

Japan

I. Brief Introduction to the Legal System of Japan

The sources of law in Japan are constitutional law, statutory law, and administrative regulations. Japan is not a common law country, but judicial precedents are very important in interpreting statutory laws and regulations. As noted in II, the Unfair Competition Prevention Law (“UCPL”) criminalizes the bribery of foreign public officials (see IV-A) and a government ordinance defines “foreign public official” as provided for in the UCPL (see IV-B).

In Japan, police and public prosecutors are in charge of the criminal investigation of the bribery of foreign public officials. However, police and public prosecutors face practical difficulties in conducting the criminal investigation of foreign bribery cases because both the briber and the public official take care to leave no trace of the crime. Since foreign bribery is frequently committed abroad and most of the important evidence is located in the foreign country, police and public prosecutors must make extensive use of mutual legal assistance, but it is not always easy to collect enough evidence to establish the guilt of a bribe-giver. Japanese police and public prosecutors cannot resort to investigation measures such as wiretapping¹ and grants of immunity from prosecution.

After police and public prosecutor have conducted the necessary criminal investigation, the public prosecutor has wide discretion to decide whether or not he/she will prosecute the bribe-giver. If the public prosecutor prosecutes the bribe-giver, the defendant faces a trial conducted by judges². A Japanese criminal trial is based upon an adversarial system in which the public prosecutor must submit enough evidence to establish the guilt of the defendant and the counsel represents and advocates on behalf of the defendant. There is no special resolution mechanism available to the parties, such as plea bargaining, and judges make the decision as to whether or not the defendant is guilty and, if he/she is found to be guilty, what the appropriate punishment is for the defendant. Public prosecutors tend to

¹ The Act on Wiretapping for Criminal Investigations was enacted in 1999, but this act authorizes investigators to use wiretapping only in criminal investigations of drug-related crimes, gun-related crimes, mass smuggling of illegal immigrants, and organized homicide.

² Japan introduced quasi-jury system in 2009 in which both professional judges and lay judges decide whether the defendant is guilty or not, but this system only applies to certain serious crimes and foreign bribery cases are tried only by professional judges.

prosecute suspects only when they think it highly probable that the court will find the suspects guilty and, as a result, the conviction rate exceeds 99% in Japanese criminal procedure³.

³ According to the "White paper on crime 2010" published by the Ministry of Justice of Japan, the number of persons finally judged as not guilty in 2009 was 75, accounting for 0.01% of the total number of persons finally judged. (http://hakusyo1.moj.go.jp/en/59/nfm/n_59_2_2_3_1_0.html)

II. Japan's Anticorruption Law

Japan is a signatory country to the OECD Convention and criminalized the bribery of foreign public officials by revising the UCPL in 1998 (see IV-A).

Paragraph 1 of Article 18 of the UCPL provides that "No person shall give, offer or promise any pecuniary or other advantage, to a foreign public official, in order that the official act or refrain from acting in relation to the performance of official duties, or in order that the official, using his position, exert pressure upon another foreign official so as to cause him to act or refrain from acting in relation to the performance of official duties, in order to obtain or retain improper business advantage in the conduct of international business."

The Ministry of Economy, Trade and Industry of Japan issued *Guidelines to Prevent the Bribery of Foreign Public Officials* ("Guidelines") (see IV-C) which provides (i) interpretation of the elements of the offense of bribery of foreign public officials under the UCPL, (ii) example cases of the bribery of foreign public officials, and (iii) an effective anticorruption compliance program that Japanese companies should introduce to prevent the bribery of foreign public officials.

The following details the important elements of the offense of bribery of foreign public officials under the UCPL.

Scope of Application

(i) Natural person

If a person commits the whole or part of the acts which constitute the bribery of foreign public officials in Japan, the UCPL is applicable irrespective of the nationality of the briber. If a Japanese national commits acts which constitute the bribery of foreign public officials outside of Japan, the UCPL will also apply to the person.

(ii) Legal entity

If a representative, agent, employee, or any other staff member of a legal entity has committed a violation of the UCPL in connection with an operation of the legal entity⁴, the legal entity is criminally liable under the UCPL.

Foreign Public Official

The UCPL is applicable to the following five categories of foreign public officials:

- (i) Persons who engage in public services for national or local foreign governments
- (ii) Persons who engage in services for an agency affiliated with a foreign national government
- (iii) Persons who engage in services for a public enterprise which is given special privileges by a foreign national government etc.
- (iv) Persons who engage in public services for an international organization
- (v) Persons who exercise a public function which falls under the authorized competence of a foreign national government etc. and is delegated by them.

Improper business advantage

According to the Guidelines, "improper business advantage" is interpreted as referring to (i) any advantage obtained by, or through, the giving of an advantage to a foreign public official, and having the foreign public official exert his discretion in a manner favorable to the advantage giver, or (ii) any advantage obtained by, or through, the giving of an advantage to a foreign public official, and having the foreign public official commit an illegal act.

The Guidelines illustrate the element of "in the conduct of international business" by the following examples:

- (i) 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.
- (ii) A Japanese-run construction company located in Country B bribes a public official of Country B in Japan with the intention of winning an order for repair work for the embassy of Country B in Tokyo.

⁴ The criminal responsibility of a legal entity under the UCPL is applicable to a foreign company which develops businesses in Japan, because Article 823 of the Corporate Code provides that, "In respect of the application of other laws, a foreign company will be considered to be a company organized in Japan that is equivalent or most similar thereto."

Facilitation payments

There is no exception for facilitation payments in the UCPL. The Guidelines provide that a small facilitation payment shall be punishable if it is given “to obtain or retain improper business advantage in the conduct of international business.”

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Punishment

A person who gives an improper advantage to a foreign public official in violation of the UCPL shall be subject to imprisonment for a period not exceeding five years or for a fine not exceeding 5,000,000 yen (Article 21-(2) (vi) of the UCPL).

If a representative, agent, employee or any other staff member of a legal entity has committed a violation in connection with an operation of the legal entity, a fine not exceeding 300,000,000 yen will be imposed on the legal entity (Article 22 of the UCPL).

Even if a bribe-giver is convicted of foreign bribery in the foreign country, the bribe-giver may be punishable for a violation of the UCPL in Japan. If the bribe-giver has actually served a sentence in the foreign country, the execution of the sentence in Japan will be mitigated or discharged.

The statute of limitations applicable to the bribery of foreign public officials is five years, but does not run during the period in which the offender is outside of Japan.

Compliance

The Guidelines encourage companies who are involved with international business transactions to improve the effectiveness of their internal control procedures, including the development of a compliance program, to prevent the bribery of foreign public officials and illustrate desirable methodologies for internal control as follows.

- (1) Defining Basic Policies and Establishing a Compliance Program
 - (i) Definition of Basic Policies
 - (ii) Establishment of a Compliance Program
- (2) Establishing Organizational Structure
 - (i) Involvement of the Highest Corporate Officer
 - (ii) Appointment of a Compliance Supervisor
 - (iii) Establishment of an Internal Consultation Desk and a Reporting Desk, etc.
 - (iv) Development of a Follow-Up Structure After Suspicion etc. of Bribery Is Brought to Light
- (3) Conducting the Promotional and Educational Activities in the Company
 - (i) Implementation of Promotional Activities
 - (ii) Implementation of Educational Activities
- (4) Regular Audits
- (5) Review by the Chief Executives

III. Assessment

OECD evaluation in 2006

In 2006, the OECD Working Group on Bribery conducted the Phase *2bis* evaluation of Japan's implementation of the Convention and reported that "the Japanese authorities have not made a serious effort to act on [the Working Group's] Phase 2 Recommendation to assess as a priority the legal and procedural impediments to the effective investigation and prosecution of the offence of bribing a foreign public official, despite the continued absence of formal investigations and prosecutions."⁵

⁵ OECD Working Group on Bribery, "Japan: Phase *2bis* Report on the Application of the Convention On Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions" (<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/37018673.pdf>).

Cases of the bribery of foreign public official after OECD evaluation

After receiving this harsh evaluation from the Working Group, the Japanese investigative authorities actively conducted the criminal investigation of foreign bribery cases and prosecuted two cases. The cases were as follows.

(i) Case of offering an illegal profit to Filipino public officials (March 2007)

Two employees of a local subsidiary of a major Japanese electrical installation company in the Philippines invited two senior Filipino officials of the National Bureau of Investigation to Japan and offered them golf club sets (equivalent to approximately ¥800,000) in order to conclude the contract for a fingerprint recognition program promptly. The two defendants were fined ¥500,000 and ¥200,000, respectively, in March 2007.

(ii) Case of giving an illegal profit to a Vietnamese public official (March 2009)

Four employees of a Japanese construction consulting company paid cumulative bribes of approximately \$820,000 to a Vietnamese senior official in order to obtain business related to a highway construction project in Vietnam. The four defendants were sentenced, respectfully, to imprisonment for two and a half years, two years, 18 months and 20 months (each with a suspended sentence of three years), and the defendant company was fined ¥70,000,000.

OECD evaluation in 2011

In 2011, the Working Group conducted the Phase 3 evaluation of Japan's implementation of the Convention and again presented a harsh evaluation, stating that "Japan has obtained convictions for foreign bribery in two cases since the foreign bribery offence came into force in Japan in 1999. Nevertheless, prosecutions in two foreign bribery cases in 12 years appears very low in view of the size of the Japanese economy, and the Working Group continues to have serious concerns that Japan still does not appear to be actively enforcing its foreign bribery offence.... The Working Group also has a clear expectation that Japan will give

serious consideration to using new investigative techniques, such as wire-tapping and grants of immunity from prosecution."⁶

Recent foreign bribery case

In March 2011, a former senior official of the Indonesian Transportation Ministry was arrested by the Indonesian Corruption Eradication Commission for allegedly overcharging the government \$2.5 million in connection with the purchase of a used railway car from a major Japanese trading company. The senior official was sentenced to three years in prison and fined \$11,000 in Indonesia.

The Tokyo Metropolitan Police Department also conducted the investigation of local employees of the Japanese trading company who allegedly gave bribes to the senior official by inviting him to Japan for a golfing trip. In June 2012, however, the Tokyo District Public Prosecutors Office finally decided not to prosecute these employees on the ground of insufficient incriminating evidence.

IV. **Texts**

A. Article 18 of the Unfair Competition Prevention Law

<http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&co=01&x=0&y=0&ky=%E4%B8%8D%E6%AD%A3%E7%AB%B6%E4%BA%89%E9%98%B2%E6%AD%A2%E6%B3%95&page=1>

B. The government ordinance to define “such person as defined in the government ordinance as foreign public official” provided for in Article 18.2(iii) of the Unfair Competition Prevention Law

See page 22 of *Guidelines to Prevent Bribery of Foreign Public Officials*

⁶ OECD Working Group on Bribery, "Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Japan" (<http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Japanphase3reportEN.pdf>).



C. Ministry of Economy, Trade and Industry, *Guidelines to Prevent Bribery of Foreign Public Officials*

http://www.meti.go.jp/policy/external_economy/zouwai/pdf/Guidelines%20to%20Prevent%20Bribery%20of%20Foreign%20Public%20Officials.pdf