JAPAN

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

21 May 2002

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

Japan signed the Convention on December 17, 1997, and deposited the instrument of acceptance with the OECD on October 13, 1998. On September 18, 1998, it enacted implementing legislation in the form of amendments to the Unfair Competition Prevention Law, which came into force on February 15, 1999.

Convention as a Whole

The amendments to the Unfair Competition Prevention Law establish the offence of bribing a foreign public official, define "foreign public official" and provide sanctions. Other existing laws, including the Penal Code, the Code of Criminal Procedure and the Commercial Code contain provisions relevant to the other obligations under the Convention.

The Japanese authorities explain that the foreign bribery offence was placed in the Unfair Competition Prevention Law as opposed to the Penal Code, which contains the domestic bribery offences, because the foreign bribery offence has a different objective. The objective of the domestic offences is to maintain public trust in a fair and honest public service.[1] On the other hand, the foreign offence is aimed at ensuring fair competition in international business transactions. Japan believes it is therefore reasonable to implement the Convention through amendments to the Unfair Competition Prevention Law.

Japan indicates that offences in the Unfair Competition Prevention Law are investigated and prosecuted in exactly the same manner as offences under the Penal Code, and the general provisions of the Penal Code apply to the foreign bribery offence.[2] Moreover, despite the placement of the offences in two different statutes and their differing objectives, the required elements of the offences are similar, and, therefore, case law on the domestic offences will be useful predictors of how the foreign bribery offence will be applied.

The purpose of the Unfair Competition Prevention Law, as stated in Article 1 therein, appears to be to prevent unfair competition in the Japanese market, not foreign markets. Thus there is some uncertainty as to whether bribery offences that only affect the foreign market would be prosecuted.

1. Supreme Court Judgment 1931.8.6. Keishu 10.412.

2. The Japanese authorities state that article 8 of the Penal Code provides that the general provisions in the Penal Code, such as the ones on complicity, are applicable to all criminal offences, not just the ones in the Penal Code.

1. ARTICLE 1. THE OFFENCE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

Article 10 bis (1) of the Unfair Competition Prevention Law sets out, as follows, the offence of bribery of a foreign public official:

No person shall give, offer or promise any pecuniary or other advantage, to a foreign public official, in order that the official act or refrain from acting in relation to the performance of official duties, or in order that the official, using his position, exert upon another foreign public official so as to cause him to act or refrain from acting in relation to the performance of official duties, in order to obtain or retain improper business advantage.

This is followed by article 10 bis (2), which defines "foreign public official" (see discussion under 1.1.6, below), and article 10 bis (3), which provides an exception to the offence as follows:

Article 10 bis (1) is not applicable when the foreign country described in items (i) to (iii) and (v) in the above paragraph [article 10 bis (2) defining "foreign public official"] is the same foreign country where the main office of someone who gives, offers or promises any advantage (in the case where a representative of a legal person, an agent or an employee of a legal person or person gives, offers or promises any advantage, in relation to the business of the legal person or the person, the main office of the legal person or the person) is located.

(The part in square brackets is added for clarity)

Article 10 bis (3) would seem to create a broad exception to the foreign bribery offence. Since this exception is closely connected to territorial jurisdiction, discussion of this provision is saved for the examination under 4.1 of Japan's treatment of territorial jurisdiction.

1.1 The Elements of the Offence

1.1.1 any person

Under article 10 bis (1) no "person" shall give, etc., a pecuniary or other advantage to a foreign public official. Although there is no definition of "person" in either the Penal Code or the Unfair Competition Prevention Law, it is a basic principle of Japanese law that criminal sanctions can only be imposed on natural persons unless it is expressly provided otherwise.[3]

1.1.2 intentionally

Although the intentional component of the offence of bribing a foreign public official is not expressly mentioned in article 10 bis (1), this element is required. Article 38 of the Penal Code provides that an act is not punishable if it is committed without criminal intent, and article 8 states that the provisions in the "General Provisions", which include article 38, apply to crimes under other statutes, including the Unfair Competition Prevention Law.

The courts interpret criminal intent to denote a recognition and acceptance of facts, even with uncertainty, regarding all the objective elements of an offence. In addition, ignorance of the law cannot be invoked as a defence.

3. Supreme Court Judgment 1935.11.25 Keishu 14-1217.

1.1.3 to offer, promise or give

In conformity with the Convention, article 10 bis (1) expressly states that no person shall "give, "offer" or "promise" any undue pecuniary or other advantage to a foreign public official.

1.1.4 any undue pecuniary or other advantage

Article 10 bis (1) prohibits the offering, etc. of "any pecuniary or other advantage", incorporating most of the language of the Convention in this respect. The Japanese authorities explain that they consider any pecuniary or other advantage given, offered or promised to a foreign public official in order to obtain or retain an improper advantage to be "undue".

There is no exception to the offence for "small facilitation payments".

1.1.5 whether directly or through intermediaries

Article 10 bis (1) does not expressly apply to a person who offers, etc. any pecuniary or other advantage to a foreign public official through an intermediary. The Japanese authorities explain that it is clear from the case law that a person who bribes through an intermediary is punishable pursuant to the foreign offence and the relevant domestic offence. This is the case where the intermediary has knowledge that he/she is mediating a bribe and where the intermediary lacks such knowledge.[4] Furthermore, the intermediary who acts with knowledge is guilty of complicity.

1.1.6 to a foreign public official

Article 10 bis (2) states that the term "foreign public official" is defined as follows[5]:

> *(i) any person who engages in public service for a national or a local foreign government.*
>
> *(ii) any person who engages in service for an entity constituted under foreign special laws to carry out specific tasks in the public interest.*
>
> *(iii) any person who engages in service for an enterprise of which the number of stocks with the right to vote or the amount of capital subscription directly owned by one or more national or local foreign governments exceeds one-half of that enterprise's total issued stocks with the right to vote or total subscribed capital, or of which the number of executives (which mean directors, auditors, liquidators or other persons who engage in management of its business) appointed or named by one or more of the national or local foreign governments exceeds one-half of that enterprise's executives, and to which special privileges are given by national or local foreign governments to do its business.*

4. Supreme Court Judgment 1956.7.3 Keishu 10-7-955; Supreme Court Judgment 1983.9.21 Keishu 37-7-1070.

5. Subsequent to the adoption of this report, amendments to the Unfair Competition Prevention Law (UCPL) which broaden the definition of foreign public officials in relation to public enterprises, were adopted in June 2001 and entered into force on 25 December 2001. See the annex attached to this report for the Working Group's evaluation of the amendments.

(iv) any person who engages in public service for an international organisation (hereinafter, "an international organisation" means an entity which is formed by governments or other international organisations among governments).

(v) any person who exercises a public function, which belongs to the authorised competence of a national or a local foreign government or an international organisation and is delegated by them.

The Japanese authorities explain that the terms "public service" and "service" convey the same meaning as "public function" under the Convention, although these terms are not defined under Japanese law.

The definition under paragraph (i) does not expressly refer to a person "holding a legislative, administrative or judicial office…whether appointed or elected". However, the Japanese authorities explain that the term " any person who engages in public service" is intended to cover all such persons. In addition, although paragraphs (i) and (v) do not refer to "all levels and subdivisions of government" as required by the Convention, this is the intention.

Paragraph (ii) defines a foreign public official in terms of someone engaging in service for an "entity constituted under foreign special laws to carry out specific tasks in the public interest". The Japanese authorities explain that "foreign special laws" is meant to convey the same meaning as "public law" under Commentary 13.

Paragraph (iii) requires that the "enterprise" be owned by shareholders. In addition, in contrast to Commentary 14, paragraph (iii) does not specify that direct or indirect control is a sufficient trigger, and does not contemplate the case where the foreign government or governments exercise de facto control over an enterprise but do not hold in excess of 50 per cent of the shares or do not control in excess of 50 per cent of the votes attached to the shares. It is the view of the Japanese authorities that this definition satisfies the requirement of Commentary 14. It is their understanding that the definition of "public enterprise" has been left up to each Party, except that the concrete example in the Commentary must be covered.

The Japanese authorities explain that the final sentence in paragraph (iii), is meant to codify Commentary 15 on the Convention, which clarifies that an enterprise that operates on a commercial basis is considered a "public enterprise" if it receives "preferential subsidies or other privileges". Japan confirms that the term "special privileges" in paragraph (iii) covers both monopoly positions conferred by the public authorities and the granting of subsidies on a preferential basis.

Paragraph (iv), which defines a foreign public official as "any person who engages in public service for an international organisation", is intended to apply to a person working within an international organisation.

Paragraph (v) applies to a person who exercises a public function, where a national or local foreign government or an international organisation has delegated the public function to him/her. Thus the only requirement for this paragraph to apply is that the person concerned engages in work delegated by a government or an international organisation.

1.1.7 for that official or for a third party

Article 10 bis (1) does not expressly cover the case where a third party receives the benefit. However, the Japanese authorities state that the foreign bribery offence applies where there is a third party beneficiary in the following cases:

1. The advantage is offered or promised to the foreign public official, irrespective if it is given to a third party.

2. The advantage is given to the foreign public official, even if the intention of the official is for the benefit to go to a third party.

3. The advantage is given directly to a third party, in certain cases.

With respect to the third category, the Japanese authorities provide that, consistent with the practice regarding bribery of domestic officials, the foreign bribery offence will be interpreted to include cases where it can be deemed that in substance the advantage has been given to the official, even if it was transmitted to a third party. The courts determine whether the advantage has been in substance given to the official based upon the facts of the given case. The prevailing interpretation is that the advantage is given in substance to the official where the third party serves as a "tool" for the official; the third party is identified with the official (e.g. he/she is the official's spouse); or there is a conspiracy between the third party and the official.[6] The advantage would also be deemed to have been given "in substance" to the foreign public official if he/she directs to whom it is given. In such a case the foreign public official has control of the advantage, and, therefore, it is considered to have been given "in substance" to him/her.

1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties

Article 10 bis (1) applies where any pecuniary or other advantage is given, etc. to a foreign public official in order that the official act or refrain from acting in the following two cases:

1. In relation to the performance of his/her official duties; or

2. In order that the official, using his/her position, exert upon another foreign public official so as to cause the other official to act or refrain from acting in relation to the performance of official duties.

The first case conforms exactly to the corresponding element in the Convention. The second case is a subcategory of the first case, but its inclusion in the offence provides clarification of the scope of the offence.

1.1.9 in order to obtain or retain business or other improper advantage

Article 10 bis (1) applies in relation to an offer, etc. given to a foreign public official "in order to obtain or retain improper business advantage". This differs from the language in the Convention to the extent that the Convention refers to "business or other improper advantage". However, it would appear that article 10 bis (1) meets the standard in the Convention as long as "improper business advantage" is intended to cover, in conformity with Commentary 5 on the Convention, "something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements".

6. Grand Commentaries on the Penal Code , published by Seirin-Shoin (vol. 7, pp. 468-469)

Japan confirms that article 10 bis (1) applies in relation to the obtaining of business as well as the retaining of business that has already been obtained.[7]

1.1.10 in the conduct of international business

The Japanese authorities explain that the term "in the conduct of international business" is not included in article 10 bis (1) because pursuant to article 10 bis (3), the offence is inapplicable to the bribery of "its own officials". Therefore, only the bribery of a foreign public official is covered, which necessarily relates to the conduct of international business transactions. [Article 10 bis (3) is discussed in more detail under 4.1 on "Territorial Jurisdiction".]

The Unfair Competition Prevention Law has been applied to cases of unfair competition involving international business transactions, including civil claims that certain products (e.g. wine, bags and toys) imported and sold in Japan were copies of well-known foreign products.

1.2 Complicity

Article 1.2 of the Convention requires Parties to establish as a criminal offence the "complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official".

The Japanese authorities state that complicity in bribery of a foreign public official is a criminal offence pursuant to articles 61 to 65 of the Penal Code.[8]

Article 61 establishes the crime of "instigation", which is described as an act that causes another to decide to commit an offence and to carry it out based on that decision. This would appear to cover incitement of an act of foreign bribery.

Pursuant to article 62, a person is an "accessory" where he/she acts with the intention of collaborating with others to commit an offence by assisting to make it easier to commit the offence. This would appear to cover aiding, abetting and authorisation, according to the usual meaning of the terms.

1.3 Conspiracy and Attempt

Article 1.2 of the Convention further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

Japan provides that the Penal Code does not criminalise an attempt to bribe a domestic official, and similarly the Unfair Competition Prevention Law does not criminalise an attempt to bribe a foreign public official.

Japan explains that pursuant to article 60 of the Penal Code, conspiracy to bribe a foreign public official is a criminal offence if the offence has been committed.[9] This means that a conspirator is liable for an

7. The original text of article 10 bis (1) employs the term "e-ru", which means both "to obtain" and "to retain".

8. Article 8 of the *Penal Code* states that articles 61 to 65 apply to crimes for which punishments are provided for by other laws, including the Unfair Competition Prevention Law.

offence if he/she did not commit the offence, as long as a co-conspirator carried out the offence.[10] For instance, where a corporate executive authorises his/her subordinate to pay a bribe and the subordinate neither pays, promises nor offers the advantage, neither the executive nor the subordinate could be punished.

2. ARTICLE 2. RESPONIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to "take such measures as may be necessary, in accordance with its legal principles, to establish liability of legal persons for the bribery of a foreign public official".

2.1.1 Legal Entities

Article 14 of the Unfair Competition Prevention Law establishes the criminal responsibility of a "juridical person" for bribery of a foreign public official by its agent, servant or other employee.[11] It states as follows:

In the case where a representative of a juridical person or an agent, servant or other employee of a juridical person or a natural person has committed, in connection with the business of such juridical or natural person, any of the violations described in the preceding article, in addition to the violator being penalised, such a juridical person shall be fined an amount not exceeding 300,000,000 yen and such a natural person shall be liable to the same fine described in the preceding article.

The Japanese authorities explain that there are no restrictions on the types of companies upon which criminal responsibility can be placed, and, therefore, state owned or state-controlled companies are included. However, unincorporated business entities are not contemplated by the term "juridical persons" under article 14.

2.1.2 Standard of Liability

Under Japanese law, criminal responsibility of a legal person is based on the principle that the company did not exercise due care in the supervision, selection, etc. of an officer or employee to prevent the culpable act.[12] The burden rests on the legal person to prove that due care was exercised.[13] Where a legal person raises the defence, a person must be identified as having exercised due care, etc., and the court must determine whether it was exercised properly having regard to the nature of the legal person and the circumstances of the case.

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9. Article 8 of the Penal Code states that article 60 on conspiracy applies to crimes for which punishments are provided under other laws, including the Unfair Competition Prevention Law.

10. Supreme Court Judgment 1958.5.28 Keishu 12.8.1718.

11. The Penal Code does not provide for the criminal liability of legal persons. However, criminal liability exists under various special law offences (offences under laws other than the Penal Code, including the Unfair Competition Prevention Law). And in 1997, district courts and summary courts around the country sentenced 1,772 legal persons to fines for special law offences.

12. Supreme Court Judgment 1965.3.26. Keishu 19.2.83.

13. Ibid.

Article 14 of the Unfair Competition Prevention Law stipulates that the "juridical person" is fined "in addition to the violator being penalised". The Supreme Court has confirmed that the expression "in addition to", which appears quite often in Japanese legislation, does not introduce the requirement that the violator be convicted in order for the legal person to be found criminally liable.[14]

Japan adds that article 14 is restricted in application to bribes given "in connection with the business" of the legal person in order to exclude from its ambit bribes given in relation to the personal activities of employees, etc. Although there are no guidelines to this effect in the Unfair Competition Prevention Law, the practice has been to look at the objective character and effect of an act, not the actor's subjective intention.

3. ARTICLE 3. SANCTIONS

The Convention requires Parties to institute "effective, proportionate and dissuasive criminal penalties" comparable to those applicable to bribery of the Party's own domestic officials. Where a Party's domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are "subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions". The Convention also mandates that for a natural person, criminal penalties include the "deprivation of liberty" sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of "comparable effect" are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Official

Bribery of a Domestic Official

Pursuant to article 198 of the Penal Code a natural person is liable for various forms of bribery of public officials, in consequence of the reverse application of the passive bribery offences to active bribery. Thus, pursuant to article 198, for the following domestic bribery offences a natural person is liable to imprisonment for not more than 3 years or a fine of not more than 2,500,000 yen[15]:

1. The bribery of a public officer or an arbitrator in connection with his/her duties[16],

2. The bribery of a person who is to become a public officer or an arbitrator in connection with the duties that he/she is to assume[17],

3. The bribery of a public officer or arbitrator[18] in connection with his/her duties where the bribe is offered to a third person[19],

14. Supreme Court Judgment 1956.12.22 Keishu 10.12.1683.

15. On 25 August 1999, 110.9 yen were valued at 1 U.S. dollar.

16. See article 198 and 197 bis (1) of the *Penal Code*.

17. See article 198 and 197 bis (2) of the *Penal Code*.

4. The bribery of a public officer or arbitrator where the public officer or arbitrator consequently performs "an illegal act or fails to perform his or her duties"[20]

5. The bribery of a public officer or arbitrator in connection with "having performed improperly or having failed properly to perform his or her duties" including the situation where the bribe is offered to a third person.[21]

6. The bribery of an ex-public officer or ex-arbitrator in connection with having "performed improperly or failed properly to perform his or her duties while in office".[22]

7. The bribery of a public officer "for the influence that he or she exerted or is to exert…upon another public officer so as to cause him or her improperly to perform or fail properly to perform his or her duties while in office".[23]

The Japanese authorities state that legal persons are not criminally liable for the bribery of a domestic public official.

Bribery of a Foreign Official

A natural person is, pursuant to article 13(3)(iii) of the Unfair Competition Prevention Law, liable to a penalty of not more than 3 years imprisonment or a fine of not more than 3 million yen for the offence of bribing a foreign public official under article 10 bis (1). A natural person cannot be liable to both a fine and imprisonment.

Pursuant to article 14, where a natural person acts as an agent for a legal person or another natural person, in connection with the business of such natural or legal person, he/she is subject to the same fine described in article 13(3)(iii). The Japanese authorities clarify that this does not mean that a natural person is liable to an additional fine where the bribe was made in connection with his/her business.

There appears to be some overlap between the sanctions provided under articles 13(3)(iii) and 14 with respect to a natural person where an agent has bribed on his/her behalf in connection with his/her business.

Due to this overlap, it is not clear whether a natural person on whose behalf a bribe has been given would be liable to imprisonment under article 13(3)(iii) or just a fine under article 14. The Japanese authorities explain that whether the natural person on whose behalf the bribe has been given would be liable to imprisonment depends on whether the conspiracy to bribe is between him/her and the agent, or the agent and a third party. In the first case the natural person on whose behalf the bribe has been given is liable to imprisonment or a fine under article 13, and in the latter case he/she is liable to a fine under article 14.

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18. Japan indicates that "arbitrator" means an arbitrator involved in the arbitration under articles 786 to 805 of the Law Concerning Public Summons Procedure and Arbitration Procedure. This arbitration procedure is rarely used.

19. See article 198 and 197-2 of the *Penal Code*.

20. See article 198 and 197-3 bis (1) of the *Penal Code*.

21. See article 198 and 197-3 bis (2) of the *Penal Code*.

22. See article 198 and 197-3 bis (3) of the *Penal Code*.

23. See article 198 and 197-4 of the *Penal Code*.

A "juridical person" is, pursuant to article 14 of the Unfair Competition Prevention Law, liable to a fine of not more than 300 million yen for the bribery of its representative, agent, employee, etc. in connection with its business.

Japan does not have sentencing guidelines to assist the court in determining an appropriate penalty. The courts determine the penalty in a particular case based on the amount of the bribe, the motive for the offence, the offender's criminal record and his/her degree of repentance.

It is the opinion of the Japanese authorities that the sanctions prescribed for the foreign bribery offence are sufficiently "effective, proportionate and dissuasive" to meet the requirements of the Convention. They point out that the fine for natural persons is higher than it is for the domestic bribery offence, and the level of the fine for legal persons in comparatively high by Japanese standards.

3.3 Penalties and Mutual Legal Assistance

Pursuant to the Law for International Assistance in Investigation, Japan can provide mutual legal assistance when the offence for which assistance is requested is an offence under Japanese laws, regulations or ordinances, regardless of the maximum term of imprisonment for the offence.

3.4 Penalties and Extradition

Pursuant to article 2 of the Law of Extradition, extradition shall not be provided in the following two cases unless "the treaty of extradition provides otherwise":

1. The offence is not punishable by death, or by imprisonment for life or for a maximum term of three years or more, by the laws, etc of the requesting country.[24]

2. The offence would not be punishable under the laws, etc of Japan by death or by imprisonment with or without forced labour for life or for a maximum term of three years or more if the offence were committed in Japan.[25]

The Japanese authorities state that since the Government of Japan regards the Convention as a "treaty of extradition", a fugitive may be extradited for the foreign bribery offence regardless of the penalties of deprivation of liberty in Japan or the requesting country.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

Confiscation of a bribe when it is in the form of a tangible object is currently possible pursuant to article 19(1) of the Penal Code. Intangible objects cannot be confiscated, nor can the money equivalent of such property. The Japanese authorities explain that the scope for confiscation and collection of bribes given to foreign public officials is expanded by the Law Concerning Punishment of Organized Crimes, Control of

24. Article 2(3) of the Law of Extradition.

25. Article 2(4) of the Law of Extradition.

Crime Proceeds and other Matters (the "Anti-Organized Crime Law"), which will come into force within six months of its promulgation on August 18, 1999.[26]

Pursuant to the Anti-Organized Crime Law, a judge has discretion to confiscate "any property given through a criminal act" where there has been a conviction for foreign bribery under article 10 bis (1) of the Unfair Competition Prevention Law. There are no guidelines on the exercise of the discretion.

Confiscation is limited to the bribe, as the Japanese authorities consider the proceeds to be extremely difficult to identify for this purpose. They explain that the proceeds obtained by a criminal act are not necessarily in the form of a commercial contract, but often in an ambiguous form. For instance where a bribe is given to a foreign public official in order to obtain permission to set up a business in a foreign country, it is difficult to identify the extent of the causal relation between the giving of the bribe and the granting of the permission. They also explain that a payment based on a contract would be considered remuneration for the realisation of the contract; therefore, the whole amount of the payment by the foreign public official could not be evaluated as proceeds, making it difficult to identify the extent of the proceeds. Moreover, the Japanese authorities believe that the monetary sanction for the foreign bribery offence has a comparable effect to confiscation of the proceeds.

The Japanese authorities state that it is "possible" to confiscate property from an offender who is a legal person.

Under the Anti-Organized Crime Law, property can be confiscated if it is moveable (including money), immovable or a "money claim" (a claim for the payment of money). Where confiscation is not possible or it is deemed inappropriate in view of the nature of the property, the money equivalent may be collected instead.

The Anti-Organized Crime Law also permits confiscation of property from a third party, including a foreign public official who acquires undue benefit, where he/she receives the property after the commission of the offence knowing that the property constitutes the proceeds of a crime. It is not necessary that he/she know that the property was obtained through a foreign bribery offence. The Japanese authorities state that a third party could be a legal person. Where it is impossible or inappropriate to confiscate the property from a third person, the money equivalent may not be collected instead.

Furthermore, pursuant to the Anti-Organized Crime Law, property may be confiscated when given through the criminal act of giving undue benefit to a foreign public official outside Japan, if the act also constitutes an offence under the laws of the jurisdiction where the act was committed.

3.7 Monetary Sanctions in Place of Confiscation of the Proceeds

The Japanese authorities state that the Unfair Competition Prevention Law provides monetary sanctions of comparable effect to the confiscation of the proceeds of the bribe in the form of the maximum fine of 300 million yen for legal persons and 3 million yen for natural persons. These are the statutory maximum penalties for the offence and not additional sanctions.

26. The Law Concerning Punishment of Organized Crimes, Control of Crime Proceeds and other Matters was passed by the Diet on 12 August 1999 and promulgated 18 August 1999. It shall enter into force on the date provided for by Cabinet Ordinance within 6 months of promulgation.

3.8 Civil Penalties and Administrative Sanctions

Japan provides that it does not impose additional civil or administrative sanctions on a person for the bribery of a foreign public official either under the Unfair Competition Prevention Law or elsewhere in the law.

4. ARTICLE 4. JURISDICTION

4.1 Territorial Jurisdiction

Article 4.1 of the Convention requires each Party to "take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory". Commentary 25 on the Convention clarifies that "an extensive physical connection to the bribery act" is not required.

Article 1 of the Penal Code states that the Penal Code is applicable to all persons who commit a crime in Japan, and Japan explains that pursuant to article 8 of the Penal Code, the same principle applies to offences under the amended Unfair Competition Prevention Law. A crime is considered to have been committed in Japan if the offence is in whole or in part committed in Japan. 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, etc); as well as the case where the bribe is offered, promised or given abroad where an act of complicity takes place in Japan (including the case where the complicity is extended overseas).[27]

The scope of Japanese territorial jurisdiction needs to be examined in light of the limitations placed on it by article 10 bis (3) of the Unfair Competition Prevention Law, a provision that qualifies the definition in article 10 bis (2) of the term "foreign public official" [28]. It is reproduced again below to assist in the discussion:

Article 10 bis (1) is not applicable, when the foreign country described in items (i) to (iii) and (v) in the above paragraph [article 10 bis (2) defining "foreign public official"] is the same foreign country where the main office of someone who gives, offers or promises any advantage (in the case where a representative of a legal person, an agent or an employee of a legal person or a person gives, offers or promises any advantage, in relation to the business of the legal person or the person, the main office of the legal person or the person) is located.

(The part in square brackets is added for clarity)

This means that, regardless of whether an act of bribing a foreign public official is committed wholly or in part in Japan, an offence is not committed if the "main office" of the briber is located in the same country for which the foreign public official engages in public service. The Unfair Competition Prevention Law does not contain guidelines for determining when an office is considered to be a "main office". In

27. In Tokyo District Court Judgment 1981.3.30 Keisaigeppo 13.3=4.282, the court held that the bribery offence is committed in Japan if the conspiracy to commit the offence and the promise to pay took place in Japan, eventhough the bribe was given to the official outside Japan.

28. Subsequent to the adoption of this report, amendments to the Unfair Competition Prevention Law (UCPL), which delete article 10 bis (3) and thus remove the "main office" exception, were adopted in June 2001 and entered into force on 25 December 2001. See the annex of this report for the Working Group's evaluation of the amendments.

addition, a case has never been decided involving a determination under the Unfair Competition Law of the location of a particular main office. The Japanese authorities indicate that a "main office" would be an office that functions as the centre for the management of an entity's business, following the interpretation that has been given to the term "head office" under article 482 of the Japanese Commercial Code.

To determine whether an office functions as the centre for the management of an entity's business, the Japanese authorities state that certain factors, including the following, would be considered on a case-by-case basis:

1. The location of the head office of a business according to its registration documents.[29]

2. The location of an entity's board meetings, and the residence and nationality of the perpetrator.

3. In the case of a multinational corporation with more than one headquarters, the connection between the business of the perpetrator and the responsibility of each headquarters. (i.e. The headquarters with the strongest link would be considered the main office.)

Based on the above criteria, the Japanese authorities believe that in the case where a division of a Japanese corporation is located in a foreign country, the "main office" would usually be considered to be in Japan. Therefore, if a person working at the division offered a bribe to an official of a foreign country, the exception under article 10 bis (3) would not apply. On the other hand, they believe that the "main office" of a subsidiary of a Japanese corporation located in a foreign country would usually be determined to be in the foreign country. The Japanese authorities confirm that this means that if a Japanese national employed by a foreign subsidiary of a parent Japanese corporation bribes in Japan in relation to the business of the subsidiary a foreign public official from the country in which the foreign subsidiary is located, article 10 bis (3) would apply, and thus no offence would have been committed. They add that if there were a conspiracy between the employee at the subsidiary in the foreign country and an employee at the parent company in Japan, both employees would be punishable. In this case participation of someone at the Japanese company would remove the case from the scope of article 10 bis (3) since one of the "main offices" of the principle offenders would not be located in the foreign country.

The Japanese authorities confirm that article 10 bis (3) does not apply to bribes, etc., given to a person described under article 10 bis (2)(v) as exercising a public function delegated by an international organization. The reference in 10 bis (3) to paragraph (v) is restricted to a person exercising public functions delegated by a "national or local foreign government".

The Japanese authorities state that the sole purpose of article 10 bis (3) is to exclude from the ambit of the offence bribery not in the conduct of international business.

4.2 Nationality Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, "take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official". Commentary 26 on the Convention clarifies that where a Party's principles include the requirement of dual

29. Corporations that intend to do business on a continuous basis in Japan, irrespective of where they are founded, must register certain information, including the location of their head office.

criminality, it "should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute".

Japan states that it has not established nationality jurisdiction in respect of the offence of bribing a foreign public official, because this has not been done in respect of domestic bribery, and due to the view that pursuant to its territorial jurisdiction an act performed abroad is "considerably punishable".

Pursuant to article 4.3 of the Penal Code, extraterritorial jurisdiction is only applied to a Japanese national who commits one of the following crimes: arson, forgery, rape, murder, bodily injury, kidnapping, larceny, robbery, fraud, extortion or embezzlement in the conduct of business. Japan explains that, with respect to the nationality principle, it has adopted the policy of enumerating in the Penal Code serious offences involving important legal interests to which the Penal Code must be applied regardless of where the offences are committed.

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

The Japanese authorities state that there are no provisions in the law requiring consultations with another country with a view to an eventual transfer to another country. However, the relevant authorities will confer with a party that has jurisdiction in a given case.

4.4 Review of Current Basis for Jurisdiction

Article 4.4 of the Convention requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and if it is not, to take remedial steps.

The Japanese authorities have concluded that the principles of the Convention are implemented through article 8 of the Penal Code on territorial jurisdiction, without the need to adopt nationality jurisdiction.

5. ARTICLE 5. ENFORCEMENT

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be "subject to the applicable rules and principles of each Party". It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

5.1 Rules and Principles Regarding Investigations and Prosecutions

Investigations

In accordance with the Constitution and the Code of Criminal Procedure, the prosecutors and the police are responsible for the investigation of alleged offences. A police official shall investigate an offence when he/she "deems" that an offence has been committed.[30] A public prosecutor may investigate an offence

30. Article 189 of the Code of Criminal Procedure.

where he/she deems this necessary.[31] However, the general procedure is for the police to conduct the initial investigation.

There shall be mutual cooperation and coordination between the public prosecutors, the Prefectural Public Safety Commission and the police during a criminal investigation.[32] The public prosecutor has the authority to instruct the police to cooperage in investigations, and to assist in an investigation where the public prosecutor is conducting an investigation himself/herself.[33]

An investigation involves interviewing concerned persons and receiving voluntarily produced evidentiary materials whenever it is concluded that a criminal act has occurred. A warrant may be issued by a judge for the arrest of a suspect or for compulsory measures such as search and seizure where there is reasonable cause to suspect that an offence has been committed. All evidence collected during the investigation must be turned over to the prosecutor.

Prosecutions

The prosecutor takes charge of the institution of a public prosecution in accordance with the Constitution and the Code of Criminal Procedure. After examining the evidence, a public prosecution will institute a prosecution if convinced beyond a reasonable doubt of the guilt of the alleged offender. In addition, the prosecutor will conduct further investigation of an alleged offence.

Pursuant to article 248 of the Code of Criminal Procedure, 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 circumstances under which the alleged offence was committed, and the conditions subsequent to the commission of the alleged offence. In addition, the Japanese authorities state that they understand that the Convention does not bind the discretion of Japanese prosecutors on investigations and prosecutions.

Injured parties (e.g. competitors) that file a complaint may challenge a prosecutor's decision to not prosecute an alleged offence by:

1. Filing a motion with the Committee for the Inquest of Prosecution, which is separate from the Public Prosecutor's Office; or

2. Appealing to the chiefs of higher Public Prosecutor's Offices, claiming dissatisfaction with the decision of the prosecutor.

5.2 Considerations such as National Economic Interest

The Japanese authorities state that investigations and public prosecutions are conducted strictly and impartially and cannot be influenced by pressure from outside bodies.

31. Article 191 of the Code of Criminal Procedure.

32. Article 192 of the Code of Criminal Procedure.

33. Articles 193(2) and (3) of the Code of Criminal Procedure.

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitations with respect to the bribery of a foreign public official provide for "an adequate period of time for the investigation and prosecution" of the offence.

Japan indicates that pursuant to article 250 of the Code of Criminal Procedure, the statute of limitations for the offence of bribing a foreign public official under the amendment to the Unfair Competition Prevention Law is 3 years. This period applies to the offence in respect of natural persons as well as the offence in respect of legal persons. Article 253 (1) states that the period begins to run when the criminal act has ceased, which is generally considered to be the moment when the results of the crime occur. Pursuant to article 255 bis (1), the period is suspended as long as an alleged offender is outside Japan. There is no provision for suspending the period when requests for assistance are necessary.

The same limitation period applies in respect of the offence of bribing a domestic official.

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

7.1/7.2 Domestic and Foreign Bribery

In Japan, neither the passive nor the active bribery of a domestic or foreign public official is currently a predicate offence for the purpose of the application of money laundering legislation. However, under the Anti-Organized Crime Law, which shall enter into force within 6 months of its promulgation on August 18, 1999,[34] the acceptance of a bribe (passive bribery) by a domestic or a foreign public official is a predicate offence for the application of the money laundering offences. Under the new legislation the acceptance of a bribe by a domestic official is a predicate offence even when the bribe is given abroad. The acceptance of a bribe by a foreign public official abroad is a predicate offence where "it would be an act constituting such an offence if committed in Japan and when it is criminal under the laws and regulations effective in the region in which the act was committed".

The following "crime proceeds" are subject to the money laundering offences:

1. Any pecuniary or other advantage given in the course of bribing a foreign public official under article 10 bis (1) of the Unfair Competition Prevention Law; and

2. Any property given as a bribe to a Japanese public official.

Thus, it is the bribe that is the subject of the money laundering offence. The Japanese authorities state that the proceeds of bribery obtained through bribery are not subject to the money laundering offence because of the difficulty of identifying the extent of the proceeds.[35]

Under the Anti-Organized Crime Law, the following acts constitute money laundering offences:

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34. See footnote 25.

35. See discussion on issue of proceeds under 3.6 on "Seizure and Confiscation of the Bribe and its Proceeds".

1. To conceal property or disguise facts with respect to the acquisition or disposition of property, knowing that it constitutes "crime proceeds"; or

2. To receive property, knowing that it constitutes "crime proceeds".

The following sanctions are available with respect to the following money laundering offences:

3. The offence of performing acts for the purpose of controlling the "management of enterprises of juristic persons and other entities using illicit proceeds or the like" is punishable by imprisonment with labour for not more than 5 years or a fine of not more than 10 million yen, or both.

4. The offence of concealing crime proceeds or the like is punishable by imprisonment with labour for not more than 5 years or a fine of not more than 3 million yen, or both.

5. The offence of receiving crime proceeds or the like is punishable by imprisonment with labour for not more than 3 years or a fine of not more than 1 million yen, or both.

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1/8.2/8.3 Accounting and Auditing Requirements/Companies Subject to Laws and Regulations/Penalties

8.1.1/8.2.1/8.3.1 Companies in General

All companies limited by shares, general partnerships, limited partnerships and limited companies are subject to the Commercial Code. Pursuant to article 32 bis (1) of the Code, every "trader" (except for traders other than companies with capital of less than 500,000 yen) "shall prepare accounting books and balance sheets for making clear the conditions of business properties and profit and loss". The Commercial Code states that in preparing accounting books "authentic accounting practices shall be taken into consideration". As the "Financial Accounting Standards for Business Enterprises" is regarded as one of the authentic accounting practices, accounting books must be prepared in accordance with the standards therein.

Article 1 of the " Financial Accounting Standards for Business Enterprises" provides that "financial accounting for business enterprises should provide a true and fair report of the financial position and of the results of operations of a business enterprise". Article 2 requires that the financial accounting include "the maintenance of accurate accounting records of all the transactions in accordance with the principle of orderly accounting".

The "Financial Accounting Standards for Business Enterprises" also provide that "contingent liabilities", if considered material, should be disclosed in the notes to the balance sheet.

Pursuant to article 498 bis (1) of the Commercial Code, promoters, members administrating the affairs of a company and directors of stock companies, unlimited partnerships and limited partnerships shall be liable to a non-penal fine not exceeding one million yen where they have failed to state any particulars that should have been stated or have made any untrue statement in respect of the inventory balance sheet, the report on final accounts, the accounting books, etc. Promoters, etc. of limited companies (Yuugen-kaisha) are subject to the same penalty pursuant to article 85 of the Commercial Code.

8.1.2/8.2.2/8.3.2 Stock Companies

Certain provisions of the Commercial Code only apply to companies that issue shares (Kabushiki-Kaisha). The Japanese authorities indicate that pursuant to article 282, the directors of a company are required to keep "the documents in article 281 (1)"and the audit report at the principal office of the company for five years, etc. It is, therefore, assumed that pursuant to article 281(1) directors are required to draw up certain documents, including financial statements. Japan further indicates that article 274 requires an auditor to "audit the execution by the directors of their functions".

The Board of Directors chooses a candidate for the position of auditor, following which an auditor is appointed at the general meeting of stockholders. An auditor may make submissions at the general meeting of stockholders with respect to his/her appointment or removal.

Article 24 of the Certified Public Accountants Law contains provisions concerning the independence of auditors. Pursuant thereto a certified public accountant cannot audit or certify financial documents for an organisation for which he/she has been an officer[36], an employee or in which he/she has had material interests within the past year.

The auditor shall report to the Board of Directors anything that a director does or there is a risk that he/she might do, which is outside the scope of the company's purpose or is contrary to the law or the articles of incorporation.[37] Moreover, the auditor shall examine the proposals and documents that the directors intend to submit to the general meeting of stockholders, and shall report at the general meeting any matters in violation of the laws, ordinances or articles of incorporation or anything that is "seriously unreasonable".[38]

Article 266 bis (3) of the Commercial Code states that directors shall be jointly and severally liable to a third person for wilfully or negligently making a false entry in relation to material matters to be stated on balance sheets, profit and loss statements and business reports, as well as in the application for shares, certificate for pre-emptive right, application for debentures, prospectus, etc.

Pursuant to article 277 of the Commercial Code, auditors shall be jointly and severally liable in damages to the company where they have neglected their duties.

8.1.3/8.2.3/8.3.3 Large Stock Companies

Pursuant to article 2 of the Law for Special Exceptions to the Commercial Code, a share-issuing company (Kabushiki-Kaisha) must be audited by an "external auditor who is an accountant and independent from

36. This prohibition also applies where the auditor's spouse has been an officer within the past year.

37. Article 266-3(3) of the Commercial Code.

38. Article 275 of the Commercial Code.

the audited entity in addition to the audit by the internal auditor" where it has either the capital of 500 million yen or more or the total liabilities of 20 billion yen or more.

An external auditor shall be a certified public accountant or an audit corporation. A director shall propose his/her appointment after having obtained the permission of the Board of Auditors.

It is the function of the external auditor to review the balance sheets and profit and loss statements, etc. and submit an audit report thereof to the Board of Auditors. The external auditor is required to report to the Board of Auditors anything that a director does that is outside the company's scope or that is contrary to the law or ordinances or the articles of incorporation. Pursuant to article 30(1) of the Law for Special Exceptions to the Commercial Code, the external auditor is liable to a non-penal fine not exceeding 1 million yen for false statements in respect of the audit report.

8.1.4/8.2.4/8.3.4 Listed Companies

Companies that issue publicly traded securities are subject to the Securities and Exchange Law. Pursuant to article 193 (2) of that statute, the balance sheet and profit and loss statement and related documents of a listed company must be audited and certified by a certified accountant(s) or an audit corporation that is "independent and does not have any special interest in the audited company". The criteria for appointing an auditor pursuant to the Securities and Exchange Law are substantially the same as with respect to the appointment of an external auditor under the Law for Special Exceptions to the Commercial Code.

Article 34-11 of the Certified Public Accountants Act states that an audit corporation shall not audit or certify the financial documents of a company and/or other person whose stock or capital is held by the audit corporation or in which the audit corporation has a substantial interest.

An external accounting auditor appointed under the Securities and Exchange Law is required to report to the Board of Auditors any illegal act or violation of laws, regulations or article of association in connection with directors' performance of their duties.

Pursuant to article 197 (1) of the Securities and Exchange Law, any person who submits a document for the registration of securities that contains "untrue statements with respect to material matters" is liable to imprisonment for up to 5 years or a fine of not more than 5 million yen, or both.[39] Article 207 provides for a "dual penalty" (i.e. the corporation is also liable to a penalty) in respect of the filing of documents contrary to article 197(1).

An applicant for the registration of securities is liable to compensate any person who acquires such security in response to a public offering where the registration statement contains an untrue statement with respect to any material matter or a material omission.[40]

Additionally, article 30 of the Certified Public Accountants Law provides for administrative penalties for an accountant or an audit corporation that certifies the truthfulness of financial documents that contain falsities, errors or omissions. The penalties include a reprimand, suspension from practice for up to one year and revocation of one's licence to practice, depending on whether the falsity, error or omission was made knowingly or through negligence.

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39. In 1998 the Securities and Exchange Law was amended to impose heavier penalties in this respect. The maximum term of imprisonment was increased from 3 years to 5 years, and the maximum fine was increased from 3 million yen to 5 million yen.

40. Article 18 of the Securities and Exchange Law.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

Article 9.1 of the Convention mandates that each Party cooperage with each other to the fullest extent possible in providing "prompt and effective legal assistance" with respect to the criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1 Criminal Matters

Japan states that it can provide legal assistance in respect of criminal investigations based upon the Law for International Assistance in Investigation where the following conditions are met[41]:

1. Dual criminality.

2. Reciprocity, which is normally guaranteed on a case-by-case basis.

3. The request for assistance is not made in relation to a political offence.

4. In relation to requests to examine a witness or the submission of seizable evidentiary material, the requesting country clearly demonstrates in writing that the evidence is indispensable to the investigation.

The measures available under the Law for International Assistance in Investigation include questioning witnesses, requesting an expert to make an inquiry, non-compulsory inspections, and requesting the submission of documents. Additionally, search and seizure and compulsory inspection are available pursuant to a warrant issued by a judge.[42]

Japan also indicates that under the Law for Judicial Legal Assistance to Foreign Courts, legal assistance can be provided between courts in response to a request for assistance from a foreign court. The requesting country may obtain judicial assistance in serving documents or taking evidence in criminal cases.[43] In order for assistance to be given under this legislation, the request must be made through diplomatic channels. The request must be made in writing and be translated into Japanese. The requesting country must also guarantee reciprocity and the payment of all expenses incurred in executing the request.[44]

Japan is currently negotiating a treaty on mutual legal assistance with the United States.

9.1.2 Non-Criminal Matters

Japan provides mutual legal assistance in civil matters pursuant to the Law for Judicial Assistance to Foreign Courts, as well as pursuant to the Convention on Civil Procedure and the Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters. The measures available thereunder are the service of documents and the taking of evidence, including the examination of witnesses or parties.

41. Article 2 of the Law for International Assistance in Investigation.

42. The measures are listed in Article 8 of the Law for International Assistance in Investigation.

43. Article 1(1) of the Law for Judicial Assistance to Foreign Courts.

44. These conditions are contained in Article 1-2 of the Law for Judicial Legal Assistance to Foreign Courts.

9.2 Dual Criminality

Dual criminality is one of the conditions under the Law for International Assistance in Investigation that must be met in order to provide mutual legal assistance. However, the Japanese authorities state that this condition has been met since the amendments to the Unfair Competition Prevention Law came into effect criminalising the bribery of a foreign public official.

9.3 Bank Secrecy

The Japanese authorities state that it is not possible to decline to render mutual legal assistance for criminal matters within the scope of the Convention on the ground of bank secrecy. They further provide that neither banking laws nor other Japanese laws contain any specific requirements that must be met by a party requesting records with respect to a request for mutual legal assistance in relation to criminal matters.

Pursuant to article 8(2) of the Law for International Assistance in Investigation, "a public prosecutor or judicial police officer may, if it is deemed to be necessary, undertake the seizure or search of evidence, or compulsory inspection, upon a warrant issued by a judge". This process applies to the search and seizure of bank records.

10. ARTICLE 10. EXTRADITION

10.1 Extradition for Bribery of a Foreign Public Official

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them.

Japan has extradition legislation in the form of the Law of Extradition. It has also concluded an extradition treaty with the United States, under which bribery is identified as an extraditable offence.[45]

The relevant conditions that must be met to provide extradition for the bribery of a foreign public official are as follows:

1. Dual criminality, unless the treaty of extradition provides otherwise.[46]

2. The imposition or the execution of punishment for the act would not be barred by reasons prescribed under the laws of Japan if the trial were held in Japan.[47] This condition is aimed at procedural impediments, such as the expiration of the statute of limitations, as well as substantive impediments, such as the availability of a defence that would make the imposition of a punishment impossible.

3. There is "probable cause to suspect" that the fugitive has committed an act constituting the offence for which extradition is requested.[48]

45. Annex 39 of the treaty.

46. Article 2(3) and (4) of the Law of Extradition.

47. Article 2 bis (5) of the Law of Extradition.

48. Article 2(6) of the Law of Extradition.

4. The fugitive is not a Japanese national, unless a treaty of extradition provides otherwise.[49]

5. Reciprocity is assured, where the request is not made pursuant to a treaty of extradition.[50]

Where the Tokyo High Court decides, pursuant to article 10 (1.3) of the Law of Extradition, that all the required conditions have been met and a fugitive can be extradited, the Minister of Justice shall, pursuant to article 14(1), order extradition if he/she "deems it appropriate". Japan explains that this is a discretionary power, but that the Minister of Justice's decision must be "legal and warrantable". Pursuant to the Administrative Appeal Law, a fugitive may file a motion of objection against the decision of the Minister of Justice to extradite him/her. Additionally, pursuant to the Administrative Case Litigation Law, the fugitive may file a lawsuit in a court for revocation of the decision of the Minister of Justice.

Discussion of the Government of Japan's position that the Convention is a "treaty of extradition" is discussed above under 3.4 on "Penalties and Extradition".

10.2 Legal Basis for Extradition

Article 10.2 states that where a party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it "may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official".

In Japan, extradition is not conditional on the existence of a treaty. Japan states that, accordingly, bribery of a foreign public official shall be deemed to be an extraditable offence regardless of the existence of an extradition treaty if the conditions under the Law of Extradition are met.

10.3/10.4 Extradition of Nationals

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

Article 2 bis (9) of the Law of Extradition states that a Japanese national shall not be extradited unless the applicable extradition treaty states otherwise. Since Japan regards the Convention as a "treaty of extradition", a Japanese national may be extradited in response to a request from a Party to the Convention. However, first the conditions must be met that are applicable to extradition in general pursuant to article 2 (5) of the Law of Extradition.[51]

Furthermore, the Japanese authorities explain that where, pursuant to article 41 (1) of the Law of Extradition, the Minister of Justice declines to order extradition solely on the ground that a person is a Japanese national, the case shall, as required by Article 10.3 of the Convention, be submitted to the prosecutorial authorities.

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49. Article 2(9) of the Law of Extradition.

50. Article 3(2) of the Law of Extradition.

51. See the discussion under 10.1 on "Extradition for Bribery of a Foreign Public Official".

10.5 Dual Criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

Japan states that the condition of dual criminality has been met since the amendments to the Unfair Competition Prevention Law came into effect criminalising the bribery of a foreign public official.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

Japan has notified the OECD Secretary-General of the following relevant authorities:

1. Consultations

The Minister of Justice (Ministry of Justice) via the Ministry of Foreign Affairs.

2. Mutual Legal Assistance in Criminal Matters

a) Receiving Authority: (i) The Minister of Justice via the Ministry of Foreign Affairs (for matters under the Law for International Assistance in Investigation and the Law of Extradition); (ii) The courts via the Ministry of Foreign Affairs (for matters under the Law on Judicial Assistance to Foreign Courts).

b) Requesting Authority: (i) The competent authorities that supervise the investigating authorities via the Ministry of Foreign Affairs; (ii) The courts via the Ministry of Foreign Affairs (for matters under the Law on Judicial Assistance to Foreign Courts).

3. Mutual Legal Assistance in Civil Matters (excluding non-criminal proceedings within the scope of the Convention brought by a Party against a legal person).

a) Receiving Authority: Ministry of Foreign Affairs.

b) Requesting Authority: (i) The courts (for matters where the Convention on the Service Abroad of Judicial and Extra-judicial documents in Civil or Commercial Matters applies); (ii) The courts by way of the Ministry of Foreign Affairs (other cases).

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

The Japanese authorities provide that bribes are not deductible because they constitute an “entertainment and social expenditure”. However, the Special Taxation Measures Law does not expressly prohibit the

deductibility of bribes to foreign public officials. Pursuant to the Special Taxation Measures Law, "entertainment and social expenditures" are not deductible, except in the case of very small corporations, which are permitted limited deductions. For instance, corporations with capital of up to 10 million yen cannot deduct the amount of the expense in excess of 3.2 million yen, and corporations with capital over 10 million yen but not exceeding 50 million yen cannot deduct the amount of the expense in excess of 2.4 million yen.[52]

"Entertainment and social expenditures" include expenses for the purpose of reception, entertainment and gifts related to the business of the corporation, regardless of the name given to such expenditures.

In addition, if a corporation does not disclose relevant information about certain expenses to the tax authority, including their purpose and the identity of their recipients, etc. such expenses are liable to the imposition of additional taxes at the rate of 40 percent.

Both the non-deductibility of bribes given to foreign public officials by corporations and the liability to additional taxes where information is not disclosed apply to expenses incurred in Japan as well as abroad.

Non-incorporated entities are subject to the same rules with respect to the non-deductibility of entertainment and social expenditures.[53]

52. See the method under article 61-4 of the Special Taxation Measures Law for calculating the permissible deduction in these cases.

53. Article 3 of the Corporation Tax Law states that "nonjuridical organizations and the like shall be considered as corporations, and the provisions of the Law (excluding Schedule No.2) shall apply thereto". (unofficial translation)

EVALUATION OF JAPAN

General Remarks

The Working Group commends Japan on the rapid implementation of the Convention, and notes that Japan was one of the first countries to formally become a Party to the Convention. The Working Group appreciates the high level of cooperation of the Japanese authorities at all stages of the examination through the provision of thorough and frank responses to the questions of the examining countries and the Secretariat.

Japan implemented the Convention by establishing the offence of bribing a foreign public official through an amendment to the Unfair Competition Prevention Law (UCPL).

I. Specific Issues

1. The offence of bribing a foreign public official

1.1 "Main office" exception[54]

Article 10 bis (3) of the UCPL provides an exception to the foreign bribery offence where the "main office" of the person giving the bribe is located in the same country for which the foreign public official engages in public service. This rule applies regardless of where the act of bribery takes place, and even provides an exception for such bribery occurring within Japanese territory. There is no definition in the UCPL or elsewhere in the law of what constitutes a "main office". However, the Japanese authorities believe that the courts would look at decisions in relation to the definition of "head office" under the Commercial Code, pursuant to which "head office" is an office that functions as the centre of management of the entity's business. Following these precedents, they believe that in the case where a division of a Japanese corporation is located in a foreign country, the "main office" would usually be considered to be in Japan. They also believe that the "main office" of a subsidiary of a Japanese corporation located in a foreign country would usually be determined to be in the foreign country. The Japanese authorities confirm that this means that if a Japanese national employed by a foreign subsidiary of a parent Japanese corporation bribes in Japan in relation to the business of the subsidiary a foreign public official from the country in which the foreign subsidiary is located, article 10 bis (3) would apply, and thus no offence would have been committed. They represent, however, that when there is a conspiracy between an employee, etc. of the Japanese parent and the employee of the Japanese subsidiary, which they state is usually the case, article 10 bis (3) would not apply and an offence would be established.

The Working Group is concerned that article 10 bis (3) creates a major loophole in the implementation of the Convention, with the result that a significant proportion of the cases covered by the Convention will not be prosecuted. Japan does not share this view, and believes that in practice article 10 bis (3) will be

54. Subsequent to the adoption of this report, amendments to the Unfair Competition Prevention Law (UCPL), which delete article 10 bis (3) and thus remove the "main office" exception, were adopted in June 2001 and entered into force on 25 December 2001. See the annex of this report for the Working Group's evaluation of the amendments.

applied to take into account its real purpose—to exclude from the ambit of the offence bribery not in the conduct of international business.

Another related issue arises in respect of mutual legal assistance and extradition, because it is not completely clear whether Japan would consider the requirement of dual criminality to be met where the offence for which a request is received falls under the "main office" exception.

In addition, the Working Group is concerned that because the purpose of the UCPL appears to be to prevent unfair competition in the Japanese market, an act of bribing a foreign public official that does not affect fair competition in the Japanese market might not be prosecuted. The Working Group's uncertainty is partly due to the Japanese explanation that the object of the "main office" exception to the offence is to limit the application of the UCPL to "international business" by excluding bribery in the course of domestic business in the foreign public official's country.

According to the Working Group, the "main office" exception contained in the UCPL is inconsistent with the standards of the Convention. The Working Group therefore strongly recommends Japan to take steps to remove this exception from its implementing legislation.

In addition, in light of the rationale for the "main office" exception, the Working Group is uncertain whether bribery offences that only affect the foreign market would be prosecuted. It is therefore recommended that re-examination of this issue take place during Phase 2 of the evaluation process.

1.2 Definition of foreign public official in relation to public enterprises[55]

The Working Group is concerned that the definition of "public enterprise" in article 10 bis (2) (iii) of the UCPL appears to be inconsistent with the definition in Commentary 14 on the Convention. Paragraph (iii) is more limiting than Commentary 14 in respect of the control that a government must have over an enterprise in order for it to be considered a "public enterprise". In particular, paragraph (iii) does not specify that indirect control is a sufficient trigger, thus it does not appear sufficiently broad to cover foreign indirect ownership. It also does not appear to contemplate the case where the foreign government exercises de facto control over an enterprise but does not hold in excess of 50 per cent of the shares with the right to vote (i.e. the case where the government owns less than the majority of shares, but its shares carry more weight than other shares thus providing it with the majority of voting rights).

The Japanese authorities explain that the issue of indirect control is covered by paragraph (iii) because it specifically applies to cases where "the number of executives…appointed or named by one or more of the national foreign governments exceeds one-half of that enterprise's executives". In addition, they believe that they are in compliance with the Convention in regard to the issue of de facto control, because it is their understanding that Commentary 14 leaves it up to the Parties to define "public enterprise", except that the concrete example in the second part of the definition must be covered.

The Working Group had serious doubts whether the definition in article 10 bis (2) (iii) of the UCPL fully meets the standard in the Convention.

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55. Subsequent to the adoption of this report, amendments to the Unfair Competition Prevention Law (UCPL), which broaden the definition of foreign public officials in relation to public enterprises, were adopted in June 2001 and entered into force on 25 December 2001. See the annex of this report for the Working Group's evaluation of the amendments.

1.3 Third party beneficiaries

The offence under article 10 bis (1) of the UCPL does not specifically apply where there is a third party beneficiary. The Japanese authorities cite case law in relation to the domestic offences as legal authority for the application of the foreign bribery offence where it can be deemed that "in substance" the advantage has been given to the foreign official, even if it was transmitted directly to a third party. The Japanese authorities state that the advantage would be deemed to have been given "in substance" to the foreign public official if he/she directs to whom it is given. In these cases the foreign public official has control of the advantage, and therefore it is considered to have been given "in substance" to him/her.

There is some uncertainty as to whether, consistent with the Convention, every instance where a foreign public official agrees to direct a payment to a third party would be covered by the offence. The Working Group therefore recommends that this issue be followed in Phase 2 of the evaluation process to determine whether in practice the offence under the UCPL is specifically applied in cases involving third party beneficiaries.

2. Sanctions

2.1 Fines in relation to legal persons

Pursuant to article 14, a legal person is subject to a fine up to 300 million yen ($2,700,000 U.S.) for the foreign bribery offence. The lead examiners question whether a fine of this level would simply be considered the cost of doing business in the case of large Japanese corporations. The Japanese authorities explain that this sanction is comparatively high by Japanese standards. They also point out that the level of the fines would not be perceived by corporations as the cost of doing business because a criminal conviction for such an offence in Japan would attract substantial media coverage and criticism and would result in serious losses for the corporation.

The Working Group does not consider the sanctions available for legal persons to be sufficiently effective, proportionate and dissuasive in view of the large size of many of its corporations, particularly since seizure and confiscation (as noted below) are not available under the Japanese legislation. It welcomes the opinion of the Japanese authorities that the stigma of a conviction would create significant losses for a corporation, but nevertheless recommends that Japan consider raising the maximum fine for legal persons.

2.2 Seizure and confiscation

Confiscation is limited to the bribe under the current provision in this regard [article 19 of the Penal Code] and the Anti-Organized Crime Law, promulgated on August 18, 1999 (which will come into force within 6 months of the date of promulgation). The Japanese authorities state that the proceeds of active bribery are not subject to confiscation because they are too difficult to identify for this purpose. They add that the fines available as sanctions could be considered "monetary sanctions of comparable effect". However, the Working Group noted that Article 3.3 of the Convention requires each Party to "take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable". The Working Group further noted that Commentary 21 on the Convention clarifies that "proceeds" of bribery are the profits or other benefits derived from the bribery transaction.

The Working Group concludes that the UCPL, which provides for limited criminal fines and does not provide for confiscation of the proceeds of bribery, does not meet the standards of the Convention, and strongly recommends the Japanese authorities to take action to meet this concern.

3. Nationality jurisdiction

Japan has not established nationality jurisdiction over the foreign bribery offence, and in its view this choice is consistent with the obligations of the Convention and the Commentaries. The Japanese authorities explain that it has taken the approach of enumerating in the Penal Code a list of offences over which it has established nationality jurisdiction. These are "serious" offences involving "important legal interests to which the Penal Code must be applied regardless of where the offences are committed (e.g. arson, forgery, rape, murder, bodily injury, kidnapping, larceny, robbery, fraud, extortion and embezzlement in the conduct of business). The Working Group feels that the offence of foreign bribery is as "serious" as some of the crimes enumerated in the Penal Code to which nationality jurisdiction applies. The concerns of the Working Group in this regard are compounded by the diminution of territorial jurisdiction caused by the "main office" exception to the offence.

The Working Group welcomes the statement of the Japanese authorities that in accordance with Article 4.4 of the Convention they will continue to examine whether their current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and strongly recommends that they take remedial steps in this regard.

4. Statute of limitations

The statute of limitations for foreign bribery under section 250 of the Code of Criminal Procedure is 3 years (in respect of offences committed by natural and legal persons). Japan asserts that the period is suspended as long as an alleged offender is outside Japan. There is no provision for suspending the period when requests for foreign assistance are necessary.

The Working Group agrees that the statute of limitations is a general issue that needs to be pursued further with a view to ensuring the consistent and effective application of the Convention.

II. Tax deductibility

Bribes are not deductible because they constitute an "entertainment and social expense", which, according to the Special Taxation Measures Law, is not deductible, except in the case of small corporations, which are permitted limited deductions. Under the Special Taxation Measures Law, "entertainment and social expenses" include expenses for the purpose of reception, entertainment, gifts and secret expenses (i.e. there is no record of the expense). Bribes are not expressly included in the list. However, the Japanese authorities state that all types of bribes are considered to be included. The Japanese authorities assured the Working Group that neither undercover expenses nor secret expenses are tax deductible, and that if a company were to claim such a deduction an additional tax would be imposed. Although the Japanese tax law permits small companies to deduct "entertainment and social expenses" (including bribes) up to certain limits, the Japanese authorities have explained that if such a company were to claim a deduction for a bribe it would risk prosecution under the UCPL.

The Working Group takes note of the clarification provided by the Japanese authorities that "entertainment and social expenses" include all types of bribes, and will revert to the matter in Phase 2 of the evaluation process.

ANNEX 1

EVALUATION OF JAPAN –PHASE I BIS AS APPROVED BY THE WORKING GROUP ON BRIBERY ON 25 APRIL 2002[56]

Japan's domestic legislation was reviewed under a rigorous process of monitoring carried out by the Working Group on Bribery made up of all signatories in April 1999. The Group identified some deficiencies in implementing legislation and called for remedial actions. In view of addressing the concerns expressed in the Japan's Phase 1 Evaluation, amendments to the Unfair Competition Prevention Law (UCPL), which remove the "main office" exception and broaden the definition of foreign public officials in relation to public enterprises, were adopted in June 2001 and entered into force on 25 December 2001. A government ordinance, which further defines a "public enterprise", also came in to force on 25 December 2001.

The Working Group congratulates Japan on taking significant steps to address some of the concerns expressed in the Japan's Phase 1 Evaluation, notably by eliminating the main office exception and by broadening the definition of foreign public officials in relation to public enterprises. The Working Group takes note in particular that the new definition addresses most aspects of indirect control by a foreign government.

The Working Group doubts however whether Japan's amended definition of a public enterprise fully meets the standard of the Convention because the Japanese definition may not cover all enterprises over which a government may indirectly exercise dominant influence. The Japanese authorities stated that the Japanese Constitution requires that the elements of the offense be explicitly stated in a concrete manner. They also stated that they believe they are in compliance with the Convention (in regard to the issue of dominant influence), so long as they ensure to cover concrete examples shown in Commentary 14**,** because it is their understanding that those examples are the only cases against which all Parties have committed to take actions at this stage. The Working Group also considers that other shortcomings noted in Japan's phase 1 evaluation are not addressed by the amended legislation.

56. This evaluation resulted from the examination by the Working Group on Bribery on 23-26 April 2002 of the amendments to the Unfair Competition Prevention Law adopted by Japan subsequent to the Group's initial report.