



Corruption

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**Has the time come for
a world wide effort
against corruption?**

BACKGROUND ASIA

Ric Beggs:
+65 9633 8489
+61 418 545 785
ric@backgroundasia.com

Alex Duperouzel:
+65 9117 3450
alex@backgroundasia.com

Alex Duperouzel of **BACKGROUND ASIA** recently attended a weeklong workshop on corruption control at the **Kennedy School of Government at Harvard**. The course was sponsored by the UN and was a lead up to meetings in August, which are in turn aimed at agreeing a **UN Convention against corruption**. Alex sets out what we think this will mean for businesses operating in Asia.

In 1999, then Vice President Al Gore hosted a Global Forum on safeguarding integrity among justice and security officials attended by 90 governments and a host of other stakeholders and media. Gore referred to the anti-corruption movement as being a group whose time had come.

Unfortunately for Al, his fellow Tennesseans did not think that his time had come and with Bush in the White House, and then the events of 9-11, the global anti-corruption movement has been off the wider public agenda.

Later this year the UN hopes to have agreement on a convention against corruption. Has the time really come for the anti-corruption movement or is it just surfacing again?

What does this new focus on fighting corruption mean for businesses operating in Asia? Will there be regulatory change?

The Movement

The anti-corruption movement that has been lead by various groups including the US State and Justice Departments, the **World Bank**, **Transparency International** and the **Hong Kong ICAC** among others, seems to have taken a backseat to the war on terror and its derivatives such as the Iraq conflict.

At various times during both the war in Afghanistan and now in the clean up and reconstruction phase of the war in Iraq, we have seen examples of US forces using bribery to win over the local war lords or officials and, as recently reported in US newspapers, strong rumours of troops being

Its ironic that the current push for a global anti-corruption standard is coming from the Europeans and it is the US that is resisting.

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alex@backgroundasia.com

involved in corrupt practices regarding the distribution of food aid.

The short-term obvious gains in terms of controlling territory that bribing local war lords resulted in are likely to be seen as hypocrisy with the rumours of extortion and theft by US armed forces. What is basically a wise strategic move will be mixed up with unacceptable war time behaviour if the DOD does not take policing issues in Iraq more seriously.

Fighting corruption just does not have the same urgency as trying to find nuclear bombs or biological weapons destined for the 'Homeland'.

Despite the recent focus of the war on terror, there are still a number of groups across the world that are pushing for institutional change at the macro and micro level to address the corruption issue. There are still anti-corruption conferences, optimistic speeches and the odd bit of backslapping when a country seems to be turning from basket case to emerging market.

There was a lot of self congratulation when the **OECD** finally introduced its version of the US Foreign Corrupt Practices Act twenty years after the US introduced its legislation. However as we believe that the guidelines have not lead to one prosecution it is hard to see what all the excitement is about.

Ironically of late we have also seen the Europeans¹ pushing hard for a codified system of anti-corruption measures that the Bush Administration is reluctant to agree to (not without good reason in some instances).

In the midst of this renewed push, a revised draft of the UN Convention Against Corruption will be debated at the sixth session of the ad hoc Committee for the Negotiation of a Convention Against Corruption to be held in Vienna from 21 July to 8 August this year.

The convention is expected to become effective at the end of this year – assuming the big two – Europe and the US, can agree what it should look like.

If the final version is anything like this current draft then those who sign up to it will be expected to ensure that their own systems have the following broad agencies and controls:

- An anti corruption body;
- Efficient, transparent and meritorious systems for finding and retaining public officials;
- Codes of conduct for public officials;

¹ Many people will be aware that up until recently most European countries allowed bribes to be tax deductible. We understand that there was a department within the French tax administration that specifically dealt with approving claims by French companies operating abroad that had bribed officials to win contracts.

We expect that the new UN convention will lead to a raft of new legislation and agencies around the world.

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alex@backgroundasia.com

- Transparent systems of public procurement;
- Transparent systems of public decision making;
- A stronger and less corruption prone judiciary;
- Stronger controls in relation to the funding of political parties;
- Attempt to reduce corruption within the private sector by providing codes of conduct, codes for the prevention of conflicts of interest, strengthening bank supervision, restricting the employment of former public servants in the private sector and denying the tax deductibility of bribes;
- Strengthen accounting and auditing standards to address off the books transactions, recording of non-existent expenditure and the falsification of documents and expenditure entries;
- Create a friendly environment for NGO's focused on corruption and integrity issues; and
- Upgrading laws relating to anti-money laundering to ensure that corrupt transactions are incorporated.

This last point is particularly important and we address it in detail later in this newsletter.

As you can see from the long list above this is quite a legislative agenda if it is adopted.

One of the most interesting observations from reviewing the draft is seeing the number of comments and suggested amendments from a large number of countries. This is a convention that is being very widely discussed and agreed upon. If you are of the view that certain countries would never implement one or more of the items on this list, then you should look at the sheer number of participants in the drafting process.

We are of the view that there is going to be a lot of legislative change in a large number of countries.

Importantly the convention places the same emphasis on the bribing of national officials as it does on the bribing of foreign public officials.

If these provisions are widely adopted then one can expect to see mini versions of the US FCPA rolling out into a number of countries. We will be particularly interested to see if China and Japan get serious about this type of law given the influence of Japanese companies in developing nations around Asia and the rise of Chinese companies operating outside of China.

Another interesting provision of the draft, Article 42, states that countries should ensure that criminal investigations arising from

² Financial Action Task Force, Suspicious Activity Reports, Non Compliant Countries and Territories, Financial Intelligence Units

The new convention aims to standardise anti-corruption systems and incentives.

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Ric Beggs:
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Alex Duperouzel:
+65 9117 3450
alex@backgroundasia.com

corruption issues are not hampered by bank secrecy laws.

If this provision is combined with the acceptance of offshore FCPA like provisions then locations like Austria, Lichtenstein and even Singapore may become less friendly for the offshore politician wishing to use those banking systems.

There are many other provisions in the draft convention which deal with issues such as mutual legal assistance between countries, supporting the investigations of other countries, making laws that will confiscate assets, ensuring that investigating bodies have the legal ability to conduct surveillance, under cover operations and controlled delivery operations and ensuring that financial intelligence units (thus far established for anti-money laundering purposes) are also able to collect and disseminate information relating to corruption issues.

What It Means for Business in this Region

Corruption is a local issue that often takes on an international flavour. Up until now, with few exceptions, enforcement against corruption has also been local. Notable exceptions in this region have generally been in Hong Kong where the ICAC is beginning to reach across the border into China.

The proposed new treaty aims to standardise both the enforcement systems and the types of anti corruption incentives that countries should adopt for corruption to be minimised.

If you are located in Hong Kong or Singapore and you conduct business in those cities then you are already subject to two excellent anti-corruption regimes, which, while not stamping it out, have done wonders in bringing it under control.

If you operate from those cities but do business elsewhere the practical effect of those systems is less established.

Importantly if you operate outside of those two systems then the overall regional standards of anti-corruption are somewhere between poor and non-existent.

In our view, if the UN convention results in significant buy in by member countries in this region – and at the moment the draft suggests that there has been some buy in - then we may see a raft of new agencies, new laws, updated codes of practice and increased oversight.

One of the ironies of this will be that in some jurisdictions the corruption may well just shift from the entity that had to be paid off before, to the

We are concerned that the model that appears to be in the minds of the convention drafters looks a lot like the anti-money laundering models put forward by the Financial Action Task Force

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anti-corruption group who will now be looking to extort their share of the economic activity.

The systems that were so successful in Hong Kong and Singapore were not just successful because of a new agency or a new law. There were other wider institutional factors at work that supported the government efforts to clean up. We are not confident that new law and code alone will be enough to clean up some of the region's worst locations.

One thing that I found of concern during my recent visit to Harvard was that the model that is being talked about in the draft UN Convention seems to be very close, if not a copy of, the sort of regulation of business practice that is applied to anti-money laundering for financial institutions.

For those of you familiar with the jargon of the anti-money laundering world, think FATF, SAR's, NCCT's, FIU's² and asset forfeiture and confiscation regimes and apply this to anti-corruption.

The current anti-money laundering model is expensive for firms to comply with and it has yet to be shown to be excellent at catching money launderers. It is excellent at tracing and recovering the proceeds of crime but success in busting pure laundering operations has been thin on the ground and, as far as we can tell, no more successful than traditional law enforcement techniques and laws.

This somewhat academic argument on our part may become a nightmare scenario if you mix the type of nasty legislation used for anti-money laundering with corruption legislation and an otherwise corrupt system within a country.

The Hong Kong ICAC has extensive, some would say draconian, powers but those powers are granted in the context of a strong and independent judiciary and an historically benign administration.

Most countries were against drug trafficking when the FATF was formed and most countries wanted to see an end to the proceeds of drug crime washing through their banking system. But will most countries feel the same way about corruption itself?

Part of the problem will be in defining what is corruption. Is it bribery, extortion, fraud, nepotism, patronage, cronyism, embezzlement, graft or all of the above? Is the focus to be on the public sector or should it extend to the private sector as well?

The definition is important because the strategies for addressing each form of corruption are different.

Business is going to need to watch carefully what new agencies and laws are introduced in some of the lesser developed countries or

New anti-corruption laws and agencies will mean that companies need to update staff operating procedures and awareness training, increase resources to anti-corruption units and be careful to build procedures and relationships that allow them to work together with law enforcement on the problem.

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Ric Beggs:
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Alex Duperouzel:
+65 9117 3450
alex@backgroundasia.com

countries with a history of capricious officialdom.

In our view, whatever system is adopted in each of the countries following the passing of the UN Convention, it is likely to be a regulatory system that will require:

- Updated staff procedures and awareness training;
- Increased resources to corruption control and investigation units;
- Careful relationship building with enforcement authorities to ensure that any discovered incidents can be handed over to them as painlessly as possible.

There may well also be a need for business coalitions to form in countries where there is a concern relating to how the new laws and agencies may be used or operate in order to protect each other from potential or actual rapacious behavior by the new agency or the operation of the new laws.

We are concerned that if any of the new agencies go the way of the dark side, then it may also bring on a number of new governmental liaison problems in getting business done in your country of interest. The good news is that with an increase in corruption awareness around the world it may be easier to whistle blow if you are the victim of a corrupt anti-corruption agency or law.

What's Next

The UK is currently revising and consolidating its anti-corruption laws. Expect to see other developed countries follow suit.

The **US Commerce Department** is continuing to put pressure on the signatories to the OECD convention to make some prosecutions.

The UN Convention will then be debated and agreed – say by mid 2004 at the latest.

Then expect to see a body like the **FATF** (<http://www1.oecd.org/fatf/>), or the FATF itself, take on an anti-corruption role in terms of standardizing legislation and agencies as well as enforcing standardization for non-compliant countries.

Concurrently we also expect to see the World Bank, the IMF and the UN take a more aggressive stance in relation to corruption so as to twist the arms of recalcitrant governments.

The big unknown is just how far the US will go on this, dare we say it, crusade.

Lastly you can expect to see more about corruption and corruption

If you would like to know more about what we do then there is more information on our website at www.backgroundasia.com

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issues in the news.

During the last week we noted that:

- The South Korean Government was found to have bribed the North to attend reconciliation talks;
- A suspected terrorist in Thailand says that he is just an anti-corruption campaigner;
- There are major concerns that a number of judges in Brooklyn, New York bribed their way into their jobs by paying off the Democratic Party in Brooklyn;
- There are allegations of corruption in Indonesia relating to a proposed purchase of military jets from Russia;
- The Slovenian Government is passing new anti corruption legislation;
- In Poland an official connected with steel privatizations has resigned amid corruption allegations;
- A Dominican bank and the Dominican government face a major corruption scandal; and
- There were 2,962 other articles on corruption in the global English language media last week.

This issue has a long way to go.

What We Do

BACKGROUND ASIA specializes in fraud and corruption detection, response, and investigation and in tailoring solutions for firms hit by fraud or corruption. We are experienced in supporting multinationals, financial institutions, multilaterals and governments in the Asian region.

We are also in the process of designing some new anti-corruption and integrity training and consulting programs for companies and government instrumentalities operating in Asia that take into account the new focus on anti-corruption, the draft convention and the leading thinking in this field.

Please note that this newsletter is for information purposes only and, as we are not lawyers, does not constitute legal advice. See your lawyer if you would like legal advice, drop us a line if you would like specific advice on these topics relating to your specific circumstances.