

## **Three Documents Place Olympus and Hiroyuki Sasa at Bay We are Publishing Full Texts of Three Legal Opinions on the Suspected Shenzhen “Bribery”. Revealing Management’s Sin in the “Off-Book Treatment”.**

**2018 June Issue BUSINESS**

On May 7, Olympus Corporation (“Olympus”) announced a shutdown of a China-based factory which has been manufacturing digital cameras and lenses. It is nothing but the Shenzhen's manufacturing subsidiary, Olympus (Shenzhen) Industrial Co., Ltd (“OSZ”), which was at the center stage of the suspicious bribery case of which this newspaper has been covering for the past two years.

About 1,700 employees would be dismissed with severance compensation. Reasons for the shutdown was explained as sharp contraction of digital camera which was competing with smartphones and the aging of equipment. Olympus denied bribery suspicion as “irrelevant”, answering to reporters’ queries.

### **Bogus Reasoning of “Aging of Equipment”**

Everything is untrue. If the Chinese subsidiary is to fire all employees, it is a common sense to discuss that with labor union beforehand. OSZ abruptly notified operational stoppage, effective that same day, out of blue. “Securities Journal”, a local Chinese newspaper reported real human voices of surprised local employees as; “I was shocked to hear the news while we heard pay-rise in the second half” or “I was told that a new product would be introduced in September, and I was totally not expecting this...”. An Olympus employee in Japan also gave a tip to this newspaper that, “the announcement is bogus, as the equipment in Shenzhen being just renovated”. The Olympus management team must have had pressing circumstances to urgently stop the operation. It must be nothing other than a conspiracy to completely bury the bribery case in the dark. As we reported in the April and May issue, looks like a plan is now in implementation phase, which is to sell the OSZ’s real estate at deceptively low price to a dummy company prepared by Shenzhen Anyuan Holdings (“Anyuan”), the chief architect of the entire bribery scheme, to make the ends meet.

Yet, it is too early that Olympus top brass to make a sigh of relief. We would like to present materials to readers as we hinted in the May issue, targeting Olympus’ weak spot. It is a copy of 38 pages of English text on letter papers. On April 6, we received an envelope without sender’s name into the editorial office mailbox. It is divided into three parts, and

there are logos of each law office attached at the top of each cover.

The moment we saw it, we knew the identity of the documents. From March to April 2017, one director of the Legal Department of the Olympus China (Mr. A) asked three leading law firms to provide legal opinions on the suspected bribery. He sent it to the upper echelon of the Olympus Tokyo headquarters and insisted for another round of investigation, but it was turned down, and he was demoted to an idle job. Those legal opinions were delivered to this newspaper. We will release on the FACTA website from 4 pm of May 18th. Please peruse them.

There lies deep darkness. Just reading these legal opinions may lead to further suspicions to readers, but it may be difficult to find the critical point. Although it seems to be roundabout, we need to review a process of deducing why these legal opinions were compiled and inferring why it was sent to this newspaper.

Mr. A, who is the creator of the opinions, also served concurrently as the Corporate Governance Department manager of the Olympus Corporation of Asia Pacific Limited from 2013 to 2014. When the OSZ had negative theoretical inventory problem, he seemed to have opposed using An-Ping-Tai Investment Development (An-Ping-Tai"), a dummy consulting subsidiary of Anyuan on grounds that their past deeds were bribery and unsocial. Despite of his plea, Hiroyuki Sasa, the president of Olympus, and his headquarter lieutenants approved using Anyun, upon responsibility-avoiding condition of "approval must be done on the local subsidiary level". Thus, the negative theoretical inventory problem was "settled" without paying any financial penalties to the Shenzhen Customs Office. As stipulated on the consulting contract, 24 million yuan (approximately 400 million yen) was paid to An-Ping-Tai.

### **If Read by the US Department of Justice ("DOJ"), the Three Opinions Would Cause a Havoc**

Concern remained for some staffs who knew internal developments. Because Olympus had been investigated by the US DOJ since 2011, in a case it has been providing illegal benefits to medical institutions and doctors in the US and South America to encourage adoption of Olympus products. If DOJ acknowledges the bribery case in China as willful misconduct, penalty will be heavier including problems of the U.S. subsidiary. Some in Olympus insisted to report proactively to the DOJ after an in-house investigation.

In February 2015, "S Investigation Committee" was formed to conduct in-house investigation on bribery suspicion, triggered by reports from multiple employees to full-time corporate auditors of Olympus. The investigation was commissioned to Shearman and Stirling Law Office ("Shearman & Stirling") and Nishimura Asahi Law Firm ("N&A"). Yet, the

final report submitted at the end of October 15 concluded as "legal and regulatory violations were not observed." Olympus had been concealing the bribery suspicions of OSZ and the existence of S Investigation Committee to investors for long, but this newspaper exposed the full final report of the S Investigation Committee on the FACTA website along with the article of "Darkness on Olympus' Shenzhen Document " in our July 2016 issue.

Having felt a threat, Olympus hurried to announce a timely disclosure "on some news reports regarding on the company and its subsidiaries", and framed up as if the issue was settled, as "no legal and regulatory violations were found, and we already explained to overseas authorities." Of course, the facts were different. Olympus still had a dispute with Anyuan on transferring employee dormitories (as described later). Underwater negotiations with Anyuan stalled, and in February 2017, the cantankerous Anyuan brought in a lawsuit seeking damages of approximately 275 million yuan (about 4.7 billion yen) to OSZ under the name of An-Ping-Tai to Shenzhen Intermediate People's Court. An-Ping-Tai's claim for compensation was unnaturally large, nearly 12 times of the initially-paid consulting fee. It is an important hint relating to Olympus's vital point, and we would like readers to highlight this point. Mr. A felt a keen sense of danger in this lawsuit and moved to obtain legal opinions, because in March the previous year, Olympus had settled with DOJ on the issue of the US subsidiary and paid \$ 646 million (approximately 74.3 billion yen) fine and signed a deferral on prosecution agreement ("DPA"). In short, Olympus was in limbo of suspended execution. What happens if there were revelations on what Olympus truly promised to Anyun as An-Ping-Tai legal case proceeded? The DOJ might revoke the DPA and severe penalty might have been levied to topple the entire Olympus.

That fear must have motivated Mr. A. Three legal opinions were written; first by Deloitte Legal's Shanghai Office on facts validation and risk analysis based on Chinese regulations, second by Hughes Hubbard in the US analyzing considering the US Foreign Corrupt Practices Act ("FCPA") viewpoint, and third by British Cravath Swine & Moore oversaw the legal risk of the employee dormitory sale. It was concluded that all three judged as very high risks were involved.

However, as mentioned above, the Olympus top managers neglected the plea of re-investigation, and Mr. A was moved to idle post at the end of November 2017. However, here a voice of protest rose from unexpected place. Mr. Takunori Sakakibara, an in-house lawyer of Olympus Legal Department pointed out that the company's treatment on Mr. A may constitute a violation on Japan's Whistleblower Protection Act and could be regarded as a power harassment, and he informed all six non-executive directors via e-mail.

In that e-mail, he attached "Notification" which summarized the opinion as an in-house lawyer on the alleged OSZ bribery case and the conclusion part of the three legal opinions

were cited. In addition, in January 2018, he filed an unheard-of lawsuit in the Tokyo District Court seeking compensation for damages to the company and his boss, claiming that a power harassment was wielded to seal-off his protest. The first trial was held on March 1, and the trial continues now.

### **Presence of Revealed "MOU"**

After the in-house lawyer's "rebellion", a large amount of information including copies of his "Notification" and his bill of complaint to the Tokyo District Court were sent to this newspaper from multiple anonymous whistleblowers in real time. Thus, we knew the fact that Mr. A acquired the legal opinions and the conclusions. Then, starting with the February 2018 issue "A Tip Came from the Olympus Legal Department", we posted articles on this case in every following month and released the full text of "Notification" and the in-house lawyer's bill of complaint on the website.

Why did the anonymous whistleblowers bother deliver the whole documents of the three legal opinion letters? We already knew the conclusion of the opinions, so the point was not there. Somewhere else, a hidden truth which has not been clarified yet, might lurk between the lines, and the whistleblowers were expecting we find out.

Jolly good, we tried. We seriously investigated the documents, comparing with the past internal documents such as S Investigation Committee report, and at last discovered. Deloitte Legal's opinion, on page 5, (3.7). The following is the quotation from the legal opinion. (Note: In the FACTA newspaper, it was translated to Japanese, but this is the original English)

3.7 As MOU between APT(An-Ping-Tan) Company and OSZ dated on Oct.16<sup>th</sup>, 2013 (the "2013 MOU") provides that,

- (i) OSZ agreed to pay 5% of the US\$ 694 million (approximately 210 million RMB) upon the APT Company accomplishing the task assigned to it in a consulting agreement to be entered into between the APT Company and OSZ sometime later than the 2013 MOU;
- (ii) if the government fine on the Customs Issue shall be lower than RMB 30 million, OSZ shall pay 80% of the differences between the actual fine amount and the RMB 30 million benchmark as a consulting fee;
- (iii) OSZ and APT Company shall also sign a supplemental agreement to the consulting agreement, by which OSZ shall transfer the Dormitory to APT Company at RMB 2,000/square meter, and
- (iv) if the Dormitory shall not be transferrable due to whatever reason in the short term, OSZ

shall transfer the possession and right of use of the Dormitory to APT Company and cooperate on the title transfer and registration matters thereafter.

In short, there was a "MOU" exchanged between Olympus and An-Ping-Tai before the consulting contract (signed by OSZ director in December 2013) was signed, and the MOU agreed the remuneration on the customs trouble to be 5% US \$ 694 million, or 210 million RMB, or approximately 3.6 billion yen. This \$ 694 million is equal to the total of the minus theoretical inventories OSZ held.

However, paying as a consulting fee composed only 80% of the total of 30 million yuan, or 24 million yuan or approximately 400 million yen, only one-ninth of the total compensation. The remaining 8/9 was designed to be settled by selling the dormitory at deceptively cheap value, planned from the beginning. In other words, Olympus intended to pay 8 / 9th of the fee for customs handling with "off-the-book" disbursement. In Deloitte's opinion note, the transfer price of the dormitory is deemed "less than one tenth of the market price". Without a sense of guilt associated with bribery, such a deceptive scheme won't be adopted. If it is known to the US DOJ, the authority won't tolerate such a deceit. Also, 3.6-billion-yen off-balance sheet payment must be approved by the Tokyo headquarter office, no way such big amount of payment to be signed by OSZ or Asia Pacific Regional subsidiary. This must be a concealment of misconduct led directly by the top management. Olympus needs to conceal this vital point at any cost.

#### **Question of Conflict of Interest by Shearman & Sterling**

Curiously, the final report of the S Investigation Committee did not mention on the MOU of October 2013, as well as the fact that OSZ agreed to pay 5% of the minus theoretical inventory as remuneration. Was that because Olympus concealed the fact to Shearman and Sterling and N&A who were commissioned to conduct the investigation? It is impossible. At least Shearman & Sterling must have known the existence and content of the MOU. Because, during the investigation period of the S Investigation Committee of 2015, it is written on page 8 "6.1" of the Deloitte Opinion, that Shearman & Sterling served as the representative of Olympus in negotiations with Anyuan/ An-Ping-Tai on the dormitory sale. Shearman & Sterling underwrote the role of law firm to investigate the bribery doubt, which is supposed to pledge neutrality, but at the same time, it represented Olympus' interest on dormitory sale negotiation. Isn't that a serious conflict of interest of a law firm who must care its reputation?

Similarly, according to (6.3) on page 9 of the Deloitte Opinion, in a negotiation with OSZ in

February 16, Anyuan asked OSZ pay 180 million yuan for unpaid remuneration agreed on the consulting contract, 36 million yuan for delayed interest, 600 million yuan for the dormitory 's refurbishment cost, and further insisting payment of legal fees and labor costs. This fact also confirms the existence of the MOU.

It was one year later that Anyuan initiated a lawsuit seeking damages of 275 million yuan to Olympus. Approximately twelve times as much as the initial consulting fee claimed. Unexpectedly, it was not an exorbitant amount offered by an anti-social company. That sum was based on the mutually-agreed MOU, and could have been rational, therefore it seems Olympus is destined to lose the suit.

Olympus is cornered, with US DOJ at the front gate, and Anyuan at the rear gate. The last resort of the Olympus management team at the cull-du-sac, must have been a top-secret plan to shut down the OSZ and selling the real estate to a new dummy company of Anyuan. If Olympus gives amount more than Anyuan claims, it will withdraw the lawsuit. As the US DOJ watching, Olympus and Anyuan may camouflage a dummy company as an independent third party. Shearman & Sterling could play a role of an accomplice in the back. A lawyer from the US Olympus sent a certified mail requesting documents' return. It's too late. We already submitted copies of the three opinion letters to the US DOJ and the Japanese Securities and Exchange Surveillance Commission and we are publishing the full text of the opinion letters on our web site. Timely disclosure of Olympus expected.

Olympus launched a forecast of an increased sales and profit for the current term in the announcement on May 11. On the contrary, Shiro Hiruda, an outside director, an old boy of Asahi Chemical who served as the chairman of the board, will retire in June. He looks busy fleeing from a sinking ship. At last, the denouement is getting closer.