

Guidelines for the Prevention of Bribery of Foreign Public Officials

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CHAPTER 1: BACKGROUND AND OBJECTIVES OF THESE GUIDELINES

1.1 Background to these Guidelines

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

This understanding is shared globally, which led to the development of the Anti-Bribery Convention ("Convention on Combating Bribery of Foreign Public Officials in International Business Transactions"¹), which was adopted by the OECD (Organisation for Economic Co-operation and Development) in 1997. In accordance with this Anti-Bribery Convention, signatory countries, led primarily by developed nations, have been working in concert towards achieving mutually equivalent measures to prevent bribery of foreign public officials².

Main Points of the Convention

(1) Elements of the Offence

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

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

(2) Definition of Foreign Public Official

"Foreign public official" means:

- any person holding a legislative, administrative or judicial office of a foreign

¹ This Convention may hereinafter be abbreviated as the "OECD Convention" or, more simply, the "Convention." For information regarding the Convention and the Commentaries adopted together with the Convention in November 1997, refer to: <https://www.oecd.org/corruption/oecdantibriberyconvention.htm> (text of the Convention and that of its Commentaries). For the Japanese translation of the text of the Convention, refer to: https://www.mofa.go.jp/mofaj/gaiko/oecd/jo_shotori_hon.html.

² This Convention is also open to non-OECD member countries, and the signatories as of January 2024 are 38 OECD member countries (Australia, Austria, Belgium, Canada, Chile, Czech Republic, Colombia, Costa Rica, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States) plus the eight other countries of Argentina, Brazil, Bulgaria, Croatia, Peru, Russia, South Africa and Romania (46 signatories in total).

- country, whether appointed or elected (including a local public entity in a foreign country);
- any person exercising a public function for a foreign country, including for a public agency (i.e. an entity constituted under public laws to carry out specific tasks in the public interest);
 - any person exercising a public function for a foreign country, including for a public enterprise; and
 - any official or agent of a public international organization.
- (3) Sanctions
- The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties;
 - The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials;
 - Legal persons shall also be held liable for the bribery of foreign public officials;
 - The bribe itself, the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, shall be subject to seizure and confiscation, or that monetary sanctions of comparable effect shall be applicable; and
 - The imposition of additional civil or administrative sanctions shall also be considered.
- (4) Jurisdiction
- Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory; and
 - Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
- (5) Money Laundering
- Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.
- (6) Miscellaneous
- In addition to the above, measures in such areas as accounting, mutual legal assistance, extradition, and follow-up on the implementation of the Convention by the signatory countries shall also be taken in conjunction in order to ensure the effect of the Convention.

In concluding the OECD Convention, Japan has been taking actions including a revision to the Unfair Competition Prevention Act in 1998 (which came into force in February 1999)³ and each

³ A partial revision was made to the Unfair Competition Prevention Act in June 2001 in order to clarify the definition of foreign public official, etc. and in May 2004 to provide that a Japanese national who commits an offense of bribery of foreign public officials outside of Japan is punishable in Japan.

signatory country is also working on measures including the creation of criminal penalties for the bribery of foreign public officials⁴ (For the details of the measures taken in Japan, refer to Chapters 3 and 4.).

Even after that, worldwide concern for the problem of fraud and corruption, including bribery of foreign public officials, showed a rapid increase. Calls were made for enhanced action to combat the problem of fraud and corruption, and the issue was specifically mentioned in summit-level documents, including those issued at the Evian Summit in June 2003 ("Fighting Corruption and Improving Transparency: A G8 Declaration"⁵) and the APEC Leaders' Declaration in October 2003 ("Bangkok Declaration on Partnership for the Future"⁶)⁷. As another initiative, the United Nations hosted, with extensive participation from developed countries and developing countries alike, the signing ceremony for the "UN Convention Against Corruption" (UNCAC) in December 2003, which, among other things, includes provisions requiring legal measures against the acceptance of bribes by domestic public officials, and against the bribery of domestic or foreign public officials. Japan is a signatory to UNCAC⁸.

In consideration of these changes in the surroundings, since there has been a need to raise awareness regarding the issue of bribery of foreign public officials, etc. among all stakeholders in Japan, these Guidelines were developed in May 2004 and have been revised as necessary.

1.2 Objectives behind the Development of these Guidelines

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

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

⁴ For the discussion on the bribery of foreign public officials at the time of development of these Guidelines (2004), also refer to "Implementation of Measures for Effective Prevention of Bribery of Foreign Public Officials" (February 6, 2004; by the Subcommittee on Corporate Activities Related to International Commercial Transactions, of the Trade and Economic Cooperation Committee, of the Industrial Structure Council) at: <https://www.meti.go.jp/policy/economy/chizai/chiteki/pdf/03zowaishoui.pdf>.

⁵ Preliminary Japanese translation of the declaration is available at: https://www.mofa.go.jp/mofaj/gaiko/summit/evian_paris03/fttk_z.html.

⁶ Preliminary Japanese translation of the declaration is available at: https://warp.ndl.go.jp/info:ndljp/pid/11865637/www.mofa.go.jp/MOFAJ/gaiko/apec/2003/shuno_sen.html.

⁷ Refer to Chapter 4.3 for international trends in efforts to combat corruption, including bribery of foreign public officials.

⁸ In Japan, a domestic law implementing the convention was passed by the Diet in 2017, and the convention was accepted in the same year. In order to promote anti-corruption cooperation among signatory countries and to consider effective review process for the enforcement of the convention, a conference of the Parties to the United Nations Convention is held every two years. Please refer to <https://www.unodc.org/unodc/en/treaties/CAC/country-profile/index.html>.

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

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

1.3 Structure of these Guidelines and Points to Note

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

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

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

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

This Chapter illustrates examples of measures, etc. that might be referred to for the purposes of augmenting the effect of preventative measures against bribery of foreign public officials at the level of the individual company and the company group and improving the effectiveness of compliance systems for prevention of bribery of foreign public officials ("Preventive Systems") as part of an internal control system^{9,10}.

2.1 Basic Views

(1) Background

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

Such efforts in the area of internal control are also extremely effective in the prevention of bribery of foreign public officials. This point is clearly shown by the agreement reached during the Evian Summit in June 2003 that governments should encourage the private sector to develop compliance programs in respect of bribery of foreign public officials¹¹ and by the adoption of the "APEC Code of Conduct for Business: Business Integrity and Transparency Principles for the Private Sector"¹² at the APEC Ministerial Meeting in September 2007 and by the inclusion of the "Good Practice Guidance on Internal Controls, Ethics, and Compliance"¹³ in Annex II to the "OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions" adopted in November 2009.

⁹ For the purpose of these Guidelines, the "internal control system" is used to mean the general term of the systems such as the information storage system and risk management system stipulated in Article 362, paragraph 4, item 6, Article 399-13, paragraph 1, item 1 (b) and (c) or Article 416, paragraph 1, item 1 (b) and (e) of the Companies Act, and Article 100, Article 110-4 or Article 112 of the Ordinance for Enforcement of the Companies Act, namely, a "system to secure the properness of operations."

¹⁰ The measures illustrated in this chapter do not represent legal obligations and do not uniformly require all measures to be taken. However, it is expected that each company will promptly start examining and taking measures to establish and operate Preventive Systems appropriately, referring to the examples given.

¹¹ "Fighting Corruption and Improving Transparency: A G8 Declaration" sets out, "2. We will strengthen the enforcement of our Anti-Bribery Laws and will encourage the private sector to develop related compliance programs. We will ... 2.2 encourage the private sector to develop, implement and enforce corporate compliance programs relating to our domestic laws criminalizing foreign bribery."

¹² The content of such norm is as follows: <https://www.apec.org/publications/2007/09/apec-anticorrupti-on-code-of-conduct-for-business-september-2007>

¹³ The OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, including the said guidance, was revised in 2021. <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378>

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

The system for detecting the offense of bribery of foreign public officials has been strengthened in Japan.¹⁴ Also, a number of cases have been detected overseas especially in the United States and the United Kingdom, including cases in which a Japanese company was subject to punishment and a case in which a penalty of over 100 billion yen was imposed.

Further, if a company is actually charged with bribing foreign public officials, such company will not only face criminal punishment but also be burdened with enormous loss such as termination of business transactions with its customers or damage to its brand value.¹⁵

We should reaffirm that bribery of foreign public officials is a material risk that Japanese companies now face in reality when conducting business overseas.

In Japan, directors of companies are required by judicial precedents to establish internal control systems to avoid fraudulent acts that are normally foreseeable¹⁶ as a part of their duty to give the due care of prudent manager, and in light of this, if a company is engaged in any business in which there is an ordinarily foreseeable risk of bribery of foreign public officials ("**Bribery Risk**") it must establish Preventive Systems necessary to comply with domestic and foreign applicable laws and to protect its corporate value.

In addition, while establishment of Preventive Systems is positioned as part of internal control systems, it can be expected to be taken into consideration when imposing criminal punishment (dual criminal liability provision of juridical persons). That is, based on judicial precedents, a juridical person can potentially be punished on the ground that there has been presumed negligence in failing to exercise necessary care in selecting, overseeing, or otherwise preventing violations of workers who act on behalf of the juridical person and that the business proprietor cannot be discharged from criminal responsibility unless they

¹⁴ A police officer in charge of measures to prevent bribery of foreign officials is designated at each prefectural police department. Also, each special investigation division in district prosecutors' offices with special responsibility for economic and financial crimes similarly has a public prosecutor in charge.

¹⁵ For example, such company may be subject to sanctions such as suspension of transactions by international financial institutions, or placed on an exclusion list by multilateral development banks such as the World Bank, or refused trade insurance. Please refer to Chapter 4.2 ([page 51]) for further details.

¹⁶ In relation to Japan System Techniques case (Supreme Court Ruling issued by the First Petty Bench on July 9, 2009; *Hanrei Jiho* No. 2055-147) where the representative director was defendant, the Supreme Court ruled, with respect to whether or not such representative director owed damages under Article 350 of the Companies Act, that the representative director cannot be said to have been in breach of his obligation to have a risk management system in place to prevent fraudulent acts that are normally envisaged, because a management system capable of preventing such fraudulent acts was established, and that, therefore, such fraudulent act can be said to have been conducted in a manner that cannot easily be envisaged, and there appear to be no special circumstance that might have made such fraud foreseeable.

can prove that they exercised such care¹⁷ (so called "theory of presumptive negligence"¹⁸). Therefore, the establishment of Preventive Systems can serve as a piece of evidence to show that a business proprietor has exercised such care.

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

(3) Internal Control Concept Applied in these Guidelines

A variety of efforts are being undertaken both internally and externally to review methodologies of corporate internal control¹⁹. In addition, as part of a 2014 amendment to the Companies Act, provisions concerning improvement of internal control systems for corporate groups consisting of a stock company (*kabushiki kaisha*) and its subsidiaries, which were previously stipulated in the Ordinance for Enforcement of the Companies Act, were upgraded to law, and it is also now required to provide an overview of the status of internal control systems in business reporting.

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

(4) Perspectives for Establishing and Operating Preventive Systems

When establishing and operating Preventive Systems, it is particularly important to keep in mind (i) the importance of the attitude and message from top management, (ii) a risk-based

¹⁷ The Supreme Court has ruled that "as this court has repeatedly pointed out and explained in its precedents, with regard to the dual criminal liability provision in the case where the business proprietor is an individual and their agent, employee, or other worker commits violations, it is appropriate to interpret the legislative intent thereof as meaning that there has been presumed negligence on the part of the business proprietor in failing to exercise necessary care in selecting, overseeing, or otherwise preventing violations by the said person, and the business proprietor also may not be exempted from punishment unless they prove that they exercised such due care (...), and this legislative intent should naturally apply even in the case where, as in the present case, the business proprietor is a juridical person (a corporation) and the person who has committed the act is not their representative but a worker." (Supreme Court Ruling on March 26, 1965. Supreme Court Criminal Case Reports, Volume 19, Issue 2, page 83 (a case of violation of the Foreign Exchange and Foreign Trade Control Act)).

¹⁸ In this regard, attention should be paid to suggestions that "providing general and abstract warning is not sufficient for the non-existence of negligence exemption to be admitted; it is necessary to have actively provided specific instructions for the purpose of preventing breaches in an active endeavor to prevent the breach (for example, refer to the Tokyo High Court on February 19, 1973; Hanrei Times No. 302, page 310), and it is important that, consequently, liability will be pursued strictly and it will be difficult in practice to obtain the exemption." Criminal law, General Part 3rd Ed.", pages 41 and 42 by Atsushi Yamaguchi (in 2016, *Yuhikaku*).

¹⁹ One of the examples of such efforts is the "Study Group on Risk Management and Internal Control" of the Ministry of Economy, Trade and Industry. This Study Group formulated and published the "Internal Control in the New Era of Risks ~ Guideline for Internal Control That Function Together with Risk Management ~" in June 2003 to assist the efforts of companies and industry. The text of those guidelines and a summary thereof are available on the following website:

<https://warp.da.ndl.go.jp/info:ndljp/pid/1368617/www.meti.go.jp/kohosys/press/0004205/index.html>

approach, and (iii) the need to take action at a subsidiary²⁰ level based on the Bribery Risk.

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

Looking at cases of punishment in Japan and foreign countries, typically employees in the field have tended to "justify" their acts of bribery in terms of its benefit to the company. Then, only top management can prevent such wrongful perceptions from taking root. It is effective for the top management to clearly and repeatedly show the following to all officers and employees by various means²¹:

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

(ii) Risk-based Approach

In order to build an efficient and feasible set of Preventive Systems against the Bribery Risk that companies face, measures should be taken according to the degree of the Bribery Risk rather than establishing and operating a uniformed system in each business division and location²². Business divisions, locations and business activities with a high Bribery Risk, should take measures to reduce risk with a focus on formulating and implementing approval rules for high-risk activities, educating officers and employees and conducting internal audits, while business divisions, etc. with lower risk, may choose more simplified measure²³.

When implementing a risk-based approach, it is necessary to identify and assess the Bribery Risk based on the scale and contents of each company's business activities, local business environment, business practices, and other specific circumstances. For example, if the existing Preventive Systems²⁴ are deemed insufficient to address the

²⁰ For the purpose of these Guidelines, the term "subsidiaries" shall be used as a general term which includes third and fourth tier subsidiaries in line with the standard for de facto control under the Companies Act. For the definition of the subsidiaries under the Companies Act, refer to Article 2, item 3 of the Companies Act, Article 2, paragraph 1, Article 3, paragraph 1 and paragraph 3 of the Ordinance for Enforcement of the Companies Act.

²¹ For example, utilizing video messages, distributing documents, sending emails, and for officers and employees at overseas business divisions and locations, preparing messages translated into the local language can be considered. In addition, in order to thoroughly spread the message from the top management to all officers and employees, it is effective if not only the top management but also the Compliance Supervisors at each business division and location, etc., who are closer to employees in the field, send messages stating the same effect from the same eye-level as those of management over and over again.

²² Guidelines issued by international organizations and foreign authorities also recommend taking measures according to the degree of the Bribery Risk. Refer to Chapter 4.3 Section (3) for guidelines issued by international organizations and foreign authorities.

²³ This does not mean that bribery is acceptable in business divisions and locations, etc., where the Bribery Risk is low.

²⁴ For details on establishing specific Preventive Systems, refer to the following "2. Desirable Preventive Systems Methodologies for Business".

remaining Bribery Risk after implementing the following measures, consider further strengthening the Preventive Systems, changing the contents of the business, or taking other measures.

- When identifying Bribery Risks, gather sufficient information from both inside and outside the company, including laws and regulations regarding the crime of giving and taking bribes in the country in which the company operates and the actual state of giving and taking bribes. If it is difficult for individual companies to gather information on foreign laws and regulations and customs, the companies can consider utilizing local chambers of commerce that are familiar with the circumstances of the country in which the company operates, or companies that operate in the same country can consider gathering together to conduct research and collect and organize information. When gathering information in-house, companies can consider conducting interviews and questionnaire surveys of officers and employees in overseas business divisions and locations.
- When evaluating the degree of an identified Bribery Risk, make judgments based on the possibility of the Bribery Risk becoming apparent and the potential impact if it does become apparent.
- Record the assessment results of the Bribery Risk appropriately, review the assessment results regularly, taking into consideration factors such as the changes in the company's business activities, business environment, and audit results of the Preventive Systems, and make efforts to improve the Preventive Systems.

The following are examples of Bribery Risks.

(a) Countries of operation

For information on Bribery Risks by country, the Worldwide Governance Indicators²⁵ published by the World Bank Group and the Corruption Perceptions Index²⁶ published by Transparency International, an international NGO, are useful references.

As to the degree of country risk, Asia, Middle East, Africa, South America, etc. are generally considered to have high Bribery Risk.

(b) Business area

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

²⁵ Worldwide Governance Indicators: <https://info.worldbank.org/governance/wgi/>

²⁶ Corruption Perceptions Index: <https://www.transparency.org/research/cpi/>

(c) Third parties²⁷

When using businesses (such as agents or consultants) that provide advice or conduct negotiations regarding obtaining permits and approvals from local governments, receiving orders, or transactions with a state-owned companies, or when forming joint ventures or consortia, it is considered that there is a risk of bribery being committed by third parties. Even if such bribery is committed by a third party, the company that appointed the third party may be subject to criminal penalties²⁸.

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

Should a subsidiary (including an overseas subsidiary) be punished for the offense of bribery of foreign public officials under applicable laws, whether domestic or foreign, not only will it affect the value of the shares of the subsidiary (its assets), but it will also damage the credit of the parent company itself, often leading to damage to the value of the corporate group through a decline in brand power and trust²⁹. Furthermore, there is a possibility of great loss due to sanctions imposed on the parent company itself based on overseas laws and regulations or due to the application of the Unfair Competition Prevention Act³⁰ to the parent company itself if its officers or employees are involved in the act of bribery.

Therefore, parent companies need to ensure that subsidiaries within the corporate group establish and operate Preventive Systems as appropriate to the degree of risk.³¹

(5) Other Points to Note

It should not be forgotten that judgement as to whether the Preventive Systems are functioning effectively requires consideration of not only whether the system exists but also its operation and the evaluation thereof.

Another point to note is that the status of establishment and operation of internal control systems, including Preventive Systems, that are generally required of a company may be evaluated differently depending on the company size, business category, and the surrounding economic and social circumstances, and the historical background, etc., and it is accordingly difficult to define uniform criteria. Therefore, companies are required to make constant efforts to regularly examine whether the level of Preventive Systems that they have developed and are using are sufficient at that point in time, and work to improve these systems with reference to those of its domestic and overseas companies in the same industry, and guidelines issued from time to time by international organizations and foreign

²⁷ The 2014 OECD Bribery Report (<https://www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm>) indicates that in 75% of bribery cases, bribes were paid through intermediaries (pages 8 and 9).

²⁸ For penalties to be imposed on juridical persons, refer to Chapter 3.3 Section (2) and Section (4).

²⁹ Refer to 4.1 of "Practical Guidelines for Group Governance Systems" (Ministry of Economy, Trade and Industry; June 28, 2019).

³⁰ For penalties to be imposed on juridical persons, refer to Chapter 3.3 Section (2) and Section (4).

³¹ If a parent company needs to secure the legal means to promote development/operation of the Preventive Systems at its subsidiaries, there are means at its disposal. For example, the parent company and the subsidiary could enter into a specific agreement aside from leveraging shareholder voting to appoint or remove officers of subsidiaries.

authorities³².

2.2 Desirable Preventive Systems Methodologies for Business³³

The following sections illustrate desirable methodologies for Preventive Systems that companies engaged in international commercial transactions should aim for in order to prevent bribery of foreign public officials³⁴. These illustrations do not constitute statutory requirements but companies are expected to refer to these illustrations and promptly start the process of examining and taking measures to properly structure and operate Preventive Systems.

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

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

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

(1) Basic Components of Preventive Systems

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

Incidentally, when establishing specific Preventive Systems suitable for a particular company, the COSO (Committee of Sponsoring Organizations of the Treadway Commission) framework³⁵ is also a useful reference:

³² For guidelines, refer to Chapter 4.3 Section (3).

³³ Of the Preventive Systems, methodologies for individual company responses to emergency are described in Chapter 2.4 below.

³⁴ The internal control methodologies illustrated here follow the sequence of "development of a policy, etc. (= plan)," "implementation of specific measures (= do)," "audit of the state of implementation and management of the measures (= check)" and "review existing policy, etc. based on the outcome of the audit (= act)." As management methods of this type tend to result in continual improvements in internal control management, it is also used as a standard method by the International Organization for Standardization (ISO) and has already been applied by a large number of companies as well.

³⁵ COSO framework was published in 1992 as a guideline for assessing the structure, development and effectiveness of internal controls. Thereafter, in response to reflecting changes in business and the environment in which businesses operated, and to the expansion of businesses and the purposes of reporting, etc., "financial reporting" was redefined

- Formulation/announcement of Basic Policies³⁶ (described in Section (2) below);
- Formulation of Internal Rules (internal procedures and judgment criteria, personnel systems) (described in Section (3) below);
- Development of organizational frameworks (described in Section (4) and Chapter 2.4 below);
- Implementation of educational activities in the company (described in Section (5) below);
- Audit, etc. (described in Section (6) below);
- Review by the management, etc. (described in Section (7) below)

(2) Formulation/announcement of Basic Policies

Basic Policies incorporating the following factors should be formulated in order to prevent acts of bribery of foreign public officials which violate domestic or foreign laws. In this case, it is desirable to achieve accountability for officers and employees of the subsidiary by clarifying the policy common to the corporate group.³⁷

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

It is important that a company's Basic Policies and Internal Rules are shared internally and thoroughly enforced, along with corporate ethics that support prevention of bribery of foreign public officials. From this perspective, it is effective if not only the management but also the Compliance Supervisors³⁸ at each business division and location, etc., who are closer to employees in the field, send messages to the same effect over and over from the same eye-level as those from management.

In addition, it is desirable to announce the Basic Policies that have been formulated for expressing the company's intention to prevent bribery within and outside the company, and also translate such policies where necessary so that they may be used not only when

simply as "reporting" in 2013 in order to effectively apply to not only to the disclosure of financial information, but also the practices of reporting purposes, operational purposes, compliance purposes pertaining to non-financial information.

³⁶ Indicates polices, codes of conduct, and compliance policies.

³⁷ Refer to 2.3.3 of "Practical Guidelines for Group Governance Systems" (Ministry of Economy, Trade and Industry; June 28, 2019).

³⁸ For a definition of "Compliance Supervisor," refer to Section (4) Part (i) below.

thoroughly informing foreign employees of the company in and out of Japan, but also when seeking understanding from foreign governments, foreign investors and business partners and customers.

(3) Formulation of Internal Rules

Internal Rules incorporating the following factors should be formulated in order to ensure careful consideration within the company:

(i) Internal procedures and judgment criteria

After putting together or organizing the cases in which contacts with foreign public officials, etc.³⁹ take place, compile internal procedures⁴⁰ and judgment criteria, etc. for each case in a manual. In preparing the manual, it should be noted that contact with foreign public officials can occur not only overseas but also in Japan. It is desirable to develop procedural rules while taking into consideration the possibility of bribes being paid through third parties such as agents.

In internal rules, establish approval requirements, decision-making procedures, recording methods, post-verification procedures, etc. In particular, based on the risk-based approach, it would be effective to designate higher levels of management seniority as approvers for the work content in business divisions and locations that are assessed to have high risk, according to the degree of the Bribery Risk.

When formulating internal rules, it is desirable to establish rules for the following acts:

- (a) Social activities⁴¹ that could be suspected as providing an improper benefit to foreign
 - Within the scope of laws and regulations and social norms of each country, setting rules in advance regarding the amount and frequency of offering gifts to (for occasions such as weddings and funerals) and entertaining foreign public officials, etc., establishing restrictions on entertaining foreign public officials, etc. depending on the timing of business negotiations related to international commercial transactions, and clarifying the policy regarding not only foreign public officials, etc. themselves but also their families and family businesses (companies controlled or managed by themselves or their relatives) are assumed.
 - It is expected that externally announcing and widely making aware that payments to foreign public officials, etc. are recorded in detail at a company will act as a warning also to foreign public officials, etc. who may otherwise wish to demand bribes from the company's employees.

³⁹ Contacts with foreign public officials include the welcoming or seeing off of arriving or departing officials, dining occasions, inspection trips, golfing and other entertainments, gift exchanges, hiring of persons associated with foreign officials such as children of them, and speech occasions, etc.

⁴⁰ Internal procedures include prior inquiries with authorized personnel such as a Compliance Supervisor (including management and appropriate departments such as the Legal Department and the Accounting Department), and notification from overseas subsidiaries to the consultation desk (hotline) or reporting desk in the main office.

⁴¹ For acts of socializing, also refer to Chapter 3.1 Section (2) Part (iii).

- (b) Handling of Small Facilitation Payments
 - With regard to Small Facilitation Payments (SFPs)⁴², it is desirable to clearly state in the internal rules that SFPs are prohibited in principle, in light of the “corrosive effect on sustainable economic development and the rule of law” of SFPs pointed out in the OECD Recommendation adopted in 2009 and revised in 2021⁴³.
- (c) Use of third parties such as agents⁴⁴
 - Confirmation procedures before concluding a contract with a third party such as an agent (representations and warranties, pledge and due diligence (“DD”)) and procedures during the term of contracts, etc.

⁴² Although there is no unique definition of Small Facilitation Payments, for example, they may be considered as payments only aiming at smooth procedures related to regular administrative services. In Commentary 9 (*1) to the Convention, it is stated that SFPs “do not constitute payments made 'to obtain or retain business or other improper advantage' (...) and, accordingly, are also not an offence,” but it indicates that SFPs are corrosive phenomena. The OECD Recommendation (*2) therefore recommends that OECD member countries encourage companies to prohibit or discourage the use of SFPs.

The Unfair Competition Prevention Act of Japan sets forth no provisions regarding SFPs. Therefore, regardless of whether or not an act constitutes SFPs, it may be deemed a violation of Article 18 of the Unfair Competition Prevention Act if a court judges that giving benefits to a foreign public official, etc. falls under the category of “making any wrongful gain in business.”

*1 Commentary 9

Small “facilitation” payments do not constitute payments made “to obtain or retain business or other improper advantage” within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

*2 OECD Recommendation

XIV. RECOMMENDS, in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law, that member countries

- i. undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon;
- ii. encourage companies to prohibit or discourage the use of small facilitation payments in internal controls, ethics, and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made and must in all cases be accurately accounted for in such companies’ books and financial records. (<https://www.oecd.org/daf/anti-bribery/2021-oecd-anti-bribery-recommendation.htm>)

⁴³ Regarding treatment of SFPs in foreign countries, the U.S. FCPA, unlike Japan, has a statutory exception of facilitation payments which are made in relation to routine governmental action of foreign public officials, etc. without their discretion. However, whether payments are considered as such facilitation payments is determined based on not the size of the payment but substantial factors, such as the purpose of each payment. (15 U.S.C. §§78dd-1 (b), 78dd-2 (b), 78dd-3 (b), please refer to pp 25-26 in “A Resource Guide to the U.S. Foreign Corrupt Practices Act”: <https://www.justice.gov/criminalfraud/file/1292051/download>).

With regard to the U.K. UKBA, the guidance (“Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions”) issued by the U.K. prosecution authorities shows the factors on considering prosecution by the authorities in terms of facilitation payments; however, there is no statutory exemption of facilitation payments under the legislations, just like Japan. (<https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and>)

⁴⁴ Taking into account the fact that using a capable agent, etc. that does not engage in act of bribery at all in a high risk country/region will lead to strengthening the competitiveness of a company, it is desirable to select appropriate agents. In addition, in relation to appointment/contract renewal of an agent, it is desirable to keep records of the facts regarding the reasons (necessity) for appointment/contract renewal of the agent, the agent's quality/aptitude, appropriateness of fees, etc. have been fully considered.

- (audit, requests for reference documents, cancelation without warning or suspension of payment) should be provided.
- In DD, the following items should be investigated: (i) the country where a third party such as an agent is located or the country in which the transaction takes place, (ii) contacts and relationship with foreign public officials, etc. in the transactions, (iii) maintenance of and compliance with Internal Rules on anti-bribery by a third party such as an agent, (iv) past and present bribery risks, and (v) expenditures in transactions with government agencies, etc.
 - The contract clauses should, for example, incorporate the following provisions:
 - representations and warranties/pledge regarding compliance with laws and regulations for the prevention of bribery by a third party such as an agent;
 - authority to investigate and audit a third party such as an agent;
 - obligation to report certain events, such as having contact with public officials or receiving requests for bribes; and
 - the right to terminate the contract and claim damages if a breach of obligations to provide materials and information such as invoices, obligations to preserve records of transactions, etc., representations and warranties, or pledge is found.
 - Clarify the work to be outsourced and confirm that the amount to be paid is reasonable in relation to the content of the work to be outsourced.

(ii) Personnel system

It should be clearly ruled that officers and employees who have violated Internal Rules, including the act of bribery, will incur personnel sanctions (including, disciplinary measures)⁴⁵.

(4) Development of Organizational Frameworks

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

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

- A compliance officer or a compliance general supervisor should be appointed to oversee the whole company (collectively referred to as "**Compliance Supervisor**")⁴⁶.

⁴⁵ In the event of a violation, personnel sanctions are necessary to deal with the matter strictly and in accordance with the prescribed rules.

⁴⁶ Some companies have a system of coordination between compliance staff in operational, management and financial divisions, etc., or set up a "compliance committee."

After properly comprehending and understanding applicable laws and regulations as well as various information from the government such as these Guidelines, the Compliance Supervisor should comprehend the status of the risk and sort out as is found appropriate the issues arising in the conduct of business.

- The Compliance Supervisor should regularly report to the management and the board of directors.
- In order to ensure the effectiveness of the Preventive Systems, it would be effective to appoint a Compliance Supervisor at each large-scale business location or each regional division with management oversight.

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

- A consultation desk should be set up to deal with cases where a judgment needs to be made on a particular case, such as when receiving a demand for bribes from a foreign public official or there is suspicion of such a request, instructions to pay bribes to a foreign public official, etc. are given within the company, or there is a request from an agent or consultant for additional expenses that suggests a possible bribe.⁴⁷
- In addition to a consultation desk, a reporting desk should also be set up to receive whistle-blower reports, etc.⁴⁸
- Confidentiality should be ensured for the consultation and reporting desks, taking into consideration requirements of Japanese laws and regulations as well as those of other countries. In addition to that, anonymous reporting should be thoroughly allowed and retaliatory actions against informants should be thoroughly prohibited. Also, advice from external specialists including lawyers, etc. should be actively utilized.
- Content and status of consultations and reports should be appropriately reported to the Compliance Supervisor and decisions on handling policy or improvements to the consultation and reporting desks function should be sought as needed.
- Face-to-face consultation on reports and investigation by hearing, etc. should also be available.

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

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

(iv) Other Points to Note

- In the operation of the Preventive Systems, "openness" should be maintained within the organization which allows personnel in the field to casually consult with the Compliance Supervisor so that any sign of bribery in the field could be dealt with at an early stage.

⁴⁷ Depending on whether the risk is high or low, a consultation desk that specializes in cases of bribery of foreign officials is expected to be set up, though in some cases utilization of an existing internal consultation desk might be adequate (such as a desk where the legal division or internal audit division or other divisions receive consultation).

⁴⁸ On the subject of safeguards against unfair treatment such as removal of employees who disclose information in the public interest, including whistle-blowing, the Whistleblower Protection Act was enacted on April 1, 2006.

- Consideration should be made for avoiding giving the sales division or sales personnel, including those of subsidiaries, any incentive to engage in acts of bribery by demanding unrealistic sales targets, setting deadlines or other requirements that are difficult for those in charge of internal projects to meet, etc.
- It would be effective to encourage the prevention of bribery by positively evaluating⁴⁹ officers and employees who have complied with internal rules, such as those who appropriately address the Bribery Risk, in their personnel evaluations.

(5) Implementation of Educational Activities in the Company

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

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

(6) Audit, etc.

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

⁴⁹ For example, the U.S. Department of Justice (DOJ) and U.S. Securities and Exchange Commission (SEC) recognize that positive incentives can promote compliance and indicate that the incentives can take many forms, such as personnel evaluations and promotions, rewards for improving and developing a company's compliance program, and rewards for ethics and compliance leadership. (refer to page 61 of A Resource Guide to the U.S. Foreign Corrupt Practices Act: <https://www.justice.gov/criminal-fraud/file/1292051/download>).

In particular, based on the risk-based approach, it would be effective to conduct audits more frequently and with a broader scope for the work content in business divisions and locations that are assessed to have high risk, according to the degree of Bribery Risk.

- Corporate officers and employees, etc. in charge of audits should regularly audit whether the Preventive Systems are effectively functioning or not and evaluate the status of implementation^{50,51}. In doing so, it is desirable that the corporate officers and employees in charge of the audit evaluate the information subject to the audit with professional skepticism⁵².
- Efforts should be made to have audit results shared widely among related officers and employees.

(7) Review by the Management, etc.

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

2.3 Parent Company's Assistance and Guidance with the Preventive Systems of Subsidiaries⁵³

A parent company should encourage its subsidiaries within the group of companies under its direct or indirect control to establish and operate necessary Preventive Systems based on Chapter 2.1 and 2.2 above and confirm the status thereof on a regular or irregular basis. In particular, in recent

⁵⁰ In recent years, the importance of a three-line defense consisting of business units (first line), management units and internal control units (second line), and internal audit units (third line) has been pointed out when considering internal control. In 4.6.2 to 4.6.4 of "Practical Guidelines for Group Governance Systems" (Ministry of Economy, Trade and Industry; June 28, 2019), the following matters are described:

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

In addition to the audits by the second and third lines described in the text, independent risk management by the first line is also considered important. The Institute of Internal Auditors (IIA) has published the Three Lines Model, which is a revised version of the Three Lines of Defense and is a helpful reference:

https://www.iiajapan.com/leg/pdf/data/iaa/2020.07_1_Three-Lines-Model-Updated-Japanese.pdf

⁵¹ To avoid audits being conducted as a formality, officers and employees involved in audits need to make efforts to understand the status of the risks, taking into consideration the contents of business activities, the local business environment, commercial practices, and other factors through communication with officers and employees subject to the audits.

⁵² Although it is in the case of an accounting audit, the "emphasis on professional skepticism" under the Standards to Address Risks of Fraud in an Audit (Business Accounting Council, Financial Services Agency) will serve as a useful reference, in terms of its three step process: maintaining, exercising and increasing skepticism.

⁵³ Parent company's response in the case of Emergency Situation of subsidiaries is described in Chapter 2.4 below.

years, there has been an increase in the number of cases where overseas companies have been made subsidiaries through M&A. As companies with diverse backgrounds and values are included in the same corporate group, it can be said that a higher level of risk management is required. In doing so, the following key factors should be kept in mind:

(1) General remarks

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

It is desirable that Preventive Systems are established for the following subsidiaries⁵⁴:

- (i) subsidiaries considered important in light of not only current and future corporate value but also the degree of Bribery Risk or the nature of its business; and
- (ii) subsidiaries that carry out projects for which the parent company is substantially involved by giving approvals with regard to important matters on the projects, etc.

- As a rule, each subsidiary should autonomously establish and operate its own Preventive Systems⁵⁵. However, if a subsidiary lacks the ability or experience to do so in reality, the parent company should supplement insufficient resources and if necessary, take a leading role in establishing and operating such subsidiary's Preventive Systems*.

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

When confirming the status of Preventive Systems in the subsidiaries, it is important that the parent company confirm not only the status of the introduction of rules⁵⁶ but also whether the Preventive Systems including such rules are really functioning in the field or not. Depending on the circumstances, the parent company may exchange opinions with

⁵⁴ In 2.3.3 of "Practical Guidelines for Group Governance Systems" (Ministry of Economy, Trade and Industry; June 28, 2019), it is pointed out that "particularly, when there are many subsidiaries, uniform management is not effective, and it is reasonable to classify the risks (size and characteristics) of each business segment and subsidiary, and then determine the strength and method of the parent company's involvement according to each risk."

⁵⁵ In 4.6.1 of "Practical Guidelines for Group Governance Systems" (Ministry of Economy, Trade and Industry; June 28, 2019), it has been pointed out that overseas subsidiaries acquired through M&A are at a higher risk of misconduct due to the lack of attention from the head office. In order to conduct effective management based on the premise of different cultures and values, it is considered effective to specify and clarify the reporting standards to the group headquarters and to use IT to visualize management information in a unified manner.

⁵⁶ There are some subsidiaries that just "copy" rules of their respective parent companies on an as is basis. It is desirable, however, that each subsidiary structure functional regulations addressing risks, with respect to the decision and approval process, etc., depending on the organization/system, manpower, business category of the relevant subsidiaries, while based on its parent company's rules.

the subsidiary's officers and employees in the field or confirm how the rules have been operated in the past (sample checking, etc.). In addition, in order to effectively operate the Preventive Systems, expenditures for public officials can be approved by higher-level personnel⁵⁷, depending on the situation of the subsidiaries.

The following factors should also be noted depending on the type of risk:

- A corporate group should jointly offer educational programs for officers and employees in relation to prevention of bribery or jointly operate audit or whistleblower systems^{58,59}, etc.
- The aforementioned joint program or joint operation is effective in that it is expected to ensure a certain standard in terms of content and operation, and in that it will enable quick and better response in an emergency situation.
- In the case of a joint venture within a corporate group over which a company does not have direct or indirect control, the company should make reasonable efforts to try to establish and operate necessary Preventive Systems to a possible extent.

(2) Points to note in M&A⁶⁰

- Based on the risk-based approach, when acquiring another company that is considered to have a high risk of bribery, the company should conduct DD intensively on the target company to examine whether the target company has any problems with violations of bribery-related laws.⁶¹
- Since there may be non-cooperation of the target company and time constraints in

⁵⁷ In subsidiaries in countries with a high bribery risk, there have been cases where the person in charge of business (e.g., immediate superior) has been asked to approve small expenditures on public officials. However, even if the case can be rejected without hesitation by the management, there is a risk that the person in charge of business will be under intense pressure from the field and approve it. The decision makers for direct and indirect expenditures on public officials can be raised to the management level, for example, the president of the subsidiary, the director in charge of business, or the director in charge of accounting.

⁵⁸ In the case of overseas subsidiaries, there is another measure to set up a local desk and have it provide feedback to the main office regarding the current state of affairs. However, EU GDPR (REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC) restricts the transfer of personal data to a third country. Attention must be paid to relevant laws and regulations such as this when processing information about whistle-blower reports within the entire corporate group.

⁵⁹ On the other hand, the importance of a mechanism to "absorb" local information, such as a global whistleblower system, is also stated at page 85 of "Report on Discussion Results of the Study Group for Japanese Companies' M&A Overseas" (Ministry of Economy, Trade and Industry; March, 2018). In order to make the whistleblower system function, it may be possible to establish, if necessary, a system that allows employees to report directly to the competent department at the head office, or a system that allows the head office to directly manage the receipt of reports by using an outside contractor.

⁶⁰ In actual M&A, it is expected that the measures to be taken will differ depending on the negotiations with the target company in each case. Therefore, it is expected that appropriate measures will be taken according to each individual case, referring to the examples given here, rather than uniformly requiring these measures in all cases.

⁶¹ At page 35 of "Report on Discussion Results of the Study Group for Japanese Companies' M&A Overseas" (Ministry of Economy, Trade and Industry; March, 2018), the importance of compliance DD is described. It is also stated that it is noted that the need for compliance DD using experts is high in M&A in emerging countries because the risk of violating bribery-related laws (so-called corruption risk) is particularly high in emerging countries and FCPA violations are likely to occur.

pre-acquisition DD, for example, verification and audit of the risks faced by the acquired company that could not be confirmed in the prior DD should be conducted as early as possible, immediately after the acquisition.

- In the pre-acquisition DD, investigation including the following points can be conducted:⁶²
 - Whether the business scheme itself of the target company has a high bribery risk (e.g., whether it involves a lot of transactions with government agencies, whether it involves a lot of transactions in high-bribery risk areas, whether it involves business in which obtaining government permits is important).
 - Status of development and implementation of internal rules related to anti-bribery in the target company. For example, (i) maintenance of compliance manuals, (ii) implementation of internal training, (iii) implementation of risk assessment, (iv) implementation of risk-based audit, (v) evaluation and updating of agents, etc., (vi) education and management of agents, etc., and (vii) disciplinary and corrective actions in the event of compliance violation.
 - Past and present bribery risks perceived by the target company (e.g., past reports to internal reporting desks and bribery cases identified as a result of audits).
 - Whether there are any unnatural expenditures in transactions with government agencies, etc. (for example, whether there are large payments to agents, etc. in contracts related to transactions with government agencies, etc. or expenditures in accounting books, etc. for items that are different from actual expenditures).
- If sufficient information cannot be obtained through pre-acquisition DD⁶³, the use of a representations and warranties clause, etc., may be considered in the M&A contract, but note that even if such a clause is established, the risks described in footnote 73 will not be immediately eliminated.
- If, as a result of DD, bribery risks are identified in the target company, specific measures (review of the acquisition deal, review of the post-acquisition management integration (PMI) schedule, etc.) should be considered⁶⁴, including decision not to acquire the company.

⁶² At page 34 of "Report on Discussion Results of the Study Group for Japanese Companies' M&A Overseas" (Ministry of Economy, Trade and Industry; March, 2018), it is pointed out that "it is necessary to categorize each question, whether it is a "Must Have" question that could lead to a deal break or a "Nice to Have" question that should be obtained as reference information, depending on the content of the answer, and clarify the priority of the investigation. " Also it is pointed out that "in legal DD, investigation related to compliance with anti-corruption laws, etc. is a "Must Have" item."

⁶³ According to page 25 of "Report on Discussion Results of the Study Group for Japanese Companies' M&A Overseas" (Ministry of Economy, Trade and Industry; March, 2018), in the DD that requires information disclosure as a formal process (especially data room materials), it should be noted that the information that can be obtained may be limited and it may be difficult to detect defects. In addition, DD generally has severe time constraints, and unless the questions and issues are clarified in advance, it is difficult to make effective use of time.

⁶⁴ Should an acquired company commit an act of bribery, the acquiring company may succeed to the criminal or civil liability for the bribery committed by the acquired company, depending on the type of acquisition. Even in cases where the company does not legally succeed to the liability for the bribery of the acquired company, it is possible that the company will bear the financial loss associated with the decline in the corporate value of the acquired company, the practical costs associated with responding to the authorities, and reputational risks, etc.

- If unexpected problems or risks become apparent through post-acquisition verification, etc., promptly consider countermeasures and, if necessary, take corrective measures⁶⁵, including reporting to the relevant authorities.
- The parent company should support the subsidiary as described in (1) General remarks, as necessary, so that the acquired company can appropriately establish and operate Preventive System after the acquisition.

* The above points were made with a particular focus on the case where a company acquires an existing company and makes it its own group company, such as a subsidiary, etc. In the case where a company establishes a joint venture (JV) with another company, for example, the above points are basically also applicable to the relationship with the company that will be the JV partner.

2.4 Response in an Emergency Situation

If a foreign public official, etc. does demand (solicit or extort) bribes in reality or it is found by an internal audit or a whistle-blower report that local staff may have paid bribes to a foreign public official, etc. (collectively, referred to an "Emergency Situation"), it is necessary to strictly comply with applicable domestic and foreign laws and regulations and to expeditiously take action to minimize any harmful effect including economic damage to the company (and ultimately to its shareholders).

In the case of an Emergency Situation at a subsidiary that lacks the ability to cope with the situation, one of the likely options for the parent company is to get actively involved in order to ensure appropriate response, as is commensurate with the impact such an event would have on the parent company. If necessary, the parent company is expected to take the lead in investigating the cause of the incident, converging the situation, and formulating preventive measures.⁶⁶

In particular, it should be also noted that, in the case of an Emergency Situation, a conflict of interest may arise between the subsidiary and its officers, etc. in which case, there is a risk of a breakdown in appropriate internal investigation or in reporting to the parent company (for instance, given that the corporate officers, etc. at the subsidiary are at risk of being dismissed by the parent company if the act of bribery is revealed, they may fail to investigate or report the matter to protect themselves).

In relation to systems for dealing with an Emergency Situation, the following matters should be

⁶⁵ According to pages through 59 and 60 of "Report on Discussion Results of the Study Group for Japanese Companies' M&A Overseas" (Ministry of Economy, Trade and Industry; March, 2018), in the management of overseas subsidiaries by Japanese companies, those companies are often troubled by local fraud and scandals. It has been pointed out that there may be a considerable number of cases, including those that are not made public, where serious irregularities and compliance violations such as off-balance-sheet debts and fictitious inventories are discovered within a few years after an acquisition. Post-closing DD and internal audits immediately after an acquisition can be meaningful for early detection of such fraud risks.

⁶⁶ Refer to 4.10.3 of "Practical Guidelines for Group Governance Systems" (Ministry of Economy, Trade and Industry; June 28, 2019).

noted:

- Rules should be put in place in advance with regard to cooperation with responsible officers, establishment of investigation team, reporting systems for information on an Emergency Situation between the parent company and subsidiaries, and other systems necessary to cope with an Emergency Situation. In particular, a system to expeditiously pass on information regarding any Emergency Situation to the Compliance Supervisor or the management should be established in advance.
- In principle, a demand for bribes from a foreign public official should not be accepted⁶⁷, and the process for handling such situations should be established in advance, such as the first action to take in the field and establishing an emergency response team at the head office, etc., as appropriate corresponding to the severity of the situation, etc. In particular, in countries where local laws prohibit bribery requests by their own public officials, consider reporting damage based on the local laws, etc.
- Independent outside officers should also be appropriately provided with necessary information regarding any Emergency Situation. They should appropriately supervise conflicts of interest between the company and the management from a position independent from management.
- Upon preservation of relevant evidence including circumstances that are disadvantageous to the company and the corporate group, interviewing those involved, and other related research or investigation, if it appears highly likely that the act of bribery did take place, consulting with a lawyer, reporting to criminal investigation agencies or surrender, and requesting to apply the Agreement Procedure⁶⁸ to the prosecutor should be considered.
- After the situation comes to an end, the causes should be investigated and recurrence preventive measures should be considered by the corporate group as a whole.^{69,70}
- Not only examine preventive measures, but also monitor the status of responses in

⁶⁷ The requirements for averting present danger may be met when a person is in danger of being assaulted if he/she fails to make payment and has no choice but to make a minimum payment necessary to avert actual infringement of life or body; in that case, illegality will be rejected, and no penalty will be imposed. Refer to Chapter 3.1 Section (3) for details.

⁶⁸ The Agreement Procedure (Article 350-2 of the Code of Criminal Procedure) is a procedure in which, for specific financial and economic crimes and drug firearm crimes, the prosecutor and the suspect or accused can make an agreement on the following contents with the consent of the defense counsel:

- The suspect or accused will cooperate with the prosecutor, such as by making statements about criminal cases of others or submitting the evidence.
- The prosecutor will treat the case of the suspect or accused in an advantageous manner, such as not prosecuting the case, prosecuting the case with a light count, or making a light sentence.

It is up to the investigative authorities to decide how to gather evidence, including the application of the Agreement Procedure, but in any case, if a company provides the investigative authorities with facts and other information uncovered through internal investigations, etc., it may contribute to the investigation of the cause of the case, which may lead to the early resolution of the situation.

⁶⁹ As described in Case (4) of the offense of bribery of foreign public officials in Chapter 3.4 of these Guidelines, it is important to consider preventive measures because, in a judicial precedent, the fact that "the company reviewed its compliance system and took preventive measures, etc." was a factor to be taken into consideration in determining punishment.

⁷⁰ The establishment of a third-party committee or internal investigation committee is also worth considering when investigating the facts and causes of the incident and considering preventive measures. For a third-party committee, refer to "Guideline for Independent Committees relating to Company Scandals" (Japan Federation of Bar Associations, July, 2010. Revised in December, 2010).

the subsidiary. In addition, restore and strengthen the governance function as a corporate group, including pursuing responsibility of the management and confirming the effectiveness and implementation status of preventive measures.

When companies consider introduction or conduct a major review of Preventive Systems with reference to the suggestions above, the company may run into difficulties implementing it across the board. In such cases, the company should, at its own responsibility and as a provisional extraordinary measure, give preference to measures that it finds particularly necessary upon considering its company size and business category, existing systems, relevance to its international commercial transactions, and effectiveness, etc. as well as consideration of the extent of risk that the company may be charged with the offense of bribery of foreign public officials.

2.5 Other Matters

In many cases, it is difficult for a single company to cope with issues of bribery of foreign public officials by, for example, accepting risk of being treated disadvantageously by refusing continuous demands (solicitation or extortion) for bribery by foreign public officials, etc.

In such cases, it can be fruitful to consult with the business support desk for Japanese companies at the local Japanese Embassy or consular office, Japan External Trade Organization (JETRO) or local chamber of commerce, etc., or leveraging such organizations to demand the local government stop explicitly or implicitly demanding bribes through specified or unspecified public officials. This can be done both before and after the fact. The Ministry of Foreign Affairs designates an officer in charge of the OECD Anti-Bribery Convention at each of its 225 diplomatic missions to serve as a point of consult for bribery cases of foreign public officials.

Further, in relation to Official Development Assistance (ODA), there is an option to consult with the consultation desk for information on fraud and corruption established within the Ministry of Foreign Affairs of Japan and Japan International Cooperation Agency (JICA) or to have such institutions negotiate with the local government based on information provided⁷¹.

On the other hand, in the light of assisting Japanese companies, the Japanese government is expected to promptly propose to the local government if requested by a local Japanese company and to consider with the relevant governmental agencies disclosing the status of such proposals and the status of action taken for each country so that Japanese companies may assess country risk.

⁷¹ Information about the fraud and corruption information consultation desk of Ministry of Foreign Affairs of Japan can be found here: <https://www3.mofa.go.jp/mofaj/gaiko/oda/fusei/>. Information about the fraud and corruption information consultation desk of JICA can be found here: <https://forms.office.com/r/5WQz3h9b6>.

CHAPTER 3: SCOPE OF PUNISHMENT UNDER THE UNFAIR COMPETITION PREVENTION ACT

The action that Japan has taken in connection with the acceding to the OECD Convention is implementing the offense of bribery of foreign public officials, among other things, through a revision to the Unfair Competition Prevention Act in 1998⁷².

This Chapter provides an article-by-article explanation of the relevant articles of the Unfair Competition Prevention Act from the perspective of further understanding and better predictability regarding the bribery of foreign public officials.

As an additional note, readers are reminded that it is the criminal investigation and prosecution agencies that are actually in charge of the application of the Act with respect to each individual and specific case and that the final interpretation of the Act is left to the courts.

3.1 The Elements of the Offense of Bribery of Foreign Public Officials (in Respect of Article 18(1) of the Act)

- Article 18(1) of the Unfair Competition Prevention Act

No person may give, offer to give, or promise to give any money or other benefit to a Foreign Public Official, etc. in order to have them act or refrain from acting in relation to the performance of their official duties, or to have them use their position to influence another Foreign Public Official, etc. to act or refrain from acting in such a manner, so that the person in question can make any wrongful gain in business regarding international commercial transactions.

(1) Overview (the subscript numbers in bracket each refer to the Items where the terms are explained in the following 3.1 (2))

Article 18(1) of the Unfair Competition Prevention Act provides, "⁽ⁱ⁾No person may ^(vii)give, offer to give, or promise to give ^(vi)any money or other benefit to a Foreign Public Official, etc. (refer to "3.2 Definition of Foreign Public Official, etc.") in order to have them ^(v)act or refrain from ^(iv)acting in relation to the performance of their official duties, or to have them use their position to influence another Foreign Public Official, etc. to act or refrain from acting in such a manner, ⁽ⁱⁱⁱ⁾so that the person in question can make any wrongful gain in business regarding ⁽ⁱⁱ⁾international commercial transactions."

This paragraph is intended to assure the provisions of paragraph 1 of Article 1 of the Anti-Bribery Convention. In other words, it prohibits the giving, offering or promising of any improper benefit in order to cause an act of commission or omission, etc. in relation to the performance of official duties of foreign public officials, etc., committed in order to obtain

⁷² The Preamble of the Convention sets out, "achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention," and, in line with this view, requires, for example, that measures be taken including the criminalization of the bribery of foreign public officials.

a wrongful gain in business with regard to international commercial transactions.

Incidentally, as stated in the Commentary 8⁷³ of the OECD Anti-Bribery Convention, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law, it is not a violation of the Unfair Competition Prevention Act because the advantage is not considered as any money or other benefit which are given to a foreign public official, etc. in order to obtain a wrongful gain under Article 18(1) of the Unfair Competition Prevention Act.

○ **Typical Behaviors subject to Punishment**

1. giving a benefit to an official of the Ministry of Health of Country A with the intention of obtaining minimum bid price information that is not released in advance, in order to win a bid for a national hospital construction project in Country A;
2. giving a benefit to an official of the inspection agency of Country B with the intention of obtaining a license to install equipment at a chemical plant constructed in Country B that does not satisfy environmental standards;
3. giving a benefit to an official of the customs agency of Country C with the intention of obtaining an illegal reduction of import duty on building materials; and
4. giving a benefit to a public official of Country D with the intention of getting preferential treatment in commodity export approval procedures with an aim of gaining an advantage over competitors.

(2) Interpretation of Terms

(i) "No person"

If someone commits the whole or part of an act subject to this offense in Japan, the Act will apply irrespective of the nationality (in other words, whether the person is Japanese or a non-Japanese).

If a Japanese national commits a prohibited act outside of Japan, the Act will also apply to that person.

Furthermore, the Act will apply to a foreign national who is a representative, agent, employee, or other worker of a corporation having its principal office in Japan and who has committed the act outside Japan in connection with the business of that corporation.

→ **[Refer to "(3) Geographical Scope of Application" in Chapter 3.3: Penalties.]**

(ii) "International commercial transactions"

This offense is to prohibit bribery to foreign public officials in the conduct of international business (Article 1-1 of the Convention).

⁷³ The Commentary 8 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions sets out, "It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law."

Within this paragraph, "international commercial transactions" means the act of economic activity beyond national borders such as trade and foreign investment. Concretely, "international" means (i) "international relations"⁷⁴ among the trading parties, or (ii) "international relations" in the content of business activities.

- **Specific examples regarding "international commercial transactions"**
 1. Where a trading company of Japan bribes a public official of Country A in order to win an order for bridge construction under an ODA project in Country A:
→ **As international relations exists between trading parties, this would be considered to be the "international commercial transactions."**
 2. Where a Japanese-run construction company located in Country B bribes a public official of Country B in Japan in order to win an order for repair work for the embassy of Country B in Tokyo:
→ **As international relations exists in the business activity, this would be considered to be the "international commercial transactions."**

(iii) "Wrongful gain in business"

- **Concept of "gain in business"**

Judicial precedents have, in light of the legislative intent to secure fair competition among enterprises, defined the term "business (*eigyō*)" to mean not only activities conducted simply for profit but also any activities that involve economic calculations of income/expenditure more broadly (such as hospital management, etc.). Therefore, it is understood that the term "gain in business" refers to a tangible or intangible economic value or any other gain in a general sense that an enterprise can gain in carrying out such "business."
- **Concept of "wrongful gain"**

The term "wrongful gain" means any gain obtained in a manner running counter to public policy or principle of good faith. Specifically, it is interpreted as referring to:

 - (a) any gain obtained for oneself, any other natural or legal entity through the giving, etc. of an improper benefit to a foreign public official, etc., and having the said foreign public official, etc. exert his/her discretion in a manner favorable to oneself, or
 - (b) any gain obtained through the giving, etc. of an improper benefit to a foreign public official, etc., and having the said foreign public official, etc. commit an illegal act.
- **Cases where the existence of the intention to obtain a wrongful gain in business can be an issue**
 - (I) Acts of Socializing**
 - Burden of expenses such as expenses for travel or meals or gift-giving for

⁷⁴ "International relations" means relations beyond national borders.

a foreign public official, etc. can be a typical form of bribery. However, if it is purely for general socializing or for fostering understanding of the company's products or services and not for any unjust purpose such as for preferential treatment from the relevant foreign public official, etc. in the course of his/her duties, such acts may not be necessarily considered an act of bribery aimed at obtaining a "wrongful gain in business".

- Specific examples of this might be gift-giving, paying for travel expenses or the provision of entertainment in small amounts that, in light of the timing, type of item, amount of money, frequency or other factors, be regarded as purely for the purpose of socializing or for fostering understanding of the company's products or services. As stated in Chapter 2.2 Section (3), it is desirable that these acts are made only after careful consideration based on the company's internal standards, which themselves are formulated from the perspective of ensuring careful internal consideration and with consideration for local laws and regulations, and that the outcome is appropriately recorded to allow for later audit.*

* Unofficial approval procedures or false records would be indicative of a payment to obtain a "wrongful gain in business".

(i) The following are highly likely to be considered payments to obtain a "wrongful gain in business":

- providing a sports car to a foreign public official, etc.;
- providing gifts, even those of low cost, frequently to a foreign public official, etc.;
- giving a merchandise coupon that is cash convertible to a foreign public official, etc.;
- a group company preferentially employing the family member or relative of a foreign public official, etc.;
- inviting the family members of a foreign public official to a resort that has little relationship with the company's products or services;
- engaging a company associated with a foreign public official, etc. as agent or consultant; and
- paying money or providing goods immediately before public bidding regardless of the amount or economic value thereof.

(ii) The following may not be necessarily always considered payments to obtain a "wrongful gain in business":

- giving promotional giveaways or commemorative gifts for general distribution, such as publicity calendars;
- providing appropriate refreshments or simple food and drink at a business meeting;

- riding with a foreign public official in a company car when it is necessary to visit the company's office due to transportation conditions;
- providing an appropriate seasonal gift of low cost in accordance with legally accepted case law;
- in cases where presenting of the company's products or services at an exhibition only is inadequate to understand the company's products or services, and a visit to the company's factory/laboratory (including any local one and those in Japan or a third country) is required, paying the cost of travel expenses of foreign public officials, etc. who are selected under certain internal standards (actual cost based on the company's internal standards formulated in accordance with the local laws and regulations); and
- providing reasonable and appropriate meals (if any anti-corruption laws exist in the country of visit or the country of the relevant foreign public officials that stipulates standards regarding the amount, then with reference to the cost stipulated in such standards) and sightseeing during spare time in connection with the foregoing visit.

(II) Acts of Donation

There may be cases where an enterprise makes a donation; however, it should be noted that any payment to a foreign public official, etc. is in most cases payment to obtain "a wrongful gain in business", i.e. a typical act of bribery. Even if it appears to take the form of a donation to a non-profit organization, if such donation is in fact made to a foreign public official, etc., then it would constitute a typical act of bribery.

It is considered that there may be a case where a donation made to a non-profit organization purely for the purpose of fulfilling the company's corporate social responsibility as a "good corporate citizen" does not constitute an act of bribery as long as it is deemed to be a donation both in name and in reality, but if the donation is in name only and is actually a payment to a foreign public official, etc. in reality, it constitutes bribery.

For these reasons, it is necessary to confirm prior to making a donation whether any officer of the recipient, or any family member or relative thereof, is related to a foreign public official, etc. involved with the company's project, and on top of that, to confirm that money donated is not flowing back to any person related to the foreign public official, etc.* to a reasonable extent, such as inspection of the accounting books of the recipient after donation.

* Unofficial approval procedures or false records would be indicative of payment to obtain a "wrongful gain in business".

(III) Others

- Refer to “Chapter 2.2 Section (3) Formulation of Internal Rules” for Small Facilitation Payments (SFP).

- In case of receiving unreasonably disadvantageous discriminative treatment⁷⁵. There are cases where, in a customs setting for instance, an enterprise has taken all the necessary procedures under local laws and regulations, yet will experience delays or other unreasonably disadvantageous discriminative treatment by the local government, effectively until money or goods are provided to the local government officials.
 - (i) An official who simply receives an application form from a company but who is not actually in charge of the examination refuses to affix a seal of receipt on the application despite there being no inadequacies with the form.
 - (ii) An enterprise is entitled to a tax refund under the local laws and regulations, but the tax office fails to process the refund without giving any reasonable grounds.
 - (iii) An enterprise has an obligation to have its fire protection equipment inspected by the fire department under the local laws and regulations, but the fire department is not willing to cooperate and conduct the inspection.

Any payment, whether it is for the purpose of avoiding discriminatory disadvantages such as the above, is itself likely to be considered to be the giving of money or other benefit "to obtain a wrongful gain in business" for oneself. Moreover, whatever the purpose, once such a payment has been made to a foreign public official, etc., the practice is likely to persist as a convention, so the fundamental principle should always be to refuse such demands for money, etc.

From the perspective of preventing the further encouragement of payment demands, it is desirable to clearly convey the intention of refusal, either independently or through the local Japanese Embassy, consular office or the local chamber of commerce, etc. as stated in Chapter 2.5 above.

Being compelled to give, etc. a benefit for the purpose of avoiding danger to one's own life or body may, in some cases, be determined as not given with the intention to obtain a "wrongful gain."

⁷⁵ Even if no imminent danger to human body/life exists, if, for example, security is poor and personal protection, etc. by local police or armed force is needed, rather than providing money, etc. directly to an individual police officer or individual military personnel, it might be possible to execute a service agreement for personal protection, etc. with the police or military organization itself, to the effect that expenses will be covered. Naturally, however, the giving of improper benefit to the police, etc. on the pretense of executing an agreement would be considered to constitute the giving of "improper benefit".

(iv) "Acting in relation to the performance of their official duties"

"Acting in relation to the performance of official duties" naturally includes any act within the scope of official authority of the said Foreign Public Official, etc., but also includes acts closely connected to his/her official duties.

Note that the definition of "official duty (*shokumu*)" here is the same as that for "official duty (*shokumu*)" in the provision of Article 197 (Acceptance of Bribe) of the Penal Code.

Judicial precedents concerning acts closely connected to official duties in the context of the offense of giving or taking bribes under the Penal Code include cases in which it was found that acts conventionally taken by a public official or acts preliminary to legitimate official duty were acts closely connected to official duties.

(v) "...act or refrain from (acting in relation to the performance of their official duties), or to have them use their position to influence another Foreign Public Official, etc. to act or refrain from (acting in such a manner)..."

The requirement here is that the purpose of the giving, etc. of an improper benefit should be the commission or omission of a certain act by a Foreign Public Official, etc., or causing the commission or omission of a certain act by another Foreign Public Official, etc.

As stated in Section (iv) above, acts by a Foreign Public Official, etc. themselves refer to an act within the scope of official authority of the said Foreign Public Official, etc. and an act closely connected to their official duties.

Also, to "influence ~ to act (*assen*)" includes having the said Foreign Public Official, etc. use their position, influence upon another Foreign Public Official, etc. to act in relation to the performance of official duties, even if that action is beyond the scope of official authority of the former official, etc.

(vi) "any money or other benefit"

The term "any money or other benefit" can mean not only economic benefit, but any benefit that serves to satisfy a demand or desire of a person. Accordingly, it would be considered to cover, naturally, money and property, as well as any economic benefit such as financial benefit, free renting of a house or building, entertainment and paid dining, offering of a collateral or guarantee, but also cover any and all other tangible and intangible benefits including non-economic benefits such as a sexual relationship or occupational position.

(vii) "...give, offer to give, or promise to give (to a Foreign Public Official, etc.)"

To "give (*kyoyo*)" does not only mean simply providing any money or other benefit as a bribe, but also must be accompanied by the acceptance of such benefit by a Foreign Public Official, etc. on the other side.

To "offer (*moshikomi*)" is an act of prompting a Foreign Public Official, etc. to accept any money or other benefit in a situation where it can be recognized as a

bribe, and does not need to be accompanied by any reaction on the part of that official, etc.

To "promise (*yakusoku*)" means an agreement on the giving/acceptance of any money or other benefit between parties of bribery.

In the case of giving, or offering or promising to give any money and other benefit to a third party other than a Foreign Public Official, etc., it would constitute an offense of bribery of Foreign Public Officials as well, if:

- there is a conspiracy between the said Foreign Public Official, etc. and the said third party;
- it is obvious that the money or benefit has been given to the said Foreign Public Official, etc., such as where it is directed to a relative of that official, etc.; or
- the Foreign Public Official, etc. has used the third party as a tool and had him/her receive the money or benefit.

(3) Averting Present Danger

- In the case of acts that are found to be averting present danger as stipulated in Article 37 of the Penal Code, illegality will be rejected, and no penalty will be imposed*.
 - * The requirement for "averting present danger" is met if "an act is unavoidably performed" (there is no realistic other way to preserve legal benefit) to "avert" (intention of averting is required) a "present danger" (infringement of legal benefit to be preserved actually exists or is pressing) to "the life or body of oneself or any other person" (legal benefit to be preserved), etc. "only when the harm produced by such act does not exceed the harm to be averted" (the relative merits of legal benefits should be determined based on conventional wisdom depending on specific case).
- In a relation to foreign public officials, etc., for instance, the aforesaid requirement for averting present danger may be met when a person is in danger of being assaulted if he/she fails to make payment and has no choice but to make a minimum payment necessary to avert actual infringement of life or body.
- An example of when the requirement for averting present danger may be met:
 - When a person pays money to a policeman carrying a gun on regular duty who expressly or implicitly demands payment and refuses to leave his/her office, with the imminent threat of physical restraint.

3.2 Definition of Foreign Public Official, etc. (in Respect of Article 18(2) of the Act and the Government Ordinance)

- Article 18(2) of the Unfair Competition Prevention Act
- 2. The term "Foreign Public Official, etc." as used in the preceding paragraph means any of the following persons:
 - (i) any person that engages in public service for a national or local foreign government;
 - (ii) any person that engages in the business operations of an entity established under foreign special laws to carry out specific business operations in the public interest;
 - (iii) any person that is a business engaged in business operations where one or more national or local governments of foreign states directly own more than 50 percent of the voting shares or capital subscription of the business, or where the majority of Officers (meaning directors, auditors, council members, inspectors, liquidators, and others involved in the management of the business) are appointed or designated by one or more national or local foreign governments, and that is granted special rights or interests by such governments for the performance of its business; or any person specified by Cabinet Order as an equivalent person;
 - (iv) any person that engages in public services for an International Organization (meaning an international organization which is formed by governments or intergovernmental organizations); or
 - (v) any person that engages in business operations under the authority of the national or local government of a foreign state or an International Organization and that are delegated by any of them to the person in question.

(1) Purposes

A definition of a "Foreign Public Official, etc." who can be a party to bribery is provided in Article 18(2) of the Unfair Competition Prevention Act and Article 3 of the Order for Enforcement of the Unfair Competition Prevention Act.

Foreign public officials, etc. subject to the application of this Act can be divided into the following five categories:

- (i) Any person that engages in public service for a national or local foreign government (Item 1)
- (ii) Any person that engages in the business operations for an agency affiliated with a foreign national government (Item 2)
- (iii) Any person that engages in the business operations for a foreign public business (Item 3)
- (iv) Any person that engages in public services for an International Organization (Item 4)
- (v) Any person that exercises a public function on behalf of a foreign national government, etc. as delegated (Item 5)

Note that those countries which Japan has not recognized as countries are also covered by the concept of "foreign."

(2) Item 1: Person that engages in public service for a national or local foreign government (Foreign Public Official)

A person that engages in public services for a national or local foreign government refers to a person who occupies a position in an administrative or legislative body, or a judicial agency.

Note that candidates for public office are not subject to the application of this Act.

(3) Item 2: Person that engages in the business operations for an agency affiliated with a foreign national government

An agency affiliated with a foreign national government refers to an organization constituted under special laws to carry out specific tasks concerning public interest, which is the equivalent of a public corporation (*tokushu hojin*) or special company (*tokushu gaisha*) in Japan.

Note that an organization constituted under special laws does not include any corporation organized under civil law, such as a public interest corporation or a commercial company, that can, under the rule-based (as opposed to permission-based) principle, be constituted if certain requirements are met.

A "person that engages in business operations" refers to a person who is determined, in terms of the function fulfilled by him/her, to perform services for the said agency.

○ **Examples of agency affiliated with a foreign national government**

Government corporations in the United States:

Specific examples include Tennessee Valley Authority and National Railroad Passenger Corporation (a.k.a. Amtrak).

Établissements publics in France:

Specific examples include *Bibliothèques nationales*, and university.

(4) Item 3: Person that engages in the business operations for a foreign public business

A "public enterprise" in this Item covers any enterprise for which:

- (i) a majority of its voting shares are owned by;
 - (ii) a majority of its total capital is contributed by; or
 - (iii) a majority of its officers are designated or appointed by;
- one or more national or local foreign government (including public interest corporations), and such enterprise equivalents as defined by government ordinance.

An enterprise defined by government ordinance as equivalent to any of the foregoing refers to an enterprise:

- (i) a majority of the voting rights of all shareholders of which are owned by;
- (ii) which is under the control of, through the holding of golden shares that require permission, license, approval or consent, etc. in order for all or some resolutions at general shareholders' meetings cannot be effective; or
- (iii) which is under the control of, via indirect ownership of a majority of its stock, etc; one or more national or local foreign governments.

Any person engaging in services for such "public enterprises" as are given special

privileges by national or local foreign governments to do the public enterprises' business falls under the definition of foreign public official, etc. under the Unfair Competition Prevention Act.

○ **Example of "public enterprise" 1: Control through golden shares**

The articles of incorporation of Company B in Country A, a private company that was formerly state-owned, had provisions requiring the consent of the government, *i.e.*, the golden share owner, for a resolution of a general shareholders' meeting to amend certain articles to take effect, including articles such as:

- (i) No one may own 15% or more shares or exercise 15% or more voting rights, either separately or jointly; and
- (ii) No non-citizen of Country A may serve as the chairman of the Company or the chief executive of the Company.

In this case, Company B would be considered to be a "public enterprise" under this Item.

○ **Example of "public enterprise" 2: Indirect control**

Companies D₁ and D₂ are both 70%-owned subsidiaries of Company D, a state-owned electricity power company in Country C (the government owns 80% of its shares). Company D₁ generates power mostly in the northern part of Country C while Company D₂ conducts the same operation mostly in the southern part of Country C.

In this case, Companies D₁ and D₂ would each be considered to be a "public enterprise" under this Item.

○ **Article 3 of the Order for Enforcement of the Unfair Competition Prevention Act**

1. The persons specified by Cabinet Order, as prescribed in Article 18, paragraph (2), item (iii) of the Act, are the following businesses engaged in business operations (excluding those prescribed in the same item), to which special rights and interests are granted by the national or local governments of the foreign states for the performance of their business:
 - (i) a business in which more than 50 percent of the voting rights of all shareholders are directly held by one or more national or local governments of foreign states;
 - (ii) a business for which, with respect to all or part of the matters to be resolved at a shareholders' meeting, the resolution will not become effective unless the national or local government of a foreign state grants permission, authorization, approval, consent, or any other similar act, or for which the resolution may be invalidated; and
 - (iii) a business where one or more national or local governments or public businesses of foreign states directly own more than 50 percent of the voting shares or capital subscription of the business, or where more than 50 percent of the voting rights of all shareholders are directly held by one or more national or local governments or public businesses of foreign states, or where the majority of officers (meaning directors, auditors, council members, inspectors, liquidators, and others involved in the management of the business; the same applies in the following paragraph) are appointed or designated by one or more national or local governments or public businesses of foreign states (excluding businesses prescribed in item (i)).
2. The term "public business" prescribed in item (iii) of the preceding paragraph means a public business as prescribed in Article 18, paragraph (2), item (iii) of the Act, and to a business stated in items (i) and (ii) of the preceding paragraph. In this case, a business where one or more national or local governments or public businesses of foreign states directly own more than 50 percent of the voting shares or capital subscription of the business, or where more than 50 percent of the voting rights of all shareholders are directly held by one or more national or local governments or public businesses of foreign states, or where the majority of officers are appointed or designated by one or more national or local governments or public businesses of foreign states, is deemed to be a public business.

(5) Item 4: Person that engages in public services for an International Organization

An "International Organization" in this Item refers to an international organization organized by a nation state, government or any other public body, irrespective of the organizational form or the scope of authority.

Incidentally, it does not include international organizations constituted by a private body, such as the IOC (International Olympic Committee).

- Examples of International Organizations
United Nations, UNICEF (United Nations International Children's Emergency Fund), ILO (International Labour Organization), WTO (World Trade Organization), etc.

(6) Item 5: Person that exercises a public function on behalf of a foreign national government, etc. as delegated

This refers to a person to whom privileges are delegated by national or local foreign

governments or an international organization and who engages in services as delegated. In other words, it is intended to mean a person to whom privileges are delegated by a foreign national government, etc. or an International Organization over services that fall under the competence of the said foreign national government, etc., such as inspection and testing services, etc., and who engages in the said services.

It does not include those persons who process some work ordered by a foreign national government, etc. without any delegation of authority, such as staff, etc. of construction companies contracted for public works projects.

- Example of person who exercises a public function on behalf of a foreign national government, etc. as delegated

"Foreign public officials, etc." includes staff of a designated inspection agency or designated testing agency delegated to conduct inspections and testing operations, etc. for a chemical plant construction to check in advance if it meets environmental criteria for permission, etc. for equipment installation, etc. pursuant to the laws of the country in which the construction takes place.

3.3 Penalties (in Respect of Articles 21 and 22)

- Articles 21 and 22 of the Unfair Competition Prevention Act (abbreviated)
- Article 21 1. to 3. (omitted)
- 4. If any of the following items apply, the person that has committed the violation is subject to imprisonment for not more than 10 years, a fine of not more than 30 million yen, or both:
 - (i) to (iii) (omitted)
 - (iv) if a person violates the provisions of Article 18, paragraph (1).
- 5. to 9. (omitted)
- 10. The offence prescribed in paragraph (4), item (iv) is governed by Article 3 of the Penal Code (Act No. 45 of 1907).
- 11. The offence prescribed in paragraph (4), item (iv) also applies to any non-Japanese national who is a representative, agent, employee, or other worker of a corporation having its principal office in Japan and who has committed the offence prescribed in the same item outside Japan with regard to the business of the corporation.
- 12 to 15 (omitted)
- Article 22
- 1. If the representative of a corporation, or the agent, employee, or other worker of a corporation or of any person has committed a violation stated in any of the provisions of the following items with regard to the business of the corporation or the person, the corporation is to be subject to the fine prescribed in the relevant items, and the person is to be subject to the fine prescribed in the relevant Article in addition to the offender being subject to punishment:
 - (i) paragraph (4) or paragraph (6) of the preceding Article (limited to the part regarding paragraph (4) of the same Article): a fine of not more than 1 billion yen;
 - (ii) (iii) (omitted)
- 2. (omitted)
- 3. The period of prescription for the punishment by fine to which the corporation or person in question is subject pursuant to the provisions of paragraph (1) for a violation under paragraph (1), (3) (4), or (6) (limited to the part regarding paragraph (1) or (4) of the same Article) is to be the same as that for the offence referred to in those provisions.

(1) Penalties for Perpetrators (natural person)

- (i) Article 21(4) (iv) of the Unfair Competition Prevention Act provides that a person who gave, etc. an improper benefit to a foreign public official, etc. in violation of Article 18(1) shall be subject to **imprisonment for a period not more than 10 years, a fine of not more than 30 million yen^{76,77}**, or both.
- (ii) Note that a person who has been convicted of a bribery offense in the country of offense may still be punishable under the offense of bribery of foreign public officials,

⁷⁶ The statutory penalties were increased by the “Act Partially Amending the Unfair Competition Prevention Act (Act No. 51 of 2023)” (came into force as of April 1, 2024).

⁷⁷ By imposing a penalty at least equal to “imprisonment with work for not more than three years or for a fine of not more than 2,500,000 yen” provided as impossible in the case of a bribery offense committed with respect to a public official of Japan (Article 198 of the Penal Code), this provision fulfills a requirement under the Convention regarding the severity of a penalty, which sets out that “the range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials” (Article 3-1).

as provided for in Article 5 of the Penal Code⁷⁸. If, however, the person has actually served a sentence either in whole or in part in that foreign country, execution of a sentence in Japan will be mitigated or discharged pursuant to the provision of the said Article.

- (iii) The statute of limitation is seven years⁷⁹. Under Article 255(1) of the Code of Criminal Procedure, however, the statute of limitation does not run during the period for which the offender is outside of Japan.

(2) Penalties for Corporation

(i) Dual Criminal Liability Provision

Article 22, paragraph 1 of the Unfair Competition Prevention Act provides that where a representative of a corporation⁸⁰, or an agent, employee or other worker of a corporation has committed a violation in connection with an operation of the said corporation, **a fine of not more than 1 billion yen**⁸¹ will be imposed on that corporation, which is in addition to punishment for the offender himself/herself⁸².

(ii) Presumption of Negligence on the Part of a Corporation

The Supreme Court has previously ruled that the legislative intent with respect to a provision of penalties for juridical persons is that the business proprietor cannot be discharged from criminal liability because of a presumption of negligence of the juridical person in its failure to appoint and oversight of the perpetrating employee, etc. and to exercise other caution necessary to prevent violation unless it is found that such caution was exercised⁸³.

While this ruling is not about the Unfair Competition Prevention Act, in order for the exemption from the dual criminal liability of juridical persons to be applicable on the basis of non-existence of negligence, it is also likely that the Act also requires that such caution be exercised as necessary to prevent violation, not just simply in the form of general and abstract advice but in the form of proactive and specific instruction.

From this perspective also, it is necessary to augment the effect of measures for

⁷⁸ Article 5 of the Penal Code: Even when a final and binding decision has been rendered by a foreign judiciary against the criminal act of a person, it shall not preclude further punishment in Japan with regard to the same act; provided, however, that when the person has already served either the whole or part of the punishment abroad, execution of the punishment shall be mitigated or remitted.

⁷⁹ As provided for in Article 250 of the Code of Criminal Procedure; further, the statute of limitations for penalties to be imposed on the juridical person is seven years under the provision of Article 22, paragraph 3 of the Unfair Competition Prevention Act .

⁸⁰ The dual criminal liability provision may also be applied to sole proprietor businesses. However, the fine is limited to 30,000,000 yen.

⁸¹ The statutory penalties were increased by the “Act Partially Amending the Unfair Competition Prevention Act (Act No. 51 of 2023)” (came into force as of April 1, 2024).

⁸² With regard to the liability of legal persons, Article 2 of the Convention sets forth, “Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.”

⁸³ Refer to Footnote 19.

preventing bribery of foreign public officials and to improve the effectiveness of internal controls by, for instance, establishing and operating a system capable of appropriate prevention of bribery of foreign public officials as illustrated in Chapter 2 and conducting dissemination of knowledge and education activities, regarding the offense of bribery of foreign public officials, using these Guidelines, etc.

(iii) Scope of a “Worker” of a Corporation

The term “worker” as used in the dual criminal liability provision means any person engaged in the business who is directly or indirectly under the control and supervision of the business proprietor and is considered a “worker” even if the person is not employed under a contract as long as the person is engaged in the business under the direction of the business proprietor⁸⁴.

For example, whether the dual criminal liability provision will be applied to the main office of a Japanese company where an employee of its overseas subsidiary gave an improper benefit to a foreign public official, etc. would be judged in light of the individual and specific circumstances, including the degree of involvement of the main office in the regular business activities of the bribe-giver (the employee), and the state of appointment and oversight of the bribe-giver (the employee) by the main office. If the bribe-giver (the employee) can be considered to be virtually a “worker” of the main office in Japan and that the wrongful gain was given in connection with the business activities of the main office in Japan, then the dual criminal liability provision should be applicable to the main office in Japan.

(iv) Application of the Dual Criminal Liability Provision to Non-Japanese Corporations

It is understood that the dual criminal liability provision under Article 22 of the Unfair Competition Prevention Act may also apply to foreign companies under the Companies Act⁸⁵.

(3) Geographical Scope of Application of Penalties

The geographical scope of application means the scope in terms of exercise of jurisdiction within which cases that have occurred in a given geographical area can be governed by criminal laws of that country and be treated pursuant to those laws, and the offense of bribery of foreign public officials is organized as follows:

- (i) The Penal Code of Japan applies the "principle of territorial jurisdiction" in Article 1 under which the criminal legislations of Japan apply to offenses committed within the territory of Japan, irrespective of the nationality of the offender, and this provision applies to the Unfair Competition Prevention Act pursuant to Article 8 of

⁸⁴ “Grand Kommentar on the Penal Code, Volume 1 (3rd Ed.)” by Hitoshi Otsuka et. al, page 144 (2015, *Seirin Shoin*)

⁸⁵ Article 823 of the Companies Act provides, “With regard to application of other acts, a foreign company shall be deemed to be the same kind of company or the most similar kind of company in Japan.” (Refer also to “Organization Criminal Liability Theory” by Kensuke Ito, page 76-79, (2012, *Seibundo*)).

the Penal Code⁸⁶.

Under the principle of territorial jurisdiction, the criminal laws of Japan will be applicable to an offense if any “act” constituting a necessary element of the offense has been committed in Japan or the “result” constituting another necessary element of the offense has occurred in Japan. In respect of the offense of bribery of foreign public officials, this can possibly lead to the conclusion that if any improper benefit is offered or promised to a foreign public official via e-mail or fax, etc. from a location in Japan, then even if the benefit is subsequently given in a location overseas, the offense as a whole is considered to have been committed in Japan.

- (ii) The Penal Code of Japan applies the "principle of nationality jurisdiction" to certain offenses, including murder, assault and fraud, etc., in Article 3, under which the criminal legislation of Japan also applies to, in addition to offenses committed within the territory of Japan, offenses committed by Japanese nationals when outside Japan. Article 21, paragraph (10) of the Unfair Competition Prevention Act sets forth that the offense of bribery of foreign public officials is governed by Article 3 of the Penal Code, and therefore Japanese nationals who have committed acts of bribery outside of Japan are also punishable, in addition to those who have committed acts of bribery in Japan.
- (iii) Pursuant to the provision of Article 21, paragraph (11) of the Unfair Competition Prevention Act⁸⁷, any non-Japanese national who is a representative, agent, employee, or other worker of a corporation having its principal office⁸⁸ in Japan and who has committed bribery outside Japan with regard to the business of the corporation is also punishable.

(4) Giving of an Improper Benefit Using an Overseas Subsidiary, etc.

It is common practice to use an overseas subsidiary, etc. in the conduct of international business such as foreign trade and overseas investment.

As an accomplice to an offense of bribery of foreign public officials is also subject to punishment according to the Convention, companies should be aware of the potential for

⁸⁶ Article 8 of the Penal Code: The general provisions of this Part also apply to crimes for which punishments are provided by other laws and regulations, except when special provisions are provided in such laws and regulations.

⁸⁷ The provision was newly established by the “Act Partially Amending the Unfair Competition Prevention Act (Act No. 51 of 2023)” (came into force as of April 1, 2024).

⁸⁸ Generally, an “office” means the place where business affairs of a corporation are executed; when there is only one office, that office is the “principal office,” and when there are two or more offices, the one serving as the center of activities is referred to as the “principal office” (“Article-by-Article Commentary on the Act on General Incorporated Associations and General Incorporated Foundations (2nd Edition),” by Norikazu Kumagai, page 10 (2021, National Association of Public Interest Corporations), “New Edition Annotated Civil Code (2) (Revived Edition)” by Ryohei Hayashi et al., page 257 (2011, *Yuhikaku*), which corresponds to the concept a “head office” of a company (Article 4 of the Companies Act). The “principal office” under the Companies Act is considered to mean the main place of business, that is, when there are multiple places of business, the place of business that manages the entire business of the company and makes decisions at the highest level (“Kommentar on the Companies Act 1 (1st Edition)” by Kenjiro Egashira (2008, SHOJIHOMU). Therefore, “a corporation having its principal office in Japan” means a corporation that has a place within Japan that serves as the center of the execution of its business affairs.

complicity of an employee of the company's main office in Japan in cases where an employee of an overseas subsidiary, etc. has committed act of bribery to a Foreign Public Official⁸⁹.

The applicability of the Unfair Competition Prevention Act is summarized below with respect to typical examples of bribing a foreign public official by an employee of an overseas subsidiary, etc.⁹⁰ where an employee of the company's main office in Japan is or is not involved*.

* In the following example, it is assumed that employees of overseas subsidiaries, etc., are not controlled or supervised by the main office in Japan (also refer to Chapter 3, Section (2), Part (iii)).

(i) Case of co-principals in conspiracy⁹¹, based on the existence of conspiracy between an overseas subsidiary employee and a main office employee

If the conspiracy between an overseas subsidiary employee and a main office employee took place in Japan, one necessary element of an offense by co-principals in conspiracy would be considered to have occurred in Japan; therefore, the offense is considered to be committed in Japan even if the improper benefit was actually given in an overseas location.

Therefore in this case, both the overseas subsidiary employee and the main office employee would be culpable of the offense of bribery of foreign public officials (In such cases, that chargeability against the employee of the overseas subsidiary would not be limited only to Japanese nationals).

In that case, if it is recognized that the benefits were given in relation to the operations of the main office in Japan, it is understood that the main office in Japan may be punishable under the dual criminal liability provision.

(ii) Case of a main office employee inducing⁹² or aiding and abetting⁹³ the offense and an overseas subsidiary employee perpetrating the act

In the case where the principal offender perpetrated the act (such as the giving of an

⁸⁹ Article 1-2 of the Convention sets out, "Each Party shall take any measures necessary to establish that complicity in, including inducement, aiding and abetting, or authorization of an act of bribery of a foreign public official shall be a criminal offence."

The respective provisions for co-principals, inducement and aiding and abetting, etc. in Articles 60 through to 65 of the Penal Code are applied to these matters.

⁹⁰ An overseas subsidiary as used here is a corporation established under foreign laws and regulations (non-Japanese corporation). Overseas branches and places of business, etc. without corporate status are not business entities independent from their domestic main office, but merely physical facilities for business purposes subordinate to the main office, and therefore persons working at overseas branches and places of business, etc. are considered employees of the domestic main office.

⁹¹ Co-principals (Article 60 of the Penal Code) are "two or more persons who have jointly committed an offense." A "person who had no role in the act of actual perpetration of an offense where several persons had conspired to commit the offense and some of them actually perpetrated it" may also be punished as a principal offender, which constitutes a case of co-principals in conspiracy.

⁹² Inducement (Article 61 of the Penal Code) is the "act of inducing another person to decide to perpetrate an offense."

⁹³ Aiding and abetting (i.e. "accessoryship (*houjo*)" per Article 62 of the Penal Code) is the "act of assisting a principal offender in a manner other than perpetration of an offense."

improper benefit) outside of Japan, the Japanese employee⁹⁴ of the overseas subsidiary who perpetrated the act is culpable of the offense of bribery of foreign public officials. In addition, the main office employee who induced or aided and abetted the act in Japan also is culpable of the offense of bribery of foreign public officials⁹⁵.

(iii) Case of giving an improper benefit through third parties⁹⁶

Cases where a third party other than an employee of an overseas subsidiary gave an improper benefit are as with the cases under (i) and (ii) that involve an overseas subsidiary employee.

Examples aside, the question of whether there is a conspiracy with an employee from the main office in Japan falls to a judicial decision based on the particular facts and circumstances of each case.

In the case of an employee of an overseas subsidiary, etc. giving an improper benefit at his/her own decision or upon instruction from that overseas subsidiary, etc. alone, the perpetrating Japanese employee of the overseas subsidiary, etc. who gave improper benefits and the Japanese employee of the overseas subsidiary, etc. who gave the instruction thereof would be culpable of the offense of bribery of foreign public officials. On the other hand, the foreign employee of the overseas subsidiary, etc. and any employee of the main office in Japan who is not involved in the giving of the improper benefit would not be culpable of the offense of bribery of foreign public officials.

Even when an employee from an overseas subsidiary, etc. is not culpable of the offense of bribery of foreign public officials, he/she may not be exempt from being charged for a bribery offense under the criminal law of the country of his/her location, which is a matter left to judicial decision of that country based on the facts of each case.

⁹⁴In the case where a foreign employee of an overseas subsidiary not subject to control or supervision of the domestic main office perpetrates an offense, the offense of bribery of foreign public officials does not apply to the said foreign employee. With regard to crimes of inducing or aiding and abetting an offense, it is indicated that “even if the principal offender is unpunished, this should be considered that it is not because the act does not constitute a crime in criminal theory; rather, it should be interpreted that the Penal Code is applicable to crimes of inducing or aiding and abetting an offense and thus be punishable” “Grand Kommentar on the Penal Code, Volume 1 (3rd Ed.)” by Hitoshi Otsuka et. al, page 87 (2015, *Seirin Shoin*).

⁹⁵ With regard to the act of complicity (inducing/aiding and abetting) and the application of the dual criminal liability provision, it is indicated that “there is a conflict of opinions that the dual criminal liability provision applies only when a worker is the principal offender (“Comprehensive Case Law Studies Series (17)” by Fumio Kanazawa, p. 145, etc.) and that it also includes cases of inducing and aiding and abetting offenses (“Fundamental Theory of Economic Criminal Law” by Tatsukichi Minobe, page 48). The restrictive interpretation of the “act of violation” may be conceivable as a literal interpretation; however, in criminal law in general, crimes of inducing and aiding and abetting as a modified form of its principal offense are often included by stating the elements of the principal offense (such as provisions for crimes committed outside Japan), and the responsibility for appointing and overseeing is a legal issue also in the cases of these forms of complicity, and therefore the expansive interpretation seems appropriate” (“Grand Kommentar on the Penal Code, Volume 1 (3rd Ed.)”) by Hitoshi Otsuka et. al, page 147 (2015, *Seirin Shoin*).

⁹⁶ For the risk of bribery by third parties, refer to Chapter 2.1, Section (4), Part (ii), (c).

3.4 Cases of the Offense of Bribery of Foreign Public Officials

Cases that have been prosecuted so far since the establishment of the offense of bribery of foreign public officials under the Unfair Competition Prevention Act in 1998 are as follows (as of September 2023):

(1) Case of giving improper benefits to Filipino public officials (Fukuoka Summary Court, March 2007)

The case: Two employees who had been loaned to a Filipino local corporation of a company that has its head office in Fukuoka and engages in equipment installation work, etc. gave improper benefits such as golf club sets (equivalent to approximately 800 thousand yen) to two senior officials of the National Bureau of Investigation (Philippines) (NBI) in order to promptly conclude a contract for a business which NBI was planning.

In this case, the two defendants received fines of 500,000 yen and 200,000 yen, respectively.

(2) Case giving improper benefits to a Vietnamese public official (Tokyo District Court, January and March 2009)

The case: Four persons—the Representative Managing Director and Head of the Sales Division and the Head of the Road and Transportation Division of a company that has its head office in Tokyo and engages in consulting services related to civil engineering and construction, the Director of the Hanoi Office of the defendant company, and the registered Representative of a company having its registered head office in Hong Kong and operating under the substantive control and oversight of the defendant company—who gave improper benefits on two separate occasions, worth around US\$600,000 (approximately ¥64 million) and US\$200,000 (approximately ¥26 million), respectively, to a senior official of the business administration bureau who had authority over a main road construction project in Ho Chi Minh City in Vietnam with the intention of receiving advantageous treatment in favor of the defendant company by ensuring the performance of the contract through fulfilling the promise to provide gratuities for the conclusion of the contract, etc. made with the senior official prior to the conclusion of the contract and concluding the contract early and on favorable conditions.

In this case, the four defendants were sentenced to imprisonment with work for two years and six months, two years, one year and six months, and one year and eight months, respectively (each with a suspension of execution of the sentence for three years; however, for one of them, including separate charge of fraud). The defendant company received a fine of 70 million yen. This was the first case where dual criminal liabilities provision applied for the offense of bribery of foreign public officials.

In sentencing, the court found the following circumstances: (i) as a result of this case, the defendant company received a severe sanction of disqualification from receiving orders related to yen loan projects from the Japan Bank for International Cooperation for 24 months, and it also suffered significant social sanctions, including loss of public trust due to a series of scandals encompassing this incident, and was forced to withdraw from its

overseas business, which achieved 40 years of business performance, (ii) the defendant company plans to enter proceedings for liquidation after fulfilling its legal and social responsibilities, and (iii) the defendant company has made significant contributions to development aid in Asian countries through the hard work of its employees over many years in a challenging environment.

* The prosecutors, on the day on which this case was prosecuted, requested a change in the count to exclude cash worth US\$600,000 that had been accounted for as consignment fees such as designing from tax deductible expense in accordance with the Act on Special Measures concerning Taxation in relation to a case of violation of the Corporate Tax Act against the defendant company, etc. for which prosecution had already been instituted, and increase the evaded income and the evaded tax for the year ended in September 2004 by approximately 66 million yen and 20 million yen, respectively.

(3) Case of giving improper benefits to a Chinese local government official (Nagoya Summary Court, October 2013)

The case: The former executive director of a stock company engaged in the manufacturing of automobile parts, etc. with its head office in Aichi gave 30,000 Hong Kong dollars (equivalent to approximately 420,000 yen) and a ladies' handbag (approximately 140,000 yen in value) to a senior official of the local government in order to have illegal operations of its local factory in China overlooked.

A fine of 500,000 yen was imposed on the defendant in this case.

(4) Cases of giving improper benefits surrounding yen-loan projects in Indonesia, Vietnam and Uzbekistan (loan assistance projects) (Tokyo District Court, February 2015)

The case: The president, the international division manager and the accounting director of a company engaged in railway consultancy business with its head office in Tokyo gave money to persons related to public railway corporations in relation to ODA projects in Indonesia, Vietnam and Uzbekistan.

Specifically, with the aim of gaining advantages for the defendant company, the defendants gave around 70 million yen to persons related to Vietnam Railways in connection with a yen-loan to Vietnam for "Hanoi City Urban Railway No.1 Construction Project", around 1.53 billion rupiah and 5 million yen (around 20 million yen) in total to persons related to Directorate General of Railways of Indonesia's Department of Transportation in connection with a yen-loan to Indonesia for "Railway Double Tracking on Java South Line Project", and around 577,000 US dollars (around 54.77 million yen) to persons related to The Uzbekistan Railways in connection with a yen-loan to Uzbekistan for the "Karshi-Termez Railway Electrification Project".

In this case, the three individual defendants were sentenced to imprisonment with work for two years (with a suspension of execution of the sentence for three years), three years (with a suspension of execution of the sentence for four years) and two years and six months (with a suspension of execution of the sentence for three years), respectively, and the defendant company received a fine of 90 million yen.

In sentencing, the court gave the following facts as favorable to the defendant company: (i) the company was socially punished (it was forced to withdraw from overseas operations and was also excluded from the nomination in nominated competitive tenders for a certain period of time by many local governments, etc. in Japan), (ii) the company incurred a huge loss due to non-payment of completed construction as a result of becoming unable to continue the contract, (iii) the company had declared the paid bribery as expenditure for a secret purpose and had paid tax thereon, and (iv) the company reviewed its compliance system and took preventive measures, etc.

(5) Case of giving improper benefits to a Thai public official (Tokyo District Court, March 2019 and Supreme Court, May 2022)

The case: Two officers (Senior Vice President, Senior General Manager of Procurement & Sourcing Division; and Director, Executive Vice President, Head of Engineering Headquarters) and the General Manager of the then-existing Logistics Division of a company engaged in research, development, design, procurement, and manufacture of boilers, gas turbines, and other equipment and devices that constitute facilities or equipment for thermal power generation systems, etc. with its head office in Yokohama gave money to a Thai public official through a person sent from its local subcontractor. The Agreement Procedure⁹⁷ was applied.

Specifically, with the aim of gaining convenience and advantages for not being prohibited from using a temporary jetty and unloading cargoes while giving tacit approval of violation of permission conditions without undertaking official procedures to get authorization to use the jetty, the defendants gave 11 million Thai baht (equivalent to approximately 39.93 million yen) to a public official in Thailand through a person sent from its local subcontractor.

In this case, the two defendants were sentenced to imprisonment with work for one year and six months (with a suspension of execution of the sentence for three years)⁹⁸ and the one defendant was sentenced to imprisonment with work for one year and four months (with a suspension of execution of the sentence for three years). As a result of applying the

⁹⁷ It was introduced with the amendment of the Code of Criminal Procedure on May 24th 2016, and it was enforced in June 2018.

⁹⁸ The court of first instance (Tokyo District Court) found the defendant, who was a Director and Executive Vice President and Head of Engineering Headquarters, guilty of being a co-principal in conspiracy, whereas the court of second instance (Tokyo High Court) reversed the judgment of the first instance, finding that the defendant aided and abetted the offence. The final appellate instance (Supreme Court) reversed the judgment of the second instance and upheld the judgment of the first instance, finding that there has been co-principals in conspiracy, stating as follows: "The judgment of the first instance is understood to have determined that there has been a conspiracy with C and others regarding the giving in question, comprehensively considering, based on the background that the defendant's status and position were the Director and Executive Vice President and Head of Engineering Headquarters of the company in question, who was overseeing the thermal power plant construction project, etc. carried out by the company and being its overall responsible person, (i) that there have been the circumstances where the defendant was asked for consolation regarding the giving in question at two meetings arranged by C, who was the Senior Vice President; (ii) the defendant's statements and actions during these meetings, including remarks such as "I suppose there is no other choice," regarding the giving in question; and (iii) the subsequent circumstances that the giving in question was actually performed after the meetings, it can be said that the defendant approved the giving in question at the meetings, and the defendant was involved in the decision-making regarding the performance of the giving in question being in the aforementioned position and status."

Agreement Procedure to this case, the company has not been prosecuted.

(6) Case of giving improper benefits to a Vietnamese public official (Kobe Summary Court, December 2019)

The case: A Vietnamese living in Japan who operated a business that supports clients who have Vietnamese nationality in obtaining status of residence, etc. in Japan gave 150,000 yen in total to a then-existing consul at the Consulate-General of Vietnam in Fukuoka to unlawfully issue the necessary documents for application of Vietnamese residence status. A fine of 500,000 yen was imposed on the defendant in this case.

(7) Case of giving improper benefits to Vietnamese customs officers (Nagoya Summary Court, January 2020)

The case: The President of a local corporation of a company that sells electronic products as its business gave 1.5 billion Vietnamese dong (equivalent to approximately 7.35 million yen) to two senior officials in Hai Phong City Customs Department with the aim of gaining advantages for reducing surcharges by customs violations. A fine of 1,000,000 yen was imposed on the defendant in this case.

(8) Case of giving improper benefits to a Vietnamese public official (Kobe Summary Court, June 2020)

The case: A Vietnamese living in Japan who operated a business that supports clients who have Vietnamese nationality in obtaining status of residence, etc. in Japan gave 100,000 yen and promised to give another 100,000 yen to a consul at the Consulate-General of Vietnam in Osaka to unlawfully issue the necessary documents for submitting marriage registration. A fine of 500,000 yen was imposed on the defendant in the case.

(9) Case of promising to give improper benefits to a Vietnamese public official (Tsu Summary Court, July 2020)

The case: A Vietnamese living in Japan who operated a business providing support services, etc. for clients who have Vietnamese nationality to obtain status of residence in Japan promised to give 140,000 yen in total to a consul at the Consulate-General of Vietnam in Osaka to issue the necessary documents for submitting marriage registration. A fine of 500,000 yen was imposed on the defendant in the case.

(10) Case of giving improper benefits to Vietnamese public officials (Kobe Summary Court, August 2022)

The case: The Representative Director of a chemical company having its head office in Toyama and two Representative Directors of its Vietnamese local corporation gave 80 million dong (equivalent to approximately 390,000 yen) and 700 million dong (equivalent to approximately 3.29 million yen) to officials of the Vietnamese authorities and tax bureau, respectively, with the intention of receiving favorable treatment such as reduction of or exemption from fines for administrative violations or additional tax.

In this case, fines of 1,000,000 yen, 700,000 yen, and 400,000 yen were imposed on the three defendants, respectively.

(11) Case of giving improper benefits to an employee of an embassy (Nagasaki Summary Court, August 2022)

An officer and employee of a company engaged in a business of inviting foreign nationals gave 80,000 yen to an employee of a foreign embassy located in Tokyo for promptly processing certification procedures related to inviting foreign nationals.

In this case, a fine of 300,000 yen was imposed on each of the two defendants, and a fine of 300,000 yen was imposed on the defendant company.

(12) Case of giving improper benefits to Vietnamese customs officers (Tokyo District Court, November 2022)

The Representative Director, the Senior Vice President and Head of Corporate Planning Division of a plastic products sales company having its head office in Tokyo and the Representative of its Vietnamese local corporation gave 2 billion dong (equivalent to approximately 9.8 million yen) and 3 billion dong (equivalent to approximately 13.8 million yen) to employees of the Vietnam Customs Department and Tax Department, respectively, with the intention of receiving favorable treatment such as reduction of or exemption from additional taxes during post-clearance inspections and in tax audits.

In this case, the three defendants were sentenced to imprisonment with work for one year (with a suspension of execution of the sentence for three years), one year and six months (with a suspension of execution of the sentence for three years), and one year and six months (with a suspension of execution of the sentence for three years), respectively. A fine of 25 million yen was imposed on the defendant company.

In sentencing, the court found mitigating circumstances for the defendant company, stating that it had established an independent third-party committee regarding the offenses in question, voluntarily reported to the Public Prosecutors Office to cooperate in clarifying the facts, and reviewed its compliance system to implement measures to prevent recurrence.

CHAPTER 4: OTHER MATTERS OF RELEVANCE

This Chapter provides information on measures taken in Japan with regard to the bribery of foreign public officials other than the Unfair Competition Prevention Act, and relevant information from other countries. The information provided here is also expected to be utilized as basic information, etc. for companies to refer to in examining its measures.

4.1 Relevant Measures Taken to Implement Obligations under the OECD Convention

In implementing the obligations under the OECD Anti-Bribery Convention, statutory measures have been taken through other laws and regulations, etc. in addition to those under the Unfair Competition Prevention Act. The overview of the measures taken in accordance with articles of the OECD Convention is as follows:

(1) Notification (Article 1 of the Convention)

Article 1 of the Convention states the measures should be taken to punish bribery of foreign public officials under their own country laws.

Regarding the measures, the Unfair Competition Prevention Act is listed among the laws which the law for Whistleblower Protection Act⁹⁹ is applied. The Whistleblower Protection Act protects the employee who provided whistle-blowing appropriately from disadvantageous treatment such as dismissal by the Japanese company, so that the offense of bribery of foreign public officials can be discovered.

(2) Confiscation of Proceeds (Article 3 of the Convention) - Money Laundering (Article 7 of the Convention)

Article 3.3 of the Convention sets out, "Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable."

In Japan in addition to monetary sanctions under the dual criminal liability provision in the Unfair Competition Prevention Act mentioned above, Article 2(2)(i)(a) of the "Act on Punishment of Organized Crimes and Control of Crime Proceeds" (hereinafter referred to as the "Organized Crime Punishment Act") sets out that the property which is produced by a criminal act which is punishable by imprisonment with work for a maximum period of four years or more, obtained through the crime act, or acquired as a reward for the criminal act will be considered "proceeds of crime" subject to confiscation under article 13 of the Organized Crime Punishment Act.

Article 21(4)(iv) of the Unfair Competition Prevention Act sets out that a person who have interfered with a bribery to public official shall be punished by imprisonment with work for 10 years or less, so property acquired by bribe-giver's side will be considered "proceeds of crime" and subject to confiscation.

⁹⁹ Please refer to the Whistleblower Protection website for details (https://www.caa.go.jp/policies/policy/consumer_system/whistleblower_protection_system/).

Article 2(2)(iii)(b) of the Organized Crime Punishment Act sets out that the "property given" to a foreign public official, etc. (which is property given to the bribe-taker's side) will be considered "proceeds of crime" subject to confiscation

Article 7 of the Convention sets out that "Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred." Article 10 of the Organized Crime Punishment Act sets out that a person who have concealed proceeds of crime shall be punished.

(3) Accounting (Article 8 of the Convention)

Article 8 of the Convention requires signatories to take such measures as may be necessary regarding inadequate and false entries in books and records, and financial statements, etc. for the purpose of, for example, hiding the giving of an improper benefit to a foreign public official.

In Japan, false entries, etc. are prohibited under the general principles of the "Accounting Principles for Business Enterprises" and Article 5 of the "Ordinance on the Terminology, Forms and Preparation Methods of Financial Statements, etc." In addition, violations may be subject to civil damages under Articles 18, 21, 22 and 24-4 of the Financial Instruments and Exchange Act, or administrative or criminal sanctions under Article 976 of the Companies Act, Articles 10, 24-2, 172, 172-2, 172-3, 172-4, 197, 197-2 and 207 of the Financial Instruments and Exchange Act, and Articles 30, 31-2, 34-21 and 34-21-2 of the Certified Public Accountants Act.

(4) Mutual Legal Assistance (Article 9 of the Convention) and Extradition (Article 10 of the Convention)

Article 9 of the Convention lays down a requirement for mutual legal assistance such as the provision of prompt and effective legal assistance to other signatory countries.

This requirement can adequately be met through the relevant procedures provided in the "Act on International Assistance in Investigation and Other Related Matters" and the "Act on Assistance Based on Commission by Foreign Courts".

Article 10 of the Convention requires that bribery of a foreign public official should be included as an extraditable offense under the internal laws of each country and the criminal extradition treaty of the signatory countries¹⁰⁰, the country's own nationals should be extraditable or, when the country declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national, the case should be submitted to its competent authorities.

¹⁰⁰ According to the Convention, any signatories where the extradition of a criminal is conditional upon the existence of a criminal extradition treaty may deem the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions to be the legal grounds for the extradition of a criminal in connection with the bribery of foreign public officials (Article 10-2 of the Convention).

As the offense of bribery of foreign public officials under the Unfair Competition Prevention Act falls under an offense punishable by imprisonment with work for three years or longer, it is an extraditable offense under the "Act of Extradition".

(5) Monitoring and Follow-Up (Article 12 of the Convention)

Based on the awareness of the need to achieve equivalence among the measures to be taken by signatory countries, Article 12 of the Convention requires cooperation among signatory countries for the purpose of monitoring and promoting the full implementation of the Convention.

In response to this requirement, the OECD Working Group on Bribery in International Business Transactions has been conducting a sequenced series of evaluations after the Convention came into force in February 1999, *i.e.*, the evaluation of the consistency of signatory countries' implementation of the Convention by reference to their relevant laws (Procedure of Self- and Mutual Evaluation - Phase 1), the follow-up evaluation on the issues pointed out in the Phase 1 evaluation (Phase 1 bis), the evaluation of the state of operation (effectiveness) of the relevant laws (Procedure of Self- and Mutual Evaluation - Phase 2), follow up on the Phase 2 evaluation, the evaluation with emphasis on the aspect of enforcement (Procedure of Self- and Mutual Evaluation - Phase 3), follow up on the Phase 3 evaluation, the Phase 4 evaluation (which is related to the main cross-cutting problem in the OECD Working Group on Bribery in International Business Transactions, and the progress about matters pointed out between Phase 1 and Phase 3), and follow up on the Phase 4 evaluation, and thereby it continually monitors the systems and applications of all signatory countries.

For Japan, phases up to the follow-up on the Phase 4 evaluation have been conducted, and the OECD Working Group on Bribery in International Business Transactions adopted and published the Phase 1 report (including the Phase 1 bis evaluation) in May 2002, the Phase 2 report in March 2005, the Phase 2 bis report in June 2006, the Phase 2 follow-up report in October 2007, the Phase 3 report in December 2011, the Phase 3 follow-up report in February 2014, the Phase 4 report in June 2019, and the Phase 4 follow-up report in October 2021¹⁰¹.

4.2 Other Relevant Actions in Japan

In addition to the measures in accordance with the OECD Convention, the Japanese government and governmental agencies have taken actions that contribute to preventing corruption, including prevention of bribery of foreign public officials. Among these actions, the following are of particular relevance.

(1) Actions in relation to Export Credits

¹⁰¹ <https://www.oecd.org/daf/anti-bribery/japan-oecdanti-briberyconvention.htm>

The OECD Export Credit Group adopted the "Action Statement on Bribery and Officially Supported Export Credits" (December 2000, OECD Working Party on Export Credits and Credit Guarantees (OECD-ECG)), which stipulates, among others, that appropriate steps be taken to deter bribery in officially supported export credits and, in the case that bribery was involved in the award of the export contract, appropriate measures be taken. Subsequently, as means to further promote the efforts stipulated in this Action Statement, the OECD Council adopted the "OECD Council Recommendation on Bribery and Officially Supported Export Credits" in December 2006 and later its revised recommendation ("**New OECD Recommendation**"¹⁰²) in March 2019. As a result, agencies of the OECD member countries that are involved in officially supported export credits are required to take equivalent action.

In Japan, Nippon Export and Investment Insurance ("**NEXI**") and Japan Bank for International Cooperation ("**JBIC**") have been making efforts in the following matters with regard to companies applying for an insurance contract and exporters, etc. in compliance with the said New OECD Recommendation since April 2020.

- (i) **NEXI**¹⁰³
 - When applying for insurance (including cases where the policyholder changes after applying for insurance), companies, etc. applying for an insurance contract are required to take an oath that "such companies, their officers, employees and agents involved in the transaction covered by the insurance contract" (hereinafter, "**companies, etc. applying for insurance**") have not previously been and will not be involved in bribery in violation of the Unfair Competition Prevention Act and the Penal Code.
 - When applying for insurance, said companies, etc. are required to declare any of the following matters, if applicable.
 - "Companies, etc. applying for insurance" are currently under prosecution or formally under investigation in any country for a crime in violation of laws, including foreign laws, against bribery.
 - Within a five-year period preceding the application, "companies, etc. applying for insurance" have been convicted in any court for violation of laws against bribery of any country, including foreign laws, been subject to equivalent measures which include deferred prosecution and administrative punishment but are not limited to them, or been found as part of a publicly-available arbitral award to have engaged in bribery
 - If the above matters are applicable, more strict due diligence than usual, which is defined as Enhanced Due Diligence by the New OECD Recommendation, is

¹⁰² The New OECD Recommendation covers the bribery of foreign and domestic public officials and bribery between private sectors if the bribery between private sectors involved in export contracts and other equivalent contracts is prohibited under national laws. Also, bribers may include not only exporters and companies which apply for insurance, but also borrowers and other relevant parties.

¹⁰³ <https://www.nexi.go.jp/international/measures/index.html>

conducted and it will be confirmed that appropriate internal corrective measures and preventive measures are taken and maintained, and that rules are documented and so on because the risks associated with bribery which is involved in the transaction covered by an insurance contract need to be confirmed more carefully.

- If there is doubt that a transaction covered by an insurance contract is involved in bribery prior to its conclusion, its conclusion shall be withheld, and if it is later found that "companies, etc. applying for insurance" are indeed involved in bribery, then the transaction is not underwritten.
- If it is concluded that "companies, etc. applying for insurance" is involved in bribery after the conclusion of an insurance contract, appropriate measures shall be taken, such as rejection of insurance claims, return of paid insurance or cancellation of the insurance contract.
- (ii) **JBIC**¹⁰⁴
 - In considering loan, etc., request exporters to take an oath or get confirmation about the following matters:
 - Exporters and governments, companies, etc. to which JBIC extends loans, etc. and the representatives, executives, agents, employees and other workers of exporters and governments and companies, etc. to which JBIC extends loans, etc. ("**exporters and other relevant parties**") have not previously been and will not be involved in the bribery of foreign public officials and domestic public officials against laws and regulations of their countries (for exporters in Japan, Article 18 (Prohibition against the Provision of Wrongful Gains to Foreign Public Officials) of the Unfair Competition Prevention Act (Act No. 47 of 1993) and Article 198 (Active Bribery) of the Penal Code (Act No. 45 of 1907) (including cases deemed applicable under the provisions of other laws)) with regard to this agreement such as export agreements or sales agreements.
 - Exporters and governments, companies, etc. to which JBIC extends loans, etc. as well as exporters and other relevant parties are required to provide any information necessary for separate due diligence if they have been indicted as suspects of the bribery involved in their domestic and foreign business, if they have been subject to investigation as far as they know, if they have been convicted or been subject to equivalent measures (including punishment based on confession/self-declaration and plea bargaining) within a five-year period preceding the application or if they have been found as part of a publicly-available arbitral award to have engaged in bribery.
 - Exporters and governments, companies, etc. to which JBIC extends loans, etc., as well as exporters and other relevant parties are not on the debarment lists of

¹⁰⁴ <https://www.jbic.go.jp/ja/support-menu/export/prevention.html>

the Multilateral Development Banks¹⁰⁵.

- Any commission or fee payments for agents of exporters and governments, companies, etc. to which JBIC extends loans, etc. are justifiable in terms of purpose and amount, etc., now and in the future.
 - If requested by JBIC, submit relevant documents to the extent they can be disclosed and cooperate with JBIC's investigation.
- In cases where it is determined that bribery is suspected in the transaction on the agreement as a result of the aforementioned confirmation, appropriate measures are taken, for example, more strict due diligence than usual, which is defined as Enhanced Due Diligence by New OECD recommendation, is conducted .
- If it is recognized that they have been involved in the bribery concerning the agreements, take the following action:
(Before execution of loan) Appropriate measures such as provision of information to law enforcement authorities, the refusal of loan, suspension of loan and cancellation of the undrawn loan amounts are taken.
(After execution of loan) Appropriate measures like provision of information to law enforcement authorities and mandatory payment before maturity are taken.

(2) Actions in relation to ODA (Official Development Assistance)

The "Development Cooperation Charter" which was decided by the Cabinet in June 2023, also refers to "Prevention of fraud and corruption" regarding development cooperation as one of the "implementation principles for ensuring the appropriateness of development cooperation", as shown below. Bribery of foreign public officials is one of the key items in that policy.

III. Implementation

2. Implementation principles for ensuring the appropriateness of development cooperation

(7) Preventing fraud and corruption

It is necessary to prevent fraud and corruption in implementing development cooperation. While taking measures to encourage establishment of a compliance system by bid winners, Japan will work with recipient countries to create an environment conducive to preventing fraud and corruption, including the strengthening of governance in these countries. In this context, Japan will ensure adherence to appropriate procedures and strive to ensure transparency in the implementation process.

The government and relevant governmental agencies, including the Ministry of Foreign Affairs of Japan and Japan International Cooperation Agency (JICA) are committed to

¹⁰⁵ Refers to the debarment lists published by the World Bank Group, the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, and the Inter-American Development Bank.

taking disciplinary actions against persons involved in bribery of foreign public officials in relation with development cooperation, on a case-by-case basis within a predetermined scope.

With the implementation of these measures, attention is paid so that no bribery of foreign public officials should take place in connection with development cooperation by the Japanese government.

[Reference 1]

"Toward Preventing a Recurrence of Corruption Related to Official Development Assistance (ODA)" (September 2009)

As a result of the occurrence of cases of giving improper benefits in relation with a yen-loan-financed project¹⁰⁶, the following main proposals were made by the "Study Panel for Preventing a Recurrence of ODA-Related Corruption"¹⁰⁷ comprised of outside specialists, set up by the Minister of Foreign Affairs:

1. Efforts that have been taken by the Ministry of Foreign Affairs of Japan and JICA
 - (i) Strengthening rules on punitive measures for businesses
 - (ii) Making good use of points of contact for information on corruption
 - (iii) More involvement of JICA in the selection and contract processes
 - (iv) Closer monitoring of ODA projects
2. Measures for firms
 - (i) Recommendations for enhancing compliance
 - (ii) Recommendations for familiarizing firms with international competition standards
3. Measures for recipient countries
 - (i) ODA policy for recipient countries where a corruption case has occurred
 - (ii) Recommendations for enhancing governance
 - (iii) Recommendations for capacity building
4. Efforts towards an International Framework
5. Follow-up on Recommendations

[Reference 2]

"Guidelines/Rules on measures in Ministry of Foreign Affairs and JICA and bribery of foreign public officials"

MOFA and JICA have taken measures against fraudulent persons or entities to be excluded from approval of the contracts or bid participation, which is based on "Guidelines on measures against Persons, etc. Engaged in Fraudulent Practices in Japan's ODA Projects", "Rules on Measures against Fraudulent Practices, etc. in Projects of ODA loan and Grant Aid" and "Rules on Measures against Fraudulent Practices in Contracts Awarded by JICA".

¹⁰⁶ See Chapter 3.4, Section (2)

¹⁰⁷ https://www.mofa.go.jp/mofaj/gaiko/oda/seisaku/f_boushi.html

In February 2011, MOFA extended the upper limit of the period of measures involved in the bribery of foreign public officials in the Guidelines from 12 months to 36 months as a part of actions with aim of strengthening rules on punitive measures for businesses in response to the recommendations by the Study Panel mentioned in the above Reference 1.

[Reference 3]

"Anti-Corruption in Official Development Assistance (ODA) Projects (Strengthening of Preventive Measures)" (October 2014)¹⁰⁸

As a result of revelation of cases of giving improper benefits surrounding ODA projects in Indonesia, Vietnam and Uzbekistan¹⁰⁹, it has been decided to take the following actions with an aim to further strengthening the foregoing preventive measures in order to inhibit similar cases from happening in the future:

1. Improvement of the Consultation Desk on Anti-Corruption
 - (i) Improvement of "consultation" function and online receipt of reports in English and in the local language;
 - (ii) Introduction of a system whereby companies that voluntarily report fraudulent practices can benefit from a reduction in or exemption from the measures of exclusion from bidding for a certain period
2. Further strengthening of the Measures against companies engaged in fraudulent practices;
3. "JICA Anti-Corruption Guidance"¹¹⁰;
4. Measures for strengthening compliance by companies;
5. Further encouragement to the government of partner countries; and
6. Strengthening of partner countries' system of governance and support for the improvement of their capabilities to prevent fraud and corruption

(3) The Agreement Procedure (Article 350-2 of the Code of Criminal Procedure)

The Agreement Procedure was introduced by the amendment of the Code of Criminal Procedure in May 2016, which came into force in June 2018.

An offense under the Unfair Competition Prevention Act is an offense subject to the Agreement Procedure. Under the Agreement Procedure, a public prosecutor may enter an agreement with the suspect/defendant upon consent of his/her counsel with regard to offenses under the Unfair Competition Prevention Act. The Agreement Procedure stipulates that the suspect/defendant cooperates the prosecutor with regard to the criminal case against the third person by making statements, in return for the favorable treatment by the prosecutor such as non-prosecution, seeking lighter sentence to the court with regard to the criminal case against the suspect/defendant.

¹⁰⁸ https://www.mofa.go.jp/mofaj/gaiko/oda/kaikaku/f_boshi/201410_kyouka.html

¹⁰⁹ See Chapter 3.4, Section (4)

¹¹⁰ <https://www2.jica.go.jp/ja/odainfo/pdf/guidance.pdf>

4.3 Trends in Foreign Countries

(1) Legal Systems and State of Enforcement in Foreign Countries

As legal systems of and the state of enforcement in signatory countries to the Convention are followed up on by the OECD as required, information on countries of interest can be obtained via the OECD¹¹¹.

(2) International Trends in Anti-Corruption

In June 2010, G20 leaders agreed to establish a Working Group to make comprehensive recommendations for consideration on how to continue to make practical and valuable contributions to international efforts to combat corruption and lead by example¹¹². In November of the same year, G20 leaders adopted the “Anti-Corruption Action Plan¹¹³.” Subsequently, within international frameworks such as the G20 and the Indo-Pacific Economic Framework for Prosperity (IPEF), recommendations to strengthen efforts against corruption have been repeatedly made.

G20 BALI LEADERS’ DECLARATION (November 15, 2022)¹¹⁴

(Excerpt)

We recall our commitments and call on all countries to criminalise bribery, including bribery of foreign public officials, and effectively prevent, combat, detect, investigate, prosecute and sanction bribery. We will further work to strengthen international cooperation and legal frameworks to combat economic crimes including corruption related to organized crime and money laundering, including, on a voluntary basis, through existing networks and initiatives such as GlobeE and the G20 Denial of Entry Experts Network. We will share information on our actions towards criminalising foreign bribery and enforcing foreign bribery legislation in line with Article 16 of UNCAC, and look forward to enlarging participation to the OECD Anti-Bribery Convention, as appropriate.

MINISTERIAL STATEMENT FOR PILLAR IV OF THE INDO-PACIFIC ECONOMIC FRAMEWORK FOR PROSPERITY (September 9, 2022)¹¹⁵

(Excerpt)

Anti-Corruption. We intend to effectively implement and accelerate progress on the United

¹¹¹ For the results of the peer review on the implementation of the Convention,, refer to: <https://www.oecd.org/investment/countryreportsontheimplementationoftheoecdanti-briberyconvention.html>
For the implementation status of each country, refer to: <https://www.oecd.org/corruption/data-on-enforcement-of-the-anti-bribery-convention.htm>

¹¹² Preliminary Japanese translation of the G20 Toronto Summit Declaration is available at: https://www.mofa.go.jp/mofaj/gaiko/g20/toronto2010/sengen_ky.html

¹¹³ Preliminary Japanese translation of the “Action Plan” is available at: <https://www.mofa.go.jp/mofaj/gaiko/g20/seoul2010/annex3.html>

¹¹⁴ Preliminary Japanese translation of the Declaration is available at: <https://www.mofa.go.jp/mofaj/files/100422034.pdf>

¹¹⁵ Preliminary Japanese translation of the Statement is available at: <https://www.mofa.go.jp/mofaj/files/100399487.pdf>

Nations Convention against Corruption (UNCAC), standards of the Financial Action Task Force (FATF), and as applicable, the OECD Anti-Bribery Convention. We aim to pursue provisions and initiatives to: prevent, combat, and sanction domestic and foreign bribery and other related corruption offenses, consistent with the UNCAC; strengthen measures to identify, trace, and recover proceeds of crime; strengthen anti-money laundering and countering the financing of terrorism frameworks and their enforcement, including enhancing transparency of real estate transactions and beneficial ownership of legal persons consistent with the FATF standards; promote transparency and integrity in government procurement practices; encourage the private sector to implement internal controls, ethics, and anti-corruption compliance programs; establish and maintain systems for confidential and protected domestic reporting on corruption offenses; promote integrity of public officials; prevent corruption that undermines labor rights based on the ILO Declaration on Fundamental Principles and Rights at Work, which the Partners have adopted; strengthen transparency and implementation of existing anti-corruption review mechanisms; and promote, within our domestic legal frameworks, the participation of all stakeholders, including individuals and groups outside the public sector, in the fight against corruption, consistent with the UNCAC.

(3) Guidelines Issued by International Organizations and Overseas Authorities

The following are examples of guidelines and other documents formulated by international organizations and overseas authorities with regard to the establishment of companies' Preventive Systems against bribery of foreign public officials.

1. Good Practice Guidance on Internal Controls, Ethics and Compliance¹¹⁶
 - Adopted in 2010 as Annex II to the “OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions” and revised in 2021.
 - Indicates that effective internal controls, ethics, and compliance programs or measures should be developed on the basis of a risk assessment addressing the foreign bribery risks facing the company (such as its geographical and industrial sector of operation, and regulatory environment, potential clients and business partners, transactions with foreign governments, and use of third parties), and that such risks should be regularly monitored, re-assessed, and taken into account as necessary, to determine the allocation of compliance resources.
 - Presents 16 good practices for ensuring effective internal controls, ethics, and compliance programs or measures.
2. Anti-Corruption Ethics and Compliance Handbook for Business¹¹⁷
 - Jointly developed and published by the OECD, the United Nations Office on Drugs and Crime (UNODC), and the World Bank.
 - Compiles the major existing international anti-corruption guidance into a single

¹¹⁶ <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378>

¹¹⁷ <https://www.unodc.org/documents/corruption/Publications/2013/Anti-CorruptionEthicsComplianceHandbook.pdf>

reference document and includes case studies of companies that have actually applied them.

3. A Guide for Anti-Corruption Risk Assessment¹¹⁸
 - Developed and published by the United Nations Global Compact¹¹⁹.
 - Provides a guide for how to implement risk assessment—a key element of an effective anti-corruption program—consisting of six steps: (i) establish the process (ii) identify the risks (iii) rate the risks, (iv) identify mitigating controls, (v) calculate remaining residual risk, and (vi) develop an action plan.

4. A Resource Guide to the U.S. Foreign Corrupt Practices Act. Second Edition¹²⁰
 - A resource guide to the interpretation, etc. of the U.S. Foreign Corrupt Practices Act (U.S FCPA).
 - As some of the basic elements the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) consider when evaluating compliance programs, presents the following: commitment from senior management and a clearly articulated policy against corruption; code of conduct and compliance policies and procedures; oversight, autonomy, and resources; risk assessment; training and continuing advice; incentives and disciplinary measures; third-party due diligence and payments; confidential reporting and internal investigation; continuous improvement; pre-acquisition due diligence and post-acquisition integration; and investigation, analysis, and remediation of misconduct.

5. The Bribery Act 2010 Guidance¹²¹
 - Guidance on the interpretation, etc. of the UK Bribery Act 2010.
 - As the six principles for measures that commercial organizations seeking to prevent bribery can put in place, presents (i) proportionate procedures, (ii) top-level commitment, (iii) risk assessment, (iv) due diligence, (v) communication (including training), and (vi) monitoring and review.

END OF THE DOCUMENT.

¹¹⁸ https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FAnti-Corruption%2FRiskAssessmentGuide.pdf

¹¹⁹ The initiative proposed by then-UN Secretary-General Kofi Atta Annan at the 1999 World Economic Forum, officially launched in 2000. Companies and organizations that join the United Nations Global Compact are required to endorse ten principles concerning the protection of human rights, the elimination of forced and compulsory labor, environmental measures, and the prevention of corruption and to continue their efforts to realize these principles under the commitment of their top leadership.

¹²⁰ The basic elements to be considered when evaluating compliance programs are described on pages 54 through 68: <https://www.justice.gov/criminal-fraud/file/1292051/download>

¹²¹ The six principles are described on pages 20 through 31: <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>