report](#); as well as Finland 2017 [Phase 4 report](#)

¹¹⁰ This recommendation is using language very similar to the one in Paragraph VI of the 2009 Recommendation. For relevant background, see Paragraphs 18-23 of Japan’s Phase 3 Report.

sense that Commentary 9 to the Convention specifies that “Small ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage’ within the meaning of paragraph 1 [of Article 1 of the Convention]”. These payments, which are not “small bribes” but payments of a different nature, that are not aiming at obtaining an improper advantage but rather an advantage that is due and that does not involve discretion on the part of the public official, are hence not, legally speaking, forbidden under article 18 UCPL.

111. The METI Guidelines were last amended in 2017 and no longer provide any information on facilitation payments. Japan should be commended for removing the ambiguous information that it formerly contained. However, total silence cannot be considered as implementing paragraph VI. (and VII.) of the 2009 Recommendation nor Phase 3 recommendation 8 (which uses similar language) that Japan “urgently take steps to encourage companies to prohibit the use of such payments”.

112. The total lack of information on what is a small facilitation payment in fact creates a grey area that is at least equally problematic as the former ambiguous example. As the Working Group found in other countries, it raises concerns that a *de facto* exception for small facilitation payments (i.e. not covered under the foreign bribery offence provision or any other text or guidance) may in practice encompass certain types of payments that would not necessarily qualify as small facilitation payments in terms of the Convention and its Commentary 9, particularly in the absence of a requirement that such payments be “small”.¹¹¹ The lead examiners regret that the opportunity of revising the METI Guidelines has not been seized to clarify the scope of the exception and implement Phase 3 recommendation 8.

113. During the on-site visit, the lead examiners’ concerns were partially alleviated because the private-sector representatives consistently maintained that the use of such payments are now prohibited – or, in a small minority of companies represented during the visit, at least discouraged – in their internal company controls, ethics and compliance programmes. This appears to, at least partially, result from the seminars METI conducted to raise awareness of the offence of foreign bribery among Japanese companies. A list of 70 seminars held by METI from 2014 to 2018 was provided in support to Japan’s responses. It shows that these meetings were held in Japan’s large and medium cities with a number of attendees that varied from 17 to 1003. Both METI and the private-sector representatives’ statements at the on-site visit indicate that at least a number of these meetings addressed the small facilitation issue identified in Phase 3. Nonetheless, the definition a small facilitation payment and the fact that it is not “a small bribe” appeared to remain ambiguous for some panellists and still needs to be clarified.

Commentary

The lead examiners believe that the Working Group should commend Japan for removing the ambiguous definition and example of facilitation payments from METI Guidelines. They also commend Japan and its private sector’s effort to banish small facilitation payments from their commercial practice.

Given the remaining ambiguity regarding the exact scope and definition of a small facilitation payment, the lead examiners recommend 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.

B.2. Sanctions against Natural Persons for Foreign Bribery

a. Criminal sanctions for natural persons

114. In Phase 3, the WGB expressed concern that the sanctions available under the UCPL and imposed in practice against natural persons might not be sufficiently effective, proportionate and dissuasive, in accordance with Article 3 of the Convention (recommendation 1). By the Phase 3 written Follow-up

¹¹¹ Germany 2018 [Phase 4 report](#), at para. 93-97, and Germany 2011 [Phase 3 report](#).

Report, Japan had not taken any steps to address the WGB’s recommendation. Instead, Japan argued that the level of sanctions available for the foreign bribery offence is adequate and more severe than for domestic bribery, which carries a maximum penalty of 3 years imprisonment or alternatively a JPY 2.5 million fine (i.e. half the maximum available for foreign bribery).

115. Sanctions against natural persons remain unchanged since Phase 3. Pursuant to Article 21(2) of the UCPL, a natural person who commits foreign bribery is subject to a maximum prison sentence of five years and/or a maximum fine of JPY 5 million (USD 65°000). Imprisonment and a fine can be imposed separately or together. In contrast, UCPL offences involving the infringement of trade secrets carry higher sanctions. For instance, the offence of disclosing a trade secret is punishable by a maximum prison sentence of ten years, a maximum fine of JPY 20 million, or both (article 21(1) UCPL).

b. Sanctions imposed in practice

116. In Phase 3, the Working Group was not satisfied that the fines imposed met the standard under Article 3 of the Convention. Those concerns have only been reinforced by the cases concluded since Phase 3. Monetary fines have fallen within the lower range available and all prison sentences have been suspended. The possibility to impose both a prison sentence and a monetary sanction has never been used. Monetary sanctions have only been imposed in the context of summary orders, whereas prison sentences have systematically been imposed following a full court trial.

i. Monetary sanctions imposed continue to be quite low and within the lower range available

117. As in Phase 3, the monetary sanctions imposed continue to be quite low and within the lower range available. The maximum fine available for foreign bribery has never been imposed. Instead, the highest monetary fine imposed in Japan to sanction foreign bribery corresponds to USD 4°404 (JPY 500°000) in the *Kyudenko case* and in the *Futaba case* concluded since Phase 3. In the *Futaba case*, the value of the bribes was estimated at HKD 30 000 (equivalent to JPY 426 000 at the time – less than USD 4 000) as well as a woman handbag of equivalent value of JPY 145 112 (approx. USD 1 340). The value of the benefit that Futaba obtained by engaging in bribery to avoid sanctions for customs regulation violations is not clear.

ii. Sentences of imprisonment for foreign bribery have all been suspended

118. Regarding the length of prison sentences, the sentences imposed against 9 natural persons in 3 cases since 1999 have ranged between 16 months to 3 years. All these prison sentences were suspended. In Phase 3, Japan claimed that the imposition of suspended sentences in foreign bribery cases was in line with sentences imposed for other financial and economic crimes.¹¹² However, the WGB still considered that the suspended prison sentences imposed at the time might not be considered sufficiently “effective, proportionate and dissuasive”.

119. Since Phase 3, prison sentences have been imposed against five individuals in two cases. In the *JTC case*, the three natural persons received suspended prison sentences ranging from two to three years. In this case, the amount of bribes totalled USD 1.6 million and the value of the contracts obtained reached USD 42 million. The Tokyo District Court followed the sentences recommended by the public prosecutors and ruled that “the degree of the violation of law was excessive” and that “this case is regarded as a relatively serious one in this category of offence”.¹¹³ It is striking that even a foreign bribery case that is found to be quite significant by the Court only results in suspended prison sentences.

120. Similarly, in the *Mitsubishi case*, the two defendants received suspended prison sentences of 18 months and 16 months respectively. The employees had paid the equivalent of hundreds of thousands of dollars in bribes (11 million baht - approx. JPY 39 million).

¹¹² Phase 3 report, paras. 13 and 44.

¹¹³ Tokyo District Court (February 4, 2015) Special Case (Wa) No. 970 and No. 1092 of 2014.

iii. Aggravating and mitigating factors taken into account

121. In the cases concluded since Phase 3, the courts took into account several mitigating factors, in particular the confession of the accused, which has occurred in all the cases concluded to date through a full trial proceeding. In the *JTC case*, the Tokyo District Court took into account questionable factors, including the fact that one of the defendants “had contributed greatly to infrastructure development in countries in Southeast Asia” through his long-time involvement in overseas project since 1955. Aggravating factors were also taken into account, including the fact that the executives held managerial positions. The court also observed that one of the executives continued to give bribes, “even after becoming aware of the reality of its overseas bribery through [a] tax inspection by the National Tax Agency”.

iv. Sanctions imposed are not deterrent

122. Overall, the sanctions that have been imposed in Japan, whether prison sentences or monetary penalties, appear to not be commensurate to the scale of the five foreign bribery cases concluded to date. This is particularly true with regard to the seriousness of the offence, the repeated nature of the offences, which in some instances occurred over a significant period of time (*e.g.* over four years in the *JTC case*), the amounts involved, both in terms of the value of the bribes paid (*e.g.* up to total of USD 1.6 million in the *JTC case*) and the amount of the contract obtained as a result of bribery (*e.g.* USD 42 million in the Vietnamese branch of *JTC case*).

123. Private sector lawyers at the on-site visit echoed concerns that the sanctions imposed in practice are not effective, proportionate and dissuasive. They explained that court precedents are an important factor in sentencing. For instance, one private sector lawyer indicated that he believed the Tokyo District Court in the *JTC case* considered the sanctions imposed in the *PCI case*. In both cases, the court imposed suspended prison sentences not exceeding three years. Yet the facts and scale of the two cases are different. Although the *PCI case* related to the bribery committed in one country during three years to secure a USD 24 million contract, the *JTC case* involved bribery committed in three countries over six years to obtain large contracts in projects funded by Japan’s ODA worth at least twice as much (*i.e.* USD 42 million contract obtained in Vietnam alone). Japan could not provide statistics on the sentences imposed on natural persons for other financial and economic crimes codified in the UCPL. When finalising this report, the Supreme Court indicated that the majority of the prison terms imposed for disclosing trade secrets under article 21(1) UCPL against the 14 natural persons sanctioned between 2015 and 2018 were also suspended.

124. The value of court precedent at sentencing is even more striking when looking at the monetary penalty imposed against the one defendant in *Futaba case*, which are similar to the penalties imposed against one of the defendant in the *Kyudenko case*. In these cases, two defendants received a JPY 500°000 monetary sanctions, even if the *Kyudenko case* involved a single bribe payment of JPY 800 000 (USD 10 400) and the total value of the bribe was JPY 560°000 (USD 5°025) in the *Futaba case*.

Commentary

The lead examiners are seriously concerned that the sanctions for foreign bribery imposed in practice are quite low by the Working Group on Bribery standards. As a result, Phase 3 recommendation 1 remains not implemented. The lead examiners are also concerned that Japan’s statutory sanctions are also not effective, proportionate, and dissuasive. Japan should take appropriate measures to ensure that it satisfies the requirements of Article 3 of the Convention. The lead examiners thus recommend that Japan enact legislation to substantially increase the statutory maximum fine for natural persons convicted of foreign bribery.

In addition, they 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.

c. Confiscation of the bribe and the proceeds of foreign bribery

125. A key concern of the Working Group in its evaluations of Japan has been the lack of legislative provisions on the confiscation of the proceeds of foreign bribery upon a conviction. The WGB has voiced serious concerns over this issue since Phase 1, in 2002.¹¹⁴

126. In June 2017, Japan finally amended the AOCL to allow for the confiscation of proceeds of foreign bribery under the UCPL. Pursuant to Article 2(2) of the AOCL, the term “crime proceeds” now extends to “any property produced by, obtained through, or obtained in reward for a criminal act” for offences punished with imprisonment of more than four years. The extended definition of “crime proceeds” now covers the proceeds of bribing a foreign public official under the UCPL. In September 2017, METI amended its Guidelines accordingly.¹¹⁵ This Phase 4 evaluation is the Working Group’s first formal opportunity to review this new provision.

127. Under this revised regime, confiscation can only be imposed as a result of a conviction. Confiscation is not a statutory penalty but an additional penalty pursuant to article 9 of the PC and article 13(1) AOCL. While the definition of “proceeds of crime” in the AOCL is linked to the length of the term of imprisonment, during the on-site visit, Japan confirmed that the amended provision allows law enforcement authorities to confiscate proceeds of foreign bribery held by a legal person. Japan also confirmed that the five-year limitation period applicable to foreign bribery and to the laundering of proceeds of foreign bribery also extends to the confiscation of proceeds deriving from such bribery, as confiscation is a supplementary punishment under article 9 PC.

128. The new definition of crime proceeds covers both directly and indirectly obtained proceeds pursuant to articles 2(3) and 13(1)-(2) AOCL. However, the provision does not always extend to proceeds detained by third party beneficiaries. During the on-site visit, the MOJ also indicated that the “property produced by, obtained through, or obtained in reward for a criminal act” would only to some extent cover crime proceeds detained by third party beneficiaries. Pursuant to article 15(1) AOCL, proceeds detained by third party beneficiaries can be confiscated if it can be established that the third party beneficiary obtained the illicit proceeds “while knowing the circumstances of the crime” and therefore would be complicit. However, representatives of the MOJ clarified that if the third party beneficiary acted in good faith and was not complicit, the proceeds detained could not be confiscated.

129. From a procedural standpoint, the amendment introduced a discretionary regime of confiscation. As a result, confiscation will not be imposed automatically upon a foreign bribery conviction but will have to be sought by the prosecution pursuant to article 293 CPC. During the on-site visit, the MOJ indicated that because courts are not bound by prosecutors’ closing statements. Courts can impose confiscation in a foreign bribery case even if not requested by the prosecution.

130. The prosecution will need to quantify the amount of proceeds deriving from the commission of the offence upon requesting confiscation measures. However, Japanese authorities have not yet been equipped to identify and quantify proceeds deriving from foreign bribery for the purpose of confiscation. Other than circulating a copy of the amendment to the AOCL within the Prosecution Service, Japan has not taken measures to make law enforcement authorities, prosecutors and judges aware of this new provision, and no guidelines have been developed on how to quantify the proceeds or benefits of foreign bribery. During the on-site visit, the MOJ indicated that in the absence of guidelines, the prosecutors

¹¹⁴ Japan [Phase 1 Report](#), pp. 15-16; [Phase 2 Report](#) paras. 98-99; [Phase 3 Report](#) paras. 79-82, [Phase 3 Follow-up Report](#) p.4. Japan was also requested to provide additional oral and written reports (in June 2012, December 2012, December 2013, March 2014, June 2014, October 2014, December 2014, June 2015, March 2017, and June 2017). Multiple letters from the WGB were sent to the MOFA, MOJ, METI as well as the Chairman of the National Public Safety Commission (i.e. in November 2009, September 2012, February 2014 and December 2016). A public statement was published in June 2014, voicing the WGB’s concerns over Japan’s continued failure to adopt the necessary amendments to the AOCL. The WGB also sent a High-Level Mission to Tokyo in June 2016 to convey its concerns

¹¹⁵ METI Guidelines for the Prevention of Bribery of Foreign Public Officials, p.3 and 47.

would rely on case law in domestic bribery cases as an indicator to determine the appropriate value to confiscate. However, the proceeds deriving from the commission of the foreign bribery offence are held by the bribers and largely differ from those deriving from domestic bribery, which can be traced back to the domestic official.

131. The amendment is not retroactively applicable (article 6 of the PC and article 39 of the Constitution) and hence cannot be applied in on-going investigations and prosecutions. It will therefore take some time before the WGB can assess its enforcement in practice. As this revised confiscation regime has yet to be tested, it remains to be seen what factors will be taken into account to decide whether or not to confiscate criminal proceeds.

Commentary

The lead examiners welcome the entry into force of the amendment to the AOCL in June 2017. This closes a significant loophole in Japan's implementation of Article 3(3) of the Convention with the newly introduced possibility to confiscate the proceeds of foreign bribery. Japan should now ensure that confiscation is routinely sought and imposed in foreign bribery cases, where appropriate. Japan should also ensure that the police and the prosecution are adequately resourced with financial analysts and accounting experts to assist in this task. The lead examiners recommend 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.

They also recommend that the Working Group follow up on the use of confiscation measures in foreign bribery cases as case law develops.

B.3. Investigative and Prosecutorial Framework

132. Since Phase 2, the Working Group has expressed concern about the apparent lack of enforcement in foreign bribery cases. For this reason, it has carefully assessed Japan's legal and institutional frameworks for fighting foreign bribery and repeatedly called for increased coordination among its law enforcement agencies.¹¹⁶

a. Japan's police force has started developing specialisation for foreign bribery

i. Overview of Japan's police force

133. The overall police structure in Japan is largely unchanged from Phase 2.¹¹⁷ At the national level, the police force is headed by the National Police Safety Commission, which sets policing policy and oversees the National Police Agency (NPA). The NPA in turn administers police resources at the national level and supervises the activities of the local police in Japan's 47 prefectures. The prefectural police departments are the units responsible for exercising actual police powers, such as conducting the actual criminal investigations, making arrests, or generally maintaining public safety.

134. Both the NPA and each prefectural police department have Second Investigative Divisions, which are responsible for economic crimes including foreign bribery. The NPA's Second Investigative Division has had a foreign bribery section since April 2007.¹¹⁸ Since April 2014, one or two executive officers in each prefecture's Second Investigative Division have been assigned responsibility over foreign bribery matters. According to Japan, the designated officers have "central roles in collecting and analysing information on possible foreign bribery cases". Japan believes that because the prefectural Second Investigative Divisions handle a variety of financial crimes, they are more able to detect foreign bribery.

¹¹⁶ [Japan Phase 3 Report](#), paras. 54, 66-72; [Phase 2bis Report](#), paras. 65-72 & 90-93; [Phase 2 Report](#), paras. 9-12 & 55-56.

¹¹⁷ Japan Phase 2 Report para. 75 & n. 59.

¹¹⁸ [Japan Phase 3 Report](#) para. 67.

In the *Futaba case*, for example, the police investigators discovered the foreign bribery angle while investigating suspected accounting and securities fraud.

ii. *Police resources and training for foreign bribery enforcement*

135. During the on-site visit, Japan's police representatives could not provide the financial resources available for foreign bribery specifically or for white-collar crime more generally. From the most recent NPA data publicly available, the overall police budget in FY2017 was just over JPY 3.6 trillion,¹¹⁹ as compared with just under that figure immediately after the Phase 3 evaluation.¹²⁰ While the primary FY2017 budget of JPY 3.32 trillion was slightly lower than in FY2016, the NPA's budget for prefectural subsidies increased slightly to make up the difference. Overall, the prefectural police accounted for nearly 94% of the total police budget, with 80% of the prefectural police budget being devoted to personnel costs. It is not clear from these annual reports how much the police spent on investigations for any criminal offence or for white-collar crimes in particular.¹²¹

136. In terms of human resources, Japan reported that the prefectural Second Investigative Divisions devoted to financial crime collectively have 3 000 police staff members. In the three largest prefectural police departments (Tokyo, Osaka, and Aichi) these divisions have between 100 and 380 staff each. In the smallest prefectures, the divisions have approximately a few dozen staff members. The personnel devoted to financial and white-collar crime is only a tiny fraction (approximately 1%) of the total prefectural police force, which in 2017, had 288 000 personnel.¹²² After the on-site visit, Japan reported that police officers in the Second Investigative Division do not necessarily rotate every two or three years. During the on-site visit, police representatives maintained that the formal allocation of personnel to the Second Investigative Division was not dispositive, as they would staff foreign bribery matters as needed by drawing officers from other units. Furthermore, they explained that the NPA's Second Investigative Division would also help provide a sounding board for advice about how to conduct an investigation or to ensure that knowledge acquired from one prefectural department's investigation will be shared with the others.¹²³

137. In terms of skills and training, following the on-site visit, the police report that they have actively recruited accountants with financial forensic expertise or other relevant white-collar investigative backgrounds. In addition, they provide investigators with educational programmes to develop skills needed to conduct white-collar investigations. Specifically, the NPA reports that it gives lectures on foreign bribery offences and investigation methods at the National Police Academy. In the past three years, it has held 16 regular training sessions for various categories of police officers who potentially could be involved in investigations of foreign bribery matters, white-collar crime or international crimes. For administrative reasons, Japan could not provide details on the number of officers who received these trainings or how long officers would be assigned to work with the Second Investigative Division.

Commentary

The lead examiners found that Japan has made efforts to ensure that its prefectural police forces have a greater awareness and capacity to detect and investigate foreign bribery. The lead examiners welcome that one prefectural police force in fact detected a foreign bribery case while investigating another matter. They strongly recommend that the police force continue to develop and maintain specialisation in foreign bribery matters and the recovery of the proceeds of crime as well as to ensure that such knowledge is not dissipated through personnel rotations. In addition, the police should

¹¹⁹ See NPA, "[Police of Japan 2018](#)", p. 11.

¹²⁰ NPA, "[White Paper on Police 2012](#)", page 53.

¹²¹ See NPA, (Feb. 2019) "[Police of Japan 2018](#)", p. 11; and NPA, (Feb. 2019) "[White Paper on Police 2017](#)", p. 34.

¹²² National Police Agency (2019), "[Police of Japan 2018](#)", p. 8 and 11. .

¹²³ [Japan Phase 3 Report](#) para. 67.

periodically review the sufficiency of the resources available for detecting and investigating foreign bribery.

b. Japan's Public Prosecutors Offices have also started developing foreign bribery specialisation

i. Overview of Japan's Public Prosecutors Offices

138. In Phase 3, the Working Group recommended that Japan ensure that its Public Prosecutors Offices expressly assign foreign bribery to the special investigative divisions having responsibility for economic and financial crimes (recommendation 4.b.i.). It also recommended that Japan ensure that the special investigative divisions have adequate resources and capacity to detect, investigate and prosecute foreign bribery cases (recommendation 4.b.ii.). The Working Group concluded that recommendation 4.b. was only partly implemented and asked Japan to develop and implement an Action Plan to enhance law enforcement capacity in foreign bribery cases.¹²⁴

139. Japan's Public Prosecutors Office system, a special organisation of the MOJ, is headed by the Prosecutor General. It is composed of four levels: one Supreme Public Prosecutors Office (SPPO), High Public Prosecutors Offices at the regional level, District Public Prosecutors Offices (DPPO) at the prefectural level; and Local Public Prosecutors Offices.¹²⁵ Prosecutors at the DPPO level would initially handle foreign bribery investigations or prosecutions. Notably, the three largest DPPOs in Tokyo, Osaka, and Nagoya have all established special investigative divisions to investigate white-collar crimes. While Japan could not provide precise current figures, these units have historically only constituted a tiny fraction of Japan's prosecution service.¹²⁶ In April 2014, the senior prosecutor and prosecutor's assistant of those special investigative divisions were designated as the prosecutors in charge of foreign bribery.

ii. Prosecution resources and training for foreign bribery enforcement

140. In terms of financial resources, the MOJ reports that the Public Prosecutors Offices have appropriated more than JPY 15 million (USD 135 000; EUR 119 000) to enhance the fight against financial and economic crime, including foreign bribery, in response to crime trends in Japan. It is not clear how this figure compares with previous budgets for financial and economic crime. In its questionnaire responses, Japan maintains that it has "ensur[ed] the necessary budget" for prosecuting financial crimes.

141. In respect of human resources, the Public Prosecutors Offices report that they have increased the number of prosecutors in part to fight economic crimes. The MOJ reported that Japan currently has just over 2 700 prosecutors, a slight increase from Phase 3. While it could not specify how many prosecutors were assigned to white-collar crime nationwide, the MOJ reported that the total number of prosecutors in the three largest DPPOs was 747 (Tokyo), 213 (Osaka), and 135 (Nagoya). Like the police force, representatives from the Public Prosecutors Offices maintained during the on-site visit that the formal staffing assignments are not particularly relevant because they would, as in the *JTC case*, staff prosecutors from other units to a foreign bribery matter as needed. In that case, the lead prosecutor from the investigating Special Investigative Division was assisted both by prosecutors from other departments within the same DPPO as well as from other locations.

142. With regard to training, the Public Prosecutors Offices have sent Special Investigative Division team members to attend foreign bribery conferences organised by U.S. law enforcement agencies on at least five separate occasions since Phase 3. In addition, Japan invited German experts to conduct seminars on foreign bribery for Japanese judges and prosecutors in 2018. Japan reported that approximately 30 prosecutors or prosecutor's assistant officers participated the conferences, while more than 100 law enforcement officials or judges participated in the seminars. During the on-site visit, some

¹²⁴ [Japan Phase 3 Follow-up Report](#) page 5.

¹²⁵ [Japan Phase 2 Report](#), para. 75 & n. 59; and MOJ, "[Public Prosecutors Office](#)".

¹²⁶ David T. Johnson, *The Japanese Way of Justice* (2000), page 8.

prosecutors reported that they or their colleagues had also acquired valuable white-collar experience from secondments with other Japanese agencies, including the NTA and the Securities Exchange and Surveillance Commission (SESC). They indicated that such knowledge could be shared if a foreign bribery investigation arose. At the same time, it became clear during the on-site visit that prosecutors, including those in the Special Investigative Divisions, are usually transferred after two or three years. Thus, a prosecutor who has developed foreign bribery expertise could, for example, be transferred to investigate and prosecute homicide or organised crime in a subsequent posting. The concerns that this also raises regarding the respective role of the PPOs and the MOJ are discussed under section B.4.a.iii.

Commentary

The lead examiners found that Japan has made efforts to ensure that the prosecutors responsible for financial crimes are also aware of the need to focus on foreign bribery. Its Public Prosecutors Offices have encouraged a small number of prosecutors to attend conferences or other educational programmes to develop their knowledge base for investigating and prosecuting foreign bribery. The lead examiners recognise that Japan has increased resources in recent years to fight financial crime, including foreign bribery. Thus, Phase 3 recommendations 4.b.i and 4.b.ii. can be considered as implemented. At the same time, the lead examiners are uncertain how effective this training is, given that prosecutors rotate positions every few years.

The lead examiners strongly recommend that the Public Prosecutors Offices: (i) continue to develop specialisation in foreign bribery matters; (ii) ensure that such knowledge is not dissipated through personnel rotations, and (iii) ensure that personnel rotation within the Public Prosecutors Offices is staggered to ensure continuity in the cases, particularly when the statute of limitations may lapse.

c. Coordination between relevant law enforcement agencies

143. Previously, in Phase 2bis, the Working Group recommended that the prosecutors consider involving the police in foreign bribery investigations given that the police had more human resources for investigating offences. In Phase 3, the Working Group recommended that Japan enhance its framework for investigating foreign bribery cases by ensuring that the Public Prosecutors Offices, *inter alia*, coordinate with police and other relevant agencies (recommendation 4.b.iii.). During the follow-up report, the Working Group found that Japan had only partly implemented this recommendation. As a result, it asked Japan to develop an Action Plan to ensure that, *inter alia*, police and prosecution resources are available to “proactively detect, investigate and prosecute foreign bribery cases”.¹²⁷

i. Action Plan

144. In March 2014, Japanese authorities began developing an Action Plan to address the Working Group’s concerns about the lack of coordination of police and prosecutorial resources for fighting foreign bribery. In April 2014, the NPA decided to appoint one or two senior officers from each prefecture’s Second Investigative Division as being responsible for foreign bribery matters. Likewise, in April 2014, the Public Prosecutors Offices designated the senior prosecutor and prosecutor’s assistant of those Special Investigative Divisions in the three largest DPPOs (Tokyo, Osaka, and Nagoya). Japan considered forming special foreign bribery teams, but ultimately did not. Instead, the designated foreign bribery personnel in the police and prosecution will supervise other colleagues who are assigned to work on a given case. The staff assigned may come from other divisions or even another office, depending on the needs of the case.

145. Japan reports that the designated police officers are “required to acquire knowledge and skills” related to the foreign bribery offence under the Action Plan. Japan also maintains that the Action Plan has made investigators “better aware of the need to combat bribery of foreign public officials”. For their part, prosecutors from the Special Investigative Divisions have participated in conferences abroad and

¹²⁷ [Japan Phase 3 Follow-up Report](#), p. 5.

other forms of training to develop expertise. Japan reported in its questionnaire responses that pursuant to the Action Plan, the police officers and prosecutors in charge of foreign bribery matters “regularly discuss in person and share information” regarding foreign bribery cases. However, during the on-site visit, it appeared that the law enforcement agencies only met as needed on an *ad hoc* basis.

146. In terms of the Action Plan’s overall impact, police representatives during the on-site visit believed that it has raised awareness about the need to fight foreign bribery. Likewise, Japan reports that the designated prosecutors have now acquired a “central role in collecting all the information relevant to foreign bribery case and actively using it”. For example, in the *JTC* and *Mitsubishi cases*, the company or its corporate representative first disclosed the foreign bribery scheme to the Tokyo DPPO’s designated foreign bribery prosecutor. Nonetheless, Japan has only concluded three foreign bribery cases in the nearly five years in which the Action Plan has been in effect. In contrast, Japan had completed two foreign bribery cases in the five years between the Phase 2bis and Phase 3 evaluations. Thus, the Action Plan has not yet had a marked impact on Japan’s ability to detect, investigate and prosecute foreign bribery.

ii. *Coordination between the police and prosecution services*

147. As discussed in prior evaluations, both the prefectural police and the Public Prosecutors Offices have the authority to investigate crimes.¹²⁸ By law, the police are the primary investigative authority, although prosecutors also have the authority to investigate cases. In practice, the police assume responsibility for investigating matters, including foreign bribery allegations, that they detect, until they transfer the file to the prosecution. For their part, when the Public Prosecutors Offices detect a foreign bribery matter, they could ask the police to investigate it. In its questionnaire responses, Japan reports that the police and prosecutors have a “cooperative relationship” that is “robust and smooth”. Nonetheless, it became clear during the on-site visit that in practice the Public Prosecutors Offices have not yet sought the assistance of the police in any foreign bribery matter that advanced to the prosecution phase.

148. As a result, the Public Prosecutors Offices have had almost exclusive control over Japan’s foreign bribery cases to date.¹²⁹ According to Japan, the police have only been involved in one foreign bribery matter that was partly concluded with sanctions since Phase 3: in the *Futaba case*, the police uncovered evidence of potential foreign bribery while investigating the company for other criminal violations. The police and prosecutors then worked closely together to establish the facts, jointly interviewing witnesses and reviewing company documents and emails. During the on-site visit, the police also reported having once been involved in a potential foreign bribery matter received through their network of foreign attachés before Phase 3. Despite close coordination with police officials in the foreign country over a multi-year investigation, that case was ultimately dropped as the police were not able to establish that a foreign official had been bribed.

149. During the on-site, both law enforcement personnel and non-government representatives confirmed that the Public Prosecutors Offices tend to conduct complex white-collar cases. In their view, the foreign bribery offence is thus not being handled any differently than comparable economic offences. According to UNAFEI, a UN-affiliated regional research institute administered and funded by the Japanese government, while the police force typically investigates virtually all of the cases that result in prosecution, prosecutors have long handled investigations of complex cases entirely on their own, including domestic bribery and other financial crimes involving high-profile politicians and

¹²⁸ See, e.g., [Japan Phase 2 Report](#) para. 73; [Japan Phase 2bis Report](#) paras. 90-93

¹²⁹ [Japan Phase 3 Report](#), para. 72.

executives.¹³⁰ Independent scholars have also noted that prosecutors tend to retain control of high-profile investigations, especially in corruption cases.¹³¹

150. At the same time, according to public statistics, the police received on average 60 reports of domestic corruption offences per year between 2013 and 2017. They reported clearing on average 57 of those cases per year during the same time period.¹³² While it is not known how many corruption matters the Public Prosecutors Offices handled during that time period, the police has both the capacity and ability to conduct corruption-related investigations as demonstrated in the *Futaba case*. Furthermore, as the Working Group has recognised before, the police workforce is considerably larger than each prosecution office.¹³³ For comparison, the size of Tokyo prefectural police’s white-collar unit is just over half as large as the total number of prosecutors in the Tokyo DPPO (380 versus 747, or 51%), while the size of Aichi prefectural police’s white-collar unit alone is nearly three-fourths as large as the number of prosecutors in the corresponding Nagoya DPPO (100 versus 135, or 74%).

Commentary

The lead examiners acknowledge that Japan has endeavoured to devise and implement an Action Plan to formally designate the personnel responsible for foreign bribery within both the police and prosecution services. However, the Action Plan does not yet appear to have had much real-world impact. While designating foreign-bribery contact points within Japan’s law enforcement agencies could potentially facilitate coordination, the lead examiners are concerned that the police and prosecution services do not in fact tend to cooperate in concrete foreign bribery cases unless the police first detected the matter.

The lead examiners believe that Japan should make better use of the resources that it has available to fight foreign bribery in a sustained fashion. They thus recommend that Japan ensure that the Public Prosecutors Offices routinely consult with the National Police Agency’s Second Investigative Division when beginning a potential foreign bribery matter in order to make full use of available police resources, including at the prefectural level and the network of police attachés abroad, in foreign bribery investigations. The lead examiners also recommend that, on the occasion of its follow-up reports, Japan report to the Working Group specific examples of how the police and prosecutors cooperate in investigating pending and future foreign bribery investigations and, if the police is not involved in a particular matter, that Japan explain why not.

B.4. Conducting a Foreign Bribery Investigation and Prosecution

a. Opening and terminating foreign bribery investigations

151. No recommendation was made in former evaluation phases in relation to opening and terminating investigations. In Phase 4, against the Japanese background of lack of enforcement, the evaluation team spent time trying to understand the involvement of different agencies and the criteria that preside over decisions to open or terminate investigations with a view to identify possible impediments to investigating and prosecuting foreign bribery.

152. In its Phase 4 questionnaire responses, Japan indicates that under the Code of Criminal Procedure (CCP), the investigative authority starts an investigation “when it deems that an offense has been committed”, a decision that needs to be grounded on sufficient circumstantial evidence. Getting to that point may, in some cases, involve consultations with various non-law enforcement agencies as discussed in the sections below.

¹³⁰ UNAFEI, (1996) “[The Criminal Justice System in Japan: Prosecution](#)”

¹³¹ See, e.g., David T. Johnson, *The Japanese Way of Justice: Prosecuting crime in Japan* (2000), page 60 & n.8.

¹³² National Police Agency (2019), “[Police of Japan 2018](#)”, Appendix 2, p. 60. .

¹³³ [Japan Phase 2bis Report](#), paras. 90-94.

i. Investigations of foreign bribery in practice to date

153. Only twelve foreign bribery cases are under investigation at the time of finalising this report, a number that is very small given the size of Japan's economy and exposure to high-risk countries and sectors. Twelve other investigations have been discontinued before any charges had been filed. In Phase 3 already, the investigation of five cases had been discontinued. Since Phase 3, the investigation of three cases was discontinued, *inter alia*, because the limitation period for the foreign bribery offence had lapsed. Three other cases were discontinued for lack of evidence, and other charges were laid in the last one. In addition, the limitation period prevented the prosecution of one legal person. As a result, only the related individual could be prosecuted.

154. With the exception of the *Futaba case*, in which the Aichi Prefectural Police was involved, all cases reported by Japan were investigated by the prosecutors only. The police has not been involved in any of these investigations. Limited investigative steps were reported. This raises questions with respect to the proactivity of Japanese law enforcement authorities in the investigation of foreign bribery allegations involving their nationals and companies abroad. (The investigative techniques used in foreign bribery cases are described under section B.4.d.)

ii. Different Phases in an investigation and respective role of the police and prosecutors

155. Prior to commencing a formal investigation, the investigative authority may take a number of investigative steps to verify the allegation of misconduct potentially constituting an offence. Japan specifies that this pre-investigative/preparatory phase in view of the possible commencement of a formal investigation is not in itself an "investigation" under the CCP. Japan further indicates that "such preparatory activity before commencement of 'investigation' is permitted as long as it is conducted on a voluntary basis and there is no limitation on the scope of such activity". During the on-site visit, MOJ representatives, the police, prosecutors and judges confirmed that only non-compulsory measures may be taken at that stage (e.g. asking a bank to provide information without asking a judge to issue a warrant). This also excludes the possibility of initiating an MLA request as these can only be made in the context of a formal investigation.

156. The pre-investigative stage may be handled by government agencies with no investigative and prosecuting powers, such as the MOJ, before being forwarded to relevant law enforcement authorities (e.g. the MOJ receives information from other ministries and provides the prosecutor with such information). In fact, either before or in parallel with the pre-investigative or the formal investigation phases, different Ministries and government agencies may also be involved as discussed below. Panellists also confirmed during the on-site visit that, in a large majority of cases, the police typically does not play any role in the investigation, whether during the preparatory phase or the formal investigation. The only exception since Phase 3 was the *Futaba case*, in which the Aichi Prefectural Police was involved.

iii. Independence and Considerations Forbidden under Article 5 of the Convention

157. Article 5 of the Convention provides that: "[Investigation and prosecution] shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

158. A recent analysis of Japan's criminal justice system emphasises that prosecutors are considered impartial representatives of the public interest, and their independence and impartiality are protected by law.¹³⁴ Article 14 of the Public Prosecutors Office Law, provides that "[the] Minister of Justice may control and supervise public prosecutors generally in regard to their functions". Japan states that "Generally" means, for example, to set up general guidance for crime prevention, the administrative interpretation of laws and how to dispose of affairs related to prosecution to maintain their uniformity. However, in regard to the investigation and disposition of individual cases, he or she may control only the

¹³⁴ Criminal Justice in Japan, 2014 edition, UNAFEI.

Prosecutor-General. The Minister of Justice cannot directly control an individual public prosecutor's investigation or disposition of cases.

159. In its Phase 4 questionnaire responses, Japan indicates that it is not required for the law enforcement authorities to obtain consent from, or inform, the executive branch of the government in order to investigate or prosecute foreign bribery cases. For this reason, Japan concludes that "the law enforcement authorities are not subject to external influences both legally and practically." A closer look at Japan criminal system and the way it is implemented in practice in foreign bribery cases may lead to nuance this assertion with regard to the MOJ's and, to a lesser extent, METI's role in the investigation of foreign bribery cases.

iv. The Ministry of Justice's (MOJ) role in foreign bribery allegations as well as in discussing ongoing cases with prosecutors

- The MOJ's role in clarifying some aspects of foreign bribery allegations

160. Before the opening of a formal investigation, some aspects of foreign bribery allegations are spontaneously checked by the MOJ Criminal Affairs Bureau. The Bureau typically clarifies the facts of the cases referred to Japan by the Working Group on Bribery through the Matrix of alleged cases. Japan claims that, as a general rule, the MOJ immediately refers allegations for investigation to prosecutors. Nonetheless, at the time of the on-site visit, the MOJ was still attempting to clarify two allegations received from the Matrix, in one case back in August 2016. Meanwhile, no law enforcement authority had commenced actual investigations into these allegations. After the on-site visit, the prosecutors eventually opened investigations. During the finalisation of this report, the MOJ explained that this situation was unusual. This could not be discussed with prosecutors as none attended the meetings leading to the adoption of this report.

161. Similarly, the MOJ Criminal Affairs Bureau plays a role in handling foreign bribery allegations reported by other ministries and government agencies. During the on-site visit, for example, MOFA's representatives explained that when its overseas missions receive allegations from either companies (2 allegations in 2017) or whistleblower reports (1 allegation in September 2018), they do not report the suspicions directly to law enforcement authorities. MOFA instead reports to the MOJ so that the information can be forwarded to the prosecutors. Depending on the material received, the MOJ may, either on its own initiative or at the prosecutors' request, ask MOFA for additional information, including from its foreign-based staff. As with the Matrix allegations discussed above, Japan claims that the MOJ refers allegations received from other ministries are immediately to the prosecutors for investigation. At the time of the on-site visit, one of the allegations received by MOFA was still with the MOJ, while it awaited a response to its request for additional information from MOFA. For its part, MOFA indicated during the on-site visit that it had reported two additional allegations in 2017 to the MOJ and the NPA. However, Japan later explained that the matters only reached the MOJ and the NPA after the on-site visit (i.e. in February 2019) due to miscommunication between the MOFA, the MOJ and the NPA. The three allegations have since been referred to the prosecutors. According to panellists, such back and forth exchanges are not exceptional. Conceivably, during the course of this clarification process, MOJ may also refer questions to METI about interpretation of the foreign bribery offence, as METI is the leading ministry on implementation of the Anti-Bribery Convention (as further discussed below).

162. It is not clear that the MOJ's specific role in clarifying certain aspects of a case is grounded in law or any other authority. It thus gave rise to in-depth discussions during and after the on-site visit, thereby demonstrating a lack of clarity concerning the timing and scope of the MOJ's involvement in foreign bribery cases. What emerges from these discussions is that, in practice, the MOJ clarifies the facts of the alleged case against publicly available information and information collected through non-coercive means. When the facts of the case are not clear, the MOJ would typically make additional enquiries to the agency that forwarded the initial suspicious to obtain additional information. If the MOJ deems that the facts of the case are not clearly established, further clarifications would be sought both before and/or after the allegation is referred to law enforcement authorities for investigation. As discussed below, the MOJ

may indeed seek further clarifications after a case has been referred to the law enforcement authorities. During the on-site visit, representatives from the MOJ indicated that the same procedure would apply to other offences and that the MOJ's clarification's role is not specific to foreign bribery allegations. Yet, the MOJ indicated that the Criminal Affairs Bureau has never conducted any such measures in relation to other alleged offences to date.

163. In total, 33 allegations have been referred to the MOJ since Phase 3. Of these 33 allegations, 3 were clearly delayed up to two years during transmission to or from the MOJ. Two of these 3 allegations, which were referred by MOFA, did not reach the MOJ for two years allegedly because of miscommunication between the ministries. For the third allegation, the MOJ sought to clarify the facts for over a year before transmitting it to the prosecutors. Closer to the finalisation of this report, Japan indicated that all these allegations were referred to law enforcement authorities after the on-site visit. Moreover, even though the MOJ states that it promptly provided the 30 other allegations that it received to the prosecutors, the prosecutors did not immediately open an investigation in certain cases. In particular, the delay in opening the 9 ongoing cases that arose from the Matrix ranged between 1 and 9 years. While Japan could not explain the reason for these delays, it is known that the MOJ may still independently seek to clarify the facts of certain allegations even after transmitting them to the prosecutors. This raises the question whether these quasi-investigative steps taken by a non-law enforcement agency may explain, at least in part, the delay in opening investigations. For example, the investigation of one of the allegations brought to the attention of Japan in August 2016 and referred to the MOJ, was only initiated three and a half years later (case not named in this report at Japan's request for confidentiality reasons). These delays in the transmission and investigation of these allegations are all the more concerning against a background where (i) MLA cannot be requested before the formal investigation stage is reached; and (ii) already four foreign bribery cases could not be prosecuted because of the expiry of the limitation period. (The statute of limitations is discussed under section B.4.c and C.2.c. of this report.)

- The MOJ's role in discussing ongoing cases with prosecutors

164. In practice, the involvement and the power of the MOJ goes beyond the mere clarification of allegations. In the context of the organisation of the on-site visit, the MOJ explained that it had insisted on attending the panel with the prosecutors because it, unlike the prosecutors, has a comprehensive knowledge and memory of the cases. According to the MOJ, the prosecutors have regular and close discussions with the Criminal Affairs Division and the International Affairs Division in each foreign bribery case. The MOJ also indicated in an exchange with the evaluation team, during the Phase 4 process, that "in a sense, these Divisions of the MOJ investigate foreign bribery cases together with prosecutors." At the stage of finalising this report, the MOJ indicated that it may, for instance, seek clarifications after a case has been referred to the law enforcement authorities, either at the request of the law enforcement authorities or on its own initiative. The important role the MOJ is playing in foreign bribery cases is further supported by the fact that while MOJ representatives attended the meetings leading to the adoption of this report, no prosecutors participated. Similarly, the MOJ attends the informal WGB law enforcement officials' meeting and participates in the Working Group's other law-enforcement activities.

165. Discussions on this topic during the on-site visit confirmed that the MOJ, even though it is not a law enforcement agency, knows the foreign bribery cases comprehensively and in a greater level of details than the prosecutors currently assigned to the DPPOs. Additionally, the MOJ appeared to have played an active role in many foreign bribery cases so far handled by the prosecutors. After the on-site visit Japan emphasised that this is due to the MOJ's involvement in seeking mutual legal assistance as is frequently required in foreign bribery cases. The high level of rotation of prosecutors (discussed under section B.3.b.) may contribute to grant the MOJ a greater role than it would otherwise have, in particular in preserving the institutional memory of the cases. This involvement of the MOJ in actual foreign bribery cases raises concerns that the MOJ may potentially interfere in foreign bribery cases including in their disposition. Against a background of the currently serious lack of enforcement of the foreign bribery

offence, in particular regarding legal persons, this raises concerns regarding the potential for undue influence, in contravention with Article 5 of the Convention.

v. *METI's role in providing interpretive guidance during the investigation of actual foreign bribery cases*

166. In Phase 3, the Working Group recommended that Japan find an appropriate balance of METI's dual roles in preventing foreign bribery offences and in facilitating enforcement of the offence (recommendation n 3). The Working Group considered that Japan had partly implemented this recommendation by the two-year Written Follow-up report.¹³⁵ In Phase 3, Japan reported that METI could provide interpretative guidance for the MOJ as well as law enforcement agencies. The Working Group's concerns about the content of the METI Guidelines are only heightened by the way in which METI's interpretations may affect pending cases.

167. As the implementing agency for the UCPL, METI can provide, upon request, interpretative guidance about the foreign bribery offence to the police and the prosecutors investigating a particular case, as discussed in section B.3.c. Thus, METI's Intellectual Property Policy Division indirectly supports Japan's law enforcement agencies in ongoing investigations by providing interpretative guidance about the scope of Japan's foreign bribery offence. Representatives from the NPA, the Public Prosecutors Offices, and the MOJ explained that law enforcement agencies would typically first look to court jurisprudence or, if applicable, to their institutions' analysis from prior investigations before seeking guidance from an implementing agency. For offences like foreign bribery, for which Japan has only limited jurisprudence and practice, law enforcement agencies have the option (but are not required) to seek interpretative guidance from the relevant implementing agency. Certain civil society representatives and private-sector lawyers acknowledged the incongruity that METI, whose mission is to promote trade and industry, had such an influential role in interpreting Japan's foreign bribery law. Nonetheless, both governmental and non-governmental participants reported that interpretive requests to implementing agencies are not unusual.

168. In Japan's questionnaire responses, METI explained that its interpretations are based largely on the METI Guidelines, which were developed in consultation with private stakeholders as well as government agencies, including the MOJ, the NPA and MOFA. According to METI representatives during the on-site visit, the Intellectual Property Policy Division does not clear its interpretations with any other part of METI, such as its legal department. While this would tend to reduce the risk of undue influence, it means that the Division is solely responsible for the interpretations provided. In this context, only two members of the Division are lawyers. Furthermore, the Division's staff does not receive any special foreign bribery training, and they typically rotate to other METI units after two or three years. Moreover, the METI Intellectual Property Policy Division does not have any lawyers with criminal law backgrounds, although Japan indicates that its members have experience in handling criminal law cases. Nonetheless, METI representatives insisted that the Division preserved its institutional knowledge by maintaining archives of the interpretations it has provided.

169. Both government representatives and legal practitioners concurred that METI's interpretations would not be binding on either prosecutors or courts. However, as METI's views would receive great deference, legal practitioners maintained that it would be difficult for prosecutors to bring a case contrary to METI's interpretation. The MOJ representatives agreed with this assessment, but stressed that if they believed that METI's interpretation was erroneous, the MOJ would consult with METI to see if they could come to a consensus on the law's scope.

170. In practice, METI reports that, since Phase 3, it has received four inquiries from the police but none from the Public Prosecutors Offices. Japan's responses specify that the requests were made "during investigation with a view to prosecuting the case". Depending on METI's advice, the case could be terminated. Three of the four requests were apparently informal, as the Division only provided its

¹³⁵ [Japan Phase 3 Follow-up Report](#) pages 4-5 & 8.

interpretation orally, for instance regarding whether an official of a private international organisation would not be considered a foreign public official.

171. The fourth request sought guidance on two separate issues for the *Futaba case*. First, the police inquired whether bribery connected with the importation of goods from Hong Kong, China, to the People's Republic of China would pertain to an "international commercial transaction" under the UCPL. The Division concluded that it likely would, given that goods were routinely subject to inspections and tariffs when crossing the border between those two economies. Second, the police inquired whether bribery to avoid customs-related duties would constitute a "wrongful gain". The Division also opined that this would likely fall within the scope of the UCPL.

172. In prior evaluations, the Working Group expressed concern that such referrals for interpretative guidance may potentially present a conflict of interest between METI's policy role and Japan's law enforcement obligations under the Anti-Bribery Convention. The evaluation team was initially concerned about the potentially serious impact of these interpretations, which through defining the scope of the offence in concrete cases, could, in some circumstances, prevent a case from being investigated and/or prosecuted based on an interpretation that may be narrower than required under the Convention. Japan emphasises that the investigators and the prosecutors are independent and that METI's interpretations focus on issues on which it has an expertise and specific access to information. However, there was a concern that, in particular when they are made on individual cases, these opinions may exert an influence or at least may have the appearance of exerting an influence on the investigation and prosecution of the case. When such influence comes from a Ministry of Economy, which purpose is notably to facilitate trade and exports, and when this Ministry of Economy is as powerful as the METI is in Japan, it may indeed raise concerns with regard to Article 5 of the Convention, i.e. with the risk that "[investigation and prosecution] may be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

173. This issue was discussed at length during the on-site visit with a range of panellists from different horizons, including METI, the MOJ, prosecutors, the police, lawyers and academics. These discussions partially alleviated the evaluation team's concerns in this regard based on detailed discussions on the opinions provided in practice to date, which have so far remained technical and focused on applying law to key, limited facts, based on anonymised requests (not disclosing the identities of the suspects involved or, in general, the countries concerned). However, in the absence of a clear framework governing requests for, and the provision of, METI's interpretation of the foreign bribery offence in specific cases, there remains a risk that Article 5 factors could influence future investigations.

Commentary

The lead examiners are concerned with the lack of clarity of the MOJ's role and in particular concerning the MOJ's handling of foreign bribery allegations, in consultation with other governmental agencies such as MOFA, unnecessarily delay the investigation of these allegations by competent authorities with investigative and prosecuting powers, namely the Prefectural Police and the District Public Prosecutors Offices. The risk of delaying and complicating the referral of allegations to investigative agencies, at least in a number of cases is that critical investigations are not taken at the earliest opportunity in circumstances where the statute of limitations is running.

The lead examiners also note that the MOJ's involvement in actual foreign bribery cases raises concerns regarding at least an appearance of undue influence based on considerations in contravention with Article 5 of the Convention, such as national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved. METI's role in providing interpretation of the foreign bribery offence in relation to actual cases also raises concerns of appearance of impropriety. The District Public Prosecutors' role in commencing investigations and prosecutions, as well as its role in the conduct of investigations, should be exercised independently of the executive, and in particular the MOJ and the METI.

The lead examiners recommend that Japan 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.

They recommend 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, in order to guarantee that investigations and prosecutions in cases of bribery of foreign public officials 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.

With this aim, they also recommend 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.

The lead examiners finally recommend 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.

vi. *Decision to Refer a Case for Consideration of Charges based on Prosecutorial Discretion*

174. In Japan prosecution is discretionary. Pursuant to article 248 CCP, the prosecutor has discretion to not prosecute an alleged offence, if a prosecution is deemed unnecessary after considering the character, age and background of the alleged offender, the seriousness of the alleged offence and the circumstances under which the alleged offence was committed, and the conditions subsequent to the commission of the alleged offence. Injured parties (e.g. competitors) that file a complaint may challenge a prosecutor's decision to not prosecute an alleged offence by: (i) Filing a motion with the Committee for the Inquest of Prosecution, which is separate from the Public Prosecutor's Office; or (ii) Appealing to the chiefs of higher Public Prosecutor's Offices, claiming dissatisfaction with the decision of the prosecutor. While the Committee for the Inquest of Prosecution can review foreign bribery charging decisions (or white collar more generally), either based on an appeal or *sua sponte*, they have never overridden a decision not to indict a person involved in a foreign bribery case, at least to the Japanese authorities' knowledge. No policy statements, guidelines, directives, or protocols that would apply to foreign bribery are available that would provide more details on the way prosecutorial discretion is exercised.

175. In Japan, there are two forms of prosecution: formal and summary (CCP article 247). The first form is a Formal Prosecution (Indictment), i.e. a request to hold a formal trial, and it is made by filing of a charging instrument called a Kiso-Jo (CCP article 256). The charging instrument must contain a clear description of the facts constituting the offence charged. In order not to prejudice the court before trial, no evidentiary materials may be attached to a Kiso-Jo. The second form is a Speedy Trial Procedure: at the time of the filing of a Kiso-Jo, with the consent of the defendant, the prosecutor may ask the court to try the case by the Speedy Trial Procedure. The Speedy Trial Procedure is applicable when the following conditions are met: (1) The offence is not punishable by death, life imprisonment, or a minimum of one year's imprisonment; (2) The case is clear and minor; and (3) The examination of evidence is expected to be completed promptly.¹³⁶ Summary prosecution was used twice in the *Kyudenko case* against two individuals; and since Phase 3 in the *Futaba case* against one individual. In this later case, the Nagoya Local Public Prosecutors Office presented a summary order, which was approved by the Nagoya Summary Court in October 2013.

¹³⁶ Criminal Justice in Japan, 2014 edition, UNAFEI.

vii. *An extremely high conviction rate at trial based on a similarly high evidentiary threshold: an impediment to prosecution?*

- An extremely high conviction rate

176. In respect to the evidentiary threshold that must be satisfied to indict a natural or a legal person, Japan indicates in its Phase 4 responses that “In practice, the prosecutors follow the general rule that a suspect be indicted only when there is a high possibility that the suspect would be convicted based on the proper evidence.” This seems to put the bar very high, especially in a country where the conviction rate is over 99,8%.¹³⁷ As reflected in Japan’s enforcement updates in Phase 4, this has led to the closing of investigations before progressing to prosecution.

177. None of the foreign bribery cases concluded to date have resulted in acquittals. An academic notes that “The cost of an acquittal weighs heavily in the calculus of Japanese prosecutors, for they are harshly criticised by the public and by the organisation for acquittals. Against this background, the prospect of an acquittal necessarily weighs in the decision to bring formal charges against defendants in foreign bribery cases. Therefore, unlike the high conviction rate at trial, the conviction rate following arrest is just 40%, reflecting the large number of cases dropped along the way.”¹³⁸ In a recent interview, a Japanese academic also emphasised that “Naturally the prosecution goes to great lengths to ensure that criminals get their just deserts, but in doing so they also exercise a high degree of discretion in deciding which cases to pursue. Public prosecutors typically concentrate on suits where conviction is almost guaranteed, leading to the suspension of around 60% of criminal cases in Japan without an indictment.”¹³⁹

- A high evidentiary threshold: central role of intentionality requirement and confessions

178. Against this general background but also based on the small proportion of cases that have progressed to prosecution to date (5 cases, i.e. 11% of all allegations), Japan appears to require a high evidentiary threshold to prove that the recipient of the bribe is in fact a foreign public official. Limited information is provided either in former evaluation phases or in Japan’s Phase 4 questionnaire responses on the evidentiary threshold for the offence of foreign bribery. In Phase 1, where intentionality was briefly assessed, the report notes that although the intentional component of the offence of bribing a foreign public official is not expressly mentioned in article 10 bis (1) UCPL [now article 18(1)], this element is required.¹⁴⁰ The report further states that courts interpret criminal intent to denote a recognition and acceptance of facts, even with uncertainty, regarding all the objective elements of an offence. This has since not been re-assessed, but enforcement developments tend to demonstrate that the intentionality requirement may be more central than assessed in Phase 1 and explain to an extent the key role played by confessions in Japan criminal procedure (see discussion on investigative tools below).¹⁴¹

179. This, in itself, is not an issue but the extent to which this needs to be proven and the level and nature of evidence needed may raise concerns, in particular if it goes as far as requiring an official

¹³⁷ J. Mark Ramseyer and Eric B. Rasmusen, *Journal of Legal Studies*, vol. XXX (January 2001) “[Why is the Japanese Conviction Rate so High?](#)”, by The University of Chicago ./ *Why are Japan’s public prosecutors so powerful? The Economist explains*, Dec 6th 2018 *Dec 6th 2018*, by D.M. | TOKYO. <https://www.economist.com/the-economist-explains/2018/12/06/why-are-japans-public-prosecutors-so-powerful>

¹³⁸ Financial Times (December 2018) “[Carlos Ghosn arrest shines light on Japan’s justice system](#)” . :

¹³⁹ Order in the Court: Explaining Japan’s 99.9% Conviction Rate, Society Jan 18, 2019, Murai Toshikuni and Muraoka Keiichi interviewed: <https://www.nippon.com/en/japan-topics/c05401/>

¹⁴⁰ Article 38 of the PC provides that an act is not punishable if it is committed without criminal intent, and article 8 states that the “General Provisions”, which include article 38, apply to crimes under other statutes, including the Unfair Competition Prevention Law.

¹⁴¹ However, a defendant cannot be convicted if the only incriminating evidence is his or her confession (article 38-3 of the Constitution and article 319-2 CCP) and other elements are needed to evidence foreign bribery.

confirmation from the authorities of the country of the public official. Such a high threshold requiring the proof of the law of the foreign official's country to ascertain whether that person was, in fact, a foreign public official would be contrary to Commentary 3, which explicitly requires the autonomy of the offence (i.e. not requiring proof of the law of the particular official's country).

- The need to evidence that the recipient of the bribe is a foreign public official

180. It derives from the information provided on actual cases and answers to the questionnaire that investigative efforts also focus a great deal on the recipient of the bribe and the need to evidence that he is a foreign public official. Japan indicates that "in proving a foreign bribery case, it is essential for the prosecution to verify the briber-taker's status as a foreign public official, his/her official authority and business. In order to do so, it is often the case that investigative authorities have to make MLA requests to foreign authorities and obtain necessary evidence from them". This seems to be very close to requiring proof of the law of the foreign public official. Japan indicates that in one case (not named in this report at Japan's request for confidentiality reasons), MLA requests were sent to two countries in 2010 to obtain material which shows that the bribe-taker's company is a state-owned enterprise, and material showing the bribe-taker's officials authorities and business. One country responded that the recipient was not a foreign public official. The second responded that "all persons concerned denied the acceptance of a bribe". The case was subsequently closed for lack of evidence and because the limitations period had lapsed. Similar requests were sent in another case (not named in this report at Japan's request for confidentiality reasons) to 6 countries.

- A great emphasis on the existence and outcome of criminal proceedings against the public officials

181. As confirmed during the on-site visit with prosecutors, Japan places great emphasis on the existence and outcome of criminal proceedings against the public officials on the passive side. Written documents regarding the outcome of proceedings against the foreign public officials or investigative steps taken in the foreign country have been requested in six cases (not named in this report at Japan's request for confidentiality reasons).

- The need to secure the cooperation of the foreign public official on the receiving end

182. Another aspect that was discussed at length during the on-site visit is the extent to which Japanese authorities need to secure the cooperation of the foreign public official on the receiving end to prove the foreign bribery offence. In Japan's 2007 Self-Assessment Report, the police indicated that they would "first need to verify the authority vested in foreign public officials on the receiving end. In addition, it would be "necessary not only to collect objective evidence in a foreign country but also to obtain concrete testimonies from the aforementioned foreign public official as the next step".¹⁴²

183. Japan's answers to the Phase 4 questionnaire seem to suggest that, in practice, Japanese authorities have tried to secure such cooperation through MLA requests. Japan has also often requested to interview the bribe taker(s). In particular, in one case (not named in this report at Japan's request for confidentiality reasons) in which evidence was sought from abroad, the evidence received was a written statement of the official simply denying the acceptance of the bribe. In another case, Japan's authorities requested to interview the official on the receiving side because information received through MLA on bank information was not sufficient to prove the bribery. The foreign country denied the request and Japan subsequently decided to close the investigation. Japan has sent similar requests in several cases (not named in this report at Japan's request for confidentiality reasons).

184. During the on-site visit, discussions did not allow clarifying the above three issues beyond the information in the answers to the questionnaire. Answers provided by the MOJ, prosecutors and judges to the evaluation team regarding the evidentiary threshold and the elements needed to prove the offence remained vague, systematically referring to the fact that these would depend on each case. Even when

based on concluded cases, discussions did not enable the evaluation team to go beyond the specifics of the cases and clarify the evidentiary threshold and tests or standards required to meet the threshold. The discussions thus did not alleviate the concerns raised by the information on the cases provided in the answers to the questionnaire.

185. A high evidentiary threshold may also have an impact already at the stage of making the decision to investigate and obviously to prosecute a case. During the on-site visit, neither the prosecutors nor the police provided a clear answer to questions in this regard: as with many other questions, they merely emphasised that it would depend. It remains that in a country where the principle of prosecutorial discretion applies, it may be perceived as a waste of time and resources to investigate a case of foreign bribery that for instance took place in a non-cooperative jurisdiction, where all the evidence may be located. This may contribute to explain the particularly low number of investigations started in Japan over the past 20 years.

viii. Self-reporting as a ground not to prosecute: a defence of effective regret?

186. The Phase 4 questionnaire responses indicate that self-reporting may not only be a mitigating factor at sentencing but it may also constitute a ground not to prosecute a company that self-reported. During the onsite visit, the MOJ and prosecutors clarified that this applies to both natural and legal persons. This is based on prosecutorial discretion to institute prosecution based on circumstances of the case and seriousness of the offence, article 42 Para. (1) of the PC provides that the punishment of a person who had committed a crime but surrendered him/herself before being identified as the suspect of the case by the investigative authority may be reduced. It does not say that it may be a ground not to prosecute but this is how it is interpreted and applied in practice. This is seen by Japan as an incentive for self-reporting.

187. In the absence of clear and transparent criteria regarding the level of self-reporting and cooperation, the possibility that a person who self-reports would not be prosecuted at all raises serious concerns to the extent that it may be tantamount to a defence of effective regret that was criticised by the Working Group in other countries evaluations as not implementing article 1 of the Convention.¹⁴³

188. A similar question derives from the application of the new non-trial Agreement Procedure that entered into force in Japan in June 2018 and allows in some circumstances to let an offender who provides information on others to go un-punished. (This is discussed under section B.5.c. below.)

Commentary

Discussions during the on-site visit as well as case law appear to require a proof of the law of the foreign official's country, to ascertain whether that person was, in fact, a foreign public official. Such a high threshold is contrary to Commentary 3 on Article 1 to the Convention, which explicitly requires the autonomy of the offence (i.e. not requiring proof of the law of the particular official's country). Even when this is established, (i) great emphasis is given on the existence and outcome of criminal proceedings against the public officials on the passive side; and (ii) Japan appears to seek to secure the cooperation of the foreign public official on the receiving end to prove the foreign bribery offence.

In light of the above, the lead examiners are concerned by the application of an overly high evidentiary threshold and the need to prove elements of the offence going beyond the requirements in Article 1 of the Convention and thus requiring extensive cooperation from the public official's country to establish these various elements. This is all the more a concern in the Japanese context where the statute of limitations is 5 years with only limited ability to extend or suspend the limitation period as demonstrated by the number of cases not initiated and discontinued on that basis, in respect of both natural and legal persons. The above-outlined issues appear to emanate primarily from a restrictive interpretation of the offence by the police, prosecutors or the courts, rather than from issues with the text of the foreign bribery legislation itself.

¹⁴³ Phase 2 evaluation Reports of the Czech Republic, para. 244, the Slovak Republic, para 244, Greece, para.134-136; Phase 3 evaluation Reports of Spain, para. 39; and Portugal, para. 41-42.

To this end, the lead examiners recommend 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.

Finally, the lead examiners recommend that Japan 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 makes self-reports and the advantages that he/she may be granted in return, including immunity from prosecution if relevant.

b. Establishing Jurisdiction (Natural Persons)

189. In its Phase 4 questionnaire responses, Japan merely states that there is no change since Phase 3 in the exercise of territorial, nationality or other forms of extraterritorial jurisdiction over the foreign bribery offence. None of its answers provides information on case law developments or any further consideration on the specific issues raised in Phase 3. These questions were revisited with relevant panellists during the on-site visit, in Phase 4, in particular with regard to the weak enforcement level of the offence in Japan 20 year after its entry into force.

i. Territorial jurisdiction

190. Territorial jurisdiction has not been assessed since Phase 1.¹⁴⁴ A crime is considered to have been committed in Japan if the offence is committed in whole or in part in Japan. Pursuant to Phase 1 analysis, this is understood to cover the case where a bribe is offered, promised or given in Japan (including the case where the act of offering, etc. is done from Japan through remittance, telephone, facsimile, or other means); as well as the case where the bribe is offered, promised or given abroad where an act of complicity takes place in Japan. If confirmed by jurisprudence, this interpretation would appear to satisfy article 4 of the Convention. Territorial jurisdiction equally applies to natural and legal persons (article 22, para 1 UCPL). At the time of the Phase 2 Written Follow-Up Report, the summary record of the Working Group discussions noted that the lead examiners were concerned that Japan had not considered whether territorial jurisdiction in Japan is adequate for covering the acts of Japanese parent companies (e.g., incitement and authorisation) in relation to foreign bribery by foreign subsidiaries. This was discussed during the Phase 4 on-site visit, and the MOJ representatives and prosecutors indicated that, based on article 22, paragraph 1 UCPL, this would be possible if it is possible to establish that employees have conspired with employees from the parent company based in Japan as illustrated with the *JTC case* further described below as it also involves a nationality jurisdiction dimension.

ii. Nationality jurisdiction

191. Japan has had nationality jurisdiction over the foreign bribery offence since 1 January 2005, when an amendment to the UCPL entered into force specifying that the nationality jurisdiction provision in article 3 of the PC would apply to the UCPL.¹⁴⁵ In its questionnaire responses, Japan indicates that its nationality jurisdiction framework has not changed since then.¹⁴⁶ Japan however clarified that while article 18(1) UCPL on the foreign bribery offence is not listed under article 3 of the Penal Code, an offence committed outside Japan by a Japanese national is subject to a punishment based on article 21(8)

¹⁴⁴ [Japan Phase 1 report](#) p. 26.

¹⁴⁵ UCPL Article 21(6). In Phase 2, the provision was codified as UCPL Article 14(3). There has not been any change in substance since Phase 2.

¹⁴⁶ [Japan Phase 2 report](#) paras. 166-167; [Phase 3 report](#) paras. 36-40.

UCPL, which provides that the foreign bribery offence “shall be governed by Article 3 of the Penal Code”.

c. Statute of Limitations

i. Adequacy of the statute of limitations (several cases dismissed because time-barred)

192. In Phase 3, the Working Group decided to follow up on whether Japan’s five-year limitations period was sufficient for investigating and prosecuting foreign bribery cases.¹⁴⁷ At the time of Phase 3 Written Follow-up, the WGB asked Japan to develop an Action Plan to address certain issues, including continuing enforcement challenges due to the expiration of the statute of limitations. In December 2013, the WGB recommended that the Action Plan address, inter alia, “continuing enforcement challenges due to the expiration of the statute of limitations”. However, the Action Plan last provided in March 2017 does not specifically address this point.¹⁴⁸ Japan Phase 4 questionnaire answers confirm that no change has since been made to the legislation with respect to the limitation period for foreign bribery.

193. The limitation period for the offence of bribing a foreign public official under the UCPL is 5 years (article 250(2)(v) CCP) as for other offences “punishable with imprisonment with or without work for a long term of less than 10 years”. This provision applies equally to natural and legal persons since 1 January 2007.¹⁴⁹ The period begins to run when the criminal act has ceased (article 253(1) CCP), which is generally considered to be the moment when the results of the crime occur. The period is suspended as long as an alleged offender is outside Japan (article 255 bis(1) CCP). The running of the limitations period is not suspended or interrupted by the initiation of an investigation. MLA requests do not suspend the limitation period either as confirmed in the Phase 4 questionnaire responses.

194. During the on-site visit, the lead examiners asked whether the limitation period is the same for other economic crimes. Japan provided examples for other domestic economic and tax offences, over half of which have a statute of limitations of seven years. These include: the submission of annual securities reports containing material misstatements,¹⁵⁰ embezzlement in the course of business activities,¹⁵¹ and corporate tax evasion and income tax evasion.¹⁵² The statute of limitations for money laundering is 5 years.

ii. The statute of limitations has hindered Japan’s foreign bribery enforcement.

195. In Phase 4, regarding whether any (domestic or foreign) bribery proceedings have been closed due to the expiry of the corresponding statute of limitations since Phase 3 (Follow-up issue 15.c.), Japan indicates that as an example, in one later discontinued investigation (not named in this report at Japan’s request for confidentiality reasons), the prosecutor decided not to prosecute one of the suspects due to the expiry of the statute of limitations. Later in its questionnaire responses, Japan reports that in the *Futaba case*, since the statute of limitations with respect to the legal person was expired, prosecutors did not indict the legal person.

196. Since Phase 3, it has become clear that the limitations period has prevented the investigation and prosecution of a total of at least 10 foreign bribery cases. This has materialised in two ways. First, six cases were determined to be time-barred before any investigation began. Second, in at least four other cases an investigation was opened and subsequently closed without charges because of the expiry of the

¹⁴⁷ [Phase 3 report](#) paras. 76-78.

¹⁴⁸ See [DAF/WGB\(2017\)11](#).

¹⁴⁹ Article 22(3) of the UCPL.

¹⁵⁰ Article 24, paragraph (1) and 197, paragraph (1), item (i) of the Financial Instruments and Exchange Act, and legal person : Article 207, paragraph (1), item (i).

¹⁵¹ Article 253 of the PC.

¹⁵² Respectively Article 159, paragraph (1) of the Corporation Tax Act, legal person: Article 163, paragraph (1); and Article 238, paragraph (1) of the Income Tax Act, legal person: Article 243, paragraph (1).

limitation period. In three cases, the Tokyo DPPO had initiated an investigation and subsequently decided to close its investigations because it found that the facts were time-barred. In a fourth case, the limitation period prevented the prosecution of the legal person involved (in the *Futaba case*). Japan was, however, able to prosecute the natural person because the limitation period had been suspended because the offender was located outside of Japan. In other cases, the expiry of the limitation period prevented the prosecution of some of the alleged bribe payments (e.g. in the *PCI case*).

Commentary

Based on the case information reviewed in Phase 4, the lead examiners consider that the number of cases that have been time-barred to date suggest a systematic issue linked to the length of the limitation period in Japan. This concern is reinforced by the observed delay in sending allegations of foreign bribery to law enforcement authorities in certain cases and delay in starting formal investigations – a stage before which no MLA request can be made (as discussed under section B.4.a. above). The combination of these factors has resulted in the expiry of the already short limitation period in the foreign bribery cases mentioned above. The limited possibilities of suspension of the limitation period do not either provide for the flexibility that complex and time consuming foreign bribery investigations usually require.

The lead examiners hence recommend that Japan 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.

d. Investigative Techniques

i. General legal framework

197. Limited information has been provided by Japan in its Phase 4 questionnaire responses regarding the availability and use of investigative tools in foreign bribery investigations. During the on-site visit, time was therefore dedicated to discussing the range of investigative techniques available in foreign bribery cases and their use in practice in the cases that have been investigated to date.¹⁵³ These discussions have shown that there is no practice of developing investigation plans, for instance in cooperation between the prosecutors and the police. In practice to date, the police has had limited involvement in the investigation of the concluded foreign bribery cases, with the exception of the *Futaba case*, which investigation started under the police auspices. This in itself shows the limited use that has been made of many investigative techniques, which would typically imply an active role of the police. The limited range of investigative techniques available in foreign bribery investigations and the scarce use of those available was also perceived by the evaluation team as constituting one of the impediments to the effective investigation and prosecution of the foreign bribery offence in Japan. In this regard, a recent article from the Economist notes that Japanese prosecutors “have restricted access to many of the tools considered normal in law enforcement elsewhere”.¹⁵⁴ In the foreign bribery cases concluded to date, Japan has mainly been relying on documentary sources and circumstantial evidence as confirmed during the on-site visit by the police representatives and the prosecutors.

198. Both non-coercive and coercive measures are available in foreign bribery investigations (also referred to as non-compulsory and compulsory measures), although coercive measures can only be used at the formal investigation stage. The use of coercive measures is subject to a prior authorisation granted by a judge. The evidentiary requirements to request judicial authorisation to perform coercive measures was described as very high in previous evaluations of Japan and this was confirmed by the police,

¹⁵³ [Japan Phase 2 report](#) paras. 73-74; [Phase 2bis report](#), paras. 75-88 and 95-99; [Phase 3 report](#) paras. 55-65.

¹⁵⁴ The Economist (December 2018), “[Why are Japan’s public prosecutors so powerful?](#)”.

prosecutors and judges at the on-site visit.¹⁵⁵ The limited use of coercive measures in the foreign bribery investigations known to the evaluation team - based on the information provided by Japan - corroborates this former evaluations and on-site visit finding. For instance, as described below, companies' premises have only been searched and documents seized in a limited number of cases (e.g. in the *Futaba case* and *a later discontinued investigation not named in this report at Japan's request for confidentiality reasons*). In principle, the criminal nature of the proceedings against legal persons allow for the use of the full range of investigative powers, including coercive measures. This was confirmed during the on-site visit by the MOJ representatives and the prosecutors.

ii. *Availability of new investigative techniques*

- Wire-tapping and other tools to intercept communication

199. In Phase 2bis, the WGB had expressed concerns that the authority to wiretap and intercept communications was not available in foreign bribery investigations.¹⁵⁶ In Phase 3, the Working Group recommended that Japan “provide an update on consideration by Japan of the use of new investigative techniques for foreign bribery, such as listening devices, digital surveillance, wire-tapping and grants of immunity from prosecution, including through the special advisory body established by the Ministry of Justice to review Japan’s criminal justice system (recommendation 4.a.)” At the time of Japan Phase 3 Written Follow-up, recommendation 4.a. was deemed partially implemented. Japan indicated that the MOJ had set-up “a Special Subcommittee on a Criminal Justice System for a New Era” in June 2011 to consider introducing new investigative techniques, including to intercept communications. In 2016, the Diet adopted various amendments to the Criminal Procedure Code to improve oversight over the investigative process and to expand Japan’s law enforcement tools.¹⁵⁷ In terms of oversight, the reforms enhance defendants’ rights to access exculpatory evidence or require that suspects’ interrogations be sound recorded or video-recorded for certain offences (not including foreign bribery).¹⁵⁸ While the Criminal Procedure Code reforms did expand law enforcement authorities’ power to conduct wire-tapping for one economic crime (fraud), these new powers are not available in foreign bribery investigations.¹⁵⁹ During the on-site visit, the police, prosecutors and judges also expressed strong reservation regarding the appropriateness of using such tools, that most of them would find disproportionate in foreign bribery cases.

- Immunity from prosecution for cooperating witnesses

200. Since Phase 3, Japan introduced the possibility for the prosecutors to grant immunity from prosecution for cooperating witnesses in its Code of Criminal Procedure in June 2016. The provision

¹⁵⁵ In Phase 2, the WGB noted that “there is a perception in Japan that in enforcing economic offences the public prosecutor must meet a very high standard, even when requesting a warrant for the search and seizure of financial records” (para. 74).

¹⁵⁶ [Japan Phase 2bis Report](#), para. 96.

¹⁵⁷ Amendments to Code of Criminal Procedure (Act 54 of 2016), promulgated on 3 June 2016. The impetus for the reform was a 2010 evidence-tampering scandal involving the Osaka DPPO. *See* Sayuri Umeda, “Japan: 2016 Criminal Justice System Reform”, US Law Library of Congress Global Legal Research Center (Nov. 2016), pages 1-2.

¹⁵⁸ The new video-recording requirement, which is designed to reduce the risk of false confessions, only apply to offences punishable by death or indefinite imprisonment or to crimes in which a victim died because of an intentional criminal act. *See* Sayuri Umeda, “Japan: 2016 Criminal Justice System Reform”, US Law Library of Congress Global Legal Research Center (Nov. 2016), pages 3-4.

¹⁵⁹ The 2016 amendment expanded the list of offences for which wiretapping is permitted. While virtually all the offences are serious crimes involving bodily harm or organised crime, such as arson, murder, and child kidnapping, the 2016 amendment authorises wiretapping for one financial crime (fraud). *See* Sayuri Umeda, “Japan: 2016 Criminal Justice System Reform”, US Law Library of Congress Global Legal Research Center (Nov. 2016), page 6.

entered into force in June 2018. In addition, under the new Agreement Procedure, which was first used for a foreign bribery matter in the *Mitsubishi case* in July 2018, the prosecution can also decide to not charge a suspect who agrees to cooperate in an investigation of another wrongdoer. The Agreement Procedure is analysed under section B.5.c.

iii. Need to use non-compulsory investigative measures and seek MLA at the earliest possible stage

201. In Phase 3, the Working Group recommended that Japan continue to use non-compulsory investigative measures and seek MLA at the earliest possible stage where appropriate (recommendation 4.a.). This recommendation was deemed partially implemented at the time of Phase 3 Written Follow-up report.

- The use of voluntary investigative measures

202. Phase 3 recommendation 4.a. first covers the broader use of non-compulsory investigative measures, such as voluntary witness interviews and requests for voluntary disclosure of financial records and company information. In order to obtain sufficient evidence to support the request for a warrant, law enforcement authorities would first use voluntary investigative measures as provided under article 197.2 of the CCP. This includes requesting official documents from financial institution to provide bank information voluntarily. The financial institutions would comply with the requests according to the MOJ representatives and prosecutors present at the on-site visit. A warrant would only be requested from a judge where such voluntary requests failed. During the on-site visit, panellists clarified that there is no requirement in Japan's legislation that the account holder be notified of the provision of information by the financial institutions to law enforcement authorities. In its questionnaire responses, Japan states that bank information has been solicited and obtained from both domestic and foreign financial institutions in past foreign bribery cases. Japan indicates that bank information was requested in *one case* (Japan did not indicate in which case). Regarding information voluntarily provided by companies at the request of law enforcement authorities, Japan indicates that voluntary cooperation was provided once by the company in the *Futaba case*. Apart from these two cases, it is not clear whether voluntary measures have been used in the cases that have since been investigated.

203. Similarly, law enforcement authorities can request a suspected company to hand over information and documents on a voluntary basis. Voluntary cooperation from a company should be distinguished from self-reporting whereby a company discloses information to law enforcement without prompting. Another potential investigative measure is voluntary witness interview. Witnesses can only be interviewed voluntarily during the investigative stage. Japan later emphasised that when witnesses refuse, the power to subpoena witnesses to be examined by a judge is available under certain conditions provided under article 226 and 227 of the CCP.¹⁶⁰ This appears to leave limited possibilities to evidence a case. , This could be significant in the Japanese context where only cases with very high probabilities of convictions are prosecuted and brought to court.

- Seeking MLA

204. Phase 3 recommendation 4.a. also covers the Working Group recommendation that Japan seek MLA at the earliest possible stage where appropriate. This section thus focuses on Japan's efforts in this regard only. (International cooperation, including MLA requests, is discussed under section B.6.) In its questionnaire responses, Japan indicates that its authorities have operated a shift in their approach to sending MLA requests in foreign bribery investigations. Japan indicated that "in the past, prosecutors used to make MLA requests only after having exhausted domestic investigations. Now, the MOJ and the prosecutors decided to change their previous stance and to proactively send out MLA requests based on the Matrix at the early stage of an investigation."

¹⁶⁰ Also see [Japan Phase 2bis report](#) para. 79.

205. This new approach appears to have materialised in practice. MLA requests have been sent in the eight investigations currently ongoing in Japan that were all but one initiated between May and July 2018. It seems that both coercive and non-coercive measures have been requested through these requests. For instance, in one case (not named in this report at Japan's request for confidentiality reasons), Japan requested the court decision regarding the bribe taker, information on the identities of any Japanese witnesses/suspects, as well as written statements and testimony records. In the *JTC case*, Japan requested bank information, documents related to the identity of the bribe taker, documents related to registry of a legal person as well as requests to interview individuals.

206. In addition to seeking formal MLA, Japan indicates in its questionnaire responses that informal cooperation was used prior to initiating an investigation in six cases (not named in this report at Japan's request for confidentiality reasons).

207. While Japan should be commended for the shift in its approach to seeking both formal and informal MLA as recommended by the WGB, it should also be exploring all potential investigative avenues in Japan (e.g. requesting information from tax authorities, requesting bank information, conducting search and seizures, interviewing witnesses and alleged involved persons etc.). In the seven on-going investigations, apart from the above-mentioned MLA requests, no other independent investigative steps appear to have been taken domestically while awaiting responses to the requests that have been sent.

iv. The use of confession as a main tool in foreign bribery cases

208. In its past evaluations of Japan, the WGB acknowledged that confession is an important feature of Japan's criminal legal system. In Phase 2bis, the WGB questioned whether such a strong reliance on confession may impede foreign bribery investigations and prosecutions (Phase 2bis Follow-up issue 9.b.) but this has not since been re-examined by the Working Group.¹⁶¹

209. The Phase 2bis report noted that in the Japanese legal system, "confession provides the suspect with an opportunity to be remorseful. It is believed that if the offender does not confess and is not remorseful, rehabilitation and reintegration will not be successful."¹⁶² In Phase 2bis, a representative from the SPPO stated that "a confession is not a pre-requisite to prosecute foreign bribery as long as other hard proof is available. However, obtaining a confession is considered an important factor in building a case." During the Phase 4 on-site visit, a similar weight appeared to be granted to confessions by the MOJ, prosecutors and police representatives. The prosecutors asserted that while confessions help speeding-up the investigative process, they would still consider bringing a foreign bribery case to prosecution in the absence of confession either by a related individual or the corporate entity itself, provided that the offence could be evidenced by other means. They however welcome the introduction of the new tool of prosecutorial agreement, which should contribute to securing more confessions and/or statements.

210. Since Phase 3, foreign bribery investigations and prosecutions have continued to rely on confession obtained from the accused persons. In its Phase 4 questionnaire responses, Japan indicates that "the most frequently used source of evidence in foreign bribery case were the statements of persons involved, the belongings of persons involved and/or company such as pocketbook and documents, and entry/exit records." During the on-site visit, private sectors lawyers stressed that given the difficulties in establishing intent, Japanese prosecutors would need to secure the confession of the accused persons. In the two cases concluded since Phase 3, the defendants have confessed to law enforcement authorities, which might have contributed to keeping the length of the criminal proceedings in both cases to less than a year. Japan indicates in its questionnaire responses that the proceedings in the *Futaba case* lasted for about 9 months (from January to October 2013). In the *JTC case*, the proceedings took about 11 months (from March 2014 to February 2015). In the *Mitsubishi case*, two of the three defendants confessed and pleaded guilty to foreign bribery charges. The third defendant did not confess and his trial was ongoing at the time of this evaluation.

¹⁶¹ [Japan Phase 2bis report](#), para. 88.

¹⁶² [Japan Phase 2bis report](#), para. 87.

v. *Untapped investigative tools and techniques*

211. Documentary evidence is usually a critical component in foreign bribery investigations. Based on the information provided by Japan in its questionnaire responses and related annexes, investigative tools and techniques usually used to uncover such evidence appear to be under-used.

212. Search and seizure is one of the most common tools used across the Parties to the Convention in foreign bribery investigations. In Japan, a court will only grant a warrant to perform search and seizure of financial or company records where it deems such information to be necessary (article 218 (1) of the CCP). Japan reports having conducted such measures in only two cases. In *the Futaba case*, Japan indicates that the “police arrested the suspects and conducted search and seizure at the relevant places. Additionally, police officers and prosecutors sought voluntary cooperation from the company which produced documents located outside Japan to law enforcement authorities”. In the *Fishing Firms case*, Japan indicates that the prosecutors seized and examined relevant documents”.

213. The reasons why searches and seizures are not performed more often in foreign bribery cases, were discussed during the on-site visit as these are usually instrumental in securing evidence in foreign bribery cases. At the time of finalising this report, Japan pointed to article 156 CCP emphasising that a mere suspicion of a crime is sufficient to request a warrant. During the on-site visit, judges could not specify the exact test would apply other than the requirement that there is “a true need” for search and seizures. From the discussion with prosecutors, they do not routinely request judicial authorisation to perform search measures, in particular because of the high evidentiary threshold these requests require. After the on-site visit, the MOJ provided a 1969 Supreme Court decision holding that a warrant for search and seizure should not be authorised “if there is clearly no need” in light of various factors, including the severity the offense, the need for evidence, and the risk that evidence could be concealed or destroyed.” The number of factors involved confirms the high evidentiary threshold mentioned during the on-site visit. This may dissuade the prosecutors from seeking to obtain a warrant, at least not before an already advanced stage in the investigations, when they have gathered enough evidence to meet the high threshold.

214. Forensic audits have not been reported by Japan in any foreign bribery cases to date, although Japan indicated that these are regularly performed by prosecutors. Japanese authorities have also never formed a joint investigative team or developed a common investigative strategy with foreign law enforcement authorities. During the on-site visit, law enforcement representatives indicated that with most Asian countries, weekly meetings are held with police attachés in the embassies in the countries and in Japan. However, beyond this routine information sharing, no police to police cooperation is used in foreign bribery investigations.

Commentary

The lead examiners welcome the change in approach of the prosecutors regarding the now early utilisation of the MLA requests, as part of the Action Plan developed by Japan to respond to a WGB Phase 3 recommendation.

However, concerns remain about the lack of other investigative steps such as police to police cooperation, general lack of coordinated investigative activities and lack of pro-activity of both the prosecution and the police in investigating foreign bribery cases, as well as an overreliance on voluntary measures and confessions. The lead examiners are concerned with the limited use of coercive measures and the seemingly high practical threshold to seek court warrants to proceed with search and seizure, which exists either by virtue of the evidentiary threshold required in practice, the “true need” requirement or a combination of both. As a consequence, there is a distinct lack of the use of coercive means in the gathering of evidence, in particular in relation to legal persons.

They also note Japan’s continued resistance to make covert methodology available in foreign bribery investigations, and they are concerned that this may hinder the timely gathering of evidence in foreign bribery matters. They find the above issues all the more concerning against a background where a

particularly high evidentiary threshold is required to establish the foreign bribery offence under Japanese law as discussed under section B.4.a. above.

The lead examiners recommend that Japan urgently take steps to more pro-actively investigate foreign bribery cases and improve the gathering of evidence through, in particular: (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 vi) conducting forensic audits where relevant.

The lead examiners also recommend that Japan revise 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 (subject to any lawful claims of privilege); and (ii) make wiretapping and other covert investigative means available in foreign bribery investigations.

e. Coordination with other authorities including tax authorities and JAFIC

215. Given the intrinsic links between bribery, tax and money laundering offences, cooperation and information sharing between law enforcement authorities, tax authorities and Japan's FIU (JAFIC) in foreign bribery investigations is important.

i. Limited cooperation with the tax and other relevant authorities

216. In Phase 3, the WGB found that there was no legal impediments to the cooperation between tax and Japanese law enforcement authorities and noted that coordination between the prosecutors, the National Tax Agency (NTA) and the SESC was taking place.¹⁶³ However, the WGB asked Japan to ensure that the special investigative divisions within the DPPO and the police cooperate effectively with these authorities in foreign bribery investigations (recommendation 4.b.). At the time, the tax authorities had collaborated to the investigation in the *PCI case*. Japan has partially implemented this recommendation. Japan had taken steps to remind law enforcement authorities of the need to seek the assistance of tax and other relevant authorities. However, in practice, this cooperation did not fully translate into the operational investigative measures taken by the prosecutors and the police.

217. In Phase 3, the NTA indicated that public prosecutors' offices often requested information from regional tax offices as part of their investigations. However, since Phase 3, such cooperation appears to have only materialised in the *Futaba case*. From the information Japan provided, this case aside, the prosecutors did not request the cooperation of the NTA or the SESC in any of the other cases that were investigated. Although Japan asserted confidentiality prevents more detailed information in this report, it appears to the evaluation team that the DPPO does not routinely mobilise the tax authorities or the SESC to further its investigations. As previously explained in this report, the police has hardly ever been involved in a foreign bribery investigation and therefore cooperation between the police and the tax authorities remains largely untapped.

ii. Similarly limited cooperation with Japan's financial intelligence unit

218. In Phase 3, the WGB recommended that law enforcement authorities provide systematic feedback to JAFIC on how they utilise information from the FIU in their foreign bribery investigations (recommendation 4.c.).¹⁶⁴ JAFIC had never uncovered foreign bribery cases. In turn, the law enforcement

¹⁶³ [Japan Phase 3 report](#), paras. 73-75.

¹⁶⁴ [Japan Phase 3 report](#), para. 81

authorities did not routinely use information referred by JAFIC in foreign bribery investigations. The recommendation was deemed partially implemented at the time of Japan regular Written Follow-up report in December 2013.

219. Since Phase 3, the situation remains largely unchanged. As discussed under section A.2, JAFIC still has not detected any cases and financial information provided by JAFIC remains under-utilised in foreign bribery investigations. Against this background, Japan indicated that JAFIC has organised regular liaison meetings with investigative authorities on suspicious transactions. The stated purpose of such meetings is for investigative authorities to provide feedback on the type of information that can usefully be reported by financial institutions. This information is then used to provide general guidance to financial institutions. While this is a positive way of sharing information, this is not exactly addressing the WGB recommendation, which aimed at improving feedback to JAFIC in the specific cases that it forwarded to law enforcement authorities.

Commentary

The lead examiners note with concerns the limited cooperation and information sharing between tax authorities, JAFIC and law enforcement authorities in actual foreign bribery investigations. They recommend that 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.

B.5. Concluding a Foreign Bribery Case

a. Cases concluded as of Phase 4

220. Of the 5 cases concluded since 1999, 3 were the result of a full court trial, before the Tokyo District court. The remaining 2 cases were concluded by way of a summary order. No prosecution has ever resulted in an acquittal in foreign bribery case. None of the sentences imposed to date have been appealed by either the prosecution or the defendants.

b. Judicial awareness, training and specialisation

221. In Japan, all criminal cases are heard and determined in ordinary judicial tribunals and all courts are incorporated into a unitary national judicial system. There are 5 types of courts: The Supreme Court, High Court, District Court, Family Court and Summary Courts.¹⁶⁵ There are no specialised courts for foreign bribery or for other types of offences. No specialised chambers or specialised judges exist even at the level of the High courts, as confirmed by judges during the on-site visit. No appeals have been made to date in the five concluded foreign bribery cases that have all been resolved at the District Court level. Based on discussions at the on-site visit, appeals do not appear to be routinely made in other serious economic crimes cases either. Japan later indicated that no statistics are kept of the rate of appeal in serious economic crimes cases but that with respect to general criminal cases (including economic crimes), the rate of appeal in district court from 2015 to 2018 is 11.5%.

222. Given the over 99% conviction rate, it appears that the impediments to enforcement may be placed at earlier stages of the procedure. It is, however, possible that the Courts have established high and often dissuasive evidentiary thresholds for establishing the foreign bribery offence. Given the lack of cases, it is not possible to make a definitive conclusion. Even if during the on-site visit, judges stressed that case law is not binding in Japan outside of Supreme Court precedent, prosecutors and lawyers indicated that they still have persuasive authority, in particular concerning the level of sanctions for previous similar offences. Given the lack of specialisation in the judiciary, awareness of the foreign bribery offence is thus instrumental for the largest possible range of judges.

223. Regarding training provided to the judiciary on the offence and the Convention, Japan indicated in its questionnaire answers, that its Legal Training and Research Institute sends judges to the yearly, one

¹⁶⁵ Criminal Justice in Japan, 2014 edition, UNAFEI.

month UNCAC training program organised by UNAFEI, a UN-affiliated regional research institute administered and funded by the Japanese government. This training program for investigators, prosecutors, and judges focuses *inter alia* on the characteristics and complexity of foreign bribery cases. It allows an exchange of experience and best practices among participants from different countries. In 2018, two judges, one from district court level and one from high court level, attended this training program. Additionally, six District Court judges attended a lecture by German judges and prosecutors experienced in handling foreign bribery cases, hosted by the MOJ in November 2018. Two District Court judges also attended a Washington D.C conference on foreign bribery and corruption, hosted by the US government in 2018. Japan did not indicate how many judges attended these two trainings. It is difficult to assess judges' training based on the limited information provided by Japan.

Commentary

The lead examiners note that training only started to take place in the year preceding the Phase 4 evaluation and that it has mainly focussed on training a limited number of judges.

The lead examiners 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 non-specialised judges, likely to handle foreign bribery cases.

c. Japan's new Agreement Procedure for resolving certain criminal matters

224. During the Phase 2bis evaluation, the lead examiners recommended that Japan consider broader investigative tools for foreign bribery, including the possibility of granting immunity to cooperating witnesses.¹⁶⁶ In Phase 3, the Working Group reiterated this recommendation (recommendation 4.a.) Japan has partly implemented this recommendation.¹⁶⁷

i. Agreement Procedure

225. According to Japan, the Agreement Procedure is available to both natural and legal persons suspected of involvement in certain specified crimes, including foreign bribery as well as false accounting and money laundering predicated on foreign bribery. It can only be used if the suspect agrees to cooperate in proving that another wrongdoer committed one of the specified crimes. The three recognised forms of cooperation are (i) making truthful statements to investigators; (ii) providing necessary cooperation, including evidence of other persons' crimes; and (iii) testifying truthfully in court.¹⁶⁸ Depending on the totality of the circumstances, including the value of the cooperation provided, the prosecution could decide not to charge a suspect entirely, pursue a lesser charge, seek a lower penalty for a given offence, or seek a summary judgment. In terms of procedural protections, the suspect's attorney must consent before the suspect can conclude an agreement. Moreover, if no agreement is reached, neither the suspect's statements nor evidence derived from them can be used against the suspect in a criminal trial.

226. The SPPO has issued a Circular setting forth the conditions for entering into an agreement and the procedures that should be followed when dealing with suspects.¹⁶⁹ In particular, the Circular highlights the importance of the evidence obtained through the suspect's cooperation as well as the severity and circumstances of the offences committed by both the suspect and the other wrongdoer concerned. Prosecutors must also ensure that the evidence about the other wrongdoer can be independently corroborated before consenting to the Agreement Procedure.¹⁷⁰

¹⁶⁶ [Japan Phase 2bis report](#), paras. 98-100 & recommendation 6.d.

¹⁶⁷ Japan Phase 3 Written Follow-Up Report, page 5.

¹⁶⁸ Kaku Hirao, "Japan: Overview", *The Asia-Pacific Investigations Review* (2019), page 50.

¹⁶⁹ Supreme Public Prosecutors Office Circular Notice No. 13 (19 March 2018).

¹⁷⁰ Supreme Public Prosecutors Office Circular Notice No. 13 (19 March 2018), page 5.

227. Japan could not confirm whether the Agreement Procedure has yet been used for a natural person in a foreign bribery case, though media reports indicate that it may have been used with natural persons in connection with at least one other white-collar economic offence.¹⁷¹

ii. A potentially useful tool whose benefits are uncertain

228. In its questionnaire, Japan explains that the Agreement Procedure was designed to encourage participants in a criminal organisation or scheme to provide evidence needed to convict the “mastermind”. Private practitioners largely concurred that Japan needs this sort of law enforcement tool, especially for transnational crimes. In their view, prosecutors in Japan have traditionally been dependent on the company to gather and provide evidence in such cases given the difficulties of obtaining MLA. The Agreement Procedure potentially provides a means for enhancing such cooperation.

229. The new Agreement Procedure could also potentially encourage individuals and companies to report crimes that have not yet been detected. While acknowledging that the SPPO had prepared a Circular to provide some guidance about the new procedure, business representatives and lawyers during the on-site visit maintained that outcomes of the new procedure were still too uncertain for them to pursue at this time. They believed the Circular was either not specific enough or provided for too much prosecutorial discretion to understand exactly how the procedure would be applied in foreign bribery cases. In particular, they could not predict the benefit that would be obtained through the procedure. One practitioner expressed a hope that Japan would develop more predictable guidelines on the benefits that companies could earn through cooperation, along the lines of what Japan has developed in the antitrust (competition) area.

iii. The first time the Agreement Procedure was used for foreign bribery, the company received a declination without any forfeiture or sanction

230. From the information obtained by the evaluation team, the Agreement Procedure has so far only been used in connection with foreign bribery in the *Mitsubishi case*. This was the first use of the Agreement Procedure for any offence. Japan was unable to confirm whether the Agreement Procedure has been used with any other legal persons. In this case, the company first reported in June 2015 its suspicions that two of its former officers and the former general manager of one of its divisions had been involved in the alleged bribery of a Thai foreign official in order to ensure the speedy delivery of parts intended for a power plant construction project. The company thus made the report before the legislation creating the Agreement Procedure was adopted in June 2016, much less entered into force in June 2018.¹⁷² According to prosecutors during the on-site, the company provided extensive cooperation that was “essential” for developing an understanding of the bribery scheme.¹⁷³ Nonetheless, in its questionnaire responses, Japan also reported that it obtained MLA, including statements of participants as well as documentation about the public officials, from the foreign country. In recognition of the company’s extensive cooperation, the Tokyo DPPO ultimately decided not to prosecute the company once the Agreement Procedure entered into force, focusing instead on prosecuting the natural persons involved.

231. Given this outcome of the Agreement Procedure, the evaluation team explored whether companies that self-report or cooperate will almost inevitably obtain a declination in foreign bribery cases. Given that companies will typically be uniquely placed to obtain evidence from abroad, their cooperation will almost always be crucial for foreign bribery investigations. The prosecutors disagreed, emphasising that each decision to resort to the Agreement Procedure will be determined on a case-by-case basis. While

¹⁷¹ [“Plea deal talks with Nissan executives over Ghosn charges began month prior to his arrest”](#), Japan Times (10 March 2019)

¹⁷² Mitsubishi Hitachi Power Systems, Ltd. (July 2018), [“Notice regarding charges filed against former officers and employee for violation of the Unfair Competition Prevention Act”](#)

¹⁷³ As described in paras. 31-33, two individuals subsequently confessed and have received suspended terms of imprisonment following conviction after trial. A third person is contesting the charges

this is a reasonable approach given that the procedure is quite new, it reinforces the practitioners' view that it is not yet possible to predict its consequences sufficiently.

232. During the on-site visit, participants reported that the public was watching the case closely, which may influence how the Agreement Procedure is used in future cases. The participants themselves expressed a range of views about the outcome of the Agreement Procedure for the company involved. While some legal practitioners believed that the trade-off between corporate and individual liability could raise ethical issues, some civil society representatives observed that in this case the natural persons were not rank-and-file employees. They also pointed out that in the long run, such agreements could deter individuals from committing crimes on behalf of their companies.

iv. The need for effective, proportionate and dissuasive sanctions

233. In the *Mitsubishi case*, the new Agreement Procedure did not exist when the company first made its self-report and started cooperating. It is thus too early to say what impact this tool will have on future cases. However, the case highlights the potential benefits and risks of this new law enforcement tool. On one hand, the company's cooperation apparently provided Japanese authorities with evidence that it has already used to obtain convictions of two of the three natural persons allegedly involved. On the other hand, by resolving the case with a declination, the company was able to avoid forfeiting any amounts that may have been illegally obtained through the bribery scheme. Japanese law does not permit confiscation without a conviction. Additionally, the MOJ confirmed that the law regulating the Agreement Procedure does not permit prosecutors to condition the agreement on a voluntary forfeiture of the illegal proceeds. It remains to be seen what sanctions will be imposed through the Agreement Procedure in future foreign bribery cases.

v. Transparency of the Agreement Procedure could be enhanced

234. Media representatives during the on-site visit reported that it had so far been difficult to learn about the Agreement Procedure as the document was sealed until used at trial. Thus, even though the natural persons had been charged, the Agreement with the company had not yet been made public as of the on-site visit. Even after two of the three accused individuals were convicted, Japan maintains that its laws on confidentiality prohibit it from sharing the Agreement Procedure with the evaluation team. Still, Japan was able to explain the contents generally, as discussed above in the Introduction's case summary of *Mitsubishi case*. For this reason, it was not possible to assess the level of cooperation that the company provided or to understand why the prosecutors decided to grant the company a declination. According to the CCP, the prosecution must submit the contents of any concluded Agreement to the court if they seek to introduce a written statement from the suspect in the trial against another individual.¹⁷⁴ This rule is intended to help the judge or, where applicable, lay judges (*saiban-in*) assess the credibility of the cooperating suspect.

Commentary

The lead examiners recognise that Japan has made tremendous efforts to revise its Criminal Procedure Code in response to the Working Group's call for greater law enforcement tools. Japan's new procedure for encouraging those involved in criminal schemes to provide evidence to law enforcement could potentially encourage better cooperation with certain suspects in order to obtain evidence to prosecute those most responsible for engaging with foreign bribery.

However, given the current uncertainty about the outcome of the Agreement Procedure, the lead examiners recommend that Japan develop a clearer framework setting out the credit that a company can earn by cooperating in the investigation and prosecution of foreign bribery cases.

The lead examiners recommend that Japan amend its law so that prosecutors can condition any declination that may be given through the Agreement Procedure on the suspect's forfeiting the

¹⁷⁴ CPC, Articles 350-8 & 350-9

unlawful proceeds obtained from foreign bribery. In addition, they recommend that the Working Group follow up to ensure that the sanctions imposed in the context of the Agreement Procedure are effective, proportionate and dissuasive.

The lead examiners recommend that Japan also ensure that the terms of any agreement concluded through the Agreement Procedure, including (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.

B.6. Mutual Legal Assistance and Extradition in Foreign Bribery Cases

a. Japan continues to develop its Mutual Legal Assistance networks

235. In Phase 3, the Working Group recommended that Japan conclude additional treaties concerning mutual legal assistance (MLA), especially with its trading partners (recommendation 6). The Working Group considered that this recommendation was partly implemented.¹⁷⁵ In Phase 4, Japan reports that it has already concluded MLA treaties with several primary trade partners.¹⁷⁶ While Japan apparently has not concluded any new treaties since Phase 3, it reports in its questionnaire responses that it has agreed with Vietnam to begin negotiating an MLA treaty with that country. Japan also reports that it is exploring the possibility of negotiating similar agreements with some other unnamed countries. In addition, Japan is a Party to the UN Convention Against Corruption (UNCAC) as well as the UN Convention against Transnational Organized Crime (UNTOC) since July 2017. As a result of the UNCAC, Japan can now seek assistance from virtually every country without having to resort to slower diplomatic channels. In terms of actual MLA practice, Japan reports a concerted effort to use MLA as an investigative tool since Phase 3, as discussed under section B.4.d.above.

b. Japan needs to ensure that it remains active and responsive in foreign bribery matters

236. Concerning Japan's response to MLA requests from other Parties to the Anti-Bribery Convention, the Secretariat asked the Working Group members to provide updates about their experiences in seeking MLA from Japan. Of the 44 Parties to the Convention, 12 responded. Of these, 7 countries reported having some MLA interaction with Japan. Only 1 country reported having sought assistance from Japan in connection with a foreign bribery case. That country was satisfied with the results, as it was able to obtain corporate records with Japan's assistance. The other 6 countries had interactions with Japan to obtain assistance in connection with other offences. These countries mainly reported positive experiences, or at least that they had not encountered any major problems. One country, however reported that it considered that Japan took an overly formalistic approach in handling its requests. Several countries also expressed some concern about the time it took for Japan to respond to their requests or reported that it was difficult to communicate with Japan's Central Authority. The longest delay reported was 885 days, but this was not in a foreign bribery case and under an older legal framework. The other country involved indicated that, while it had some initial difficulties having its request processed (under the old procedures), Japan's substantive responses to the request was exemplary and helped the country obtain convictions in that matter.

237. For its part, Japan reports receiving requests from five countries since Phase 3 in connection with the alleged bribery of a foreign public official. One of these countries was not a Party to the Anti-Bribery Convention. These requests sought various forms of assistance, including obtaining bank records or company documents, interviewing witnesses, as well as obtaining Japanese government documents, such

¹⁷⁵ [Japan Phase 3 Follow-Up Report](#), pages 5 & 13.

¹⁷⁶ Indeed, Japan has already concluded MLA treaties with most of its current top trading partners, including the United States; South Korea; the People's Republic of China; and Hong Kong; China. See Japan Phase 3 Report, para. 102 and *Compare* UNTAD Stat, (Nov. 2018), "[General Profile: Japan 2017](#)"

as investigative records prepared by Japan’s law enforcement authorities. From the data Japan reported, it took on average 5.2 months to respond to those requests. The longest reported time was 9 months in connection with a request for investigative records held in Japan.

Commentary

Given that Japan is a Party to the UNCAC, the lead examiners recognise that Japan now has a strong legal framework for cooperating with virtually any country that may have evidence concerning a particular foreign bribery matter. They nonetheless recommend that the Working Group follow up on Japan’s ongoing efforts to maintain and develop bilateral MLA relationships with its main trading partners and other countries in the region.

c. Extradition for foreign bribery matters remains untested

238. The Working Group last examined extradition in Phase 1.¹⁷⁷ At the time, Japan could generally only extradite if an offence was punishable by at least three years’ imprisonment in both Japan and the requesting country “unless a treaty of extradition provides otherwise”.¹⁷⁸ According to Japan, a suspect could be extradited regardless of the penalties that could be imposed in Japan or the requesting country because the Anti-Bribery Convention would be considered a “treaty of extradition”. Japan has not provided any indication that this interpretation has been confirmed in either jurisprudence or practice. As the Anti-Bribery Convention expressly provides that if a Party imposes a dual criminality condition, “that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention”.¹⁷⁹ Thus, it appears that Japan should be able to extradite a suspect regardless of the maximum sentences that could be imposed either in Japan or in the requesting country, notwithstanding Article 2(iii) and (iv) of the Act on Extradition.

239. The Act of Extradition also provides that extradition will be refused on other grounds, “unless a treaty of extradition provides otherwise”, including when the suspect is a Japanese national.¹⁸⁰ Likewise, extradition will be refused if under Japanese law “it would be impossible to impose or execute punishment” if the offence was deemed to have been committed in Japan or if a Japanese court would have tried the offence.¹⁸¹ Once again, there does not appear to be any case law or practice interpreting Japan’s ability to extradite its nationals in light of the Anti-Bribery Convention. In general, Article 2(ix) of the Act on Extradition prohibits the extradition of a Japanese national unless a treaty provides otherwise. The Anti-Bribery Convention in turn requires each Party to ensure that it can either (i) extradite its nationals or (ii) prosecute its nationals for foreign bribery. If a Party refuses an extradition request concerning a foreign bribery offence “solely on the ground that the person is a national”, the Party “shall submit the case to its competent authorities for the purpose of prosecution”.¹⁸² Given the Anti-Bribery Convention’s lack of an express obligation to extradite, it is not clear whether Japanese courts would authorise extradition of a Japanese national notwithstanding the general default rule against extradition.

240. Moreover, it is not clear whether Japan would extradite any suspect against whom it would be impossible to impose or execute a sentence in Japan. While no court jurisprudence is available on this point, this could potentially mean, that if Japan’s limitation period were shorter than the requesting country, Japan would have to refuse extradition.

¹⁷⁷ [Japan Phase 1 report](#) p. 10 (Section 3.4).

¹⁷⁸ [Japan Phase 1 report](#) p. 10 (citing Law of Extradition (Act 68 of 1953), Article 2).

¹⁷⁹ Anti-Bribery Convention, article 10(4).

¹⁸⁰ Act of Extradition, Act 68 of 1953 (as amended by Act 37 of 2007), Article 2(ix).

¹⁸¹ Act of Extradition, Act 68 of 1953 (as amended by Act 37 of 2007), Article 2(v).

¹⁸² Anti-Bribery Convention, article 10(3)

Commentary

While recognising that Japan has not yet been asked to extradite a national or any other suspect in connection with foreign bribery, the lead examiners recommend that the Working Group follow up on how Japan will handle such requests as practice develops.

C. RESPONSIBILITY OF LEGAL PERSONS

C.1. Scope of Corporate Liability for Foreign Bribery and Related Offences

a. Prerequisites for corporate liability

241. In Phase 3, the Working Group observed that Japan’s framework for imposing corporate liability for foreign bribery appeared broad.¹⁸³ However, given that Japan only had one case in which a company had been sanctioned for foreign bribery, the Working Group could not definitively assess Japan’s framework against the standards in the 2009 Recommendation. The situation remains mainly the same as of Phase 4, although the *JTC case* represents a second foreign bribery case in which Japan held a company liable.

242. Article 22 UCPL sets forth two basic conditions that must be satisfied before a company can be sanctioned for foreign bribery. First, the company’s “representative ... agent, employee, or other worker” must have violated the UCPL. Second, the violation must have been made “with regard to the [company’s] business”.¹⁸⁴ In the *JTC case* (the one foreign bribery case since Phase 3 in which a company was held liable for foreign bribery) the court found numerous instances in which the company’s “representative director”, an “executive director” and a “manager” of a division had engaged, along with a number of other employees, in bribery schemes “in relation to the business of the defendant company”. Thus, the two basic elements establishing corporate liability under the UCPL were satisfied.

243. During the on-site visit, the evaluation team explored these two conditions. Concerning the relevant actors, the prosecutors maintained that the persons whose acts could give rise to corporate liability was indeed quite broad. For instance, they reported that the term “other workers” in Japanese law could cover a range of other related individuals, such as beneficial owners. No jurisprudence was provided to support this interpretation. Concerning the needed connection between the violation and “the company’s “business”, the prosecutors and Ministry of Justice representatives were also not aware of any court jurisprudence concerning this condition. One Ministry of Justice representative suggested that a starting point would be to examine the corporate charter to determine the range of activities that the company can undertake. While the court in the *JTC case* did not expressly interpret this condition, it accepted that bribes given for favourable treatment in connection with various activities, such as obtaining construction contracts, modifying the terms of those contracts, and in executing the contracts, constituted violations of the UCPL.

Commentary

The lead examiners welcome that Japan has obtained another conviction of a corporation for foreign bribery since Phase 3. On paper, the formal conditions for imposing liability under the UCPL would appear to be quite flexible, potentially in line with the first approach described in Annex I, Part B of the 2009 Recommendation. As there is not yet clear jurisprudence on the full scope of Japan’s conditions for corporate liability, for example in cases in which a low-level employee or an agent bribes without an officer’s direction or authorisation, the lead examiners recommend that the Working Group follow up on this issue until sufficient practice develops.

¹⁸³ [Japan Phase 3 report](#) paras. 36-39.

¹⁸⁴ Article 22 of the UCPL.

b. Impact of a company's compliance system on liability

244. In Phase 1, the Working Group observed that corporate liability in Japan was tied to a concept of negligence, specifically the failure to exercise due care in supervising the acts of employees or agents in order to prevent the offence.¹⁸⁵ While the UCPL does not expressly link negligent supervision to corporate liability for foreign bribery, the Supreme Court has long interpreted corporate liability under other laws to imply such a concept. In 1965, for example, it upheld a company's conviction under the Foreign Exchange and Foreign Trade Act despite a claim that the provision unconstitutionally imposed a form of strict liability.¹⁸⁶ That provision, like the UCPL, did not expressly link corporate liability to negligence. Nonetheless, the Supreme Court upheld the constitutionality of the conviction because the offence implied a presumption of negligence. As a result, a company will be liable for a violation committed by an employee "unless it is proven that such employer exercised due care as reasonable."¹⁸⁷ The Supreme Court's judgment appears to exclude this defence in situations where the company's representative commits the violations, but Japan could not provide any Supreme Court jurisprudence explaining how such cases would be handled.

245. The METI Guidelines refer to this Supreme Court jurisprudence as evidence that a corporate compliance system may be considered a potential defence to liability for foreign bribery under the UCPL.¹⁸⁸ In its questionnaire responses, Japan affirms that the mere "existence of internal controls, ethics and compliance programs or measures to prevent and detect foreign bribery" cannot exclude criminal responsibility. During the on-site visit, however, both government and private-sector lawyers recognised that the Supreme Court jurisprudence, if extended to the UCPL, would enable a company to avoid liability if it could prove that it had reasonably sought to prevent the employee's violation from happening. According to prosecutors and private practitioners, the company would presumably bear the burden of establishing that it had not been negligent in order to prevail, for instance by showing that it properly designed and implemented a compliance programme. Further jurisprudence or legislation will be necessary to clarify if, and under what circumstances, corporate compliance programmes will enable companies to avoid liability for foreign bribery.¹⁸⁹ As discussed in section C.1.b., compliance programmes or similar efforts to prevent corruption could also be mitigating factors even if a company were held liable for foreign bribery.

Commentary

The lead examiners suggest that the Working Group should follow up on 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.

c. Imposition of a corporate fine in the absence of a prosecution or conviction against a natural person

246. Given the lack of jurisprudence, the Working Group reserved judgment in Phase 3 on whether companies could be held liable for foreign bribery in Japan even if a natural person is not prosecuted or convicted.¹⁹⁰ In Phase 4, Japan reports that there are still no cases where it has convicted a company for foreign bribery without also convicting natural persons. Indeed, in the *JTC case*, both the company and

¹⁸⁵ [Japan Phase 1 report](#) page 7.

¹⁸⁶ This 1965 case is also cited in METI's *Guidelines for the Prevention of Bribery of Foreign Public Officials* (Sept. 2017), section 3.3(2)(ii) & footnote 51.

¹⁸⁷ Supreme Court ruling of 26 March 1965, Supreme Court Criminal Case Reports, vol. 19, no. 2, page 83..

¹⁸⁸ METI *Guidelines*, Section 2.1(2) & footnote 17.

¹⁸⁹ The Working Group's analysis of corporate liability frameworks in the then 41 Parties to the Anti-Bribery Convention showed that at least 12 Parties envisioned that corporate compliance programmes or other efforts to exercise supervision could, in some circumstances, negate corporate liability for foreign bribery. OECD (2016), *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report*, page 66.

¹⁹⁰ [Japan Phase 3 report](#), para. 39.

three individuals involved in the bribery scheme were convicted in the same proceedings. In its questionnaire responses, however, Japan reports that companies have been convicted of other offences even though no natural person was prosecuted. For example, a tire company's subsidiary was prosecuted for violating the UCPL by submitting false data to regulators, even though no natural person was charged. After the on-site visit, Japan clarified that this conviction was predicated on an offence with a *mens rea* element, but it was not clear if this was the same as that for the foreign bribery offence.

Commentary

The lead examiners recognise that Japan has, in at least one instance, convicted a company for violating the UCPL without first prosecuting or convicting a natural person. However, as Japan has not yet held a company liable for foreign bribery without also prosecuting a natural person, the lead examiners recommend that the Working Group continue to follow up this issue as practice develops for the foreign bribery offence.

d. Liability of the legal person for acts committed by intermediaries, including related persons

247. In Phase 3, the Working Group could not ascertain whether corporate liability would be triggered if a relevant officer or employee of a Japanese company “directed or authorised” a representative of a foreign subsidiary or other intermediary to bribe a foreign public official.¹⁹¹ For this reason, the Working Group decided to follow up as jurisprudence develops. For Phase 4, Japan did not report any foreign bribery cases in which a company bribed through a foreign subsidiary or any other intermediary. In both the *JTC* and the *Mitsubishi cases*, the natural persons involved in the bribery schemes were variously former representative directors, executives, or managers of the Japanese companies. As a result, these cases do not clarify exactly when Japan's corporate liability framework would impose sanctions on a company that engaged in foreign bribery through an intermediary.

248. As for corporate liability for acts committed by agents, prosecutors during the on-site visit reported that courts would likely apply Civil Code article 99 to understand whether a particular individual would be considered the company's “agent”. This article provides that a principal will be bound by a “manifestation of intention” made by an agent who represents that it is “made on behalf of the principal within the scope of the agent's authority.” Without actual jurisprudence, however, it is not clear exactly how far this agency liability would extend in a criminal context. For instance, it is not clear whether agency liability would result in a Japanese company being held liable for bribery committed by a non-Japanese agent abroad or without the company's direction or knowledge while fulfilling a general mandate (e.g. to obtain a contract or a license).

249. In its Phase 4 questionnaire, Japan maintained that if an employee or other relevant person of a Japanese company conspires, while in Japan, with the employee of a foreign subsidiary to engage in foreign bribery outside of Japan, the Japanese company can be held liable. It also adds that the same logic would apply if the employee in the Japanese company induces or aids and abets the commission of foreign bribery by the employee of the foreign subsidiary. No case law was provided to confirm these interpretations. Even though Japan's questionnaire response stressed the need to have a natural person in Japan, it is logical that Japan could also impose liability when a Japanese national participates in a foreign bribery offence abroad, whether directly or indirectly, such as by conspiring with or directing a non-national to engage in bribery. After the on-site visit, Japan elaborated that a company could be held liable in such circumstances, provided that the Japanese national abroad had sufficient ties to the company, but it did not provide any supporting jurisprudence.

250. Finally, Japan maintains that the Japanese parent company could potentially be held liable for the acts of an employee of a foreign subsidiary if the employee were deemed to be a virtual employee of the parent company based on factors, such as the parent company's “degree of involvement” in the day-to-

¹⁹¹ [Japan Phase 3 report](#), para. 40.

day activities of its subsidiary as well as the amount of oversight and control it exercises. Again, this interpretation is yet to be confirmed in a foreign bribery case.

Commentary

The lead examiners observe that while the UCPL envisions the possibility that a company can be held liable for the acts of its agents, there is not yet jurisprudence confirming how such liability would be imposed in practice. Japan's theories for holding parent companies liable for the acts of their subsidiaries by either finding that a relevant person of the parent company participated in the crime or that the subsidiary's employee was also a de facto employee of the parent company are also untested in the foreign bribery context. Given the lack of case law, the lead examiners recommend that the Working Group continue to follow up on how Japan's corporate liability framework imposes liability on companies for foreign bribery committed by both related and unrelated intermediaries.

e. Liability of successor companies

251. In its questionnaire responses, Japan reports that if a legal person that has been indicted "ceases to exist" before a final conviction, Japanese courts will be required to dismiss the case.¹⁹² Hence, a company could avoid conviction by, for example, merging with another entity before the conviction is final. Once the conviction is final, however, a criminal sentence can be executed on a successor entity.¹⁹³ To avoid abuses, Japan can punish an executive who extinguishes a company's existence through a merger or other means with the intent to avoid criminal prosecution or the execution of criminal sanctions. The sanction for such an offence is up to five years' imprisonment. It is not clear whether this provision has ever been applied in practice. It is also not clear if the individual executive could claim that the existence of an independent business reason for the corporate reorganisation (e.g., favourable tax treatment, economic cost-cutting) would negate liability for ending the existence of a company that is or could be subject to prosecution for foreign bribery.

Commentary

Given the lack of case law, the lead examiners recommend that the Working Group continue to follow up on whether Japan's corporate liability framework adequately imposes liability in situations where a company ceases to exist through a corporate merger or other transaction before being finally convicted of foreign bribery.

C.2. Enforcement of Corporate Liability for Foreign Bribery

a. Overview of enforcement to date

i. A low corporate enforcement rate for foreign bribery

252. The number of legal persons held liable in foreign bribery cases is alarmingly low in light of the Japanese export-oriented economy, and the sectors and countries where its companies operate.¹⁹⁴ No Japanese state-owned or state-controlled company or member of *keiretsu* has ever been held liable for foreign bribery. In total, only two legal persons have been convicted in the five foreign bribery cases concluded over the last 20 years.¹⁹⁵ Since Phase 3 (over the last 8 years), only one legal person has been held liable for foreign bribery in the *JTC case*. In addition, one legal person concluded a non-trial

¹⁹² Code of Criminal Procedure, Article 339.

¹⁹³ Code of Criminal Procedure, Article 492

¹⁹⁴ By way of comparison, the WGB expressed concern that one Party to the Anti-Bribery Convention, which is of a relatively comparable economic size, only established corporate liability against 18 legal persons, corresponding to a quarter of the concluded foreign bribery cases. See [Phase 4 Report of Germany](#) section C.2.

¹⁹⁵ In Phase 3, only one legal person (a Japanese parent company) was held liable in 2009 in the *PCI case*, together with four company's executives, including one executive of the company's foreign subsidiary.

agreement without sanctions with the Tokyo DPPO in the *Mitsubishi case*, in June 2018, whereby it agreed to cooperate with the ongoing investigation into the natural persons. As a result, the company was not prosecuted. Corporate liability was not pursued in the *Futaba case* because the prosecution concluded that the alleged bribery committed by the legal person was time-barred. Japan's derisory level of corporate enforcement in foreign bribery cases raises serious questions about the priority it gives to holding Japanese companies liable for foreign bribery.

ii. *The use of prosecutorial discretion to initiate proceedings and prosecute legal persons*

253. One of the reasons that such a low number of legal persons have been sanctioned may be linked to a conservative use of prosecutorial discretion. Pursuant to article 248 CCP, the principle of discretionary prosecution applies to the decision whether to prosecute offenders in foreign bribery cases. At the time of Phase 2, prosecutorial discretion had resulted in the non-prosecution of foreign bribery cases.¹⁹⁶ In Phase 3, the Japanese authorities indicated that one investigation regarding the alleged bribery of a foreign public official by a Japanese company had been closed for lack of evidence.¹⁹⁷ In Phase 4, Japan ascertains that it always considers whether to prosecute any legal persons that may be involved in a foreign bribery case. However, Japan did not provide information on the number of criminal proceedings that have been initiated against legal persons and the number of criminal proceedings dropped. Absent such statistics, the lead examiners are not able to make a comprehensive assessment of Japan's approach to corporate liability.

Commentary

The lead examiners are concerned that Japan demonstrates a derisory level of corporate enforcement in foreign bribery cases, which raises serious concerns over Japan's ability to effectively implement its international commitment under Article 2 of the Convention. Only two legal persons have been held liable over the 20 years since the entry into force of the Convention in Japan. The lead examiners were not given any assurances that proper consideration is given to investigating the legal persons involved in the cases currently under investigation. However, Japanese companies have also been sanctioned for foreign bribery by foreign jurisdictions in cases that have not been prosecuted in Japan.

They therefore recommend that Japan 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.

b. *Application of nationality jurisdiction*

254. In Phase 3, the Working Group decided to follow up on whether legal persons are subject to the provision on nationality jurisdiction for the foreign bribery offence (follow-up issue 15.b.iii.). This has been a follow-up issue in all evaluations since Phase 2. During the Phase 3 follow-up report, the Working Group found that Japan had only partly implemented this recommendation.

255. The relevant provision on nationality jurisdiction remains unchanged since Phase 3. Nationality jurisdiction applies vicariously to legal persons when jurisdiction can be established over a related natural person. Pursuant to article 21(8) of the UCPL and article 3 of the PC, Japan only has extraterritorial jurisdiction over a legal person if it also has jurisdiction to prosecute the natural person who committed the offence abroad. Consequently, Japan does not have jurisdiction to prosecute a Japanese company for bribery committed outside Japan by company employees or agents who are not Japanese nationals. In such a case, Japan can establish jurisdiction if it can prove that any of the parent company's employees in Japan or any Japanese national employee abroad conspired to commit bribery.

256. Since Phase 3, Japan has been able to establish jurisdiction over the legal person in the *JTC case*. In this case, JTC's employees who were Japanese nationals gave or conspired with others to give bribes

¹⁹⁶ [Japan Phase 2 report](#), para. 175.

¹⁹⁷ [Japan Phase 3 report](#), para. 14.

to foreign public officials outside Japan in the course of carrying out JTC's businesses. Japanese prosecutors could thus establish nationality jurisdiction over the company even though the bribes were paid outside of Japan.

257. However, difficulties establishing nationality jurisdiction over legal persons have clearly materialised in at least two foreign bribery matters. In one case (not named in this report at Japan's request for confidentiality reasons), the MOJ informally contacted the foreign authorities on the passive side and learned that the bribery did not take place within Japanese territory and that the foreign authorities had not identified any Japanese national who participated in the offence or conspired with the person prosecuted for bribery in the foreign country. Similarly, in another case (not named in this report at Japan's request for confidentiality reasons), the MOJ informally liaised with the foreign authorities who reported that no Japanese individuals were involved in foreign bribery. Therefore, Japan concluded that there were no grounds in either case for establishing jurisdiction. However, Japanese law enforcement authorities did not take any independent investigative steps to ascertain whether, in the absence of the involvement of a Japanese national abroad, any employee of the parent company had conspired or otherwise participated in the offence from Japan. As a result, Japan did not fully consider whether it had territorial jurisdiction over the offence.

Commentary

The lead examiners are concerned that jurisdiction can only be established over a legal person for bribery committed abroad if a natural person participated in the offence while in Japanese territory or, if the bribery occurred entirely abroad, at least one participant is a Japanese national. This is a major loophole in Japan's implementation of the Convention.

The lead examiners recommend that Japan 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

In parallel to amending its legislation, the lead examiners recommend that Japan 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.

c. Adequacy of the limitation period applicable to legal persons

258. Pursuant to article 22(3) of the UCPL and article 250(2)(v) of the CCP, the statute of limitations for foreign bribery under the UCPL is five years. This provision equally applies to natural and legal persons since 2007¹⁹⁸ In Phase 3, the Working Group decided to follow up to ensure that this five-year-period is adequate for investigating and prosecuting foreign bribery (follow-up issue 15.c.).

259. Since Phase 3, foreign bribery proceedings against at least one legal person have been closed due to the expiry of the corresponding statute of limitations. In the *Futaba case*, the prosecutors did not indict the legal person involved because it found that the facts were time-barred. The limitation period for the natural person had, however, been suspended for a year because the offender was located outside of Japan. The expiry of the statute of limitations has also prevented the investigation and prosecution of at least eight foreign bribery cases for both natural and legal persons. In other cases, the expiry of the limitation period prevented the prosecution of some of the alleged bribe payments. The adequacy of the limitation period for natural persons is discussed under section B.4.c.

d. Japan's new Agreement Procedure for resolving certain criminal matters

260. The Agreement Procedure, which applies to both natural and legal person, is analysed under section B.5.c. about natural persons.

¹⁹⁸ Article 22(3) of the UCPL.

C.3. Sanctions Available for Legal Persons for Foreign Bribery

a. *Monetary sanctions for legal persons remain unchanged and comparatively low since Phase 3*

261. In Phase 3, the Working Group recommended that Japan take appropriate steps to ensure that sanctions imposed on legal persons were sufficiently effective, proportionate, and dissuasive. In the only concluded case in which a company was sanctioned for foreign bribery, Japan's statutory maximum fine represents only a tiny fraction of the value of the bribery scheme (recommendation 1). This recommendation was deemed unimplemented at the time of Japan Written Follow-up report.¹⁹⁹

262. For context, the UCPL, whose stated purpose is to further "the sound development of the national economy", groups the offences for which companies can be held liable into three categories.²⁰⁰ The foreign bribery offence is in the group of UCPL offences punished in the lowest category with a maximum fine of JPY 300 million (approx. USD 2.7 million; EUR 2.4 million).²⁰¹ In contrast the most severe offences under the UCPL are punished with a maximum fine of JPY 1 billion (approx. USD 9.1 million; EUR 8 million). Examples include fraudulently acquiring a trade secret with intent to use it outside Japan or using the trade secret of an "Owner conducting business within Japan".²⁰² Hence, the overall structure of the Act suggests that, consistent with its purpose, it reserves the harshest penalties for offences directly injuring the Japanese economy.

263. During the on-site visit, government officials, including prosecutors, believed that the fines were adequate even if the sanctions for other offences were higher. Representatives from MOJ argued that the sanctions for foreign bribery should be compared with the domestic bribery offence rather than with other UCPL offences. Given that companies are not subject to the PC's domestic bribery offences, however, it is difficult to make any meaningful comparison for assessing the dissuasiveness of Japan's corporate liability regime for foreign bribery. Furthermore, Japan has consistently argued that the foreign bribery offence should be placed in the UCPL rather than in the PC precisely because it considered that the purposes of the foreign and domestic bribery offences is different.²⁰³ By this logic, it would seem more appropriate to compare the sanctions for foreign bribery against those provided for other UCPL violations.

Private practitioners and several civil society representatives also reported that the sanction for foreign bribery was low compared with domestic antitrust (competition) offences or false financial statement disclosures, especially for larger companies. Some legal practitioners reported that for this reason they sometimes had difficulty convincing clients to take anti-corruption training as seriously as they took training for other Japanese economic offences. Several also observed that the fines were quite low from an international perspective, as compared with the US FCPA or the UK Bribery Act. Practitioners reported that for this reason Japanese businesses were more concerned about exposure to US or UK foreign bribery laws than the domestic foreign bribery offence. For their part, representatives from larger companies admitted that the fines for foreign bribery were fairly low. They maintained, however, that the fines were sufficient when considering the reputational impact associated with the offence.

264. Given the low statutory maximum fine currently available under the UCPL, the overall effectiveness of Japan's corporate liability regime will depend on the use of Japan's new powers to confiscate the proceeds illegally obtained through foreign bribery discussed in section B.2.c. below.

Commentary

¹⁹⁹ [Japan Phase 3 Follow-up Report](#), p.5.

²⁰⁰ UCPL Article 1; *id.* Article 22(i)-(iii).

²⁰¹ UCPL Article 22(1)(iii) as read with Article 21(2)(vii).

²⁰² UCPL Article 22(1)(i) as read with Articles 21(1)(i) & 21(3)(i): Fraudulently acquiring a trade secret with intent to use it inside Japan or using the trade secret of an owner not conducting business in Japan is punishable with a maximum fine of JPY 500 million.

²⁰³ [Japan Phase 2 report](#) para. 171; [Japan Phase 2bis report](#) paras. 101-104.

The lead examiners echo the Working Group’s concern from prior evaluations that Japan’s corporate sanctions for foreign bribery remain low both compared with corporate liability for other economic offences in Japan and with foreign bribery offences enacted by other Parties to the Anti-Bribery Convention. For this reason, they recommend that Japan 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 large-scale corruption cases.

b. Sanctions imposed in practice

265. In Phase 3, the WGB was concerned that the sanctions imposed on legal persons in practice might not be sufficiently effective, proportionate and dissuasive (recommendation 1). In the one case that resulted in corporate sanctions, the fine imposed against the legal person was not comparable to the value of the contract obtained through bribery.²⁰⁴ At the time of Phase 3 Follow-up report, recommendation 1 was deemed “not implemented”.

266. The WGB concerns over the level of sanctions imposed in practice remain valid in Phase 4. In the only case resulting in corporate liability since Phase 3, the fine imposed does not appear to meet the effective, proportionate and dissuasive requirements under Article 3 of the Convention. In the *JTC case*, the Tokyo District Court ordered the company to pay a JPY 90 million criminal fine (less than USD 800°000) against the prosecutors’ recommendation that a JPY 150 million criminal fine be imposed. The corporate fine amounted to less than half the value of the total amount of the bribes given, estimated at USD 1.6 million. The amount of the criminal fine is also extremely low when compared to the value of the contracts obtained through bribery. In Vietnam alone, the value of the contract secured through bribery was estimated at JPY 4.2 billion (approx. USD 42 million). This means that the amount of the corporate fines corresponds to only 2% of the value of one of the contracts secured. Even if the court had imposed the maximum JPY 300 million statutory fine for foreign bribery, the fine would have been less than 10% of the contract obtained.

267. Japan does not have any express mitigating factors, except that a person who commits a crime can receive a reduced sentence by surrendering to the law enforcement authorities before they have identified the perpetrator.²⁰⁵ As a result, Japanese courts impose the most appropriate sentence within the statutory maximum based on the totality of the circumstances. Mitigating factors taken into account by the court included the fact that the company and the three executives involved in the case surrendered to law enforcement authorities and their consistent cooperation during the investigation, which included giving detailed statements of the circumstances of the bribery. The court also took into account the debarment measures imposed against the company by JICA from ODA funded contracting prior to the conviction, the “considerable social sanctions” resulting from such debarment and the financial loss resulting from the suspension of some of the company’s ongoing international operations and the non-payment of work already undertaken for the contracts awarded through bribery. The court also took into account the company’s measures to review its internal corporate compliance system, the revision of the company’s tax return for the bribe payments and payment of approx. JPY125 million in taxes. Finally, the court noted that “the defendant company had devoted its efforts over many years to the development of railways in developing countries despite the harsh environment entailed”.

268. In spite of all these elements, the level of the financial sanctions imposed in this case raises serious question over its deterrent effect in a case of this magnitude and severity. Indeed, this case was found to be quite serious by the Tokyo District Court, which found that “the degree of the violation of law was excessive” and that “this case is regarded as a relatively serious one in this category of offence”. In addition, the court found that “the responsibility of the defendant company for each crime in this case is

²⁰⁴ In [Phase 3](#), the only legal person convicted had received a JPY 70 million fine (approx. USD 910°000 at the time) whereas the contract obtained through bribery amounted to USD 24 million in the *PCI case*.

²⁰⁵ Article 42 of the PC.

grave, and in particular, it should be strongly blamed as the bribery continued even after the tax inspection by the National Tax Agency”.²⁰⁶

Commentary

The lead examiners are concerned that the sanctions imposed to date against legal persons have not been adequate. The two corporate fines imposed to date are well below the value of the bribe given and of the contract obtained and consequently, well below the level of profits derived from committing foreign bribery. As a result, foreign bribery may still constitute an attractive investment for Japanese companies operating abroad. The lead examiners therefore recommend that Japan urgently take all necessary steps, including through providing 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.

c. Confiscation

269. As discussed under section B.2.d., Japan amended the AOCL to allow for the confiscation of proceeds of foreign bribery under the UCPL in June 2017. This new confiscation regime applies to both natural and legal persons in foreign bribery cases. The confiscation regime is discussed under section B.2.d.

d. Tax treatment of sanctions and confiscation imposed on legal persons

270. The tax treatment of sanctions and confiscation imposed on legal persons has an impact on the deterrent effect of both fines and confiscation imposed in foreign bribery cases pursuant to Article 3 of the Convention. Japan indicates that confiscated assets in foreign bribery cases are assumed to be deductible from the taxable income base because there is no specific rule indicating that those values are not deductible. The equivalent value of the confiscated assets would be included as losses or necessary expenses according to article 37 of the Income Tax Act (ITA) and article 22 of the Corporation Tax Act (CTA). Confiscation measures have yet to be imposed in a foreign bribery case and therefore the deductibility of confiscated assets from a taxpayer’s taxable income has never been applied in foreign bribery cases. The NTA has not developed guidelines for the tax authorities on the handling of tax treatment of monetary sanctions and confiscation since the amendment of the AOCL in June 2017. On the contrary, monetary fines are not deductible from the taxable income base nor from the corporate taxes due pursuant to article 45(1)(vi) ITA, and article 55(4)(i) CTA.

Commentary

The lead examiners recommend that Japan 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.

e. Debarment as an additional administrative sanction

271. In Phase 3, the Working Group observed that Japan did not have a uniform debarment regime that automatically applies upon conviction for foreign bribery. Instead, government authorities can impose debarment according to their own rules.²⁰⁷ JICA, for example, has debarred a number of companies for foreign bribery, as discussed in section D.4.d. below. Furthermore, in the *JTC case*, the court observed that in addition to JICA, local authorities also had even debarred the company before its conviction.²⁰⁸ It is not clear, however, whether all government agencies have developed a consistent set of criteria explaining when a company will be debarred. Given the number of administrations involved, Japan could not confirm whether the national and local authorities followed a standard approach to debarment. For

²⁰⁶ Tokyo District Court (February 4, 2015) Special Case (Wa) No. 970 and No. 1092 of 2014.

²⁰⁷ [Japan Phase 3 Report](#), para. 121

²⁰⁸ Tokyo District Court Judgment of 4 February 2015, page 11 (translation).

their part, both MOFA and JICA report that they can even debar an individual or company before conviction under certain circumstances, such as following an arrest for foreign bribery, while JICA can also debar someone who acknowledges wrongdoing even if the person has not been convicted. It is not clear if companies subject to debarment can seek reinstatement after undertaking compliance reforms or other measures to prevent future wrongdoing. Both MOFA and JICA, however, can cancel a debarment decision if they find that the person or entity subject to debarment was not responsible. Further clarity in this matter would help reinforce the deterrence value of this important administrative sanction.

Commentary

The lead examiners recognise that Japanese authorities at both the national and local levels have used their debarment powers to sanction companies involved in foreign bribery cases. Given the powerful deterrent role that debarment can play, they recommend 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.

C.4. Engagement with the Private Sector

a. METI continues to engage with the private sector to raise awareness of foreign bribery and to promote compliance.

272. In Phase 3, the Working Group recommended that METI enhance the visibility of information about the foreign bribery offence on its website (recommendation 9.i.) and better engage with small- and medium-sized enterprises (SMEs), including the promotion of METI's Guidelines (recommendation 9.ii). In addition, the Working Group recommended that METI clarify its role in advising private companies about the foreign bribery offence (recommendation 9.iii.) as well as promoting international compliance standards (recommendation 9.iv.). Japan had only partly implemented these recommendations by the time of the Phase 3 Follow-up report.²⁰⁹

273. As part of its efforts to raise awareness about foreign bribery and to promote compliance, METI's Intellectual Property Policy Division has developed the METI Guidelines in consultation with other government agencies and non-governmental stakeholders. The Division distributes the Guidelines and other materials about foreign bribery to a wide cross-section of Japanese businesses. It also provides advice to Japanese companies about the interpretation of UCPL's foreign bribery offence as well as the development of internal controls and compliance programmes. In past evaluations, the Working Group believed that METI's decision to place information about foreign bribery in the intellectual property section of its website hindered METI's outreach efforts.²¹⁰ In Phase 4, METI maintains a separate webpage on the "Prevention of bribery of foreign public officials" under METI's list of policy areas for the "External economy" in addition to the material in the intellectual property section.²¹¹ Moreover, between 2014 and 2018, METI organised or attended 14 seminars per year on average, at which it distributed the METI Guidelines as well as other materials about foreign bribery and its reporting desk.

274. Besides organising and participating in seminars to engage with Japanese businesses, METI has further raised awareness about the foreign bribery offence and compliance programmes by consulting with the private sector to prepare the September 2017 revision of METI's Guidelines. During the on-site visit, representatives from the business community and the legal profession appeared largely satisfied with METI's consultation efforts and its general awareness-raising activities. Representatives from large companies also reported that METI provided helpful advice on setting up compliance programmes.

275. As far as clarifying METI's role in providing interpretative guidance about the UCPL and compliance programmes, the agency has witnessed a marked increase in the number of consultation

²⁰⁹ [Japan Phase 3 Follow-up Report](#), p. 5,15-17.

²¹⁰ [Japan Phase 3 report](#), para. 30.

²¹¹ METI, "[Prevention of bribery of foreign public officials](#)".

requests concerning foreign bribery in recent years. For instance, as recently as 2012, METI's own surveys suggested that the private sector only had "minimal" awareness about its "reporting desk".²¹² METI has not conducted similar surveys lately. Still, it reports receiving 114 consultation requests concerning foreign bribery between December 2013 and December 2018 (around 22 per year on average). Typically, the consultation requests either seek legal interpretations about Japan's foreign bribery offence or advice about features of compliance programmes. As many consultation requests are anonymous, it was not possible to break down the types of individuals or businesses contacting the "reporting desk". METI has not analysed the substance of requests received to identify the challenges that Japanese businesses are facing or to identify issues that may need to be addressed in future revisions of the METI Guidelines.

276. METI also commissioned a private law firm to conduct a survey of compliance risks in seven countries in Southeast Asia. The purpose of the study was to provide information about countries or situations in which Japanese companies may encounter higher risks of corruption. It found bribery risks in a range of situations, including customs, tax affairs, immigration matters, labour relations, construction permits, and other situations such as dealings with police or the judiciary. It also surveyed companies' compliance efforts, such as developing rules on gifts and entertainment, manuals for handling solicitation requests, or reporting hotlines. Using such survey results could help METI advise companies on how to better tailor their compliance efforts. This is especially important as some business representatives during the on-site visit confused facilitation payments with entertainment expenses, while others maintained that the problem of corruption lay more in solicitation by public officials rather than the private sector's efforts to regulate its own conduct.

b. METI is reaching out to SMEs but more effort is still needed to raise awareness about foreign bribery and to promote compliance.

277. In terms of SME outreach, Japan has demonstrated a variety of efforts to raise awareness about foreign bribery risk. The Intellectual Property Policy Division explained that it is working with other organisations, such as the Japan External Trade Organization (JETRO), an independent body within METI, to develop seminars for SMEs. For its part, JETRO indicated that it provides support to SMEs operating abroad through 80 offices overseas that collectively provided approximately 100 000 consultations per year about various issues relevant to SMEs. SMEs could receive more information about Japan's prohibitions against foreign bribery and facilitation payments through those channels. METI also distributed its brochure on foreign bribery to the Japan Chamber of Commerce and Industry, which in turn conducted approximately 70 seminars or trainings for SMEs. The Chamber also issues guidelines to help companies and maintains a help desk that companies can contact with questions. In addition, the Small and Medium Enterprise Agency has disseminated METI's information about foreign bribery through its social networking services. Other organisations, such as SME SUPPORT JAPAN have also developed a risk assessment manual designed for SMEs, which they distribute through their centres around Japan.

278. SME representatives during the on-site visit were all knowledgeable about foreign bribery offence and related risks. Their enterprises had different compliance structures in place to deal with those risks. Some established Codes of Conduct, training programmes and even whistleblower channels. Other companies had operations in low-risk environments or operated through trading companies, so they had little direct exposure to corruption risks. The SME representatives also displayed awareness about METI's Guidelines. One SME participant indicated that, given METI's reputation, the compliance advice in the METI Guidelines was considered to embody international standards.

279. Many on-site participants, including METI and JETRO representatives, reported that more work was still needed to raise awareness among SMEs. Civil society and business-sector representatives concurred with this assessment. While METI maintained that the overall number of SMEs with exposure

²¹² [Japan Phase 3 Follow-Up Report](#) p. 16.

to foreign bribery remains low, other on-site participants reported that smaller Japanese companies were increasingly following larger companies abroad to remain part of their supply chain. In addition, some specialised technology companies also have increasing overseas presence.

Commentary

The lead examiners welcome METI's various initiatives to revise and promote its Guidelines and to raise awareness about the foreign bribery offence. Information about foreign bribery can be readily found on METI's website, implementing outstanding Phase 3 recommendation 9.i. They also welcome METI's engagement with SMEs and other entities about foreign bribery risks through conferences and seminars. Given the consensus that more work is still needed to enhance SMEs' awareness and capacity to deal with foreign bribery risks, the lead examiners recommend that METI create a version of its Guidelines expressly designed for SMEs and to use it to conduct consultations or other awareness-raising exercises with SMEs.

The lead examiners also consider that the number of consultation requests received since Phase 3 indicate that METI has indeed clarified its ability to provide advice to the private sector about the foreign bribery offence and compliance programmes, thus implementing Phase 3 recommendations 9.iii and 9.iv. They recommend that METI analyse 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.

D. OTHER ISSUES

D.1. Money Laundering

a. Japan now criminalises the laundering of the proceeds of foreign bribery

280. In Phase 3, the WGB was concerned that Japan had not criminalised laundering of proceeds of foreign bribery (recommendation 5).²¹³ The WGB has echoed this concern since Phase 1, as this lacuna rendered Japan's AML system unable to address the laundering of the proceeds of foreign bribery. Japan had not implemented this measure by the time of Japan Phase 3 regular Written Follow-up report.

281. In June 2017, Japan finally amended the definition of "crime proceeds" in the AOCL to cover, *inter alia*, the proceeds obtained through foreign bribery. Pursuant to article 2(2) of the AOCL, the term "crime proceeds" now extends to "any property produced by, obtained through, or obtained in reward for a criminal act" for offences punishable with imprisonment of no less than 4 years. During the on-site visit, Japanese authorities confirmed that the provision would also apply to legal persons that launder the proceeds of foreign bribery.

b. Dual criminality requirement attached to the predicate offences, when bribery is committed abroad

282. Article 7 of the Convention requires each Party to make money laundering a criminal offence where the predicate offence is foreign bribery, "without regard to the place where the bribery occurred". Pursuant to article 2(2) AOCL the proceeds of crime cover: "any property produced by, obtained through, or obtained in reward for a criminal act constituting the following offences (including an act committed outside Japan which would be an act constituting these crimes if committed in Japan and constitutes a crime under the laws and regulations of the jurisdiction where the act is committed) committed for the purpose of obtaining an illegal economic advantage". As a result, the offence of laundering the proceeds of bribery committed outside Japan would, in certain cases, only be constituted if it is also an offence in the foreign country where it is committed.

²¹³ [Phase 1 Report](#), pp. 15-16; [Phase 2 Report](#) paras. 98-99; [Phase 3 Report](#) paras. 79-82, [Phase 3 Follow-up Report](#) p.4

283. The MOJ asserted that pursuant to article 2(2) AOCL, dual criminality is only required for acts that are not punishable under Japanese law. Conversely, dual criminality is not required for criminal offences that are punishable in Japan, even when committed outside of Japan. This would, in principle, cover foreign bribery, unless the offence took place entirely abroad and no Japanese individual can be identified (see section C.2.b above on the application of nationality jurisdiction). In the absence of case law, it is unclear whether the differentiated dual criminality requirement provided by the MOJ will consistently be applied in practice.

Commentary

The lead examiners welcome the amendment of the AOCL in June 2017, which criminalised the laundering of the proceeds of foreign bribery.

However, the lead examiners are of the view that it is unclear that the predicate offence to laundering the proceeds of foreign bribery would always be constituted in Japanese law. Therefore they recommend that the Working Group follow-up 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”.

D.2. Accounting Requirements, External Audit, and Company Compliance and Ethics Programmes

284. Under the Financial Instruments and Exchange Act (FIEA), the sanctions for false statements will vary based on the disclosure document in which the false statement is made. When contained in an annual securities report, the maximum sanction is up to 10 years’ imprisonment with hard labour, a fine of JPY 10 million, or both.²¹⁴ For semi-annual or quarterly reports, the maximum sentence is up to 5 years’ imprisonment with hard labour, a fine of JPY 5 million, or both.²¹⁵ Furthermore, if a “representative, agent, employee, etc. of a corporation” commits a violation of the FIEA “concerning the business and property of the corporation”, then the corporation itself can be fined. The applicable corporate fine is JPY 700 million for false statements in annual securities reports and JPY 500 million for false statements in semi-annual and quarterly securities reports.²¹⁶ In addition, an administrative fine can also be imposed on top of criminal sanctions of up to JPY 6 million or JPY 3 million, depending on the type of filing.²¹⁷

285. These provisions have never been applied in connection with a foreign bribery matter. Following the on-site visit, the Financial Services Authority (FSA) reported, however, that in at least one occasion, it imposed an administrative penalty on a parent company for having filed consolidated financial statements that contained false accounting statements in relation to its foreign subsidiary. Thus, while Japan’s criminal law appears to only assert jurisdiction over foreign bribery offences committed in Japanese territory as well as offences committed abroad when a Japanese national is a participant, Japanese accountants and auditors should be more mindful about foreign bribery irregularities in foreign subsidiaries even in situations where Japanese criminal jurisdiction does not exist. In addition, Japanese law enforcement authorities should also routinely consider whether such charges could be filed either along with, or instead of, foreign bribery offences, especially in cases where the offence was committed abroad.

Commentary

The lead examiners recommend that prosecutors always consider the feasibility of filing false accounting charges against the Japanese parent company for bribery that occurs within the context of

²¹⁴ Financial Instruments and Exchange Act, Article 197(1)(i).

²¹⁵ Financial Instruments and Exchange Act, Article 197-2(vi).

²¹⁶ Financial Instruments and Exchange Act, Article 207.

²¹⁷ Financial Instruments and Exchange Act, Article 172-4.

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.

D.3. Tax Measures for Combating Bribery

a. Enforcement of the non-tax deductibility of bribe payments

286. Japanese tax legislation expressly denies the tax-deductibility of bribes paid to foreign public officials.²¹⁸ In Japan, expenses are considered *prima facie* deductible, and the onus to prove that the expenses are in fact bribe payments is on the tax authorities. If a taxpayer is sanctioned in a foreign bribery case, the tax authorities should re-examine the tax returns for the relevant years to determine whether the bribes had been deducted.

287. No system is in place to ensure that law enforcement authorities routinely inform the NTA that a taxpayer has been convicted of bribery. As a result, the NTA stated during the on-site visit that they have not been informed of the bribery cases concluded to date. After a tax return has been filed, the NTA normally has five years from the statutory date for the filing of tax returns to re-open and re-examine the tax return. The NTA indicated during the on-site visit that this time-limit can be extended up to seven years if the tax return is fraudulent, which would be the case for foreign bribery.

288. When requested to confirm whether the tax returns of the two legal persons convicted of foreign bribery have been reassessed, the NTA stated that it is bound by confidentiality rules and therefore cannot provide information on specific cases. However, it seems that the tax returns of at least one of the two companies have in fact been re-assessed although not as a result of the foreign bribery convictions. In the *JTC case*, the Tokyo District Court took into account at sentencing the fact that the company had revised its tax return for the paid bribes and paid approximately JPY 125°000°000 in taxes. However, it is unclear whether the readjustment was voluntary or imposed by the NTA. In the *PCI case*, the legal person was sentenced for tax evasion prior to being convicted for the foreign bribery.²¹⁹ In this case, it is unclear whether the bribe payments had been deducted from income tax as a legitimate expense and whether the company's tax return was adjusted by the NTA. In any event, it remains to be seen whether the NTA would re-examine the tax returns of a natural and/or legal person convicted of foreign bribery independently of whether the taxpayer has also been indicted and convicted of tax fraud.

Commentary

The lead examiners recommend that Japan encourage (i) law enforcement authorities to promptly inform the tax authorities of foreign bribery-related convictions; and (ii) tax authorities to re-assesses the tax returns of taxpayers convicted of foreign bribery to verify whether bribes were impermissibly deducted.

b Cooperation with foreign law enforcement authorities

289. Since Phase 3, Japan has ratified the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and amending protocol.²²⁰ Article 22(4) of that Convention allows Japan to share information received for tax purposes with law enforcement authorities to combat corruption and other

²¹⁸ In April 2006, Japan amended the Corporation Tax Law and the Income Tax Law to expressly prohibit the tax deductibility of bribes paid to foreign public officials.

²¹⁹ [Phase 3 report](#), para. 13. The alleged bribery had initially been detected in the course of a criminal tax investigation.

²²⁰ The Multilateral Convention on Mutual Administrative Assistance in Tax Matters and amending protocol can be used to provide tax information to foreign authorities for use in criminal foreign bribery investigations. Similarly to article 26(2) of the OECD Model Tax Convention, article 22(4) of the Convention allows information provided under the Convention to be used for other (e.g. criminal investigation) purposes when “such information may be used for such other purposes under the laws of the supplying Party” and the supplying Party authorises such use.

financial crimes under certain conditions. Since 2013 and as of February 2019, Japan indicates that it has incorporated the language of article 26(2) of the OECD Model Tax Convention into 19 bilateral tax treaties which similarly provides for the possibility for tax authorities to share information with foreign law enforcement authorities for use in high priority non-tax matters. Japan could not confirm whether the Convention has ever been used as a ground to share tax information for non-tax purposes in foreign bribery cases. In practice, Japanese tax authorities have not shared information obtained from foreign tax authorities with the Japanese law enforcement authorities for non-tax purposes. Japanese tax authorities have, so far, not been asked by foreign authorities to authorise the sharing of information for non-tax purposes, including in foreign bribery cases.

D.4. ODA Official Development Assistance (ODA)

290. This Phase 4 evaluation is the first time Japan’s ODA system is reviewed in light of the 2016 Recommendation for Development Cooperation Actors on Managing Risks of Corruption (the 2016 Recommendation), and in particular sections 6-8 and 10 which more directly pertain to foreign bribery.²²¹ (The aspects of this Recommendation that are more specifically and directly related to prevention and detection are discussed under section A.3.c.)

a. Volume and Distribution of Japanese ODA

291. Japan is the 4th largest donor of official development assistance (ODA), and the largest in Asia. In 2017, Japan’s net ODA amounted to USD 11.5 billion,²²² representing 0.23% of Japan’s gross national income. In 2018, Japan’s ODA is estimated to have decreased by 13.4% mostly due to a decrease in its contributions to multilateral institutions. Japan has been using ODA to engage Japanese companies in emerging markets.²²³ Infrastructure is a key sector of Japan’s bilateral development assistance, in particular in the form of loans for middle-income countries in Asia.²²⁴ Both the sector and countries are at high risk of corruption. The Ministry of Foreign Affairs (MOFA) and/or Japan International Corporation Agency (JICA) are respectively involved in the distribution of Japanese Official Development Aid (bilateral and multilateral).

292. The top five recipient countries and the amounts provided in 2016 are detailed in the following chart. (Unit: million USD):

Bilateral ODA total				
Rank	Country	Gross disbursements	Country	Net disbursements
1	India	2 376,10	India	1 553,63
2	Bangladesh	1 421,65	Bangladesh	1 312,66
3	Vietnam	1 389,60	Vietnam	927,96
4	Indonesia	520,59	Mongolia	501,08
5	Mongolia	516,73	Myanmar	379,07

293. A recent article emphasises that the trend to linking Japanese business and contractors to the nation’s aid projects began some time ago through a new scheme of tying called *Special Terms for Economic Partnership (STEP)*, which improved Japanese firms’ procurement inside the government’s

²²¹ The 2016 [OECD Recommendation for Development Co-operation Actors on Managing Risks of Corruption](https://doi.org/10.1787/dcr-2018-en) replaces the 1996 DAC Recommendation on Anti-Corruption Proposals for Bilateral Aid Procurement.

²²² In 2017 current prices.

²²³ Donor Tracker, Japan Donor profile <https://donortracker.org/country/japan>.

²²⁴ Japan country profile in: OECD (2018), *Development Co-operation Report 2018: Joining Forces to Leave No One Behind*, OECD Publishing, Paris, <https://doi.org/10.1787/dcr-2018-en> ; and OECD (2018), *Sector Financing in the SDG Era, The Development Dimension*, OECD Publishing, Paris, <https://doi.org/10.1787/9789264307711-en>

ODA projects.²²⁵ This article presents this policy as a response to Japan's long-term economic downturn, while Japanese companies are seeking profitable business opportunities overseas. With Japan's emphasis on 'quality infrastructure', 'quality growth' and 'quality partnership', aid money is now increasingly linked to Japan's technology, design and construction. Large ODA commitments in recent years to countries like Vietnam, Indonesia and India also present significant business opportunities for Japanese companies in these emerging economies. These are also countries ranked by Transparency International (TI) as high-risk countries in terms of TI Corruption Perception Index (CPI). Specific measures to prevent corruption and address it when it occurs should be put into place as part of a corruption risk management system in line with the 2016 Recommendation.

b. *Certification or declaration that the applicant has not been engaged into corruption*

294. JICA reports that it requires all applicants to certify that they have not directly or indirectly engaged in any corrupt, collusive or coercive activities prohibited by its Guidelines. In its prequalification documents, JICA sets forth a clear policy that its applicants must "observe the highest standards of ethics during the procurement and execution" of contracts funded with Japanese ODA loans or other forms of assistance.²²⁶ MOFA indicates that under the Grant Assistance for Japanese NGO Projects Programme, the administering body is required to declare that they are not engaged in illegal activities but the applicants are not required to submit a declaration specifically related to corruption offences.²²⁷ With the exception of checking the World Bank debarment list, neither JICA nor MOFA have put into place mechanisms to verify the accuracy of the information provided, such as the systematic verification of debarment lists of national and other multilateral financial institutions 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.

c. *Provision in the contract to ensure that the money will be used properly*

295. Both MOFA and JICA report efforts to prevent and detect foreign bribery in ODA-funded projects, including to provisions in ODA contracts (such as requirements to disclose prior corruption convictions). With respect to loans, Japan requests the recipient countries to take necessary measures to ensure that the loan will be used properly. This does however not equate to requiring insertion of a provision regarding preventing bribery.

296. Regarding whether ODA contracts specifically prohibit implementing partners (whether from the body administering ODA, local agents in developing countries or from third countries) and their possible sub-contractors from engaging in corruption: for both JICA's loans and grants, the procurement guideline prohibits a Contractor or sub-contractor from engaging in corruption. In some schemes, the contracts do not mention prohibition *per se*; however, the contracts clearly state that implementing organisations should return ODA funding and are subject to penalties if corrupt or fraudulent practice is found. The Note Verbal also states that a detailed report on the use and effect of the grant should be submitted upon completion of a project as well as upon request.

297. As part of its policy to prevent the misuse of development aid money, Japan emphasises that it is taking measures for strengthening governance capacity in the partner countries. Japan supports development of their legal systems for public procurement and prevention of fraud and corruption through JICA training, dispatch of experts, and technical cooperation projects. In addition, JICA conducts

²²⁵ [Japan, New thinking redefines Japan's foreign aid policy](#), by Purnendra Jain, Asian Studies Association of Australia, 2016.

²²⁶ [Japan, New thinking redefines Japan's foreign aid policy](#), by Purnendra Jain, Asian Studies Association of Australia, 2016.

²²⁷ See document on page AF-16:
https://www.jica.go.jp/activities/schemes/finance_co/procedure/guideline/tender/ku57pq00000v0qfy-att/prequa.pdf

seminars to familiarize the relevant officials of the partner countries with its contract clauses in order to improve their capabilities to prevent fraudulent practices, including corruption.

d. Non-eligibility to participate in ODA tenders as a result of debarment by JICA

298. In 2016, the High Level Mission learned about notable steps taken by Japan to respond to two cases of foreign bribery involving official development assistance (ODA) funds, which were prosecuted by the Japanese authorities between 2008 and 2014. In the Phase 3 *PCI case*, the company was delisted from official development assistance (ODA) funded contracting for 24 months by the Japan Bank for International Cooperation (JBIC), and delisted from JICA's registration list of consultant firms. Similarly, in the *JTC case*, the company was debarred for 36 months and JICA delisted the company from ODA funded contracting. The companies involved in the cases were suspended from ODA projects and receiving disbursements of loans in relation to contracts deemed ineligible.

299. In the *JTC case*, the contracts secured through the payment of bribes by JTC in Vietnam, Indonesia and Uzbekistan were funded by JICA. The corruption pattern that persisted over a number of years and contracts shows that the due diligence measures performed in relation to these projects were either non-existent or weak. Japan has since taken preventive steps in response to this case by forming joint committees for preventing corruption in Japanese ODA with the three concerned governments. In spite of the high likelihood of corruption in the infrastructure sector, which dominates Japan's ODA, Japan has not entered into similar arrangements with other governments, in particular in countries with high corruption risk.

300. The joint committees agreed on several measures to be taken by Japan and the three governments. For instance, Japan agreed to strengthen the measures of exclusion from bidding for a certain period against companies engaged in fraud and corruption, and to encourage companies to establish compliance systems. The three governments agreed to measures, including building and strengthening systems for preventing the recurrence of fraud and corruption in Government, and the monitoring of projects.

301. In addition, JICA issued an Anti-Corruption Guidance in 2014, which, as discussed under Section A.6.a., describes various anti-corruption measures, including JICA's anti-corruption consultation desk and required actions by governments, partner countries, executing agencies and companies. JICA will reject the applicant if it determines that it has engaged in corrupt or fraudulent practices in competing for the ODA-related contract. Likewise, it will debar an applicant for a particular period of time if it determines that the applicant has engaged in corrupt or fraudulent acts in competing for, or executing, a prior ODA-backed contract or even – under certain conditions – if the company has been debarred by the World Bank Group.²²⁸ If a subcontractor is responsible for the misconduct, Japan/JICA shall also impose measures against the subcontractor for the same or a shorter period as the one decided for the main contractor.²²⁹ Japan reports that since Phase 3, JICA applied debarment to five entities on the ground of bribery of foreign public officials. MOFA maintains a database of sanctioned entities.²³⁰

302. In addition, JICA also debarred Japanese and foreign companies that were sanctioned for foreign bribery by foreign authorities because it related to projects funded by JICA. JICA became aware that the

²²⁸ See JICA Prequalification Documents, Instructions to Applicants, Sections 3.1.

²²⁹ JICA Rules on Measures to Suspend Eligibility for Participation in Tenders for Contracts (Rules No.42 of 2008), JICA Rules on Measures against Persons Engaged in Fraudulent Practices, etc. in Projects of ODA Loan and Grant Aid (Rules No. 43 of 2008):

https://www.jica.go.jp/english/our_work/types_of_assistance/rule02.html

https://www.jica.go.jp/english/our_work/types_of_assistance/rule01.html

Procurement Guidelines for Japanese ODA Loans (2012) Section 1.06 and 1.07

https://www.jica.go.jp/activities/schemes/finance_co/procedure/guideline/handbook/pdf/chapter1_2012e.pdf ;

https://www.jica.go.jp/activities/schemes/grant_aid/guideline/ku57pq0000sby3v-att/type01_en_1.pdf

²³⁰ See the Exhibit of JICA Rules on Measures against Persons Engaged in Fraudulent Practices, etc. in Projects of ODA Loan and Grant Aid (Provisional Translation):

https://www.jica.go.jp/english/our_work/types_of_assistance/rule01.html

companies were convicted through information from media, reports from its overseas offices as well as from self-disclosures. In 2012, **Marubeni Corp.** pleaded guilty to having violated FCPA provisions and agreed to pay a fine of USD 54.6 million to the US Department of Justice (DOJ). As a result, the Japanese authorities acknowledged the plea and in March 2014, MOFA and JICA decided to disqualify **Marubeni corp.** from receiving orders for ODA projects for 9 months. Foreign companies sanctioned by foreign authorities have also been debarred by JICA from ODA funded projects. In February 2015, JICA delisted two foreign firms, **Alstom Power Inc.** and **PT Alstom Power Energy Systems Indonesia** from participation in competition of any procurement contract with JICA. Similarly, in September 2015, a third foreign company, **Louis Berger Group, Inc.** (United States), was delisted from participation in competition of any procurement contract with JICA.

Commentary

The lead examiners commend Japan's ODA multifaceted due diligence efforts to combat corruption, including measures for strengthening governance capacity in the partner countries. They also commend Japan for its rigorous debarment policy, which has been applied since Phase 3 in five foreign bribery cases.

They nevertheless consider that there is room for improvement. Given the high risks of corruption in the infrastructure sector, which dominates Japan's ODA, and the interesting steps Japan has taken with three governments following a recent large scale corruption scandal (JTC case), they recommend that, Japan consider extending the policy it has initiated to enter into agreements and form joint committees for preventing corruption in Japanese ODA with 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.

They further recommend that JICA and MOFA verify the accuracy of the information provided by applicants, including 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.

CONCLUSION: POSITIVE ACHIEVEMENTS, RECOMMENDATIONS, AND FOLLOW-UP ISSUES

303. The Working Group is seriously concerned that Japan has still not given full effect to its foreign bribery offence in the UCPL 20 years after the Convention's entry into force. The small number of foreign bribery allegations that have been uncovered and the number of cases in which sanctions have been imposed to date altogether are not commensurate to the size of the Japanese economy, its export-oriented nature, and the high-risk regions and sectors in which Japanese companies operate. Japan should therefore promptly take necessary steps to more proactively detect and enforce its anti-bribery legislation. Furthermore, Japan needs to improve key elements of its legislative framework, in particular to increase the level of sanctions and the limitation period for foreign bribery. Japan also needs to broaden Japan's framework for establishing nationality jurisdiction over legal persons.

304. Regarding the previously outstanding Phase 3 recommendations, Japan has now fully implemented recommendations 2. on confiscation; 4.a. on new investigative tools; 5. on money laundering; 6. on international cooperation; and 13. on whistleblower protection. In turn, Japan has partially implemented recommendations 3. on METI's role in foreign bribery enforcement; 4.a. on MLA and non-compulsory investigative measures; 4.b. on investigative agencies; 4.c. on JAFIC's role in foreign bribery cases; 8. on small facilitation payments; and 9. on METI's role in preventing and detecting foreign bribery. Finally, recommendations 1 on sanctions and 11. on tax measures remain not implemented.

305. In conclusion, based on the findings in this report, the Working Group acknowledges Japan's good practices and positive achievements (Part 1 below), makes recommendations (Part 2) and issues for follow-up (Part 3). Japan will submit a written report to the Working Group in two years (i.e. in June 2021) on its implementation of all recommendations as well as detailed information on its foreign bribery enforcement. Japan will also submit a written report in one year on recommendations 7.c., 12.a., 14.b. and 15.a. concerning key amendments to its legislation and its enforcement efforts. A technical mission will then be arranged, to explore solutions for enhancing Japan's enforcement of its foreign bribery offence, unless Japan has demonstrated sufficient progress at that time.

Positive Achievements and Good Practices

306. This report has identified positive achievements related to Japan's implementation of the Convention and related instruments. However, given Japan's limited foreign bribery enforcement, it is not possible to ascertain whether these areas of progress actually represent good practices and positive achievements that have proved effective in combating foreign bribery.²³¹ Nevertheless, the Working Group considers that some areas developed by Japan could constitute potential good practices. In particular, Japan amended the AOCL in June 2017 to introduce the possibility to confiscate the proceeds of foreign bribery and, by the same token, criminalised the laundering of the proceeds of foreign bribery. This closes a significant loophole in Japan's implementation of Article 3(3) and Article 7 of the Convention. Japan also introduced a new non-trial resolution procedure in June 2018, which could potentially enable Japan to more effectively investigate and conclude foreign bribery cases. Furthermore, METI's outreach efforts appear to have inspired the Japanese private sector to banish small facilitation payments from their commercial practice.

307. A further potential good practice relates to Japan's ODA multi-faceted due diligence efforts to combat corruption in the projects it finances. Japan has devised strong measures for strengthening governance capacity in its partner countries. In addition, the Working Group considers that JICA has developed and enforced a rigorous debarment policy for companies implicated in foreign bribery

²³¹ See Phase 4 Monitoring Guide, which states that Phase 4 evaluations should also reflect good practices and positive achievements which have proved effective in combating foreign bribery and enhancing enforcement.

offences. This debarment policy also extends to Japanese and foreign companies sanctioned by foreign authorities where it affects projects funded through Japan's ODA. This constitutes a potentially powerful tool in the sanctioning of the foreign bribery offence.

Recommendations of the Working Group

Recommendation regarding detection of foreign bribery

1. Regarding **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.]
 - 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.]
 - 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.]
 - 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.]
 - 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.]
 - 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.] and
 - 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.]
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.]
 - 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.]

- 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.] and
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.] and
 - 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.]

Recommendation regarding enforcement of the foreign bribery offence

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

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.]
 - 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.] and
 - 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.]
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.]
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.] and
 - 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.]
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.]
 - 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.] and

- 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.]

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]
- 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]
- 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] and
- 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]

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.].
- b. (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.] and
- 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.]

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 non-specialised judges, likely to handle foreign bribery cases. [Article 1 of the Convention; 2009 Recommendation, Annex I.D.]

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

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.]
- 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.]
- 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]
- 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] and
- 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.

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 large-scale corruption cases. [Article 3 of the Convention; 2009 Recommendation III.ii. and V.]
- 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.]
- 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] and
- 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.]

Recommendations regarding other measures affecting implementation of the convention

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]
- 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] and

- 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.]

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.] and
- 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.]

Follow-up by the Working Group

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

- a. The number of foreign bribery allegations that METI receives and how they are handled, especially those from potential whistleblowers;
- 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;
- c. Whether whistleblowers who report in good faith and on reasonable grounds can obtain redress;
- d. The coverage of bribe payments to third party beneficiaries;
- 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;
- f. The use of confiscation measures in foreign bribery cases;
- 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;
- h. Whether the sanctions imposed in the context of the Agreement Procedure are effective, proportionate and dissuasive;
- i. Japan's ongoing efforts to maintain and develop bilateral MLA relationships with its main trading partners and other countries in the region;
- j. The extradition of Japanese nationals or any other suspect in foreign bribery cases; and

- 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”. [Article 7 of the Convention]

ANNEX 1: Japan's Foreign Bribery Enforcement Actions since Phase 3

This annex describes the allegations of Japanese nationals or companies bribing foreign public officials that have surfaced since Phase 3 in 2011. The three foreign bribery cases that have resulted in sanction since Phase 3 are described in the introduction of this report (see paras. 26-33). The two cases already concluded at the time of Phase 3 are described in the Phase 3 report, paras. 12 and 13. Japan shared more information on the foreign bribery matters described below with the evaluation team during the course of this evaluation. Japan asserted the need for confidentiality in matters which did not lead to an investigation, on-going investigations, and discontinued investigations. Hence, the following summary contains only anonymised details taken from public sources known to both Japan and the Working Group. In particular, at Japan's request, no factual information is provided in the Annex on the three allegations reported by MOFA and four allegations reported by METI as the discussion of these cases was not predicated on any public sources.

On-going investigations into potential foreign bribery

East West highway Case

A consortium of five of the largest Japanese public works companies allegedly paid bribes to public officials in North Africa in 2006 to secure a USD 6.2 billion contract for the construction of sections of the East-West highway.

Automotive Case

A joint venture with an Asian state-owned car maker allegedly paid up to USD 5.8 million in bribes between 2005-2008 to a foreign public official and his child in return for facilitated deals. The foreign public official admitted taking millions of dollars in bribes and was convicted and sentenced to life imprisonment in December 2014 in the official's home country.

Aluminium Trader Case

Aluminium traders from a Japanese company allegedly paid bribes to a senior Middle Eastern royal who served as adviser to the prime minister, s former minister of finance, and the chairman of the country's state-run aluminium producer and one of the largest industrial companies in the Middle East, to secure contracts.

Aluminium Corporation Case

A large Japanese trading company, allegedly paid USD 8.7 million in bribes to employees of a Middle Eastern state-run aluminium producer between 1998 and 2004 to secure discounts on aluminium purchases for its affiliates. The bribe payments were allegedly wired to various overseas bank accounts controlled by then-employees of the aluminium producer.

Chemical Company Case

Two foreign employees of a foreign subsidiary of a Japanese chemical company allegedly bribed public officials working at the disease control centre between 2006 and 2011, to obtain procurement contracts. The bribes are alleged to amount to between 2.8% and 6.5% of each contract awarded and would have totalled around USD 260 000.

Entertainment Case

A foreign subsidiary of a Japanese multinational conglomerate gaming and entertainment corporation allegedly paid bribes to government officials. The Japanese parent company is reportedly conducting an internal investigation into the bribery allegations.

Gambling Industry Case

A Japanese national and former vice-chair of a US chain of hotels and casinos allegedly made improper payments to officials in east and Southeast Asia to secure support for a construction project. An internal investigation allegedly unveiled that at least one executive was involved in the scheme.

Airlines Company Case

Between 2014 and 2016, a Japanese Airlines company allegedly gave free upgrades to officials from a foreign tourism authority to secure/continue to secure business contracts. In 2017, the foreign officials' home country reportedly imposed sanctions for received the bribes.

Online Gaming Case

Between 2005 and 2014, the founder of an Asian company traded on the Tokyo Stock Exchange and headquartered in Tokyo, allegedly bribed a senior prosecutor in the form of travel expenses and a luxury car lease in return for legal advice in cases involving his company. The company's founder and the senior prosecutor were both convicted in 2017 in the foreign country.

Alleged foreign bribery cases which did not lead to a formal investigation

In total, 10 foreign bribery allegations have been clarified by the Criminal Affairs Bureau of the Ministry of Justice (MOJ). Of these allegations the 5 allegations below did not lead to an investigation because it was determined that the cases were either time-barred or lacked sufficient evidence. The MOJ's role is detailed in section B.4.a.

Electronic Company Case

A Japanese electronics company allegedly made improper payments to the ruling political party of an African country in connection with contracts to build two multi-billion dollar power plants.

In the United States, the Japanese company agreed to pay USD 19 million to settle violations of the books and records and internal accounting provisions of FCPA with the US Security and Exchange Commission (SEC) in September 2015. In December 2015, the African Development Bank (AfDB) debarred the Japanese company from the bank's financed projects for one year debarment for fraudulent practices by Hitachi subsidiaries in an AfDB-financed power project in South Africa.

Japanese Steel Suppliers Case

Between 1999 and 2004, a US-based steel company made corrupt payments of approximately USD 204°537 on its own behalf and as a broker for Japanese steel companies to managers of government-owned customers in one Asian country to facilitate the sale of metals for to steel producers.

In October 2006, the US-based steel company entered into a DPA with the US Department of Justice to resolve FCPA related charges involving its wholly-owned subsidiary and agreed to pay USD 7.5 million in penalties. In parallel, the subsidiary entered into a plea agreement for violation of the anti-bribery, books and records and internal control provisions of the FCPA. The same month, the US-based steel company agreed to resolve FCPA related charges with the SEC and agreed to pay USD 7.7 million in disgorgement.

Port Modernisation Case

Between 1987 and 1999, a Japanese trading company, allegedly paid bribes to an official from an African Ports Authority to obtain a contract to modernise a port. The project was reportedly financed by a JPY 6,000 million loan from Japan International Cooperation Agency (JICA). In the African country, a large anti-corruption operation was launched in 2006 to fight corruption (Epervier operation). The official from the Ports Authority was convicted in December 2007 for embezzlement over the management of the Port.

Information Technology Services Case

Between 2004 and 2012, a subsidiary of a Japanese information technology equipment and services company based in Germany, allegedly paid bribes amounting to EUR 50 million to Romanian public officials to secure the awarding of a contracts to supply schools with Microsoft licences in April 2004 and the award of a contract prolonging the deal in October 2004.

Power Station Case

Between 2002 and 2003, a consortium composed of Alstom Power Generation AG and two Japanese companies allegedly paid bribes to public officials from the Power Development Board to secure the awarding of contract for the overhauling of a unit of the Ashuganj Power Station.

Discontinued foreign bribery investigations

TSKJ Case

As part of a consortium called TSKJ, a Japanese engineering and construction company, allegedly paid USD 180 million in bribes to high-ranking African officials between 1995 and 2004 to secure engineering, procurement and construction contracts for the building of an industrial complex for a Liquefied Natural Gas project.

An investigation was initiated two years later in July 2005 by the Tokyo DPPO. The police was not involved in the investigation. In the course of the investigation, the Tokyo DPPO conducted witness interview and informally cooperated with foreign authorities. MLA requests were received from three Parties to the Convention and executed. The investigation was closed because the facts of the case were found to be time-barred.

In the US, the Japanese company entered into a deferred prosecution agreement (DPA) with the US DOJ in 2011 to resolve charges of conspiracy and aiding and abetting violations of the FCPA and agreed to pay a USD 218.8 million fine.

Casino Project Case

A Japanese manufacturer operating in the entertainment and gaming industry allegedly paid USD 40 million in bribe payments to officials of the national gaming authority in 2010 to secure the rights of operating Casino entertainment projects. An investigation was initiated based on the Matrix in March 2013 by the Tokyo DPPO. The police was not involved in the investigation. The only investigative steps taken was the sending MLA requests to obtain bank information on the bank account used to transfer the bribe which was successfully executed; and to another country to interview an intermediate agent and the briber taker. However, both the agent and the bribe taker refused to accept an interview. The case was then closed for lack of evidence.

Electric Power Station Case

A major Japanese integrated trading and investment business conglomerate allegedly conspired with the French company Alstom to pay bribes to at least three officials from the Indonesian state-owned electric company, Perusahaan Listrik Negara, through two consultants, to win the bidding of a USD 268 million project which had received funding from Japan Bank for International Cooperation (JICA predecessor).²³²

An investigation initiated in May 2013 by the Tokyo DPPO. The police has not been involved in the investigation. The prosecutors interviewed witnesses and examined documents. Japan did not seek MLA but MLA was sought by the US and Indonesia to obtain emails and documents and Japan reportedly

executed the requests. The investigation was subsequently closed for lack of evidence and because the case was determined to be time-barred.

In 2012, the Japanese conglomerate pleaded guilty to having violated the FCPA provisions and agreed to pay a fine of USD 54.6 million to the US Department of Justice (DOJ). As a result, the Japanese authorities acknowledged the plea and debarred the company from ODA funded contracts.

Marine Hose Case

Between 1999 and 2007, a Japanese tyre maker, allegedly conspired to rig bids and to make corrupt payments amounting to at least JPY 150m (approx. USD 1.5 million at the time) to foreign public officials in two Latin American countries in relation to the sale of marine hose and other industrial products manufactured by the company.

Japan indicated that out of several suspicious transactions reported by the company, only two instances were not time-barred. An investigation was initiated in February 2008 and subsequently closed for lack of evidence and because the case was determined to be time-barred.

As part of the investigation, interviews were conducted and MLA requests were sent to the foreign countries involved to conduct interviews and requesting material showing that the bribe takers' company was a state-owned enterprise. One country responded that the recipient was not a foreign official. The second country executed the request after two years and responded that all persons concerned denied the acceptance of a bribe and that there was no further evidence.

In 2011, the Japanese company agreed to plead guilty to having violated the FCPA provisions and to pay a USD 28 million criminal fine to the US Department of Justice (DOJ) for its role in conspiracies to rig bids and to make corrupt payments to foreign government officials in Latin America.

Fishing firms Case

Between 2007 and 2009, four Japanese fishing firms allegedly paid over USD 6 million in bribes to officials from a former soviet country, including naval inspectors to be able to fish over the allocated quotas in the Exclusive Economic Zone. In December 2010, the four companies paid USD 2.4 million to the Japanese tax authorities to adjust their tax statements for having concealed part of their incomes by disguising the payments as legitimate business expenses.

An investigation was initiated in December 2010 by the Tokyo DPPO. The police has not been involved in the investigation. The prosecutors conducted interviews with the member of the firm and seized documents, but were not able to identify when, how, where and to whom the bribe payments were made. No request for MLA was sent because Japan was not able to obtain enough information to specify the fact. The Tokyo DPPO did not contact the tax authorities either. The case was closed for lack of evidence.

Construction Case

Employees of a Japanese joint venture, allegedly bribed several public officials to obtain favourable treatment regarding a tunnel construction project in August 2003. An investigation was opened in November 2008 by the Tokyo DPPO. The police has not been involved in the investigation.

As part of the investigation, the Tokyo DPPO sent an MLA request in 2008 to request to take statements from employees of the Nishimatsu's foreign subsidiary and of employees for the venture corporate partner. The Japanese authorities also requested to obtain bank information and to seize documents and other relevant materials from the two companies. However, Japan indicated that the foreign authorities were not able to provide evidence that the bribe payments were actually given over to foreign public officials.

The Tokyo DPPO conducted interviews of witnesses and suspects and also obtained relevant bank transaction records but was not able to prove that the alleged bribes were paid to foreign public officials. Both the interviews and bank information were obtained voluntarily. The case was ultimately not

prosecuted for foreign bribery but for the violation of the Foreign Exchange and Foreign Trade Act. The President of the Japanese company as well as other officials and the company itself were convicted

Labour Suit Case

A Japanese national and President of a foreign subsidiary of a Japanese company together with another employee of the company allegedly paid total of JPY 4.8 million (approximately USD 40°000) as bribes to a foreign labour court judge and court clerk to obtain a favourable judgment regarding a labour law suit against the foreign subsidiary.

The case was detected through the WGB Matrix and the Tokyo DPPO initiated an investigation in September 2012. The police was not involved in the investigation. As part of the investigation, the Tokyo DPPO sent an MLA request to the foreign country asking for evidence including written statements as well as other evidence necessary to prove the foreign bribery offence. In the foreign country, the President of the foreign subsidiary was convicted of bribe giving in December 2012 and sentenced to three years imprisonment and a fine. The request was executed, albeit a year later, and provided copies of the judgment as well as written statements.

Based on the information obtained through MLA, Japan found that the evidence provided was insufficient to prove the foreign bribery case beyond reasonable doubt. Japan followed-up with the foreign authorities who indicated having provided all the information available. No other investigative steps were taken. The Tokyo DPPO therefore decided to discontinue the investigations on the ground it was not possible to obtain the necessary evidence through MLA and because the defendant was already convicted abroad. The Tokyo DPPO did not consider prosecuting the Japanese company in this case.

Foreign bribery allegations that have given rise to proceedings in foreign countries for which Japan has not provided information

Medical Equipment Case #1

In 2015, a Japanese medical precision machineries maker, voluntarily disclosed to the U.S. Department of Justice (DOJ), and to local foreign authorities having uncovered bribes paid to foreign officials, including custom officials between 2006-2014, in the course of an internal investigation.²³³

Medical Equipment Case #2

Between 2006 and 2011, a foreign subsidiary of a Japanese medical precision machineries maker, paid approx. USD 3 million in bribes to publicly employed health care providers and hospital officials to induce the purchase of the company's products in Central and South America. The payments included cash, money transfers, personal grants, personal travel and free or heavily discounted equipment.²³⁴

In October 2011, the US subsidiary of the Japanese medical precision machineries maker which controlled marketing operations in Brazil voluntarily disclosed the misconduct to the US DOJ. The allegations had been uncovered by the company's compliance officer, who was subsequently fired and filed a whistleblower claim under the False Claims Act.²³⁵ In March 2016, the Latin America subsidiary, entered into a deferred prosecution agreement (DPA) with the DOJ and agreed to pay USD 22.8 million criminal penalty for violations of the FCPA. In turn, the US subsidiary agrees to pay USD 623.2 million

²³³ The New York Times, (April 2016), "[Olympus Investigation Shows Ethical Lapses and a Caterer With Clout](#)"; The Japan Times (June 2016) "[Olympus denies bribery, says China unit's wining, dining of customs official an 'internal control' matter](#)".

²³⁴ US Department of Justice, (March 2016), [Olympus Latin America DPA](#).

²³⁵ FCPA Blog, (March 2016), "[Former Olympus USA compliance chief collects \\$51 million for blowing the whistle on global bribes](#)".

to the DOJ to resolve claims of conspiracy to violate the Anti-Kickback Statute.²³⁶ The Japanese parent company was not charged in the US.

Electronics Corporation Case

The US subsidiary of a Japanese multinational electronics corporation offered a consultant position to a government official at a state-owned airline to induce the official to help the company obtaining and retaining business from the airline. In April 2018, the US subsidiary of the Japanese multinational entered into a DPA with the DOJ to resolve charges of having falsified the books and records of its Japanese parent company and agreed to pay a USD 137.4 million fine. In a related proceeding, the SEC filed a cease and desist order whereby the company admitted to having violated the anti-bribery, anti-fraud, books and records, internal accounting controls provisions of the FCPA, and agreed to pay approximately USD 143 million in disgorgement, including prejudgment interest. The Japanese parent company was not charged in the US.²³⁷

Film Industry Case

A Japanese film studio, allegedly paid bribes to foreign officials through a locally-based contractor Dynamic Marketing Group to overcome the country's quota and censorship systems and secure distribution in that country for its video game 2010's Resident Evil: Afterlife. The Japanese film company retained a law firm to initiate an internal investigation during which documents were reviewed and employees interviewed. In June 2013, Sony Corp. was subpoenaed by the US SEC for possible violation of the FCPA.²³⁸

Petrobras -Related Case

A Japanese engineering company, allegedly paid bribes to win contracts from Petroleo Brasileiro SA, Brazil state-owned enterprise. The Brazilian intermediary reportedly disclosed to Brazilian authorities that he intermediated business between Petrobras and the Japanese-Brazilian joint venture.²³⁹

²³⁶ The Anti-Kickback Statute prohibits payments to induce purchases paid for by federal health care programs.

²³⁷ US Department of Justice (April 2018), "[Panasonic Avionics Corporation Agrees to Pay \\$137 Million to Resolve Foreign Corrupt Practices Act Charges](#)"; US Department of Justice (April 2018), "[Panasonic Avionics DPA](#)"; and SEC (April 2018), "[Panasonic Charged With FCPA and Accounting Fraud Violations](#)".

²³⁸ WSJ (January 2015), "[Sony Documents Pull Back Curtain on Studio Dealings in China](#)"; The Hollywood Reporter (January 2015), "[Sony Subpoenaed in Bribery Probe Over 'Resident Evil' Release](#)"; and Forbes (December 2014), "[Inside Sony's Mysterious 'Red Pockets': Hackers Blow Open China Bribery Probe](#)".

²³⁹ GIR (October 2015), "[Brazilian prosecutors vie with CGU over Car Wash settlements](#)"; Boomborg (June 2015) "[U.S. Alerted in Brazil's Foreign Supplier Probe, Prosecutor Says](#)"

ANNEX 2: Phase 3 Recommendations to Japan and assessment of implementation by the Working Group on Bribery in 2013

	RECOMMENDATIONS	WRITTEN FOLLOW-UP
<i>Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery</i>		
1.	The Working Group recommends that Japan take appropriate steps according to its legal system to ensure that sanctions imposed on natural and legal persons in practice are sufficiently effective, proportionate and dissuasive, in accordance with Article 3 of the Convention.	<i>Not implemented</i>
2.	The Working Group recommends that Japan take appropriate steps within its legal system to urgently establish the necessary legal basis for confiscating the proceeds of bribing foreign public officials upon conviction of foreign bribery, to ensure that Japan is in compliance with Article 3.3 of the Convention. (Convention, Article 3.3)	<i>Not implemented</i>
3.	The Working Group recommends that Japan find an appropriate way to balance the emphasis on prevention with facilitating enforcement of the foreign bribery offence by the Ministry of Economy, Trade and Industry (METI), or alternatively, that METI increase coordination with relevant ministries and agencies, such as the Ministry of Justice, to achieve this balance. (Convention, Article 5; Commentary 27; 2009 Recommendation, Annex I, para. D)	<i>Partially implemented</i>
4.	Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Japan immediately take appropriate steps to actively detect and investigate foreign bribery cases, and the Working Group further recommends that Japan:	
	a. Continue to use non-compulsory investigative measures and seek MLA at the earliest possible stage where appropriate, and provide a progress report to the Working Group in 24 months on consideration by Japan of the use of new investigative techniques for foreign bribery, such as wire-tapping and grants of immunity from prosecution, including through the special advisory body established by the Ministry of Justice to review Japan's criminal justice system;	<i>Partially implemented</i>
	b. Further strengthen the framework for investigating foreign bribery cases by ensuring that special investigative divisions in district prosecutors' offices with special responsibility for economic and financial crimes: i) expressly include foreign bribery within the crimes they cover; ii) are adequately resourced and equipped to detect, investigate and prosecute foreign bribery cases; and iii) coordinate effectively with police and other relevant agencies, including the National Tax Agency and the Securities and Exchange Surveillance Commission; and	<i>Partially implemented</i>
	c. Take appropriate steps to ensure that the law enforcement authorities systematically follow-up with JAFIC, Japan's financial intelligence unit, on how they are utilising information from JAFIC in their foreign bribery investigations. (Convention, Article 5; Commentary 27; 2009 Recommendation V and Annex I, para. D)	<i>Partially implemented</i>
5.	The Working Group recommends that Japan take urgent steps to adopt the necessary amendments to the Act on Punishment of Organized Crimes and Control of Crime Proceeds (AOCL) to make it an offence to launder the	<i>Not implemented</i>

	proceeds of bribing a foreign public official. (Convention, Article 7; Commentary 28)	
6.	The Working Group recommends that Japan continue to conclude MLA treaties, particularly with its trade partners.	<i>Partially implemented</i>
7.	The Working Group recommends that Japan consider including in its bilateral tax treaties, the optional language of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention, which allows the sharing of tax information by tax authorities with other law enforcement authorities and judicial authorities on foreign bribery. (2009 Recommendation on Tax Measures for Further Combating Foreign Bribery)	<i>Fully implemented</i>
<i>Recommendations for ensuring effective prevention and detection of foreign bribery</i>		
8.	The Working Group recommends that Japan periodically review its policies and approach on small facilitation payments and urgently take steps to encourage companies to prohibit the use of such payments in their internal company controls, ethics and compliance programmes or measures. (2009 Recommendation, para. VI)	<i>Partially implemented</i>
9.	The Working Group recommends that Japan strengthen the role of METI in preventing and detecting foreign bribery, by: i) increasing visibility of information on the foreign bribery offence on METI's website, including the METI Guidelines to Prevent the Bribery of Foreign Public Officials, and the foreign bribery _reporting desk'; ii) more proactively engaging with small- and medium-size enterprises (SMEs), including by more actively promoting the METI Guidelines; iii) clarifying METI's role in providing informal advice on foreign bribery; iv) more actively engaging with companies of all sizes on effective compliance programmes, based on international developments in this area; and (v) assessing the reasons why so far no reports of foreign bribery allegations have been received by the METI _reporting desk', and establishing clear guidelines on how such reports should be processed and referred to the law enforcement authorities when received. [2009 Recommendation, para. II i), IX i), and X C i)]	<i>Partially implemented</i>
10.	Regarding Japan's accounting and auditing framework for preventing and detecting foreign bribery, the Working Group recommends that Japan:	
	a. Work with the Japanese Institute of Certified Public Accountants (JICPA) and relevant business associations to raise awareness of Japan's foreign bribery offence among the accounting and auditing profession, especially members of the profession that perform accounting and auditing activities for companies that are not subject to the Financial Instruments and Exchange Act (FIEA);	<i>Fully implemented</i>
	b. Consider providing clearer guidance on the application of Article 193-3 of the FIEA, including on whether and/or when an external auditor should report suspected acts of foreign bribery to the Financial Services Agency (FSA) and how suspicions that have been reported to the FSA are to be shared with law enforcement authorities, and consider keeping a record of the number of opinions submitted to the FSA related to foreign bribery and how they are resolved; and	<i>Fully implemented</i>
	c. Further clarify when a bribe payment to a foreign public official falsely recorded in the books and records incorporated in registration	<i>Fully implemented</i>

	and disclosure documents would be material to a company's financial statements, for the purpose of the application of the offence of making a false statement in registration and disclosure documents. [Convention, Article 8, 2009 Recommendation, para. X A i), iii), and v)]	
11.	The Working Group recommends that Japan take appropriate measures to ensure the detection by the tax authorities of bribes to foreign public officials concealed under various tax deductible expenses, including 'miscellaneous expenses', and exercise particular care in this respect when auditing tax returns of companies that are not subject to the FIEA. (2009 Recommendation on Tax Measures for Further Combating Foreign Bribery)	<i>Not implemented</i>
12.	The Working Group recommends that Japan consider providing specific training to contact points in overseas missions to help them collect and analyse information on allegations of foreign bribery and respond to questions from Japanese nationals and companies overseas regarding Japan's foreign bribery offence. [2009 Recommendation, para. IX ii), X C i)]	<i>Fully implemented</i>
13.	The Working Group recommends that Japan update the Working Group on any progress, on which it can publicly report, regarding research by the Consumer Affairs Agency on the effectiveness of the Whistleblower Protection Act and the number of cases brought to court under the Act and, where possible, the outcomes of these cases. Japan could consider including in this research an analysis of the possible application of the Act to Japanese private-sector employees overseas. [2009 Recommendation, para. IX iii)]	<i>Partially implemented</i>
14.	The Working Group recommends that Japan take appropriate steps to coordinate the efforts of the Japan Bank for International Cooperation (JBIC) and Nippon Export and Investment Insurance (NEXI) to prevent and detect foreign bribery in international business transactions benefitting from official export credit support and that NEXI and JBIC also raise awareness of the risks of foreign bribery among Japanese companies, especially SMEs. [2009 Recommendation, para. III vii), XII ii); 2006 Recommendation on Bribery and Officially Supported Export Credits, para. 1 (a)]	<i>Fully implemented</i>

PHASE 3 ISSUES FOR FOLLOW UP BY THE WORKING GROUP

15.	The Working Group will follow-up the issues below as case law and practice develops on the implementation of the foreign bribery offence in the UCPL:	
	a. Whether in practice the foreign bribery offence covers the case where a bribe has been transferred with the agreement of the foreign public official to a third party, such as a political party, business partner, charity, or family member;	
	b. The liability of legal persons for the foreign bribery offence, including whether: (i) a legal person is liable where the bribe is for the benefit of a company related to the legal person from which the bribe emanated; (ii) the liability of legal persons depends upon the conviction or punishment of the natural person who perpetrated the offence; (iii) legal persons are subject to the provision on nationality jurisdiction; and (iv) whether liability of a parent company would be	

	triggered if someone representing it directed or authorised a representative of a foreign subsidiary to bribe a foreign public official; and	
	c. New five-year statute of limitations, to ensure that it allows an adequate period for the investigations and prosecution of the foreign bribery offence.	

ANNEX 3: List of participants in the on-site visit

Government ministries and agencies

- Consumer Affairs Agency (CAA)
- Financial Service Agency (FSA)
- Japan Bank for International Cooperation (JBIC)
- Japan Financial Intelligence Center JAFIC (FIU)
- Japan International Cooperation Agency (JICA)
- Japanese Institute of Certified Public Accountants (JICPA)
- Ministry of Economy, Trade and Industry (METI)
- METI's Small and Medium Enterprise Agency
- Ministry of Foreign Affairs (MOFA)
- Ministry of Finance(MOF)
- Ministry of Justice (MOJ)
- National Tax Agency (NTA)
- Nippon Export and Investment Insurance (NEXI)

Law enforcement and the Judiciary

- Aichi Prefectural Police
- Legal Training and Research Institute
- Nagoya District Public Prosecutors Office
- National Police Agency (NPA)
- Osaka District Public Prosecutors Office
- Regional Taxation Bureaus
- Supreme Court
- Supreme Public Prosecutors Office
- Tokyo District Court
- Tokyo District Public Prosecutors Office
- Tokyo Metropolitan Police Department

Private enterprises

- Arkhe Co. Ltd.
- KeihinRika Industry Co. LTD.
- Nemoto &Co., Ltd.
- SANWA DENKI KOGYO Co., Ltd
- Hitachi, Ltd.
- ITOCHU Holdings, Inc.
- JXTG Holdings, Inc.
- Kawasaki Kisen Kaisha,.,Ltd. ("K Line")
- Mitsubishi Corp.
- Mitsui & Co., Ltd.
- Nippon Steel Corporation
- Panasonic Corporation
- SUMITOMO Corporation.

Business organisations and auditing associations

- Anti-Bribery Committee Japan (ABCJ)
- Business Ethics Research Center (BERC)
- Deloitte
- Global Compact Network Japan (GCNJ)
- Grant Thornton

- The Japan Chamber of Commerce and Industry
- Japan External Trade Organization
- Japan Overseas Enterprises Association
- KEIDANREN (Japan Business Federation)
- Mizuho Bank, Ltd.
- MUFJ Bank, Ltd.
- Organization for Small & Medium Enterprises and Regional Innovation, JAPAN
- PWC
- Sumitomo Mitsui Banking Corporation

Legal profession

- Anderson Mori & Tomotsune
- Baker & McKenzie
- Clifford Chance
- Ikeda & Smoeya
- Japan Federation of Bar Association
- Morrison & Foester
- Mori Hamada & Matsumoto
- Nishimura & Asahi
- T. Kunihiro & Co. Attorneys-at-Law

Civil society and academics

- Asia Crime Prevention Foundation
- Japan NGO Center for International Cooperation
- Kyodo News
- Transparency International Japan
- University of Hosei
- University of Tokyo
- University of Doshisha
- Yomiuri Shimbun
- Waseda Chronicle

ANNEX 4: List of abbreviations, terms and acronyms

ADB	Asian Development Bank
AML	Anti-Money Laundering
AOCL	Act on Punishment of Organised Crimes and Control of Crime Proceeds
ASEAN	Association of South East Asian Nations
CAA	Consumer Affairs Agency
CCP	Code of Criminal Procedure
CID	Criminal Investigation Department
CPI	Corruption Perception Index (by Transparency International)
CTA	Corporation Tax Act
DPA	deferred prosecution agreement
DPPO	District Public Prosecutors Office
EU	European Union
EUR	Euro (currency)
FATF	Financial Action Tax Force
FDI	Foreign Direct Investment
FIEA	Financial Instruments and Exchange Act
FIU	Financial Intelligence Unit
FSA	Financial Service Agency
GDP	Gross Domestic Product
HKD	Hong Kong Dollar
HLM	High Level Mission
HPPO	High Public Prosecutors Offices
ITA	Income Tax Act
JAFIC	Japan Financial Intelligence Center
JBIC	Japan Bank for International Cooperation
JETRO	Japan External Trade Organisation
JICA	Japan International Cooperation Agency
JICPA	Japanese Institute of Certified Public Accountants
JPY	Japanese Yen
METI	Ministry of Economy, Trade and Industry
MLA	Mutual Legal Assistance
MOFA	Japan Ministry of Foreign Affairs
MOJ	Japan Ministry of Justice
NEXI	Nippon Export and Investment Insurance
NGO	Non-Governmental Organisation
NPA	National Police Agency
NTA	National Tax Agency
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
PC	Penal Code
PEP	Politically Exposed Person
SECS	Securities Exchange and Surveillance Commission
SME	Small and Medium Sized Enterprise
SPPO	Supreme Public Prosecutors Office
STR	Suspicious Transaction Report
TI	Transparency International
UCPL	Unfair Competition Prevention Law
UN	United Nations
UNAFEI	UN Asia and Far East Institute

UNCAC	UN Convention against Corruption
UNTOC	UN Convention against Transnational Organized Crime
US DOJ	United States Department of Justice
US FCPA	United States Foreign Corrupt Practices Act
USD	US Dollar
WFU	Phase 3 Written Follow-up report
WGB or Working Group	Working Group on Bribery in International Business Transactions (para. 1)
WPA	Whistleblower Protection Act