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Overview of ASEAN anti-corruption legislation: the uneven road to harmonisation*

Recently, international attention has been focused on two significant changes in the Asia-Pacific region that could profoundly alter the conduct of business and investment: the loosening of restrictions on foreign investment in Myanmar and the establishment of the ASEAN Economic Community (AEC), composed of Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. The AEC Blueprint lays out five core elements that the AEC believes are critical to attaining the goal of a single market and production base for the ASEAN region – the free flow of: goods; services; investment; capital; and skilled labour. At present, numerous laws and regulations in each country need to be amended in order to facilitate this lofty goal. But, with less than three years until the AEC is to be formed, are the individual member countries ready or otherwise doing all they can to ease the transition to the single market objective?

While the formation of the AEC does involve modification and/or creation of laws within each country, in order to achieve uniform policies and legal standards, some areas of the law and practice will remain country-specific or will otherwise undergo a slower transition to uniform regional standards. One such area in which country-specific laws and practices are expected to initially retain some individuality is with respect to anti-corruption legislation.

While foreign companies operating in the AEC can employ generally uniform policies with respect to their compliance with established foreign anti-corruption regimes, such as the Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act, they would be wise to take a country-specific compliance approach when operating within each AEC

member country. This is because, despite the goal of single market rules and practice, ASEAN member countries invariably retain some country-specific anti-corruption laws and enforcement practices.

According to Transparency International's 2011 Corruption Index, an evaluation of 182 countries' efforts at fighting corruption (from the perspective of private sector businesses), the implementation and enforcement of anti-corruption legislation lacks harmonisation. This lack of cohesiveness also extends to the smaller set of AEC member countries. Of these, Singapore is, as usual, considered a clean country and currently ranks 5th worldwide (it was ranked 1st in 2010). Brunei, Malaysia, and Thailand rank 44th, 60th, and 80th respectively – rankings which place them somewhere between countries rated average and those in need of better transparency for attracting investment. These rankings represent a decrease from their 2010 positions. In contrast, Indonesia, Vietnam, and the Philippines, which rank poorly at 100th, 112th, and 129th respectively, have each managed to improve their rankings slightly compared to 2010 figures. Finally, Laos, Cambodia, and Myanmar still remain near the very bottom of the Corruption Index, ranking 154th, 164th, and 180th respectively.

UNCAC and the ADB/OECD Action Plan

Most developed countries have ratified arguably the two most important international anti-corruption conventions: the United Nations Convention on Anti-Corruption (UNCAC) and the Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Officials in International Business Transactions (the 'OECD Convention'). Ratification of one or both of these conventions not only shows a commitment to making efforts to combat corruption domestically, but also puts in place specific obligations to make the legislative changes necessary to achieve this goal.

Most ASEAN member countries have ratified the UNCAC, the latest being Thailand in 2011, with only Myanmar and Cambodia in ASEAN yet to fully ratify. Although this is a positive development which is, in part, a reaction to international pressures to adopt the UNCAC, much remains to be done in each country to improve anti-corruption legislation. When it comes to the OECD, however, not a single ASEAN member country has adopted the convention. This highlights the fact that despite the ambitious regional objective of a single, cohesive ASEAN market economy, ASEAN member countries are still largely reliant on country-specific laws and regulations, particularly with regard to anti-corruption legislation.

One area which lacks ASEAN-harmony is in legislation criminalising the acts of foreign officials involved in corrupt activities. Only Cambodia and Malaysia have enacted and enforced laws penalising corrupt foreign officials. For example, in Cambodia, foreign public officials or officials of public organisations can face punishment of incarceration from seven to 15 years for unrightfully asking for, demanding, or accepting, directly or indirectly, gifts, donations, promises, or any other benefit in order to perform or refrain from performing their duties.

Nonetheless, the OECD has created a plan to support the fight against corruption in the general Asia Pacific region under the joint leadership of the Asian Development Bank (ADB) and the OECD. This plan, called the ADB/OECD Anti-Corruption Initiative, has the initial support of most ASEAN member countries, excluding only Brunei, Laos, and Myanmar. According to the ADP/OECD Action Plan, member countries have agreed on the goals and standards for sustainable safeguards against corruption in the economic, political, and social spheres of countries in the region. The initiative is in its nascent stages, and therefore it is realistic to expect that ASEAN member countries will need a few years before improvement in their anti-corruption efforts can be effectively observed. This is an optimistic view toward anti-corruption development in the region, but the reality is that the pace will be uneven. This is largely a function of resources and political will.

Existing legislation

One issue preventing a rapid harmonisation of anti-corruption laws between ASEAN member countries is the difference in the legal regimes. For example, Malaysia, Myanmar, and Singapore are common law jurisdictions, whereas other ASEAN member countries employ European-based civil law systems, including Indonesia, Thailand, and Vietnam. As a result of the

foundational differences in the legal systems, the interpretation of anti-corruption laws and regulations differs from one country to another. It is also important to note that Brunei, Malaysia, Myanmar, and Singapore, as former British colonies, remain heavily influenced by court decisions from England and Wales, a fact not shared by other ASEAN member countries.

When considering ASEAN countries, it is interesting to note that most have implemented, amended, or have otherwise modified their anti-corruption laws or procedures in the last decade. For example, Brunei revised Chapter 131 of its Prevention of Corruption Act in 2002. In 2009, Malaysia adopted important revisions to its Malaysian Anti-Corruption Act, effecting important changes to its 1997 predecessor, while the Cambodian Anti-Corruption Law was enacted in November 2010 as a supplement to the Cambodian Penal Code. In addition, the Organic Act on Counter Corruption, which is the main anti-corruption legislation in Thailand, was implemented in 1997, and for the first time, was revised in 2011 after Thailand signed the UNCAC. In its efforts to update its anti-corruption laws, the Thai government has issued numerous notifications to cover topics including, but not limited to, ethics for state officials, protection for whistle-blowers, and rules regulating gifts and benefits under Thai law. These are limited but positive examples of the slow movement in some ASEAN member countries toward a more comprehensive anti-corruption programme supported by the law.

In contrast, some other ASEAN member countries have not amended their laws for many years and have done little to move toward regional harmonisation of anti-corruption laws. Myanmar, for example, which has faced political difficulties for several decades, relies only on its Penal Code when it comes to prosecution in corruption cases. Indonesia has a limited anti-corruption law dating back to 1960, the Anti-Graft and Corrupt Practices Act Republic Act No 3019, which has only recently been supplemented by revisions to the Penal Code – revisions that fail to cover the controversial issue of facilitation payments. Finally, while Singapore has not made any significant changes to its primary anti-corruption law in almost 20 years, there is arguably little real need for change, as Singapore has one of the best anti-corruption enforcement records in the world and is unquestionably the ASEAN leader.

What is a bribe?

Within ASEAN, the interpretation of what constitutes a bribe is largely uniform. So while most ASEAN member countries can agree on the meaning of a bribe in the broadest sense, they differ on whether facilitation payments are exempted from such classification. There is also a lack of consistency on the meaning of a facilitation payment. As a result, the distinction between lawful facilitation payments and illegal bribes is understandably blurred in several ASEAN member countries. This is in contrast to how facilitation payments are addressed in many other countries outside ASEAN, where facilitation payments are differentiated from a bribe. Typically, this differentiation allows for the use of facilitation payments to a government official, if the payment is of a minimum value, and the objective of such payment is for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature.

Contrary to the FCPA and the OECD Convention, the UK Bribery Act does not exempt facilitation payments from being considered a bribe. Interestingly, in several ASEAN member countries, facilitation payments are not exempted. In Thailand, however, such payments are acceptable if the payment represents a benefit provided to exercise a normal governmental function, although this is limited to THB 3,000 (approximately US$100) per occasion and per giver. Contrast this with Cambodia which, in 2011, made facilitation payments to officials illegal altogether. While these are two examples of how two ASEAN member countries treat facilitation payments, it is important to understand that culture and practice within ASEAN member countries may not necessarily align with prescribed laws. For example, it is our assessment that in many ASEAN member countries, the use of facilitation payments, in some capacity at least, remains common practice. Thus, in evaluating the use of facilitation payments, companies must not only look to the applicable law or laws, but should also consider the intent behind a proposed facilitation payment.

The prevailing use of local customs and practice in several ASEAN member countries is a significant concern for many businesses operating in the ASEAN region. This is particularly the case when considering the extent to which the provision of private benefits to government officials is permissible. In Indonesia, for example, public officials receiving

gifts for their wedding, or for the wedding of their children or relatives, are entitled to keep such gifts if the total value is lower than IDR 1m (around US$110). However, it is uncertain as to whether this amount is also applicable to non-wedding gifts. In Vietnam, an official is entitled to keep a gift if it is provided under specific circumstances, such as for the New Year, a funeral, or a wedding, and its value is lower than VND 500,000 (around US$25). The notion of gifts is understood broadly to include items such as shares, bonds, goods, properties, tourism benefits, or medical services.

It is also interesting to note that only a few ASEAN countries, such as Indonesia and Malaysia, consider payments between private parties illegal. In Singapore, it is illegal only if it is contrary to public policy. The Philippines and Thailand, in contrast, use other laws outside the specific category of anti-corruption legislation to punish private bribe-givers and private bribe-takers. For example, laws preventing the disclosure of trade secrets are sometimes used to punish those involved in private acts of corruption. Unfortunately, reliance on such non-specific legislation has its limitations, since not all forms of private corruption are contemplated. This can result in a situation where those participating in acts of private corruption are not being punished in circumstances where the specific elements of a statute are not met. This highlights the need for development of specific, yet consistent, anti-corruption legislation across the ASEAN region.

Bribe giver versus bribe taker

Among ASEAN member countries, penalties imposed on and cases involving bribe takers are generally more widespread than those relating to bribe givers.

Singapore punishes both the bribe giver and taker, although in an unequal manner. A bribe giver can be punished with a fine of up to SGD 100,000 (around USD 77,000) and/or imprisonment for a term not exceeding five years. This is in contrast to punishment for the bribe taker, which is limited to a fine corresponding to the value of the gratification illegally accepted. Additionally, if the bribery is private in nature, the bribe giver faces punishment by a fine not exceeding SGD 100,000 and/or imprisonment not exceeding seven years. Among the recent cases filed in Singapore, two former employees of the Singapore Table Tennis Association (STTA), including the former president, have been charged with corruption for accepting gratification and for committing a breach of trust. In this case, the president allegedly provided advantages for one player to represent the STTA in various tournaments.

In Thailand, only section 144 of the Penal Code punishes the bribing of an official or Assembly member intended to entice him or her to undertake, avoid, or delay an act. The law requires that the desired act be contradictory to the official's functions. Thus, the act of bribing with the intention to induce an official to act in accordance with his or her functions does not violate the law. Furthermore, the mere offer or agreement to give a benefit is punishable under section 144, regardless of whether an advantage or disadvantage was established. Unfortunately, the Thai Penal Code does not impose high penalties. The penalties for accepting or offering of a benefit include imprisonment not exceeding five years and/or a fine not exceeding THB 10,000 (about US$316) for each individual involved. Other punishments exist in case of malfeasance in office and general abuse of power. It should be noted that the severity of punishment depends on the degree of seriousness of the acts committed. On average, sentences meted out by the Supreme Court average between five and eight years.

There have been in excess of 100 Thai Supreme Court cases filed under sections 148 and 149 of the Penal Code, with most defendants being officers in the Royal Thai Police or the Royal Thai Army. The Organic Act on Counter Corruption states that any receipt of a bribe or payment of a value above THB 3,000 (approximately US$100) will result in the state official being liable for imprisonment for up to three years and/or a maximum fine of THB 60,000 (about US$1,900). In Thailand, however, cases involving officials are usually based on the possession of unusual wealth only.

One prominent case attracting much local and international publicity involves the former Thai Prime Minister, Thaksin Shinawatra. In January 2007 the Financial Institutions Development Fund (FIDF) filed a complaint against the former Prime Minister and his spouse, Potjaman Shinawatra, in relation to the purchase of four plots of land from the FIDF in 2003 for a value of THB 772 million each (approximately US$23m). The FIDF based its complaint to the Assets Examination Committee on a claim of an alleged violation of the Organic Act on Counter Corruption, according to which government officials and their spouses are prohibited from entering into or having interests in contracts made with state agencies under their authorisation. The FIDF claimed that the former

Prime Minister was guilty of malfeasance in office and conflict of interest. While the appraisal price was lower than the purchase price offered by Mrs Shinawatra, when the Assets Examination Committee reviewed the case, it appeared that the purchase price was still lower than the real value, even though Mrs Shinawatra offered and paid more than the appraised value. The Assets Examination Committee therefore claimed that the initial appraised value did not relate to the real value of the land, which was higher than the price at which it was sold.

In defending himself against this accusation, the former Prime Minister argued that he was not overseeing the FIDF at that time, and thus there was no conflict of interest. The Supreme Court opined that the FIDF should be deemed an administrative agency, and with the then Prime Minister, Thaksin Shinawatra, considered the de facto supervisor. Based upon these findings, he was found guilty of abusing his power by assisting his wife in purchasing the land, and he was sentenced to two years' imprisonment. The Supreme Court made no ruling on whether the purchase of land itself was illegal.

In Vietnam, the bribe taker can face criminal penalties of up to life imprisonment and administrative penalties of up to VND 500m (about US$21,000). Among the recent cases filed in Vietnam was one involving Huynh Ngoc Si, who was accused of taking bribes of up to US$262,000 in 2003 from a Tokyo-based company in relation to a major infrastructure project. As a deputy director of Ho Chi Min City's Transport Department, he was in charge of major road schemes. He was found guilty and forced to return VND 3bn (approximately US$144,000) to the court. In addition, he was sentenced to life imprisonment, although the same court later reduced the sentence to 20 years.

The Philippines' Revised Penal Code provides strong penalties for bribe takers. For indirect bribery, the bribe taker faces imprisonment of up to six years and public censure. For qualified bribery (ie, where the offender is a public law enforcement officer, and the offender refrains from arresting or prosecuting someone having committed a crime in return for a benefit), punishment includes imprisonment of 20 to 40 years. Although the death penalty for such an offense has been suspended, it is still technically provided for in the Philippine Penal Code. Six recent Philippine cases were filed between the months of April to September 2011 involving claims of corruption against former President Gloria Arroyo. One of these cases involved the controversial national broadband network (NTE) contract signed between the Arroyo government and a Chinese telecommunication company, ZTE. Allegations were made that this US$262m contract was overpriced in order to pay for bribes to government officials. If convicted, those found guilty under the Anti-Graft and Corrupt Practices Act could face imprisonment of between six and 15 years, permanent disqualification from public office, disqualification from transacting with the Philippine government, and confiscation of the illegal gift. Further, other domestic laws could impose additional fines and punishment against the wrongdoer.

Extraterritoriality

Citizens of ASEAN member states are not governed by the same laws when it comes to bribery of foreign officials. Rather, local laws and regulations govern cases involving the bribery of foreign officials.

For example, the Malaysian Anti-Corruption Act 2009 contains an extraterritoriality provision in relation to citizens and permanent residents whereby the person may be dealt with in respect of an offense committed outside Malaysia as if it were committed within Malaysia. In the same manner, a Singaporean national convicted of bribing a foreign official could also be punished under the Prevention of Corruption Act.

Moving toward stronger enforcement

Although Singapore is highly ranked in the Transparency International Corruption Index, it is interesting to note that most other ASEAN member countries in the Index do not strictly apply and enforce laws and penalties in place to combat corruption. While certain international laws, such as the FCPA and the UK Bribery Act, do have some influence on local anti-corruption efforts within the ASEAN region, the fact remains that a truly effective and harmonious system of anti-corruption enforcement remains a distant ideal.

Notes

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