Global Legal Insights

Bribery & Corruption 2020

Seventh Edition

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global legal group

GLOBAL LEGAL INSIGHTS – BRIBERY & CORRUPTION

2020, SEVENTH EDITION

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We are extremely grateful for all contributions to this edition.
Special thanks are reserved for Jonathan Pickworth and Jo Dimmock for all of their assistance.

Published by Global Legal Group Ltd.
59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 207 367 0720 / URL: www.glgroup.co.uk

ISBN 978-1-83918-013-2
ISSN 2052-5435

Printed and bound by CPI Group (UK) Ltd, Croydon, CR0 4YY
November 2019

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PREFACE

We are pleased to present the seventh edition of *Global Legal Insights – Bribery and Corruption*. This book sets out the legal environment in relation to bribery and corruption enforcement in 28 countries and one region worldwide.

This edition sees the addition of new chapters relating to Belgium, Poland, Hong Kong and the Czech Republic, as well as an Asia-Pacific overview. In addition to addressing the legal position, the authors have sought to identify current trends in enforcement, and anticipated changes to the law and enforcement generally.

Incidents of bribery and corruption often involve conduct and actors in several different jurisdictions. As enforcement activity increases around the world, attention is being focused on particular problems companies face when they seek to resolve cross-border issues.

Coordinating with multiple government agencies can be challenging at the best of times, and can be even more difficult when dealing with bribery and corruption laws that have been amended or have just entered into force. Sometimes a settlement in one jurisdiction can trigger a further investigation in another. Stewarding a company through these sorts of crises involves not only dealing with today's challenges, but thinking about the next day, the next week, the next month, and beyond, on a global stage.

We are very grateful to each of the authors for the contributions they have made. We hope that the book provides a helpful insight into what has become one of the hottest enforcement topics of current times.

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November 2019

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 18th least corrupt country out of 180 in the most recent *Corruption Perceptions Index*.[1] The World Justice Project's 2018–2019 Rule of Law Index ranked Japan as the 13th least corrupt country out of 126,[2] and the US State Department has characterised the direct exchange of cash for favours from Japanese government officials as "extremely rare".[3]

Corruption had been a prevalent feature of Japan's post-war economic boom, which was built on a close-knit alliance known as the "iron triangle" among 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 US 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 the death of one governor by suicide; and the Bank of Japan ("BoJ") and Ministry of Finance ("MoF") 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).[4] 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.[5] 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.[6]

In addition, especially during the past 15 years, Japanese firms have instituted 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 firm trumpet their commitment to compliance and corporate social responsibility. While some challenges 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 25 years ago.

Since July 2013, an LDP-led coalition under the leadership of Prime Minister Shinzo Abe has dominated the Japanese government. But the popularity of the Abe administration has diminished recently, in the wake of scandals involving known associates of Abe and his wife appearing to receive favourable treatment in government approval processes.[7] In relation to these scandals, *sontaku*, a seldom-used Japanese term referring to the pre-emptive, placatory following of a superior's inferred wishes, is increasingly being used to imply a system corrupted through governance-by-guesswork.[8] In August 2018, the Tokyo District Public Prosecutors Office decided not to prosecute a long-time aide to Shinzo Abe, who allegedly received 2m yen (approximately US$18,600) in undeclared donations from a scandal-tainted school operator.[9]

As discussed below, in March 2017, the Ministry of Education, Culture, Sports, Science and Technology ("MEXT") disclosed that 63 current or former ministry employees had illegally negotiated with universities to secure post-retirement jobs for their colleagues. A little more than one year later, two former senior MEXT officials were indicted for unrelated corruption charges. In July 2018, a former director-general of the ministry's Science and Technology Policy Bureau was indicted for bribery. He allegedly helped a private medical university win ministry subsidies; in return, his son's entrance exam score was altered to secure the son a place at the university. An executive of a medical care consulting firm, who allegedly served as an intermediary between the official and the school, was also indicted. In August 2018, a former director-general for international affairs at the ministry was indicted for allegedly receiving bribes worth about 1.5m yen (approximately US$14,000) in the form of wining and dining. The above-mentioned consulting firm executive was also involved in this case, and was indicted for bribing the official.[10]

Legal overview

Bribery of Japanese public officials

Article 197 of Japan's Penal Code prohibits a public official, defined (in Article 7) 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",[11] 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 under Article 198 to give, offer or promise to give a bribe to a public official or a person to be appointed a public official. So-called "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 a public official (or a person to be appointed a public official) who accepts a bribe is imprisonment with work for up to five years, as well as confiscation of the bribe or its monetary value. If a public official agrees to perform an act in response to a request, the sanction is imprisonment with work for up to seven years. Further, if 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 up to three years, or a maximum fine of 2.5m yen (approximately US$23,200).

In July 2017, Japan revised the Act on Punishment of Organised Crime and Control of

Crime Proceeds[12] to forbid conspiracies by groups of two or more people to commit certain crimes, including giving and receiving bribes. The revision ostensibly was necessary in order for Japan to ratify the United Nations Convention against Transnational Organised Crime. The government rushed through the passage of the revision, characterising it as an "Anti-Terrorism Law", and arguing that the conspiracy statute would only be used against criminal organisations and terrorists, not the general population.

"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*). These laws expressly forbid anyone from bribing such persons, and forbid such persons from accepting bribes.[13] In addition, without using the term "deemed public officials", certain laws prohibit the employees of specific firms that perform public services from accepting or demanding bribes.[14]

<u>Bribery of foreign public officials</u>

Japan has been a member of the Organisation for Economic Co-operation and Development ("OECD") since 1964. Japan implemented the 1997 OECD Anti-Bribery Convention in 1998, by amending the Unfair Competition Prevention Act ("UCPA") to add Article 18, which criminalised bribery of foreign public officials. An additional law was enacted in 2004 to broaden the jurisdiction of Article 18 to cover conduct by Japanese nationals while abroad. The Japanese government also amended the Income Tax Act in 2006 to prohibit deducting bribes paid abroad as business expenses. Unlike the Penal Code, Article 22(1) of the UCPA expressly imposes criminal liability on legal persons (firms and organisations).

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

> *No person shall give, or offer or promise to give, any money or other benefit to a Foreign Public Official, etc. in order to have the Foreign Public Official, etc. act or refrain from acting in relation to the performance of official duties, or in order to have the Foreign Public Official, etc. use his/her position to influence another Foreign Public Official, etc. to act or refrain from acting in relation to the performance of official duties, in order to obtain a wrongful gain in business with regard to international commercial transactions.*[15]

Originally, the penalty for bribing a foreign public official was imprisonment with work for up to three years or a maximum fine of 3m yen (approximately US$27,900), or both, and the statute of limitations for natural persons had been three years. However, in response to the OECD's recommendations, Japan increased the penalties to five years and 5m yen (approximately US$46,500), and extended the limitations period to five years.[16] In addition, if an individual bribed a foreign official in connection with the business of a legal person, such legal person could now be subject to a maximum fine of 300m yen (approximately US$2.8m). The law does not provide for confiscation of the proceeds of bribing a foreign public official.

In March 2019, the OECD Working Group reiterated its recommendations that Japan: 1) increase the level of sanctions and the limitation period for foreign bribery; 2) broaden its framework for establishing nationality jurisdiction over legal persons; 3) encourage its agencies to become more proactive in detecting foreign bribery; 4) ensure that the Ministry of Justice transmits and clarifies allegations of foreign bribery without creating delays in opening investigations; 5) ensure that the prosecution exercises its role independent from the Ministry of Justice and the Ministry of Economy, Trade and Industry ("METI"); and 6) ensure that both the police and the prosecution are more proactive and coordinated when investigating foreign bribery, including by reducing the reliance on voluntary measures and confession.[17]

The METI administers the UCPA, including Article 18, but the Public Prosecutors Office handles prosecutions under Article 18. METI's website includes a section dedicated to preventing the bribery of foreign officials (http://www.meti.go.jp/policy/external_economy/zouwai/index.html (in Japanese)). The site provides a detailed "Guideline to Prevent Bribery of Foreign Public Officials" ("METI Guideline") that explains the law, as well as how firms can prevent bribery.

The Japan Federation of Bar Associations ("JFBA") issued the "Guidance on Prevention of Foreign Bribery" in July 2016, as a supplement to the METI Guideline, with the purposes of clarifying: (1) the elements of an anti-bribery compliance programme necessary to fulfil the duty of firms to implement an internal control system; (2) the elements of an internal control system that may help firms seek mitigation of or relief from penalties; and (3) a practical approach to foreign bribery issues for firms and lawyers.[18]

The Japan International Cooperation Agency ("JICA"), an agency that coordinates Official Development Assistance ("ODA") for the Japanese government, issued an Anti-Corruption Guidance in 2014, which describes various anti-corruption measures, including JICA's anti-corruption consultation desk and required actions by governments, partner countries, executing agencies and companies. JICA will reject an applicant for procurement for grant aid and ODA loan projects if it determines that it has engaged in corrupt or fraudulent practices in competing for the ODA-related contract. Likewise, it will debar an applicant for a particular period of time if it determines that the applicant has engaged in corrupt or fraudulent acts in competing for, or executing, a prior ODA-backed contract or if, under certain conditions, the company has been debarred by the World Bank Group.[19]

Facilitation payments

The original METI Guideline issued in 2004 indicated that the UCPA 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, and METI updated the Guideline in September 2010 to clarify that facilitation payments would be illegal under Japanese law if the payments were intended "to obtain or retain improper business advantage in the conduct of international business". The OECD subsequently criticised Japanese authorities for not actively encouraging Japanese firms to prohibit making even small facilitation payments, and METI removed the paragraph related to facilitation payments in its July 2015 revision of the Guideline.

The JFBA Guidance, noting that the issue of handling facilitation payments often arises both in business practices and in legal consultations, states that paying even small sums to facilitate the smooth progress of ordinary administrative services is prohibited. Additionally, the JFBA Guidance suggests Japanese companies cooperate with the Japanese embassy or consulate, chamber of commerce, Japan's Ministry of Foreign Affairs, and other institutions to press the local government to eliminate facilitation payments.[20]

<u>Introduction of plea bargaining</u>

The amendments to the Code of Criminal Procedure that came into effect in June 2018[21] introduced a plea-bargaining system with respect to certain specified crimes, including bribery. Under the system, a prosecutor may enter into a formal plea-bargaining agreement with a suspect or defendant to withdraw or reduce criminal charges or agree to pre-determined punishment when the suspect or defendant provides evidence that may be used against other suspects or defendants.

Notably, the first plea bargain under the system was reached in a case that involved employees of a major Japanese power plant construction firm bribing Thai officials. The firm cooperated with the Tokyo District Public Prosecutor's Office by providing evidence that could be used to prosecute the former executives for conspiring to bribe a Thai public official with approximately US$357,000 to speed up the clearance of cargo related to a local power plant project. This case garnered a mixed reaction: on the one hand, it showed the plea-bargaining system to be a useful tool for prosecuting bribery of foreign public officials, for which gathering evidence overseas is often difficult; on the other hand, there is concern of a firm's "scapegoating" its employees in return for escaping corporate liability.[22]

A second plea bargain under the system was reportedly reached in relation to an arrest of and charges against the then-chairman of a multinational automobile manufacturer for violations of the Financial Instruments and Exchange Act. Two executives of the company are said to have handed the Tokyo District Public Prosecutor's Office materials relating to the charges against the former chairman for underreporting his income, as well as information relating to suspicions that he had the company provide luxury housing. It has also been reported that the two executives, in exchange for promises to submit all necessary evidence as well as to testify in court, would not be indicted.

Commercial bribery

Article 967 of the Companies Act prohibits commercial bribery. 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, the conduct is punishable by imprisonment with work of up to five years or a fine of up to 5m yen (approximately US$46,500). In addition, the bribe or its monetary value may be subject to confiscation. 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 (approximately US$27,900). This statute is analogous to Article 197 of the Penal Code, and the analysis of what constitutes a bribe is virtually the same.[23] However, prosecutors have not used this statute, instead preferring to go after managers who accept bribes based on "aggravated breach of trust" against the firm, under Article 960 of the Companies Act. Corporations are not liable 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 firm 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) that are major sources of political funds, or are potential sources of work after the official leaves government. After long acceptance, the government started prosecuting this type of conduct 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 Act.

But a flood of major bid-rigging incidents in 2005 and 2006, including those resulting in the arrests of three prefectural governors, led in 2006 to an accelerated passage of amendments to the existing law against *kansei dango*. Additionally, starting with a bid-rigging case on a steel bridge construction project in 2006, shareholders began suing corporate executives on the premise that the executives' participation in the bid-rigging schemes had damaged their firm. Further, the Japan Fair Trade Commission ("JFTC") found in three separate cases (2007, 2009, and 2012) that officials of the Ministry of Land, Infrastructure and Transportation ("MLIT") were involved in bid-rigging, requiring the JFTC to demand improvements of the MLIT.

Despite these changes, new *kansei dango* cases continue to emerge.

- In February 2017, the Nagoya District Court imposed a three-year suspended sentence and a fine of 320,000 yen (approximately US$3,000) on a former regional employee of MLIT for leaking information related to the construction of a bridge in Mie Prefecture. The court also imposed three-year suspended sentences on former employees of the construction company that received confidential bidding information from the former regional MLIT employee.
- In May 2017, the Nagoya District Court imposed a five-year suspended sentence and a 1.95m yen (approximately US$18,100) fine on a former regional employee of MLIT for leaking information related to the construction of a tunnel in Mie Prefecture.
- In March 2018, the Saitama District Court imposed a two-and-a-half-year suspended sentence and a fine of 600,000 yen (approximately US$5,600) on a former mayor of Ageo City, Saitama Prefecture for receiving bribes of 600,000 yen in return for changing bidding qualifications for the city garbage-disposal operation in favour of a local company.
- In April 2019, an Osaka City Construction Bureau employee was indicted and dismissed for receiving bribes of 4m yen (approximately US$37,200) in return for leaking information related to the city's electricity construction projects.
- In October 2019, an electric utility company announced that 20 current and former executives of the company had received a total of 320m yen (approximately US$3m) in cash and gifts of various forms such as gold coins, gold bars and certificates for tailored suits from a late former official of a town hosting one of its nuclear plants, who passed away in March 2019. In particular, two senior current and former executives who were responsible for the utility's nuclear business received more than 100m yen (approximately US$936,000) each from the influential former official. A construction company linked to the former official received orders worth at least 3bn yen (approximately US$28m) from the utility over a period of four years between September 2014 and March 2019.

<u>*Amakudari*</u>

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 providing future job opportunities for such officials.[24] Reportedly, for example, 68 bureaucrats retired from METI into top positions at Japan's 12 electricity suppliers, which METI oversees,[25] and between 2007 and 2009, 1,757 bureaucrats were hired at organisations and firms that received subsidies or government contracts during 2008.[26]

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 prevents 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 stalled. 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 in 2012, but has not pressed for new legislation on this issue to date. In March 2017, the MEXT announced that it had confirmed 63 cases in which current or former ministry employees had illegally negotiated with universities to secure their colleagues' post-retirement jobs. The ministry's discovery resulted in the resignation and penalisation of 43 senior ministry bureaucrats.[27]

<u>Low enforcement of UCPA Article 18</u>

In the 18 years since its enactment in 1998, UCPA Article 18 has been enforced only four times,[28] in addition to the indictment of the employees of the power plant construction firm discussed above:

- In March 2007, two Japanese individuals were found guilty of bribing two senior Filipino officials with about 800,000 yen (approximately US$7,400) worth of golf clubs and other gifts, in an effort to win a government contract. They failed to win the contract, but the bribes were reported by a whistleblower. The individuals were fined 500,000 yen (approximately US$4,600) and 200,000 yen (approximately US$1,900), respectively. It appears that the firm they worked for (the Philippines subsidiary of a Japanese firm) 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 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 expired on some of the earlier conduct. The court imposed three-year suspended sentences on the individuals. The firm they worked for was fined 70m yen (approximately US$650,900), and was also temporarily delisted by the Japan Bank for International Cooperation and JICA.
- In September 2013, a former executive of a Japanese automotive parts manufacturer was fined 500,000 yen (approximately US$4,600) 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 UCPA 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 imposed three-year suspended sentences on the three individuals, and fined the consulting firm 90m yen (approximately US$836,800).

The OECD has criticised the low level of enforcement activity, issuing a news release in March 2019, both in English and Japanese, declaring that Japan must step up enforcement of its foreign bribery laws and strengthen the capacities of its law enforcement agencies to proactively detect, investigate and prosecute foreign bribery offences. While noting positive developments, the OECD still emphasised that Japan's enforcement rate is not commensurate with the size and export-oriented nature of its economy or the high-risk regions and sectors in which its companies operate.

The greatest challenge for increasing enforcement of UCPA Article 18 is creating incentives for firms to self-report, or for whistleblowers to come forward. The type of whistleblower award programme instituted by the US Securities and Exchange Commission will be difficult to implement in Japan, considering the smaller potential recovery available (*i.e.*, 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 firms to self-report, but the maximum corporate exposure of 300m yen (approximately US$2.79m) may not be large enough to justify the trouble. In addition, the four decided cases – to the extent that they provide any guidance – seem to indicate that courts will impose a fine that is roughly equivalent to the amount of the bribe.

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* * *

Endnotes

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12. See Act No. 136 of 1999, as amended by Act No. 67 of 2017.
13. 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); Act No. 33 of 2015 (The Tokyo Organising Committee of the Olympic and Paralympic Games). This list of "deemed public officials" is not exhaustive.
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Catherine E. Palmer is a partner in the Hong Kong office of Latham & Watkins. Ms. Palmer anchors the firm's Asia White Collar Defence and Government Investigations Practice and Antitrust/Competition Practice. Ms. Palmer leads the firm's Asia-based Corporate Risk and Government Investigations Team. Ms. Palmer is a former US DOJ prosecutor. As a DOJ prosecutor, Ms. Palmer handled numerous complex criminal investigations in Asia involving corruption, money laundering, extortion, fraud and other crimes committed by criminal organisations based in Asia.
Ms. Palmer focuses her practice on the representation of multinational companies involved in criminal or regulatory investigations throughout the world, with an emphasis on global corruption/bribery investigations, global antitrust cartel investigations and investigations related to US trade and economic sanction issues. Ms. Palmer has interacted with regulators throughout the world on behalf of clients, including regulators in the US, EU, UK and Asia.

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Junyeon Park is an associate in the Litigation & Trial Department of Latham & Watkins' Tokyo office. Her practice focuses on cross-border litigation and international arbitration. She also has experience in investigations regarding potential antitrust violations and internal investigations of potential violations of the Foreign Corrupt Practices Act (FCPA), and matters concerning compliance with the FCPA and other global commercial compliance regulations.
Before attending law school, Ms. Park served as a foreign service officer for the Ministry of Foreign Affairs and Trade of Korea. During law school, she served as Senior Articles Editor of *The NYU Journal of International Law and Politics*. Ms. Park is qualified to practise before the New York Bar and in Japan as *Gaikokuho-Jimu-Bengoshi* (registered foreign lawyer, New York law). She is fluent in English, Japanese, and Korean.

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