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Japan

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Background

Japan is widely perceived to be one of the least corrupt countries in the world. Transparency International ranked Japan as the 15th least corrupt country out of 175 in the most recent Corruption Perceptions Index – the second-highest in Asia – and Japanese companies as the fourth-least likely to pay bribes overseas. Global Integrity reported Japan’s overall anti-corruption and rule of law performance as “very strong”, and the U.S. State Department has characterised the direct exchange of cash for favours from Japanese government officials as “extremely rare”.

However, corruption was a prevalent feature of Japan’s postwar economic boom, which was built on a close-knit alliance known as the “iron triangle” between Japanese businesses, politicians of the ruling Liberal Democratic Party (“LDP”), and elite bureaucrats. This close coordination guided Japan to its growth as the world’s second-largest economy, but it also created a culture of secret, backroom dealings which, when exposed, shocked the public. Some of the most notorious scandals of that era include: the Lockheed case (1976), which led to the conviction of former Prime Minister Kakuei Tanaka (and was partly responsible for the creation of the U.S. Foreign Corrupt Practices Act); the Recruit case (1989), which brought down the administration of Prime Minister Noboru Takeshita; the Zenecon (general contractors) cases (1993-1994), which resulted in several prefectural governors along with dozens of others being convicted, and one governor committing suicide; and the Bank of Japan/Ministry of Finance cases (1997-1998), which led to the arrests, resignations and suicides of several high-ranking finance officials.

The type of conduct in these cases included firms seeking to win lucrative contracts through massive cash payments (Lockheed, Zenecon); firms offering highly lucrative insider stock information to win influence (Recruit); and officials receiving lavish entertainment, sometimes of a sexual nature, in exchange for favours (BoJ/MoF). Japan’s economic downturn through the 1990s soured the public’s patience for such behaviour, and increasingly became the focus of blame for the nation’s woes. In particular, one type of entertainment – “no-pan shabushabu” (referring to an establishment where a type of hot pot was served by women wearing no underwear) – became synonymous in the public imagination with high-level corruption.

In response, the Japanese government enacted various reforms, including requiring disclosure of politicians’ assets, bringing more transparency to political contributions, and imposing stricter ethical rules on public officials. In addition, especially over the past 10 years, Japanese companies have begun instituting codes of conduct that prohibit giving or receiving inappropriate payments, gifts or entertainment, not only to government officials,
but in business transactions generally. Today, the websites of nearly every listed Japanese company trumpet their commitment to compliance and corporate social responsibility. As a result, while some issues remain, as discussed in the “Current issues” section below, bribery is now widely understood in Japan to be impermissible, and corruption is no longer as prevalent a feature of the Japanese political and business landscape as it was 20 years ago.

Since July 2013, an LDP-led coalition under the leadership of Prime Minister Shinzo Abe has dominated the Japanese government. His administration has pushed for an aggressive economic agenda, dubbed “Abenomics”, based on the “three arrows” of fiscal stimulus, quantitative easing, and structural reforms. While the first two arrows have shown positive effects, there has been little progress in actual structural reforms in the Japanese economic system and corporate culture.

### Legal overview

**Bribery of Japanese public officials**

Article 197 of Japan’s Penal Code prohibits a public official, defined as “a national or local government official, a member of an assembly or committee, or other employees engaged in the performance of public duties in accordance with laws and regulations”, from accepting, soliciting or promising to accept a bribe in connection with his or her duties. It also prohibits a person who is to be appointed as a public official to do likewise, in the event that he or she is appointed. Furthermore, it is an offence to give, offer or promise to give a bribe to a public official or a person to be appointed a public official. Legal persons (i.e., firms and organisations) are not liable for bribery under the Penal Code. Non-Japanese nationals are liable for bribery under the Penal Code only if the crime is committed within Japan. Japanese public officials are liable for accepting bribes outside Japan.

The punishment for the acceptance of a bribe by a public official (or a person to be appointed a public official) is imprisonment with work for not more than five years, plus confiscation of the bribe or its monetary value. Where a public official agrees to perform an act in response to a request, the sanction is imprisonment with work for not more than seven years. Further, where such public official consequentially acts illegally or refrains from acting in the exercise of his or her duty, the sanction is imprisonment with work for a period within a range of one to 20 years. The sanction for offering or promising to give a bribe to a public official is imprisonment with work for not more than three years, or a fine of not more than 2.5 million yen.

As part of the reforms of the late 1990s, the Japanese government established the National Public Service Ethics Board, which provides a website with the ethics code applicable to bureaucrats, as well as detailed guidelines.

“Deemed public officials” and other prohibitions against bribery of employees in public services

Under various laws specific to formerly or predominantly state-owned enterprises, employees of such entities have the status of “deemed public officials” (minashi koumuin), and it is expressly forbidden to give bribes to such persons, or for such persons to accept bribes. Also, while not using the term “deemed public officials,” certain laws in relation to specific companies that perform public services prohibit the bribery of employees.

**Bribery of foreign public officials**

Japan has been a member of the Organisation for Economic Co-operation and Development (“OECD”) since 1964. It implemented the 1997 OECD Anti-Bribery Convention in 1998,
by amending the Unfair Competition Prevention Law ("UCPL")\(^{29}\) to add Article 18, which criminalised bribery of foreign public officials.\(^{30}\) Additional law was enacted in 2004 to broaden the jurisdiction of Article 18 to cover conduct by Japanese nationals while abroad.\(^{31}\) Also, the Tax Law was amended in 2006 to prohibit the deduction as business expenses of bribes paid abroad.\(^{32}\) Unlike the Penal Code, the UCPL expressly imposes criminal liability on legal persons (firms and organisations).\(^{33}\)

Article 18 was intended to track the language of the Anti-Bribery Convention, and provides as follows:

*No person shall give, offer or promise any pecuniary or any 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 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.*\(^{34}\)

Originally, the penalty for bribery of a foreign public official was imprisonment with work for not more than three years or a fine of not more than 3m yen, or both, and the statute of limitations for natural persons had been three years; but in response to the OECD’s recommendations, the penalties were increased to five years and 5m yen, and the limitations period was also extended to five years.\(^{35}\) In addition, if an individual bribed a foreign official in connection with the business of a legal person, such legal person may be subject to a fine of not more than 300m yen.\(^{36}\) The law does not provide for confiscation of the proceeds of bribing a foreign public official. The OECD Working Group recently recommended establishment of the legal authority to confiscate the proceeds of foreign bribery, which is required by the OECD Convention, and punish those who launder such proceeds.\(^{37}\)

The Ministry of Economy, Trade and Industry ("METI") administers the UCPL, including Article 18, but prosecutions under Article 18 are handled by the Public Prosecutors Office. METI’s website includes a section dedicated to the prevention of bribery of foreign officials,\(^{38}\) and provides detailed “Guidelines to Prevent Bribery of Foreign Public Officials” that explains the law, as well as what companies can do to prevent bribery.\(^{39}\)

**Facilitation payments**

The original METI Guidelines issued in 2004 indicated that the UCPL does not explicitly exempt “small facilitation payments”, but that such payments would not be a criminal offence under the OECD Anti-Bribery Convention. The OECD criticised this (and METI’s attempts to explain its interpretation) as confusing,\(^{40}\) and METI updated the Guidelines in September 2010 to clarify that facilitation payments would be illegal under Japanese law if their purpose was “to obtain or retain improper business advantage in the conduct of international business”.\(^{41}\) The OECD criticised this guidance as misleading, so a revision in July 2015 clarified that demand for bribes from foreign public officials must be rejected as a rule, even if Japanese companies face cases in which they would be forced or extorted to pay bribes in order to avoid being treated unreasonably and unfairly by the foreign public officials.\(^{42}\)

**Commercial bribery**

At least theoretically, commercial bribery is prohibited under Article 967 of the Companies Act.\(^{43}\) Under that statute, if certain specified types of corporate executive or employee, or an accounting auditor, accepts, solicits or promises to accept property benefits in connection with such person’s duties, in response to a wrongful request, it is punishable by imprisonment with work of up to five years or a fine of up to 5m yen.\(^{44}\) In addition, the
Giving, offering or promising to give a commercial bribe is punishable by imprisonment with work of up to three years or a fine of up to 3m yen. This statute is analogous to Article 197 of the Penal Code, and the analysis of what constitutes a bribe is virtually the same. However, this statute has been unused, with prosecutors instead preferring to go after managers who accept bribes based on “aggravated breach of trust” against the company, under Article 960 of the Companies Act. There is no corporate liability for commercial bribery under the Companies Act.

**Current issues**

**Kansei dango**

Despite the reforms discussed above, one type of corruption that remains deeply entrenched in Japan is government-led bid-rigging on public projects (kansei dango): a type of bid-rigging scheme in which a public official acts as an organiser to determine which company will win. Typically, the official is a representative of the government entity that issued the bid request, who wishes to dole out favours to firms (especially in construction) which are major sources of political funds, or are potential sources of work after the official leaves government. This type of conduct had been long accepted, but started to be prosecuted in the 1990s as part of the general trend towards anti-corruption. As the widespread nature of the practice became apparent, legal reforms were instituted in the early 2000s, including the passage of a law specifically prohibiting kansei dango and amendments to the Anti-Monopoly Law. But a flood of major bid-rigging incidents in 2005 and 2006, including those resulting in the arrests of three prefectural governors, resulted in an accelerated passage in 2006 of amendments to the existing law against kansei dango. Additionally, in 2006, shareholders began suing corporate executives on the theory that their participation in the bid-rigging schemes damaged the company.

Despite these changes, new kansei dango cases continue to emerge. In 2010, it was reported that Air Self-Defense Force officials were involved in rigging procurement contracts. In 2012, Ground Self-Defense Forces employees were found to have improperly provided information to a firm about a development bid for a next-generation helicopter. In June 2013, Kagoshima police launched an investigation of a prefectural official in connection with a rigged hospital construction bid. In March 2014, the Japan Fair Trade Commission (“JFTC”) filed a criminal accusation relating to a bid-rigging case concerning snow-melting equipment engineering works for Hokuriku Shinkansen involving executives of Japan Railway Construction, Transport and Technology Agency, an incorporated administrative agency of the Ministry of Land, Infrastructure and Transportation (“MLIT”). In June 2015, the Metropolitan Police Agency raided the offices of MLIT’s Tokyo Regional Civil Aviation Bureau in connection with a bid for inspection of sprinkler equipment.

Further, the JFTC found in three separate cases (2007, 2009 and 2012) that officials of MLIT were involved in bid-rigging, requiring the JFTC to demand improvements by MLIT.

**Amakudari**

A related issue is amakudari, which literally means “descent from heaven”, and refers to the practice of government officials retiring into lucrative positions in businesses they used to regulate. This practice has been identified as a significant cause for kansei dango, because bidders are populated by former officials of agencies requesting the bids, or provide future job opportunities for such officials. It has been reported that, for example, 68 bureaucrats retired from METI into top positions at Japan’s 12 electricity suppliers, which METI oversees, and that between 2007 and 2009, 1,757 bureaucrats got jobs at organisations and firms that received subsidies or government contracts during 2008.
In the wake of the *kansei dango* scandals of the mid-2000s, in which collusion was found to have occurred between current and former government officials, the National Public Service Act (“NPSA”) was amended in 2007. The amendment prevented ministries from finding post-retirement jobs for their officials, limited job-hunting by officials while still in government, and prohibited former officials from recruiting activities. However, the reform has not been particularly effective, with many officials still being hired by firms and organisations they used to oversee. During the administration of the Democratic Party of Japan (“DPJ”) from 2009 to 2012, further attempts to amend the NPSA made no headway. In July 2013, the “Headquarters for Promotion of Reform to the National Public Service System”, which was founded in 2008 to implement the 2007 amendment, formally disbanded after its five-year term expired; in fact, it was virtually non-operational during the DPJ years. The LDP included the eradication of *amakudari* as one of its campaign promises, but has not yet pressed for new legislation on this issue.

**Low enforcement of UCPL Article 18**

In the 17 years since its enactment in 1998, UCPL Article 18 has been enforced only four times:

- In March 2007, two Japanese individuals were found guilty of bribing two senior Filipino officials with about 800,000 yen (approximately US$6,600) worth of golf clubs and other gifts, in an effort to win a government contract. They failed to win, but the bribes were reported by a whistleblower. The individuals were fined 500,000 yen (approximately US$4,100) and 200,000 yen (approximately US$1,700), respectively. It appears that the company they worked for (the Philippines subsidiary of a Japanese company) was not prosecuted.
- In January and March 2009, four Japanese individuals were found guilty of bribing a Vietnamese official in connection with a highway construction project that was partly financed by official development assistance (“ODA”) from Japan. The value of the contract was approximately US$24m, and the total amount given to the official was about US$2.43m, but the court specified the amount of the bribes at US$820,000, partly because the statute of limitations had run on some of the earlier conduct. The four individuals were sentenced to imprisonment for 2.5 years, 2 years, 1.5 years, and 20 months, respectively, and all of their sentences were suspended for three years. The company they worked for was fined 70 million yen (approximately US$580,900), and also temporarily delisted by the Japan Bank for International Cooperation and the Japan International Cooperation Agency.
- In September 2013, a former executive of a Japanese automotive parts manufacturer was fined 500,000 yen (approximately US$4,100) for bribing an official in China to ignore an irregularity at a subsidiary’s factory in Guangdong Province.
- In February 2015, the Tokyo District Court found a railway consulting firm and its three former executives guilty of violating the UCPL by bribing government officials of Vietnam, Indonesia and Uzbekistan with approximately US$1.2m in order to obtain consulting contracts related to ODA projects in the three countries. The court sentenced the three individuals to imprisonment for two years suspended for three years, three years suspended for four years, and two-and-a-half years suspended for three years, and fined the consulting firm 90 million yen (approximately US$747,000). In the meantime, the Japanese government agency in charge of ODA said that Japan will resume providing ODA funds after Vietnam returns the bribe.

The OECD has criticised this low level of enforcement activity, issuing a news release in January 2012, both in English and Japanese, stating: “Japan is still not actively detecting and investigating foreign bribery cases and, as a result, the enforcement of Japan’s anti-bribery law remains low.” In February 2014, the OECD recommended that Japan establish and
implement an action plan to address these concerns, and to report orally in March 2014 and in writing in June 2014. The scheduled reports are not publicly available as of this writing, but the OECD released a critical statement in June 2014, specifically noting the action plan’s failure to rectify misleading information on facilitation payments and to establish a legal authority to confiscate the proceeds of foreign bribery.

The greatest challenge for increasing enforcement of this law is creating incentives for companies to self-report, or for whistleblowers to come forward. The type of whistleblower award programme instituted by the U.S. Securities and Exchange Commission will be difficult to implement in Japan, considering the smaller potential recovery available; the amount of the potential reward is unlikely to offset the downsides of reporting on one’s employer. Instituting a leniency-type system to reduce potential fines in exchange for cooperation may encourage some companies to self-report, but the maximum corporate exposure of 300 million yen (approximately US$3m) may not be large enough to justify the trouble. Also, to the extent that the four decided cases so far provide any guidance, they seem to indicate that courts will impose a fine that is roughly equivalent to the amount of the bribe.

An interesting point of comparison may be the JFTC’s cartel leniency programme, which is modelled on similar programmes in the US and the EU. When the programme was first proposed, many doubted that it would succeed in a group-oriented culture like Japan. But to the contrary, Japanese firms immediately began filing applications. Between 2006 and 2014, there have been a total of 836 filings, resulting in 102 publicised actions against a total of 245 firms. Its success indicates that measures initially viewed as unlikely to succeed in Japan may still be worth implementing.

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* * *

Endnotes
5. Sone, supra, at 149 endnote 5, 6.

8. See Horvat, supra.


13. There are still some cases, but they tend to be more regional and at a lower level. In June 2014, Hiroto Fujii, the mayor of Minokamo City in Gifu prefecture and widely known as the youngest mayor in Japan, was arrested on charges of receiving hundreds of thousands of yen in bribes from a businessman in 2013 while he was still a member of the city council. In March 2015, Fujii was found not guilty by the Nagoya District Court. “Nation’s youngest mayor acquitted of bribery in Gifu”, The Japan Times, Mar. 6, 2015 (http://www.japantimes.co.jp/news/2015/03/06/national/crime-legal/nations-youngest-mayor-acquitted-bribery-gifu/#.VgYaH5P55-8).


15. Penal Code, art. 7. Unless otherwise noted, translations of Japanese laws in this article are from the “Japan Law Translation” website of the Ministry of Justice (http://www.japaneselawtranslation.go.jp/).

16. Id. art. 197(1).

17. Id. art. 197(2).

18. Id. art. 198.

19. Id. arts. 1(1), 3-2.

20. Id. art. 4(iii).

21. Id. art. 197.

22. Id. art. 197-5.

23. Id. art. 197.

24. Id. art. 197-3(1).

25. Id. art. 198.


27. See Act No. 165 of 1947 (Japan Post); Act No. 89 of 1997 (Bank of Japan); Act. No. 205 of 1949 (bar association); Act No. 112 of 2003 (national universities); Act No. 185 of 1951 (driving schools); Act No. 141 of 1959 (National Pension Fund Association). This list of “deemed public officials” is not exhaustive.

28. See Act No. 69 of 1984 (Japan Tobacco); Act No. 85 of 1984 (NTT); Act No. 88 of 1986 (Japan Railways); Act No. 132 of 1950 (NHK); Act No. 124 of 2003 (Narita Airport); Act No. 37 of 2007 (International Criminal Court). In April 2015, employees of Japan Freight Railway Company and electrical equipment seller Kanaden Corporations have been arrested by Tokyo police on charges of taking and giving bribes in connection with warehouse construction projects in violation of the Act No. 88. “Officials of JR Freight, Kanaden arrested over bribes”, The Japan Times, Apr. 12, 2015 (http://www.japantimes.co.jp/news/2015/04/12/national/crime-legal/officials-of-jr-freight-kanaden-arrested-for-bribery).


31. Act No. 51 of 2004; see also Penal Code, art. 3 and UCPL art. 21(6).

33. UCPL art. 22(1).
36. *Id.* art. 22(1).
44. *Id.* art. 967(1).
45. *Id.* art. 969.
46. *Id.* art. 967(2).

64. See endnote 60, supra.

65. Act No. 120 of 1947.


73. Endnote 37 supra.

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