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Briefing note November 2015

Time to Up Your Game: The TPP's Enhanced Anti-Corruption Provisions

On November 5, 2015, the text of the Trans-Pacific Partnership Agreement (TPP) agreed to by 12 countries – Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam – was disclosed to the public. Hailed as a landmark agreement setting a new standard for global trade, the TPP includes the strongest anti-corruption standards of any multi-lateral (and bilateral) trade agreement in history. These provisions, if implemented and enforced, could level the playing field for compliant companies operating in Asia Pacific – and make it harder for those unwilling to up their game.

Corruption in Trade

Corruption acts as a significant trade barrier. Bribes distort free market pricing, increase the cost of capital investment and deter foreign investment. When operating in countries with corruption, companies are faced with a difficult choice: pay the bribes (which can increase the cost of doing business) or not pay them (which may mean the loss of a business opportunity). Inevitably, those companies that comply with anti-corruption laws, in particular the Foreign Corrupt Practices Act (**FCPA**) and the UK Bribery Act (**UKBA**), and choose not to bribe, are significantly disadvantaged, despite the fact that trade agreements are meant to decrease economic barriers to trade.

In fact, the two core principles of trade regulations underpinning the world trade system in the last fifty years have been non-discrimination and transparency. This is evident in various World Trade Organization (**WTO**) agreements, which have always been aimed at limiting obstacles in world trade, especially in the areas of customs operations and public procurement. Anti-corruption provisions, however, have not played a significant role in assisting the WTO and other trade regimes to achieve non-discrimination and transparency – at least not until recently.

Anti-Corruption Provisions

Increasingly, bilateral trade agreements have included anti-corruption provisions. These types of provisions vary by agreement but will generally take one of the following forms:

- requiring the country trade agreement parties to combat corruption within their borders by adopting global anti-corruption conventions and increasing transparency in government procurement processes; or
- depriving a trade transaction or investment tainted by corruption of the standard protections offered by the particular trade or investment agreement.

The United States has spearheaded the push for such provisions, due to its recognition of the disadvantage US companies suffer in countries where bribery is rampant and enforcement of anti-corruption laws limited (or at times, non-existent) – especially given the harsh penalties imposed for violations of the FCPA.

Multi-lateral Trade Agreements

While there are a number of examples of bilateral trade agreements with anti-corruption provisions (most of them U.S. free trade agreements), multi-lateral agreements have lagged behind. Of the multilateral trade agreements currently in force in Asia Pacific (or countries within this region), only the Trans-Pacific Strategic Economic Partnership (involving Brunei Darussalam, Chile, Singapore, and New Zealand) has an anti-corruption provision, which focuses on corruption in government procurement alone. However, progress has been made in part as a result of the United States' aggressive stance on anti-corruption as well as a consensus that elimination of corruption in trade requires a global effort. The TPP is a major result of this effort.

TPP's Anti-Corruption Provisions

Article 26 of the TPP, covering *Transparency and Corruption*, requires member parties to have and enforce anti-bribery laws, and to accede to and ratify the United Nations Convention against Corruption (**UNCAC**) (which Japan and New Zealand have yet to ratify). Set forth below are interesting aspects of Article 26:

Defining bribery

Article 26.7(1) requires that member states adopt or maintain laws criminalising the offer to or solicitation of an *undue advantage* by a public official, in order that the official act or refrain from acting in relation to the performance or the exercise of his or her official duties.

The use of the term "undue advantage" departs from other anti-corruption provisions in bilateral trade agreements and instead tracks language used by European legislative acts, including the Criminal Law Convention on Corruption of the Council of Europe. Arguably, undue advantage is broader than – and therefore includes – "anything of value" (from the FCPA) and "financial or other advantage" (from the UKBA). TPP member states currently comply with this provision as they all have anti-corruption laws, although the laws vary across jurisdictions.

Public official

Article 26 defines public official as any person holding a legislative, executive, administrative or judicial office and any other person who performs a public function for a member state.

The language in this section appears to track Article 1 of the Organization for Economic Cooperation and Development (**OECD**) Convention. Although Article 26 does not define "public function," the term does not seem to encompass employees of state-owned or state-controlled entities (unlike the FCPA).

Books and records

Article 26.7(5) requires that member states adopt or maintain measures regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards to prevent false accounting, including off-the-books expenses, non-existent expenditures, and the entry of incorrectly identified liabilities.

This language tracks Article 12(3) of the United Nations Convention against Corruption (**UNCAC**), which essentially replicates the books and records provisions of the FCPA and the OECD Convention.

Private sector and civil society

Article 26.10 includes a section that is a first for trade treaties – it commits member states to take appropriate measures to promote the active participation of individuals and groups outside the public sector, including enterprises, civil society, NGOs, and community-based organizations in the prevention of and the fight against corruption in matters affecting international trade or investment.

This provision does not appear to track the language of any existing anti-corruption law, the OECD Convention or the UNCAC, although the United States and Transparency International have reportedly suggested that the TPP include an obligation to involve civil society and the private sector in addressing corruption.

Enforcement

Article 26.9 requires that member states effectively enforce their anti-corruption laws adopted or maintained to comply with Article 26. This is arguably the most important section of the anti-corruption provision as laws are only effective if they are enforced. Yet, the section does not define "effective" enforcement and falls short of mentioning due process, judicial fairness or efficiency.

Enforcing the TPP

If the United States seeks to aggressively enforce the TPP as it does the FCPA, it may aim to define "effective enforcement" (Article 26.9) via the dispute settlement mechanism under Article 28. The United States has made clear that the TPP is aimed at levelling the playing field for US companies operating in Asia Pacific. Countries and their respective nationals will need to be prepared for this if they want to get in the game.

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