



# Anti-Corruption Regulation

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# 2011

Contributing editor: Homer E Moyer Jr



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<b>Overview</b> Homer E Moyer Jr <i>Miller &amp; Chevalier Chartered</i>	<b>3</b>
<b>Introduction</b> Monty Raphael QC <i>Trustee and member of the board, Transparency International UK</i>	<b>8</b>
<b>Between Regulation and Responsibility</b> Nicola Bonucci, <i>legal director and Patrick Moulette, head of Anti-Corruption Division of the OECD</i>	<b>10</b>
<b>Antigua &amp; Barbuda</b> Edward H Davis Jr and Arnaldo B Lacayo <i>Astigarraga Davis / Nicolette M Doherty Nicolette M Doherty Attorney at Law and Notary Public</i>	<b>12</b>
<b>Australia</b> Jane Ellis and Simon Rudd <i>Blake Dawson</i>	<b>16</b>
<b>Austria</b> Christina Hummer <i>Saxinger, Chalupsky und Partner Rechtsanwälte GmbH</i>	<b>23</b>
<b>Bangladesh</b> M Amir-UI Islam <i>Amir &amp; Amir Law Associates</i>	<b>28</b>
<b>Bolivia</b> Alejandra Yacob and Patricio Rojas <i>CR &amp; F Rojas – Abogados</i>	<b>34</b>
<b>Brazil</b> Carlos Amadeu Bueno Pereira de Barros <i>Grinberg, Cordovil e Barros Advogados</i>	<b>39</b>
<b>Cambodia</b> Vicheka Lay	<b>44</b>
<b>Canada</b> Milos Barutowski <i>Bennett Jones LLP</i>	<b>47</b>
<b>Chile</b> Marcos Ríos and Solange González <i>Carey y Cía Ltda</i>	<b>53</b>
<b>China</b> Daniel F Roules and Zijie (Lesley) Li <i>Squire, Sanders &amp; Dempsey (US) LLP</i>	<b>58</b>
<b>Costa Rica</b> Robert C van der Putten and Paola Montealegre <i>FSV Abogados</i>	<b>65</b>
<b>Czech Republic</b> Daniela Musilová <i>PRK Partners</i>	<b>70</b>
<b>Dominican Republic</b> Marcos Peña-Rodríguez <i>Jiménez Cruz Peña</i>	<b>76</b>
<b>Ecuador</b> Bruce Horowitz <i>Paz Horowitz, Abogados</i>	<b>80</b>
<b>France</b> Stéphane Bonifassi <i>Lebray &amp; Associés</i>	<b>84</b>
<b>Germany</b> Kai Hart-Hönig <i>Dr Kai Hart-Hönig Rechtsanwälte</i>	<b>89</b>
<b>Greece</b> Ilias G Anagnostopoulos and Jerina (Gerasimoula) Zapanti <i>Anagnostopoulos Criminal Law &amp; Litigation</i>	<b>94</b>
<b>Hong Kong</b> Angus Hamish Forsyth <i>Stevenson, Wong &amp; Co</i>	<b>99</b>
<b>India</b> Vineetha M G and Aditya Vikram Bhat <i>AZB &amp; Partners</i>	<b>103</b>
<b>Indonesia</b> Richard Cornwallis and Benny Bernarto <i>Makarim &amp; Taira S</i>	<b>112</b>
<b>Israel</b> Yuval Horn, Ohad Mamann and Adi Sharabi <i>Horn &amp; Co, Law Offices</i>	<b>117</b>
<b>Italy</b> Roberto Pisano <i>Studio Legale Pisano</i>	<b>123</b>
<b>Japan</b> Kenichi Sadaka and Kei Akagawa <i>Anderson Mōri &amp; Tomotsune</i>	<b>129</b>
<b>Kenya</b> Godwin Wangong'u <i>Mboya &amp; Wangong'u Advocates</i>	<b>134</b>
<b>Korea</b> Kyungsun Kyle Choi and Kyo-Hwa Liz Chung <i>Kim &amp; Chang</i>	<b>140</b>
<b>Lebanon</b> Jihad Rizkallah, Marie-Anne Jabbour and Hala Okeili <i>Badri and Salim El Meouchi Law Firm</i>	<b>145</b>
<b>Liechtenstein</b> Siegbert Lampert and Rudolf Schächle <i>Lampert &amp; Schächle Attorneys at Law Ltd</i>	<b>151</b>
<b>Luxembourg</b> Rosario Grasso <i>Kleyr Grasso Associés</i>	<b>156</b>
<b>Mexico</b> Luis Rubio-Barnette, Bertha A Ordaz-Avilés and Carlos A Camargo-Tovar <i>Rubio Villegas y Asociados SC</i>	<b>162</b>
<b>Namibia</b> Peter Frank Koep and Hugo Meyer van den Berg <i>Koep &amp; Partners</i>	<b>166</b>
<b>Netherlands</b> Enide Z Perez and Max JN Vermeij <i>Sjōcrona Van Stigt Advocaten</i>	<b>170</b>
<b>New Zealand</b> Hayden Wilson <i>Kensington Swan</i>	<b>175</b>
<b>Nigeria</b> Babajide O Ogundipe and Chukwuma Ezediario <i>Sofunde, Osakwe, Ogundipe &amp; Belgore</i>	<b>181</b>
<b>Norway</b> Erling Grimstad and Anne Marthe Holtet <i>Advokatfirmaet G-Partner AS</i>	<b>185</b>
<b>Peru</b> José Ugaz Sánchez-Moreno <i>Benites, Forno, Ugaz &amp; Ludowieg, Andrade Abogados</i>	<b>190</b>
<b>Philippines</b> Francisco Ed Lim and Chryssilla Carissa P Bautista <i>Angara Abello Concepcion Regala &amp; Cruz Law Offices (ACCRALAW)</i>	<b>194</b>
<b>Russia</b> Khristofor Ivanyan and Vasily Torkanovskiy <i>Ivanyan &amp; Partners</i>	<b>200</b>
<b>Saudi Arabia</b> Robert Thoms and Sultan Al-Hejailan <i>The Law Firm of Salah Al-Hejailan</i>	<b>207</b>
<b>Singapore</b> Wilson Ang <i>Norton Rose (Asia) LLP</i>	<b>210</b>
<b>South Africa</b> Johann Scholtz <i>Webber Wentzel</i>	<b>216</b>
<b>Sweden</b> Peter Utterström and Amanda Wassén <i>Advokatfirman Delphi</i>	<b>221</b>
<b>Switzerland</b> Paul Gully-Hart and Peter Burckhardt <i>Schellenberg Wittmer</i>	<b>227</b>
<b>Thailand</b> Douglas Mancill and Wayu Suthisarnsuntorn <i>Deacons (Price Sanond Prabhas &amp; Wynne Ltd)</i>	<b>234</b>
<b>Trinidad &amp; Tobago</b> Edward H Davis Jr, Ava Borrasso and Sunita Harrikissoon <i>Astigarraga Davis</i>	<b>240</b>
<b>United Arab Emirates</b> Charles Laubach and Aly Shah <i>Afridi &amp; Angell</i>	<b>245</b>
<b>United Kingdom</b> Monty Raphael QC <i>Peters &amp; Peters</i>	<b>252</b>
<b>United States</b> Homer E Moyer Jr, James G Tillen, Jeffrey Hahn and Marc Alain Bohn <i>Miller &amp; Chevalier Chartered</i>	<b>265</b>
<b>Venezuela</b> Fernando Pelaez-Pier and Patrick Petzall <i>Hoet Pelaez Castillo &amp; Duque</i>	<b>273</b>
<b>Vietnam</b> Ngo Viet Hoa <i>Russin &amp; Vecchi Vietnam</i>	<b>278</b>
<b>Yemen</b> Sheikh Tariq Abdullah <i>Law Offices of Sheikh Tariq Abdullah</i>	<b>284</b>
<b>Zambia</b> Mutembo Nchito <i>MNB Legal Practitioners</i>	<b>289</b>
<b>Appendix</b>	<b>294</b>

# Japan

**Kenichi Sadaka and Kei Akagawa**

Anderson Mōri & Tomotsune

## 1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Japan is a signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the 'OECD Convention').

This was signed on 17 December 1997 and ratified on 13 October 1998. Based on this, the Unfair Competition Prevention Act (Act No. 47 of 1993; see question 2) (the 'UCPA') was amended in 1998 and bribery of foreign public officials came to be criminalised in Japan.

Japan is also a signatory to the United Nations Convention against Transnational Organised Crime, which was signed in December 2000 and ratified on 14 May 2003, and the United Nations International Convention against Corruption, which was signed on 9 December 2003 and ratified on 2 June 2006.

## 2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Bribery of foreign public officials is criminally punishable under the UCPA. Violators may be imprisoned for up to five years and fined up to ¥5 million (article 21, paragraph 2 of the UCPA).

Bribery of domestic public officials is criminally punishable under the Penal Code (Act No. 45 of 1907).

The prohibitions on foreign bribery and domestic bribery are based upon different philosophies. That is to say, the former is aimed at securing and promoting the sound development of international trade, while the latter is aimed at ensuring the rectitude of the Japanese public service and maintaining people's trust in such rectitude. As a consequence of this difference, the foreign bribery prohibition was not incorporated in the Penal Code, but in the UCPA.

## Foreign bribery

### 3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

In order for bribery of a foreign public official to be punished under the UCPA, the bribe must be paid with regard to an 'international commercial transaction' (article 18, paragraph 1). An 'international commercial transaction' means any activity of international commerce, including international trade and cross-border investment. The bribe must be provided to foreign public officials or others as defined in question 4.

The prosecutor must then establish that the bribe was made 'in order to obtain illicit gains in business'. Here, 'gains in business' means any gains that business persons may obtain during the course of their business activities, which include, for example, the acquisition

of business opportunities or governmental approvals regarding the construction of factories or import of goods.

Further, the prosecutor must establish that the bribe was made 'for the purpose of having the foreign public official or other similar person act or refrain from acting in a particular way in relation to his or her duties, or having the foreign public official or other similar person use his or her position to influence other foreign public officials or other similar persons to act or refrain from acting in a particular way in relation to that person's duties'.

Please note that not only the giving of the bribe, but also the offering or promising of the bribe is punishable under the UCPA.

## 4 Definition of a foreign public official

How does your law define a foreign public official?

Under the UCPA, it is prohibited to give bribes not only to foreign public officials per se, but also to other persons in a position of a public nature, such persons included in the definition of 'foreign public officials, et cetera'. Article 18, paragraph 2 of the UCPA defines foreign public officials, etc, as:

- (i) a person who engages in public service for a foreign state, or local government (a public official in a narrow sense);
- (ii) a person who engages in service for an entity established under a special foreign law to carry out special affairs in the public interest (ie, a person engaging in service for a public entity);
- (iii) a person who engages in the affairs of an enterprise:
  - of which the number of voting shares or the amount of capital subscription directly owned by one or more foreign states or local governments exceeds 50 per cent of that enterprise's total issued voting shares or total amount of subscribed capital; or
  - of which the number of officers (including directors and other persons engaging in the management of the business) appointed or designated by one or more foreign state or local governments exceeds 50 per cent of that enterprise's total number of officers; and
  - to which special rights and interests are granted by the foreign state or local governments for performance of their business, or a person specified by a Cabinet Order (for such Cabinet Order, please see below) as an 'equivalent person' (ie, a person engaging in the affairs of an enterprise of a public nature);
- (iv) a person who engages in public services for an international organisation constituted by governments or intergovernmental international organisations; and
- (v) a person who engages in affairs under the authority of a foreign state or local government or an international organisation.

The Cabinet Order referred to in (iii) above (Cabinet Order No. 388 of 2001) specifies as an 'equivalent person' referred to in (iii) above any person who engages in the affairs of the following enterprises

(see below) to which special rights and interests are granted by foreign state or local governments for performance of their business:

- (a) an enterprise of which the voting rights directly owned by one or more foreign state or local governments exceeds 50 per cent of that enterprise's total voting rights,
- (b) an enterprise of which the shareholders' resolution cannot become effective without the approval of a foreign state or local government; or
- (c) an enterprise:
  - of which the number of voting shares or the amount of capital subscription directly owned by foreign state or local governments or 'public enterprises' (defined below) exceeds 50 per cent of that enterprise's total voting shares or capital subscription;
  - of which the number of voting rights directly owned by foreign state or local governments or public enterprises exceeds 50 per cent of that enterprise's total voting rights; or
  - of which the number of officers (including directors and other persons engaging in the management of the business) appointed by foreign state or local governments or Public Enterprises exceeds 50 per cent of that enterprise's total number of officers.

The Cabinet Order defines 'public enterprise' as an enterprise as set forth in the item (iii) above, and an enterprise as set forth in the items (a) and (b) above.

An 'international organisation' referred to in (iv) above must be constituted by a governmental or intergovernmental international organisation (for example, the UN, ILO, WTO, etc). Therefore, international organisations constituted by private organisations are outside of the scope of the foreign bribery regulations under the UCPA. According to the Guidelines for the Prevention of Bribery to Foreign Officials set by the Ministry of Economy, Trade and Industry (the 'METI') in 2004 (the 'Guidelines'), an illicit payment to an officer of the International Olympic Committee cannot be punished because it is constituted by private organisations.

For the definition of a public official under a domestic bribery law, see question 24.

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#### 5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The UCPA does not have any rules differentiating gifts, travel expenses, meals or entertainment from other benefits to be provided to foreign public officials. This means that the provision of any gifts, travel expenses, meals or entertainment could be considered as illegal bribery in the same way as the provision of cash or any other benefits.

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#### 6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

The UCPA does not permit 'facilitation payments'. The Guidelines provide that such small facilitation payments shall be punishable as long as they are considered to be given 'in order to obtain illicit gains in business'.

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#### 7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Payments of bribes to foreign public officials are prohibited, whether they are made directly or through intermediaries. While the relevant provision makes no express reference to intermediaries, it is sufficiently broad to capture and punish the payment of bribes through intermediaries.

However, in order for a person to be held liable for paying a bribe to foreign public officials through intermediaries, such person must recognise that the cash or other benefits provided by him or her to the intermediaries will be used for the payment of a bribe to such officials. For example, if a person appoints an agent in order to obtain an order from a foreign government and the appointer fully recognised that part of the fee he or she pays to the agent would be spent for the payment of a bribe to an official of the foreign government, then the appointer may be punished. On the other hand, if the appointer was unaware of such fact, then the appointer will not be punished.

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#### 8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Yes, both individuals and companies can be held liable for bribery to foreign public officials (article 22, paragraph 1 of the UCPA).

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#### 9 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

As mentioned above, Japanese foreign bribery laws are included in the UCPA. The UCPA was originally intended to prohibit unauthorised use of others' trademarks (registered or unregistered) or trade secrets, as well as other activities that are against fair competition. The UCPA defines such acts as 'unfair competition' (article 2), and there are special civil remedies and related treatments available for Unfair Competition, such as an injunction, presumed damages and documents production system, etc.

However, foreign bribery is explicitly excluded from the definition of 'Unfair Competition', and there are no special civil remedies or related treatments available for the violation of foreign bribery restrictions under the UCPA.

Regarding claim for damages and compensation, it may be possible based upon tort. However, in reality, it would be difficult for a plaintiff to prove the necessary causal relationship between the bribe and his or her loss of business opportunity as well as the amount of damages. So far, there has been no case reported where victims of foreign bribery (for example, competitors of a violator who lost business opportunities because of the violator's payment of a bribe) filed a civil lawsuit against the violator to recover the damages they suffered.

As to criminal enforcement, please see questions 2 and 10.

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#### 10 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

There is no special government agency to enforce the foreign bribery laws and regulations. Like other criminal laws, the foreign bribery laws are enforced by the Public Prosecutors Office and police departments of each prefecture.

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#### 11 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

No. If a person who committed a crime surrendered himself or herself before being identified as a suspect by an investigative authority, his or her punishment may be reduced (article 42, paragraph 1 of the Penal Code). However, since this provision obviously assumes that a violator is an individual, companies themselves will not be able to enjoy the benefit of self-surrender under the said provision.

**12 Dispute resolution**

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Japanese criminal procedure does not have such systems as plea bargaining or settlement agreements. However, public prosecutors (who are, in principle, exclusively granted the power to decide whether or not to prosecute criminals under article 248 of the Code of Criminal Procedure (Act No. 131 of 1948)), may choose summary proceedings at summary courts provided, however, that the summary proceedings are conditioned on the consent of the criminals (article 461-2, paragraph 2 of the Code of Criminal Procedure). In this summary procedure, summary courts can only impose on criminals fines of up to ¥1 million, and the summary courts cannot sentence the criminals to imprisonment (article 461 of the Code of Criminal Procedure).

**13 Patterns in enforcement**

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Although foreign bribery laws in Japan were once rarely enforced, Japanese authorities are paying more attention to corruption than ever before. In 2002, media agencies reported that Mitsui & Co, a Japanese leading trading company, provided a bribe to high-ranking Mongolian officials in connection with official development assistance for the provision of diesel power generation facilities in Mongolia. However, the Tokyo District Prosecutors Office decided not to prosecute the perpetrators.

In 2007, the news media reported that two employees of a Filipino subsidiary of Kyushu Electric Power Co gave Filipino government officials golf sets whose value was approximately ¥800,000 in relation to the subsidiary's entry into the Filipino market for digital fingerprint recognition systems. The two individuals were prosecuted for violation of the UCPA. Both of the individuals admitted that they had violated the foreign bribery laws, and were fined ¥500,000 and ¥200,000, respectively.

As to the recent shifts in enforcement of criminal penalties in general, please see 'Update and trends' below.

**14 Prosecution of foreign companies**

In what circumstances can foreign companies be prosecuted for foreign bribery?

Like Japanese nationals and companies, foreign companies can be prosecuted for foreign bribery because article 22, paragraph 1 of the UCPA (see question 15) does not make any distinction between domestic companies and foreign companies. However, this does not mean that foreign companies can be prosecuted with no jurisdictional basis. Under the Japanese criminal law system, any crime committed within the territory of Japan should be punishable (article 1 of the Penal Code), and it is generally construed that when all or part of an act constituting a crime was conducted in Japan or all or part of the result of a crime occurred in Japan, such a crime is deemed to have been committed within Japan and therefore is punishable.

For example, if an employee of a US company, who may or may not be a Japanese national, invites a public official of the Chinese government to Japan and provides a bribe to that official in Japan in violation of the UCPA, then not only the very employee, but also the US company can be punished under the UCPA. However, from a practical point of view, there may be procedural difficulties in the enforcement of Japanese foreign bribery laws against such a foreign company if it has no place of business in Japan or no business activities in Japan.

Another possible circumstance where foreign companies can be prosecuted under the UCPA is where a foreign company hires a Japanese national and the Japanese national gives a bribe to a foreign official on behalf of his employer (the foreign company), either inside

or outside of Japan. This is because the UCPA stipulates that Japanese foreign bribery laws shall apply to any Japanese nationals who commit foreign bribery not only in Japan, but also outside of Japan (article 21, paragraph 6 of the UCPA, article 3 of the Penal Code).

For example, if a US company, which has no Japan-based business, hires a Japanese national in the US and the Japanese national gives a bribe to an official of the US government in the US, then we could not deny the theoretical possibility that the US company could be prosecuted under the UCPA of Japan. From a practical point of view, however, there may be procedural difficulties in the enforcement of Japanese foreign bribery laws against foreign companies in such circumstances.

**15 Sanctions**

What are the sanctions for individuals and companies violating the foreign bribery rules?

Individuals violating the foreign bribery laws may be imprisoned for up to five years, and fined up to ¥5 million (article 21, paragraph 2 of the UCPA). When a representative, agent or any other employee of a company has violated the foreign bribery laws with regard to the business of the company, the company may be fined up to ¥300 million (article 22, paragraph 1 of the UCPA).

**16 Recent decisions and investigations**

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

On 12 February 2008, Bridgestone Corporation, a Japanese company and a leading manufacturer of rubber-based products, announced that it suspected that some of its Asian subsidiaries had made 'inappropriate payments' to their local agents in connection with the order of marine hoses (rubber-based hoses mainly used for the transfer of oil at sea), and part of such payments were provided to foreign officials of local governments. Bridgestone further announced that it reported the possible violation of foreign bribery laws to the Tokyo District Public Prosecutors Office and the US Department of Justice.

On 29 January 2009, KK Pacific Consultants International (PCI), a Japanese consulting company, and three of its former officers were convicted of foreign bribery in the Tokyo District Court.

**Financial record keeping****17 Laws and regulations**

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Laws and regulations that require companies to keep accurate corporate books and records, prepare periodic financial statements and, in the case of large companies, undergo external auditing include the Companies Act (Act No. 86 of 2005) and the Company Accounting Regulations. In addition, the Financial Instruments and Exchange Law (Act No. 25 of 1948) (the FIEL) requires public companies to keep accurate corporate books and records, prepare periodic financial statements, and establish effective internal control systems.

**18 Disclosure of violations or irregularities**

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Companies are not obligated to disclose violations of anti-bribery laws or associated accounting irregularities under the laws regarding financial record keeping. In the case of public companies, if the associated accounting irregularities are considered so 'material' that the irregularities may affect the decision-making of investors, then the companies may be required to disclose such irregularities under the FIEL.

**19 Prosecution under financial record keeping legislation**

Are such laws used to prosecute domestic or foreign bribery?

They are not directly intended to be used for prosecution of domestic or foreign bribery. However, it would be possible to use such laws in order to indirectly punish bribery if a company engages in false bookkeeping in order to create large slush funds for the purpose of bribery.

**20 Sanctions for accounting violations**

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

There are no specific sanctions for violating of the accounting laws associated with the payment of bribes. However, if there is a materially false statement (eg, fictitious description or intentional omission concerning the amount of bribes) in securities reports to be submitted by a company under the FIEL, the person who submitted such securities reports may be imprisoned up to 10 years and fined up to ¥10 million (article 197, paragraph 1 of the FIEL), and the company may also be fined up to ¥700 million (article 207, paragraph 1 of the FIEL). Whether such false statements are deemed as 'materially' false statements will depend on the amount of the bribe, the financial conditions of the company and other factors.

**21 Tax-deductibility of domestic or foreign bribes**

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Yes. Article 55, paragraph 5 of the Corporate Tax Law (which applies to domestic corporation and also to foreign corporation mutatis mutandis pursuant to article 142 of the same law) stipulates that the amount spent for domestic or foreign bribes shall not be tax-deductible. A criminal court need not determine that such expenditure took the form of a bribe in order for tax authorities to deny the deductibility of such expenditure.

**Domestic bribery****22 Legal framework**

Describe the individual elements of the law prohibiting bribery of a domestic public official.

**Public official**

In the Penal Code, the term 'public official' means a national or local government official of Japan, a member of an assembly or committee, or other employees engaged in the performance of public duties of Japan in accordance with laws and regulations (article 7, paragraph 1 of the Penal Code).

**Bribe**

Cash, gifts or anything that satisfies one's desires or demands can be a bribe under Japanese domestic bribery law, provided that it is given in connection with the public service of a public official.

**23 Prohibitions**

Does the law prohibit both the paying and receiving of a bribe?

Yes, both paying for and receiving a bribe are prohibited by the Penal Code. See question 29.

**24 Public officials**

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

A public official is defined as a national or local government official, a member of an assembly or committee or other employee engaged in the performance of public duties in accordance with laws and regulations (article 7, paragraph 1 of the Penal Code) (see question 22).

Thus, employees of state-owned or state-controlled companies are not necessarily included within the definition. However, persons that are not included in this definition may be deemed a public official by specific statutes. For example, officers and employees of the Bank of Japan are deemed public officials (article 30 of the Bank of Japan Act). For the definition of a foreign public official, see question 4.

**25 Public official participation in commercial activities**

Can a public official participate in commercial activities while serving as a public official?

National public officials are prohibited from participating in commercial activities while serving as public officials, except when approved by the National Personnel Authority (article 103, paragraphs 1 and 2 of the National Public Service Act (Act No. 120 of 1947)). Local public officials must obtain similar approval from those who appointed them to their posts in order to participate in commercial activities (article 38, paragraph 1 of the Local Public Service Law).

**26 Travel and entertainment**

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

Even if gifts, entertainment or other benefits are intended as a courtesy, they could be considered an illegal bribe (regardless of their value), as long as they are given for and in connection with the power and authority of the relevant public official.

Certain high-level national government officials are obliged to report any gifts or benefits from business entities if the value of such gifts or benefits exceeds ¥5,000 (article 6 of the National Public Service Ethics Act (Act No. 129 of 1999)). Please note that whether or not this reporting requirement applies is different from whether the gifts or benefits in question constitute bribes.

**27 Gifts and gratuities**

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

Please see question 26.

**28 Private commercial bribery**

Does your country also prohibit private commercial bribery?

Japanese law does not impose a general prohibition on private commercial bribery. However, some special laws prohibit private commercial bribery for companies the business of which is closely related to the public interest. For example, under the Act on Nippon Telegraph and Telephone Corporation, bribes to employees of Nippon Telegraph and Telephone Corporation are prohibited. Further, if a director, or similar official, of a stock corporation, in response to unlawful solicitation, accepts, solicits or promises to accept any benefit of a proprietary nature in connection with his or her duties, such person may be punished by imprisonment for up to five years or a fine of up to ¥5 million. In addition, the benefit received by such person shall be confiscated, while the person who gives, offers or promises to give the benefit may be punished by imprisonment for up to three years or a fine of up to ¥3 million (articles 967 and 969 of the Companies Act).

**29 Penalties and enforcement**

What are the sanctions for individuals and companies violating the domestic bribery rules?

A person who gives, offers or promises to give a bribe to a public official may be imprisoned for up to three years or fined up to ¥2.5 million (article 198 of the Penal Code). Companies are not punished

**Update and trends**

As mentioned in question 12, the public prosecutors are exclusively authorised to decide whether to indict a criminal and, in that connection, they are vested with broad discretion to enable them to take various circumstances into consideration under article 247 and 248 of Code of Criminal Procedure (Act No. 131 of 1948). However, a very important exceptional process recently came into practice.

The Committee for the Inquest of Prosecution (the Committee), which was established under the Act for the Inquest of Prosecution (Act No. 147 of 1948) (the Act), was given the special power pursuant to an amendment of the Act in 2004 (which came into effect in 2009). The committees are located together with each district court (and its branch) and consist of 11 citizens who are randomly selected. Before the reform, in response to the request of a person who filed a complaint or accusation, or if a victim objects to non-prosecution by the public prosecutors, the Committee could only provide a non-binding advisory opinion to the Prosecutor's Office that the requested case was worthy of prosecution. The amendment of the Act enabled the Committee to compel a prosecution and substantially changed

the power of the Committee. If the Committee resolves to compel prosecution, an attorney appointed by the court shall indict the suspect and take responsibility of the prosecution.

Recently, a request arose concerning an alleged violation of the political fund control law committed by a famous politician, which drew public attention. The Committee finally resolved to compel prosecution in October 2010. Even though the politician disputed the validity of such resolution in the form of an action for revocation of administrative disposition, the Tokyo District Court rejected the politician's action, concluding instead that the validity of the resolution shall be decided through the criminal procedure. Accordingly, the politician was indicted in January 2011.

From the perspective of the authority which enforces anti-corruption, before the reform there was no effective means to seek criminal sanctions once the Prosecutor's Office decided not to indict a suspect. However, after the reform, a request can be made for a resolution compelling prosecution. As a result, this procedure may become a useful method of seeking criminal sanctions.

for their employees' violations of domestic bribery laws.

Sanctions against public officials are different, depending on the circumstances. A public official who simply accepts, solicits or promises to accept a bribe in connection with his or her duties may be imprisoned for up to five years (article 197, paragraph 1 of the Penal Code). If an official agrees to perform a certain act in response to a request, the sanction may be increased to imprisonment for up to seven years (article 197, paragraph 1 of the Penal Code). If a public official commits any of the conduct described above and later actually acts illegally or refrains from acting in the exercise of his or her duty, he or she may be imprisoned for one year or longer (article 197-3 paragraphs 1 and 2 of the Penal Code). A former public official may be imprisoned for up to five years, if he or she received a bribe in connection with his or her duty during his or her public service in the past (article 197-3, paragraph 3 of the Penal Code).

A bribe accepted by a public official will be confiscated. If all or part of the bribe cannot be confiscated, then an equivalent sum of money shall be collected (article 197-5 of the Penal Code).

**30 Facilitating payments**

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Yes. Japanese domestic bribery law does not differentiate 'grease' payments from other benefits, and such payments can constitute a bribe.

**31 Recent decisions and investigations**

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

In 2007, a high-ranking official of the Ministry of Defence was prosecuted for receiving bribes (including golf outings) from an ex-director of Yamada Corporation, a trading company specialising in military weapons. This scandal gathered much public attention, and the media reported that General Electric suspended transactions with Yamada Corporation because of this scandal. In 2008, the official was sentenced to imprisonment of two years and six months without suspension, and forced to forfeit the ¥12.5 million he had received. The Tokyo High Court rejected the official's appeal in 2009. The judgment became finalised and binding and the official was imprisoned in September 2010.

In 2009, the Supreme Court rendered a judgment that an ex-official, deputy director general in the Central Procurement Office of the Defence Agency (subsequently reorganised as the Ministry of Defence), who was in charge of overcharged refund claims to private manufacturers of equipment, was guilty of the crime of accepting bribery after resigning from office. The ex-official illegally underestimated the refund obligation of a private electric device supplier in his term of office and, shortly after that, retired from the Defence Agency and assumed the post of part-time adviser to the private company and received money therefrom as an adviser. The Supreme Court upheld the original judgment that even where it cannot be said that the ex-official did not actually work as an adviser, the money paid to him served as consideration for those illegal acts and brought a ten year court battle to an end.

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