INTRODUCTORY REMARKS

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It is my pleasure to open the discussions at the Fourth Regional Seminar on Good Governance for Southeast Asian Countries. This year's seminar topic, "Securing Protection and Cooperation of Witnesses and Whistle-Blowers", has two components to its subject matter: measures to secure protection, and measures to secure cooperation. The topic also mentions two groups of people as covered by these measures: witnesses and whistle-blowers.

As an introduction to the seminar, I will first provide a quick overview of the topic, and then proceed to explain the relevant laws and practices in Japan.

I. SECURING PROTECTION OF WITNESSES

Criminal justice systems rely upon witnesses to provide information and testimony necessary to detect, investigate, and prosecute criminal activity, and to convict those who are responsible for it. The ability of witnesses to fully cooperate and testify without fear is, therefore, a prerequisite for the systems to function properly and achieve their intended goals.

This is particularly true in the investigation and prosecution of organized crime and terrorist groups, for witness intimidation and retaliation are prevalent elements of their modus operandi. The same can be said about large-scale corruption. Corrupt leaders of government, bribe-taking officials, and successful businesspersons involved in the scheme, all of them powerful figures, will take advantage of whatever means are at their disposal to discourage witnesses from coming forward and cooperating with the authorities.

Against such a backdrop, Article 24 of the United Nations Convention against Transnational Organized Crime (UNTOC) and Article 32 of the United Nations Convention against Corruption (UNCAC) mandate States Parties to take appropriate measures to provide effective protection to witnesses. The relevant provisions are almost identical, and Article 32, paragraph 1 of the UNCAC reads as follows:

> Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

Witness protection in the broad sense includes the following:

(1) witness assistance and support;[1]
(2) police protection;
(3) procedural protection[2] and;
(4) witness protection programmes.[3]

We invited Ms Karen Kramer, a Senior Expert at the United Nations Office on Drugs and Crime, to speak to you about witness protection generally. She will provide you with an excellent overview including

1 "Witness assistance and support" refers to measures designed to reduce the psychological burden of witnesses and to avoid secondary victimization.
2 "Procedural protection" refers to procedural measures designed to allow witnesses to testify free of intimidation and fear.
3 "Witness protection programme" refers to a formally established programme that provides for the relocation and change of identity of the witness.

the background, objectives, and key features of witness protection programmes.

II. SECURING COOPERATION FROM WITNESSES

One important fact of life, known to all investigators and prosecutors, is that evidence that most persuasively and effectively establishes criminality often comes from tainted sources.

As criminals know much more about criminal activities and conspiracies than law-abiding citizens do, accomplice testimony plays a vital role in investigation and prosecution of organized crime and corruption. When the target of investigation and prosecution is the leader or his or her close associate within the group, testimony from accomplices and insiders is not just useful: it may be *the only means available to connect the most culpable* to criminal activity that can be proven in a court of law.

In order to encourage and facilitate the cooperation of such people, a number of countries allow authorities to offer leniency or immunity in exchange for cooperation, information, and truthful testimony. There is a growing recognition of the effectiveness and usefulness of such practices, which is reflected in Article 26, paragraph 1-3 of UNTOC and Article 37, paragraph 1-3 of UNCAC. They are similarly phrased, and the latter reads in relevant part as follows:

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence … to supply information useful to competent authorities for investigative and evidentiary purposes…;

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence …;

3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence….

In some countries, notably the United States, plea bargaining and cooperation plea agreements between prosecutors and witnesses/defendants are widely utilized. You will hear from Mr. Courtney, a United States Department of Justice attaché to the U.S. Embassy in Manila, how cooperation plea agreements operate in the United States.

In other countries, including Japan, such practices are still controversial. You will hear from Ms. Zimmermann, a Legal Desk Officer working for the German Federal Ministry of Justice, about the policy discussions that took place in Germany on the subject, and how they were incorporated into a recent law change regarding Germany's so-called crown witness system.

One thing to bear in mind: while witnesses cooperating under promises of leniency are one of the main categories of participants in witness protection programmes, a fundamental difference between the two measures should not be overlooked. Leniency is offered in exchange for the witness's cooperation, but protection is not: it simply removes obstacles to full cooperation, and it should not be seen as a reward.

III. WHISTLE-BLOWER PROTECTION

"Whistle-blower" is not a precisely defined legal term. The UNCAC does not use the term. Instead, it refers to "any person who reports in good faith and on reasonable grounds to the competent authorities any

facts concerning offences established in accordance with the Convention (Article 33)."

Whistle-blowers do not necessarily become witnesses, but they play an important role of alerting the authorities to wrongful acts that would have otherwise remained unnoticed. For that reason, the UNCAC requires States Parties to "consider" incorporating appropriate measures to protect reporting persons from unjustified treatment.

IV. JAPANESE LAWS AND PRACTICES

A. Witness Protection in General

Regular police and other criminal justice authorities, notably the public prosecutors office, provide witness protection in Japan. There is no specialized agency responsible for the matter. Police protection is provided on a case-by-case basis and may be enhanced in accordance with the risk involved.

B. Witness Assistance and Support

Various forms of witness assistance and support – measures designed to reduce psychological burdens and avoid secondary victimization of witnesses – are provided especially for victim-witnesses, by both the police and public prosecutors offices.

The first step in the provision of assistance is to inform the witness of the details of the criminal procedure and to explain what to expect during the investigation and upcoming trials. In order to facilitate the understanding of the process, the public prosecutors office has prepared a 54-page easy-to-read colour booklet entitled For Victims of Crime.[4] Other assistance given by the prosecutors office includes accompanying witnesses to courthouses and introducing other organizations that can provide services, such as psychological and financial support, not within the competency of the prosecutors offices

C. Procedural Protection

The Japanese Code of Criminal Procedure and court rules provide for a wide variety of procedural measures designed to ensure that witnesses testify free of intimidation and fear:

(1) Limiting disclosure of a witness's personal information;
(2) Presence of accompanying persons for psychological support;
(3) Shielding of witnesses;
(4) Testimony via videoconferencing;
(5) Removal of defendant from courtroom;
(6) Removal of spectators from courtroom;
(7) Use of pretrial statements.

As these measures affect the defendant's right to fair and public trial and the right to confront witnesses, a careful balancing between competing interests – witness protection and the defendant's procedural rights – is essential. In Japanese law, such a balancing is reflected in the measures available and the conditions under which they may be applied.

1. Limiting Disclosure of a Witness's Personal Information

During preparation for trial and as part of pretrial discovery, prosecutors are required to notify the defence counsel of the names and addresses of their witnesses. Likewise, the prosecutor's evidence, which may contain personal information of witnesses, will be disclosed. While such information cannot be suppressed entirely, the Code allows for the possibility to delay or set appropriate conditions on the disclosure in order to protect the witnesses.

4 The contents of the booklet (English version) can be accessed at the following link: http://www.moj.go.jp/ENGLISH/CRAB/crab-02.html

2. Presence of Accompanying Persons for Psychological Support

The court, after hearing the opinions of the prosecutor and of the defendant or his/her counsel, may allow any witness to be accompanied by an appropriate person during the testimony if the witness is likely to feel extreme anxiety or tension. Accompanying persons are usually a family member, a psychological counsellor, or a police officer who has been providing assistance from an early stage in the investigation. The role of the accompanying person is to quietly sit by and provide mental support, and they are prohibited from disturbing the examination of witnesses or taking action that may unduly influence the testimony.

3. Shielding of Witnesses

The court, after hearing the opinions of the prosecutor and of the defendant or his or her counsel, may order that the witness be shielded from the defendant and/or from the spectators. Shielding can avoid stressful face-to-face confrontation with the defendant and help protect the witness's identity. In practice, shielding is done by setting up a screen.

There are two types of shielding: shielding from the defendant and from the spectators. As the former affects the defendant's right of confrontation, it is only available when the defence counsel is present in court. The screen will be set up in such a way that the counsel can still see the witness and observe his or her demeanour.

4. Testimony via Videoconferencing

Article 24, paragraph 2(b) of the UNTOC and Article 32, paragraph 2(b) of the UNCAC mention rules of evidence that allow testimony to be given through video link or other communication technology. The courts in Japan, after hearing the opinions of the prosecutor and of the defendant or his or her counsel, may place the witness in a different room and have him or her testify via simultaneous two-way video and audio transmissions. This option is available for (1) victim-witnesses of certain sex crimes and (2) witnesses who may feel pressure and have their peace of mind seriously harmed, if examined under ordinary procedure.

Accompanying persons, shielding, and videoconference technology may be used together.

5. Removal of the Defendant from the Courtroom

When the presence of the defendant creates pressure and makes the witness unable to testify fully, upon hearing the opinion the prosecutor and the defence counsel, the court may temporarily remove the defendant from the courtroom. In order to protect the rights of the defendant, this procedure is available only when the defence counsel is present, and after the testimony, the court is required to call the defendant back, inform him or her of the content of the testimony, and grant an opportunity to place further questions to the witness.

6. Removal of Spectators

When the presence of a particular person makes the witness unable to testify fully, the court may exclude that person from the courtroom. As this does not directly affect the defendant's procedural rights, the requirements and conditions are less strict than those that apply to removal of defendants.

7. Use of Pretrial Statements

Under the Japanese Code of Criminal Procedure, hearsay (pretrial statements of witnesses are hearsay) is generally inadmissible. However the Code recognizes several exceptions, and statements taken by a public prosecutor and signed by the witness are admissible if one of the following conditions are met:

(1) the witness is unavailable to testify at trial; or
(2) the witness takes the stand, gives different testimony, and the prior statement before a prosecutor is considered more trustworthy.

While these hearsay exceptions do not directly protect the witnesses, they indirectly do so by discouraging criminals from attempting to kill, harm, or otherwise threaten witnesses, in the hope of making them unavailable or influencing their testimony.[5]

5 Note that witness tampering usually justifies a finding that the pretrial statement is more trustworthy than the trial testimony.

8. Some Statistics

The following table shows the number of witnesses for whom procedural protection measures have been applied (source: Supreme Court of Japan). There has been a steady growth in their usage since their introduction in 2000. They are not just potential measures on the statute books but are a real and utilized part of Japan's current criminal practice.M

	2000	2001	2002	2003	2004	2005	2006	2007	2008	Total
Accompanying Persons	10	38	68	51	87	68	77	70	86	555
Shielding	104	847	912	1,062	1,074	1,103	1,233	1,222	1,007	8,564
Testimony via Video-link	–	67	122	136	217	210	234	224	202	1,412

D. Witness Protection Programmes

Currently, there is no formally established covert programme that provides for relocation and change of identity of witnesses.

E. Measures to Secure Cooperation from Witnesses

Persons who testify truthfully against their accomplices usually have already made truthful admissions of their wrongdoing and have accepted responsibility for it. Naturally, these admissions will be reflected in the prosecutor's charging decision and sentencing recommendations as well as the sentencing decision by the court.

Beyond that, however, Japan is a "Land without Plea-bargaining." There is no immunity statute or crown witness system, either. Despite some powerful arguments in favour of introducing such measures, they have been controversial and have not materialized so far.

F. Whistle-blower Protection

The Whistleblower Protection Act was enacted in 2004. The Act protects persons reporting certain prescribed wrongdoing (called "Reportable Facts") from unjustified dismissal and disadvantageous treatment such as demotion and salary cuts.

Reportable Facts include criminal conduct and statutory violations relating to protection of life, body, or property, consumer interest, environmental preservation, and ensuring fair competition. The scope of the act is not limited to wrongdoing within government but extends to whistle-blowing within the private sector.

Although the Act is not without its critics – for example, it is often pointed out that violation of tax laws and election laws are not included in Reportable Facts – it is expected to promote compliance with law generally, and to contribute to the prevention and detection of various forms of wrongdoing.

V. CONCLUSION

While the need to protect witnesses is universal, how best to achieve it differs from country to country. It has to be determined in accordance with each country's legal tradition, society and culture, available resources, levels and types of criminality, and frequency of violence against witnesses. For that purpose, learning from other countries' experiences and looking into emerging international standards and good practices should be particularly useful. This Seminar is intended as an opportunity to share experiences and exchange ideas, and I hope it will contribute to developing a common understanding on this important subject of witness protection.