CLIFFORD
CHANCE

Briefing note
Feburary 2012

Under-Criminalisation of Foreign Bribery in Asia Pacific

Countries signing on to the United Nations Convention Against Corruption (UNCAC) are required to enact laws to criminalise bribery of foreign public officials. All of the Asia Pacific countries (except North Korea) have signed the UNCAC, and yet, only a small minority of them have enacted a specific criminal offense covering bribery of foreign public officials.

Now, other countries are making demands on Asia Pacific countries to comply with international standards. Beyond the ethical necessity to capture the misconduct involving non-domestic public officials committed abroad by their nationals, there is also a fair competition requirement that all the business actors operate on a level playing field, regardless of their nationality.

History of International Anti-Corruption Standards in Asia Pacific

Foreign bribery has quite recently become relevant due to the rapid expansion of world trade. It is therefore a relatively new offence in most jurisdictions (except in the United States where the Foreign Corrupt Practices Act has been in force since 1977). From a legal perspective, anti-corruption restrictions were first imposed on the agenda of the industrialised countries by the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1997. The restrictions were more widely applied through the UNCAC in 2005.

Article 16 of the UNCAC sets out the requirement that active foreign bribery of public officials be subject to criminal penalties in the countries signing the Convention. Passive bribery (allowing the prosecution of foreign public officials) is a recommendation. As previously mentioned, all but one of the Asia Pacific countries have signed the UNCAC; however Japan, New Zealand, Myanmar and Bhutan have not ratified it yet.

Recent Trends in Criminalisation

According to the Asian Development Bank/OECD Anti-Corruption Initiative for Asia and the Pacific, as of 2010 only six of 28 members had enacted a specific offence covering the bribery of foreign public officials. This includes Australia, Cambodia, Japan, Kazakhstan and Korea.

However, in 2011, China introduced the offence of foreign bribery of public officials into its criminal law, raising the number to seven. This is still far from ideal and has led some observers to characterise the current status as an "under-criminalisation" of foreign bribery in Asia Pacific.

In the short run, this under-criminalisation creates an unfair market distortion, giving advantage to the Asia Pacific companies against those complying with stricter standards, in particular when they are in competition in countries where corruption is endemic. In the long run, this could turn into a disadvantage for the same companies which, by not having a strong anti-corruption culture, may be seen as impracticable business partners in a context where the risks in this area are getting tougher.

Key issues

History of International Anti-Corruption Standards in Asia Pacific

Recent Trends in Criminalisation

Conclusion

If you would like to know more about the subjects covered in this publication or our services, please contact:

Wendy Wysong
Partner
Tel: +852 2826 3460 (Hong Kong)
Tel: +1 202 912 5030 (Washington DC)
wendy.wysong@cliffordchance.com

Charles-Henri Boeringer
Senior Associate
Tel: +852 2826 3517
charles-henri.boeringer@cliffordchance.com

Clifford Chance, 28F Jardine House, One Connaught Place, Central, Hong Kong
Clifford Chance, 2001 K Street NW Washington 20006 - 1001, USA

www.cliffordchance.com

All in all – and not to mention in detail the damaging social effects of foreign bribery at a macro level – delaying the implementation of the international instruments is driven by short-sighted strategies rather than by a long-term and sustainable vision.

While the seven countries above have enacted stand-alone offences addressing bribery of foreign public officials that comply with the international standards, some jurisdictions like Hong Kong and Singapore assert that even if their criminal legislation does not expressly cover foreign bribery of public officials, they meet the requirements of the UNCAC through the broad drafting of their existing legislation.

For instance, in a 2009 ruling, the Hong Kong Court of Final Appeal decided that the scope of the term agent, defined as "any person employed by or acting for another," applied to bribery of foreign public officials. See B. v, Commissioner of the ICAC, FACC No 6. Singapore uses similar reasoning, i.e., that the offense of corruption of agents provides authority to investigate and prosecute bribery overseas. To our knowledge, Singapore's assertion has not been judicially confirmed to date.

Generally speaking, using the notion of agent to cover foreign official bribery creates a number of uncertainties such as the scope of the offence and available defences. Indonesia also argues that its existing law would cover foreign bribery if the result or effect of the offence committed abroad occurs in the Indonesian territory under a "cause" theory. These theories without explicit coverage of foreign bribery are not altogether satisfactory.

Moreover, countries with the most dynamic economies in the regions, such as Vietnam, the Philippines, Indonesia and Thailand, do not have any legislation making foreign bribery of public officials an offence.

However, significant progress is being made in the region as the two leading countries – China and India – are moving forward in this area. China adopted the Eighth Amendment to the Criminal Law of the People's Republic of China, which took effect on May 1, 2011.

This amendment added a second paragraph to Article 164 of the PRC Criminal Law, creating a new offence of bribery of foreign public officials or officials of international public organisations (active bribery only). Even if the notion of "foreign public official" and "official of an international public organisation" are not defined, it seems that they should be construed in the light of the definition provided by article 2 of the United Nations Convention Against Corruption.

It is worth noting that by a Nov. 14, 2011, regulation, the Supreme People's Procuratorate and the Ministry of Public Security set out thresholds for initiating investigation and prosecution of the offence of bribery of foreign public officials or officials of international public organisations that are as follows: RMB 10,000 (about USD $1,600) if the offender is an individual; RMB 200,000 (about USD $31,700) if the offender is an organisation (e.g., a company).

India has recently introduced in the lower house of the Parliament a bill titled "The Prevention of Bribery of Foreign Public Officials and Officials of Public Interest Organisations Bill, 2011", which is based on the UNCAC. This bill, which expressly criminalises foreign bribery, defines a foreign public official widely, including any person holding a legislative, executive, administrative or judicial office in a foreign country; any person exercising a public function for a foreign country; and any official or agent of a public international organisation.

Conclusion

Asia Pacific is clearly a decisive market, and pushing for a uniform and enforceable set of rules over the region is part of any coherent strategy to reduce corruption in international business. This process may be long though.

When the U.S. government suggested in 1989 that OECD members adopt an agreement on foreign bribery in line with the FCPA, they received a rather cold reception. It has been only after long negotiations that the members adopted the landmark OECD Convention in 1997.

It took another 10 to 15 years for these countries to eventually modify their legislation accordingly. There is no reason to expect that Asia Pacific countries will be much quicker. But with India and China stepping forward, the region may pick up the necessary momentum.

This was first published in CCI in February 2012