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APAC Anti-Bribery Legislation Roundup

INTRODUCTION

While most companies implement Anti-Bribery and Corruption (ABAC) compliance based on US legislation — such as the Foreign Corrupt Practices Act and the Foreign Extortion Prevention Act — there is much less awareness of the parallel body of local laws in place in the Asia Pacific (APAC) region.

Being compliant with one set of laws does not make you compliant with all. Without proper awareness, entanglements from overlapping legislation can represent a significant risk to companies active in the APAC region.

The following paper seeks to highlight local regulations to raise awareness about the emerging ABAC regulatory environment in the APAC region. PSA has created this overview as a basis for increased awareness and conversation.

China

The Criminal Law and Anti-Unfair Competition Law (“AUCL”) are China’s (PRC) main anti-bribery statutes, with the latter serving as the basis for administrative enforcement of commercial bribery. PRC law criminalizes both the giving and receiving of bribes, covering bribery in the public and private sectors. Bribery is defined as money or property given in return for “illegitimate interest” or the provision of “improper benefits”, which under the AUCL includes trading and economic opportunities in violation of fair competition practices. Bribes may include gifts and hospitality, with no legal exemptions for facilitation payments. “Public officials” are broadly interpreted, encompassing government office holders, state-owned enterprise (SOE) employees, and any individual performing public duties. Anti-bribery laws also cover family and close associates of government officials, foreign public officials, and intermediaries involved in bribery. PRC anti-bribery laws have extraterritorial scope, applicable to both Chinese citizens and foreigners.



Individuals found guilty of bribery are subject to criminal and administrative fines, imprisonment, and confiscation of property. Public officials who accept bribes may also receive the death penalty. Companies are subject to criminal and administrative fines, as well as property confiscation and the revocation of their business licenses. Criminal penalties are generally more severe for bribing public officials and entities, which may also be subject to Communist Party of China (CPC) disciplinary measures. Companies can be held criminally liable for bribery carried out by employees, depending on the degree to which the company itself is involved. The AUCL, however, automatically holds companies liable for employees’ bribery, unless they can prove the bribes were irrelevant to seeking competitive advantages. A parent company may be held responsible for bribery carried out by its subsidiary, depending on its degree of involvement, though the two are generally regarded as legally independent. China’s National People’s Congress recently amended the Criminal Law to impose higher penalties on bribe givers and corruption in private firms.



India

The Prevention of Corruption Act (“PCA”) is India’s primary anti-corruption legislation, though other laws such as the Indian Penal Code, Companies Act, Lokpal Act, and Central Vigilance Commission Act also contain applicable provisions. Indian law criminalizes the giving and receiving of bribes, which the PCA defines as the transfer of “undue advantage” to “public servants”. The concept of undue advantage includes both monetary and non-monetary benefits, while public servants are broadly defined as those in the service or pay of any government authority, SOE, or institution controlled or aided by the government. Private sector bribery is not specifically prohibited in India, but could be considered a criminal act under general criminal statutes, as well as through a broad interpretation of the concept of “corporate fraud” under the Companies Act. Hospitality and gifts may be considered bribes depending on certain criteria including motive and intent, while facilitation payments are expressly prohibited. Indian anti-bribery laws have an extraterritorial effect on Indian citizens and public servants, but do not directly apply to foreign public officials.

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Individuals found guilty of bribery in India are subject to criminal fines and imprisonment. Companies are also subject to criminal liability and may receive fines, while directors and senior management can be held individually responsible and imprisoned. Recent changes to the PCA introduced provisions related to the attachment and confiscation of property obtained through bribery. Certain offenses under the Indian Penal Code, such as cheating, may be enforced as bribery cases, while middlemen and the act of abetment can also be targeted. Attempted bribery is a prosecutable offense, regardless of whether any benefits have been transferred. Indian law does not usually hold a company liable for the acts of subsidiaries. However, courts may ascribe liability if the parent company is found to be acting through its subsidiary, while recent amendments to the PCA have strengthened this relationship in cases of commercial bribery.



Indonesia

The Indonesian Criminal Code is an umbrella law for criminal acts, including bribery and corruption. Law No. 31 of 1999 on the Eradication of Criminal Acts of Corruption as amended by Law No. 20 of 2001 (“Corruption Law”) and Law No. 11 of 1980 on Bribery (“Bribery Law”) are the key statutes covering bribery. Bribery has multiple definitions under Indonesian law, but is generally characterized as gifting or promising something to an official to induce them to commit or omit an act in violation of their duties. Both the giving and receiving of bribes are criminalized, while intermediaries are also targeted. The Corruption Law broadly defines “public official” to include people employed in a public office or by the state, who are remunerated by corporations that utilize state capital or facilities, or otherwise belong to a government institution. Indonesian law does not define “foreign public official” or establish specific provisions for the bribing of foreign public officials. While the Corruption Law focuses on public sector bribery, there are no laws that explicitly reg-

ulate bribery in the private sector. However, the language used in the Bribery Law could potentially be interpreted to cover private sector bribery. Gifts and hospitality received by public officials (i.e. “Gratification”) could be classified as bribes, though there are numerous exemptions for traditional and religious ceremonies. If the “Gratification” is unreported and involves a quid pro quo by the recipient, then it may be an actionable crime. Indonesian anti-bribery laws are expressly extraterritorial in scope, and do not provide any exemptions for facilitation payments.

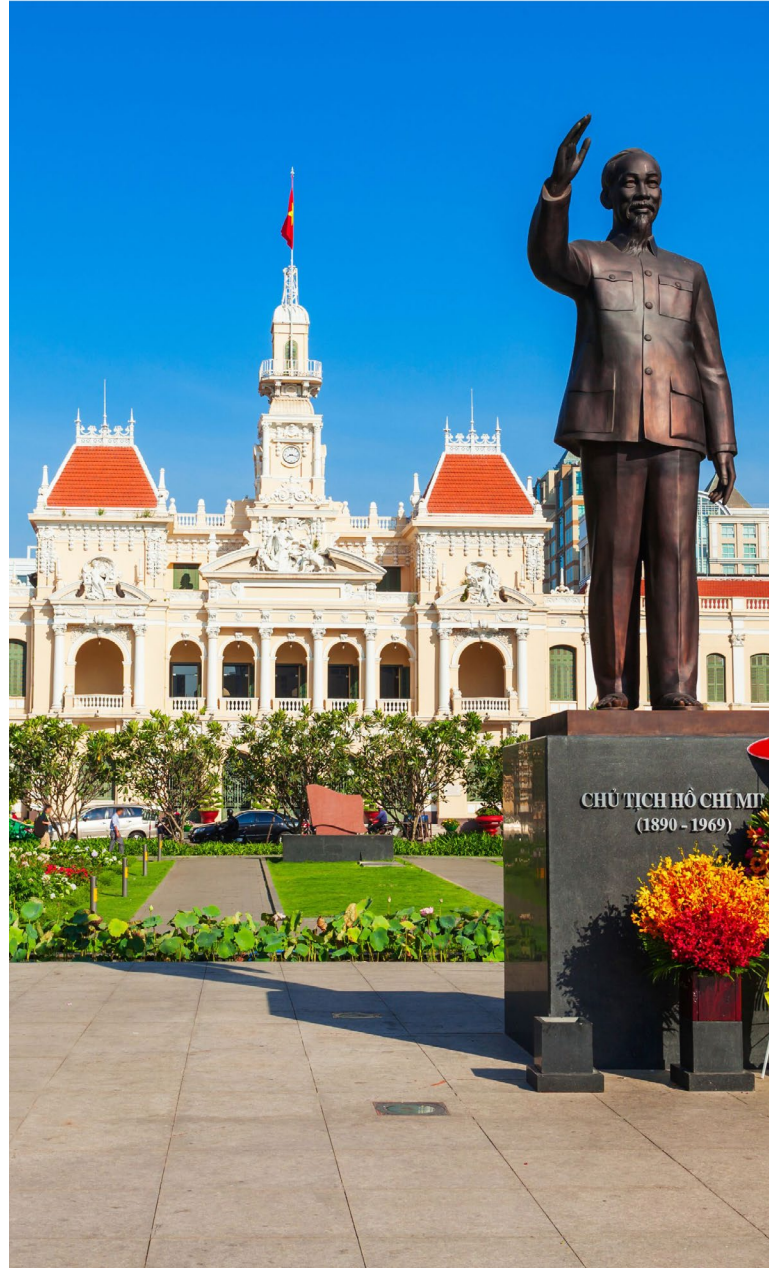
Penalties for individuals found guilty of bribery include imprisonment, criminal fines, repayment of gains, asset confiscation, and revocation of certain rights, including the right to vote or hold elected office. Companies are subject to criminal fines, asset seizure, repayment of gains, and closure for up to one year, while senior managers may also be held responsible. Parent companies can be held criminally liable for the actions of a subsidiary if it was involved in the act. Penalties imposed by the Corruption Law, which focus on public sector corruption, are generally more severe than those under the Bribery Law.

Vietnam

The Penal Code and Anti-Corruption Law are the key anti-bribery statutes in Vietnam. Vietnamese law criminalizes the giving and receiving of bribes, both in the public and private sectors. Bribery is defined as the transfer of “material” or “non-material” benefits to an individual in a position of power to perform, or refrain from performing, certain acts. Material benefits include money, assets and may also encompass gifts and hospitality. The concept of non-material benefits is not clearly defined, but possible examples may include promises of professional advancement, favors and access, and other forms of indirect influence. Vietnamese law does not provide an exemption for facilitation payments, and bribery through intermediaries is also criminalized. The concept of “domestic officials” is subject to a broad interpretation, covering office holders, public employees, and the representatives of state capital invested within enterprises. Bribery of “foreign officials” is also prohibited. The Penal Code has an extraterritorial effect, applicable to both Vietnamese citizens and foreigners engaged in overseas bribery.

“Public officials found guilty of bribery may also be subject to Communist Party of Vietnam (CPV) disciplinary measures.”

Individuals found guilty of bribery are subject to criminal fines, confiscation of assets, and imprisonment under Vietnamese law, while the receivers of bribes may also receive the death penalty in serious cases. Significantly, Vietnam only imposes criminal liability on individuals in relation to bribery offenses, not companies. Senior management may instead be



held criminally responsible for bribery carried out by organizations, depending on their degree of involvement. Note that companies can still be administratively sanctioned, and corporate criminal liability does extend to certain corruption-related offenses, including money laundering. Vietnamese law does not hold parent companies liable for the actions of subsidiaries, which are regarded as legally independent. Public officials found guilty of bribery may also be subject to Communist Party of Vietnam (CPV) disciplinary measures. This has gained pace in recent years as part of the “Blazing Furnace” anti-corruption campaign.

CONCLUSION

Ensuring corporate compliance across the APAC region necessitates a deep understanding of local ABAC laws and regulations. Firms that proactively adapt their operations to the regulatory landscape of specific jurisdictions, in addition to traditional US FCPA and FEPA considerations, are more likely to mitigate ABAC risks. As the above summary demonstrates, many APAC countries adopt broad definitions of the concepts of “bribery”, “public officials”, and “interests”, granting authorities significant latitude to interpret and punish acts of bribery. These jurisdictions also impose steep criminal penalties for acts of bribery, which involve both corporate and individual liability, and can result in significant reputational damage. To prevent ABAC non-compliance and its attendant risks, it is essential for companies with business interests in the APAC region to attune their due diligence practices to local ABAC laws and regulations.

Jurisdiction	Criminalizes Bribing Foreign Public Sector Officials	Criminalizes Private Sector Bribery	Criminalizes Giving and Receiving Bribes	Allows Facilitation Payments	Extraterritorial Scope
China	Yes	Yes	Yes	No	Yes
India	No	No	Yes	No	Yes – for Indian public servants and Indian citizens overseas.
Indonesia	No	Yes – if public interest involved	Yes	No	Yes
Vietnam	Yes	Yes	Yes	No	Yes



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