Client Alert

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For further information please contact

Andy Leck
+65 6434 2525
andy.leck@bakermckenzie.com

Weiyi Tan
+65 6434 2689
weiyi.tan@bakermckenzie.com

Chew Kherk Ying
+603 2298 7933
kherkying.chew @wongpartners.com

Eddie Chuah
+603 2298 7939
eddie.chuah@wongpartners.com

Baker & McKenzie.Wong & Leow
8 Marina Boulevard
#05-01 Marina Bay Financial Centre
Tower 1
Singapore 018981

www.bakermckenzie.com

Trans-Pacific Partnership Agreement (TPP): Anti-Corruption Principles

In February 2016, 12 countries (Australia, Brunei, Chile, Canada, Japan, Mexico, Malaysia, New Zealand, Peru, Singapore, the United States and Vietnam) ("**TPP Parties**") signed the Trans-Pacific Partnership Agreement ("**TPP**"). The TPP seeks to enhance trade and investment through, among other things, raising standards amongst the parties. We highlight in this alert TPP standards on anti-corruption from Chapter 26 of the TPP on Transparency and Anti-Corruption ("**Chapter 26**"), as well as the potential implications on Singapore and Malaysia, two of the signatories to the TPP in Southeast Asia.

Anti-corruption in the public sector

TPP Parties have affirmed their adherence to the TPP anti-corruption standard which is based on the APEC Conduct Principles for Public Officials. The APEC Conduct Principles for Public Officials lays out ethical principles for public officials and urges the domestic implementation of measures to combat corruption. It also urges member states to provide assistance to one another in their efforts to combat corruption. In addition, each Party must ratify or accede to the *United Nations Convention against Corruption*, concluded in New York on 31 October 2003 (UNCAC), which obliges member states to, amongst other things, prevent corruption, criminalise a wide range of corrupt acts, cooperate internationally with other signatories and engage in asset recovery. In providing for asset recovery, the UNCAC outlines both mandatory and suggested measures to detect and prevent money-laundering. Singapore, Brunei, Vietnam and Malaysia have all ratified the UNCAC and fulfilled this condition.

TPP Parties must adopt measures to promote integrity and disclosure of suspicious activity among public officials. Chapter 26 further sets out specific requirements on measures to combat corruption. Accordingly, TPP Parties must establish criminal offences to sanction corruption acts. The sanctions are extended to offences committed by foreign public officials or officials of public international organisations.

Notably, Chapter 26 prohibits TPP Parties from allowing tax deductions for expenses incurred in connection with the commission of prescribed corruption offences.

Adopting measures to protect whistleblowers is not compulsory, but must be considered.

There are no specific provisions related to corporate criminal liability.

The TPP requires that no Party shall fail to effectively enforce its laws or other measures to combat corruption through a sustained or recurring course of action or inaction. The Parties, however, recognise that individual cases or

specific discretionary decisions related to the enforcement of anti-corruption laws are subject to each Party's own domestic laws and legal procedures.

Anti-corruption in the private sector

Chapter 26 encourages TPP Parties to observe the APEC Code of Conduct for Business: Business Integrity and Transparency Principles for the Private Sector, September 2007. The key obligation under this Code of Conduct is to prohibit bribery through implementing anti-bribery programs. Article 12 of the UNCAC is also applicable, pursuant to which parties must take measures, in accordance with the principles of its respective domestic laws, to prevent corruption within the private sector.

Notably, the provisions pertaining to addressing corruption in the private sector are written in permissive, rather than mandatory, language. The Chapter provides suggestions for parties to adopt various programs to counter corruption in the private sector but does not require the criminalisation of such private offences.

Comments

The TPP Chapter on Transparency and Anti-Corruption provides for greater harmonisation of anti-corruption laws between the parties to the TPP. While there are current discrepancies in the anti-corruption laws between the parties, it appears that the parties are moving towards more consistent and comprehensive coverage of criminal liability for corruption in relation to foreign and domestic public officials, as well as the private sector.

The TPP will enter into force after ratification by all signatories, if this occurs within two years. If the TPP is not ratified by all parties before 4 February 2018, it will enter into force after ratification by at least 6 states which together have a GDP of more than 85% of the GDP of all signatories. Following the ratification of the TPP by the signatories, we can anticipate stricter enforcement of domestic anti-corruption laws in TPP countries and cross-border cooperation between the relevant countries in combating corruption. The successful eradication of corruption would bode well for trade and investment across member countries.

A brief outline of the laws in Singapore and Malaysia, as well as some of the changes that may be expected in view of the TPP obligations, are summarised below.

Singapore

Singapore's anti-corruption laws are generally in line with the requirements of the TPP.

Anti-corruption laws are largely governed by the Prevention of Corruption Act (Cap. 241) ("**PCA**") and the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap. 65A) ("**CDSA**"). The PCA criminalises corruption in both the public and private spheres, with an additional presumption of corruption for gratification given to or received by public officials. Accordingly, the PCA goes further than the mandatory provisions for domestic public officials and the permissive provisions for the private sector in the TPP. Of note, the PCA does not expressly refer to bribes given to or received by foreign public officials as required by the TPP. This is potentially one of the areas of change, as Singapore undertakes its review of the PCA.

The CDSA criminalises money laundering, for example the concealing, disguising, converting or transferring of benefits from criminal conduct. The CDSA provides for greater extraterritorial reach than the PCA as it defines "*criminal conduct*" to include any activity that may constitute a serious offence, a foreign serious offence or a foreign serious tax offence. The CDSA also provides for corporate liability if conduct is made on behalf of the corporation. There are also reporting obligations upon reasonable suspicion of criminal conduct, regardless of the location of such conduct.

Malaysia

Malaysia's anti-corruption laws, which include the Malaysian Anti-Corruption Commission Act 2009 ("**MACCA**") and the Penal Code, are generally in line with the requirements of the TPP.

In gist, Malaysia's anti-corruption laws make it an offence for a person (whether in the private or public sector) to accept or offer or give or solicit any gratification as an inducement to or reward for any person doing or forbearing to do anything in respect of any matter. Where it is proven that a gratification has been offered or given or accepted or solicited, there is a presumption that such gratification is for corrupt purposes unless the contrary is proven. Gratification has been widely defined to include, among other things, money, donations, gifts, fees, rewards, valuable security, property or interest in property, being property of any description. Further, the MACCA makes it an offence to bribe officers of a public body or a foreign public official, in line with the TPP.

The MACCA does not contain mandatory provisions for corporations to put in place systems to prevent the offering of undue advantages to public officials, which is a TPP requirement. In this regard, there are suggestions to amend the existing Malaysian legislation to include such requirements.

This client alert only provides high level comments on Chapter 26. Kindly note that the principles under Chapter 26 should be read carefully with footnotes and schedules, which contain a number of caveats and country-specific exemptions / reservations.