



# THE ASIA-PACIFIC INVESTIGATIONS REVIEW 2019

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# **The Asia-Pacific Investigations Review 2019**

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For further information please contact [Natalie.Clarke@lbresearch.com](mailto:Natalie.Clarke@lbresearch.com)

## **The Asia-Pacific Investigations Review 2019**

**Senior business development manager** Nicholas O'Callaghan  
**GIR Insight business development manager** Edward Perugia  
edward.perugia@globalinvestigationsreview.com  
Tel: +1 202 831 4658

**Head of production** Adam Myers  
**Deputy head of production** Simon Busby  
**Chief subeditor** Jonathan Allen  
**Editorial coordinator** Hannah Higgins  
**Production editor** Gina Mete  
**Subeditor** Charlotte Stretch

**Editor, Global Investigations Review** Marieke Breijer  
**Editor in chief** David Samuels

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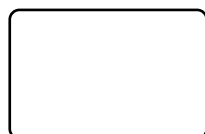
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Fax: +44 20 7229 6910  
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# Preface

**Global Investigations Review** is the hub of the international investigations community, bringing practitioners together through our journalists' daily news, GIR Insight resources and GIR Live events. **GIR** gives our subscribers – mainly in-house counsel, private practice lawyers, government enforcement agencies and forensics advisers – the most readable explanation of all the cross-border developments that matter, enabling them to stay on top of their game. Over the past 12 months, our reporters have conducted roundtables on the cost of investigations and the future of investigations firms, interviewed government enforcers, refreshed our surveys showcasing Women in Investigations and the top firms in investigations (the GIR 100) and – after a successful court decision – obliged the DOJ to release the names of unsuccessful candidates for Foreign Corrupt Practices Act monitorships.

Complementing our journalists' original work, this annual report gives readers the 'front-line' view from selected practitioners. Each is invited to reflect on the complex issues that they – and their in-house clients – face in internal and government investigations every day. All authors are leaders in their field and we are grateful to them all for their time and energy. We encourage readers and co-authors to share feedback and comments.

If you would like to get involved in future editions or have thoughts for us, please contact [edward.perugia@globalinvestigationsreview.com](mailto:edward.perugia@globalinvestigationsreview.com).

We hope you enjoy reading *The Asia-Pacific Investigations Review 2019*.

**Global Investigations Review**

London

August 2018

# Cambodia: Anti-Corruption

David Mol  
Tilleke & Gibbins

Cambodia has become an attractive destination for foreign investment as a result of robust growth rates. According to the World Bank's economic outlook on Cambodia, which was published on 10 May 2018, Cambodia's economy grew 6.8 per cent in 2017, and is projected to grow 6.9 per cent in 2018. The report further states that 'robust demand in advanced economies' is expected to 'underpin Cambodia's high growth trajectory'. As for the Asian Development Bank, it anticipates that Cambodia's GDP will grow 7 per cent per year through to 2019.

In March 2018, the Ministry of Economy and Finance stated in the press that foreign direct investment had increased to approximately US\$2.5 billion in 2017, and is expected to rise to around US\$3 billion in 2018. In conjunction with this rise in foreign direct investment, Cambodia is focusing on diversifying its economy by expanding investment beyond the garment industry and tourism, being the traditional drivers of Cambodia's economy. Construction is now becoming a leading sector in Cambodia's economy. According to the Asian Development Bank Outlook 2018, there has been a 27 per cent increase in construction projects approved as compared to 2017, and a corresponding 36 per cent increase in the import of construction materials.

As a result of sustained economic growth, the Cambodian population is gaining purchasing power and the economy is diversifying. Further, the Cambodian government is committed to maintaining an open market for investment, and has made attempts to broaden the tax base and undertaken other reforms to encourage corporate compliance.

Over the past two years, Cambodia's General Department of Taxation (GDT) has been actively encouraging businesses to register with the GDT so that taxes can be collected. This push has led to a significant increase in state revenues, and has contributed to a more level playing field between local and foreign businesses. The government has also promoted awareness of internal corporate governance policies and practices in order to encourage and prepare companies to list on the Cambodia Securities Exchange. These reforms show the government's commitment to providing a fair but liberal market to attract foreign investment.

These economic opportunities, however, are not without risks. As is common in the region, there is the potential for corruption when doing business in Cambodia. It is not easy to avoid corruption completely, given its widespread nature and general acceptance in Cambodian society. In part because of corruption-related issues, Cambodia's ranking in the World Bank's *Ease of Doing Business 2018* report dropped four spots to 135 out of 190 countries.

Regardless, it is critical for foreign investors to comply with local and international anti-corruption regulations, as non-compliance can result in very serious consequences in Cambodia and abroad. Although enforcement by local authorities may seem uneven at times, such enforcement patterns are likely to change in the future as Cambodia's anti-corruption institutions, such as the Anti-Corruption Unit (ACU), grow in stature and begin to more aggressively

investigate and prosecute corruption in the public and private sector.

In addition, some foreign companies have been charged and prosecuted under foreign corruption laws for acts taking place in Cambodia. While these cases are not common, they demonstrate the risks involved with non-compliance. Investors should be aware of these risks and their responsibility to comply with domestic and international anti-corruption regulations, and they should work with local counsel to establish control and oversight mechanisms to avoid these risks.

## Corruption – an overview

Corruption is widespread in Cambodia. All sectors are affected by corruption, though some sectors are more vulnerable than others. Corruption in Cambodia takes all forms and shapes, ranging from small unofficial payments to speed up an administrative process or pay off a speeding ticket, to allegations of corruption in multimillion-dollar investments. Enforcement seems scarce and uneven, and the lack of publicised case law strengthens this perception.

In Transparency International's 2017 Corruption Perceptions Index, Cambodia is the lowest South East Asian country on the list, and within the larger Asia-Pacific region, only North Korea and Afghanistan are ranked lower. Cambodia ranks 161 out of 180 countries and territories, with a score of 21 on a scale of zero (highly corrupt) to 100 (very clean). Its score remained the same as in the 2016 Index, although Cambodia did drop five places as compared to other countries.

Notwithstanding the government's effort in enacting the Anti-Corruption Law and establishing the ACU, which, in addition to having broad investigative powers, has a mandate to provide education and training to government institutes and the public on anti-corruption compliance, corruption remains a serious issue that influences the business climate.

## Anti-corruption laws and regulations

Anti-corruption is covered by various domestic laws, including:

- the Anti-Corruption Law, as amended;
- the Criminal Code, as amended;
- the Common Statute of Civil Servants; and
- the Law on Anti-Money Laundering and Combating the Financing of Terrorism.

In addition to domestic laws, companies and individuals conducting business in Cambodia may fall under the jurisdiction of their home countries. Examples of applicable foreign laws are the US Foreign Corrupt Practices Act, the UK Bribery Act and the OECD Convention Against the Bribery of Foreign Government Officials.

Cambodia ratified the United Nations Convention Against Corruption in 2007. Cambodia is also a member of the Anti-Corruption Initiative for Asia-Pacific, an initiative by the Asian Development Bank and the Organisation for Economic Co-operation and Development.

## Corruption offences

The Anti-Corruption Law explains that corruption is defined to include the corruption-related criminal offences found in the Criminal Code. In addition, a number of specific offences are added by the Anti-Corruption Law itself, but the Criminal Code holds the main body of offences.

The Cambodian Criminal Code states that offering, accepting or soliciting a bribe is punishable. Offering, accepting or soliciting any gift, present, or promise to a government official or corporate recipient, or providing this recipient with any other benefit to induce that person to perform or abstain from performing his or her duty, is seen as a corruption offence. This is the general definition, with aggravating circumstances depending on the positions of the intended bribe receiver or solicitor.

Other corruption-related offences found in the Criminal Code are improper biddings, money laundering, embezzlement, favouritism and extortion. Offences related to corruption found in the Anti-Corruption Law are abuse of power by public servants or citizens that hold public office through election, illicit enrichment, corruption-proceeds offences and petty corruption offences.

All corruption-related offences require a benefit for the intended receiver or solicitor of the bribe. Benefits are defined differently per applicable law, but in general, they include monetary and non-monetary benefits, for example, giving or promising jobs, contracts, payments, gifts or services, and opting not to perform services.

Cambodia's anti-corruption regulations cover both the public and private sectors, and therefore include commercial bribery between private entities. Corrupting any private employee or public official is considered an offence and is punishable. The position of the intended receiver or solicitor of the bribe determines the applicable punishment regime. For example, corrupting a judge or a company's director leads to higher minimum punishment.

## Facilitation payments

Facilitation payments are mostly small payments made to speed up certain administrative procedures. The general definition of a corruption offence encapsulates facilitation payments. In addition, the Criminal Code specifies delivering bribes to a civil servant or a citizen so that the receiver will:

- perform any act within his or her functions or facilitate anything using his or her functions; or
- not perform any act within his or her functions or facilitate anything using his or her functions.

Although they seem to be widely accepted in Cambodia, facilitation payments are illegal under Cambodian law. Using a benefit to speed up a process is prohibited under law and under the general definition of a corruption-related offence.

## Corporate liability

Under article 42 of the Criminal Code, legal entities may be found criminally liable for the actions of their representatives and organs, as long as the acts were in the company's interest. The Criminal Code and the Anti-Corruption Law specify which corruption-related offences are applicable to legal entities.

Article 42 of the Criminal Code states that a company can be found 'criminally responsible for the offences committed, for their interests, by their organs, or their representatives'. The requirements do not include knowledge of the act, substantially broadening the possibilities of corporate liability. In addition, liability for acts of representatives may go as far as third-party contractors.

Furthermore, under the Civil Code, authorised and unauthorised actions of an agent may be attributed to a principal, possibly leading to corporate liability under civil law. Given that corruption laws are applicable to both the public and private sectors, this liability may have serious consequences for companies.

The Anti-Corruption Law states that liability will exist for a legal entity that conceals, keeps or transports proceeds that come from corruption. Knowledge that the proceeds have come from corrupt acts must be proven for this particular offence. Conviction is punishable by a fine, and also subject to accessory penalties such as dissolution, placement under the court's watch, expulsion from public procurement and other punishments.

## Whistleblowing

The Anti-Corruption Law provides very limited protection for whistleblowers. The ACU, established by the Anti-Corruption Law, has the power to implement measures on whistleblowers, but no measures have yet been published. The ACU is bound to maintain absolute confidentiality of corruption-related information sources under the Anti-Corruption Law, which includes punishments for the leakage of confidential information on corruption.

In contrast to most whistleblowing provisions in other countries, the Anti-Corruption Law criminalises whistleblowing in certain situations. When allegations of corruption contain disinformation or 'defamatory' statements, a whistleblower may be subject to punishment.

The Law on Anti-Money Laundering and Combating the Financing of Terrorism includes obligations to whistleblow. The law obligates banks, financial institutions, casinos, law firms, and a string of other financial and non-financial institutions to report certain transactions to the Financial Intelligence Unit.

Reporting obligations are triggered by the size of the transaction and the suspicious nature of a transaction. A suspicious transaction is defined as a 'transaction that involves funds suspected to be the proceeds of an offence, or funds related to the financing of terrorism.' In case of a suspicious transaction, the entity is obligated to inform the Finance Intelligence Unit within 24 hours from learning of the suspicion. Communication with the Finance Intelligence Unit is confidential, and the Unit itself is bound by confidentiality as well.

In December 2017, the head of Cambodia's ACU reported to the press that a draft law on whistleblowing and witness protection is near completion. This law is highly anticipated, as current whistleblowing protections are limited in Cambodia, and the new law will hopefully have a positive effect in reporting and fighting corruption in all sectors.

## Foreign corruption statutes

Companies conducting business in Cambodia must be aware of the applicability of foreign corruption statutes in addition to Cambodian anti-corruption legislation. Conduct allowed under Cambodian anti-corruption regulations may be prohibited by these foreign corruption statutes.

Foreign corruption statutes have extraterritorial applicability, and companies may be prosecuted for acts conducted outside of their home jurisdiction. Among several countries, Australia, the United States and the United Kingdom have foreign corruption statutes or have included provisions on foreign bribery in their criminal codes. Corrupt activities in Cambodia by companies connected to these countries may lead to prosecution in these countries. The statutes provide for corporate liability and require companies



to implement systems to prevent corruption or mechanisms to flag non-compliance.

The UK Bribery Act covers corruption in both the private and public sectors. It requires a close connection to the United Kingdom for the person offering or accepting the bribe. This includes companies incorporated in the United Kingdom, but also non-UK companies conducting business activities in the United Kingdom. Even if the bribery takes place in Cambodia, the extraterritorial application of the act makes it possible for the company or person with a close UK connection to face prosecution in the United Kingdom.

The US Foreign Corrupt Practices Act is applicable to all US companies and persons, but also includes foreign companies and persons if they issue securities on a US exchange. Furthermore, the Department of Justice has adopted a broad reading of the act's applicability, including companies using US bank accounts or committing any act furthering an act of corruption on US territory. Even non-US persons and companies can be found liable under this act, as a minimal nexus to the United States must be established in the Department of Justice's reading. The act is applicable to offering a bribe to foreign officials, and does not cover corruption of the private sector or accepting a bribe.

The Australian foreign bribery laws are part of the Australian Criminal Code Act and are applicable to Australian citizens, residents and companies operating anywhere in the world, including Cambodia. It addresses bribery of a foreign public official with the intent to influence the official and gain an advantage.

### Anti-corruption compliance

A vital tool for avoiding corruption and fulfilling a company's duties under local and foreign anti-corruption regulations is an anti-corruption compliance programme. A comprehensive anti-corruption programme should include work rules, guidelines, laws and regulations, the company's commitment to conducting business without corruption, training and education on compliance, and preferably practical examples of situations that are likely to happen in the course of business. Another vital tool is an internal system for whistleblowing and whistleblower protection, as corruption within the company itself should be reported as soon as possible.

The Cambodian Labour Law requires companies that employ more than seven employees to establish internal regulations. Including strong anti-corruption rules in these internal regulations is strongly advisable when conducting business in Cambodia, and this must be seen as a bare minimum requirement for companies operating in Cambodia.

In 2015, the ACU in cooperation with several companies and private sector working groups published the Guidebook on Anti-Corruption Program for Business in Cambodia. This guidebook contains valuable tips for developing and implementing an anti-corruption programme. Publishing the comprehensive guidebook shows the government's commitment to education on anti-corruption compliance in the business sector.

### Memorandum of understanding with the ACU

Several major local companies and local subsidiaries of major foreign companies have signed a memorandum of understanding with the ACU. These agreements have no specific basis in law, but serve as an agreement between the companies and the ACU to conduct business without any form of corruption.

Companies establish focal points to exchange information on where corruption offences take place, and where the company encounters corruption. The memorandum usually includes confidentiality agreements and could function as a different form of whistleblower protection. The companies that have signed these memoranda have responded positively to the cooperation with the ACU. The ACU signed approximately 60 memoranda in 2017 alone, and has announced plans to expand this programme in the near future.

### Summary

Cambodia is an attractive South East Asian destination for foreign direct investment as it is experiencing strong economic growth and has a pro-business government. Strengthening the legal framework by revising old laws and implementing new laws will contribute to a better business climate. Clarifying the practice and interpretation of corruption-related laws will lead to a better understanding of corruption-related issues, and will hopefully lead to more transparent means for addressing corruption.

In the meantime, investors and their counsel should be aware of the risks posed by corruption. Investors should do everything possible to address corruption head on in order to protect their investments. Being associated with corruption presents a major risk for a foreign investor's image, and it can be disastrous for a company's activities in Cambodia and abroad. Educating and encouraging lawful behaviour will contribute to a healthier business environment and enhance understanding of anti-corruption regulations.

Establishing a comprehensive anti-corruption programme that includes internal policy rules will limit the risks and contribute to a better understanding among employees at all levels of a company. Although enforcement by authorities may be limited, companies should not walk away from their responsibility in terms of compliance.



**David Mol**  
Tilleke & Gibbins

David Mol is an adviser in Tilleke & Gibbins' Phnom Penh office. He assists both domestic and foreign clients on matters relating to anti-corruption, intellectual property, licensing, regulatory affairs and doing business in Cambodia. Prior to working at Tilleke & Gibbins, David advised the prosecution in the high-profile *Khmer Rouge* case before the Extraordinary Chambers in the Courts of Cambodia. He has also advised NGOs and non-profit organisations in Cambodia on a range of commercial transactions, including financial and funding matters, real estate, employment relations, and regulatory affairs. In addition, David has experience advising the private sector on intellectual property and related enforcement issues.

David received a bachelor's degree in law and a master's degree in public international law from the University of Amsterdam. With his international background and experience working in Cambodia, David has a strong local network of expats and Cambodians to facilitate the needs of his clients.

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# Tilleke & Gibbins

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16th Floor, Phnom Penh Tower  
#445, Monivong Blvd, Sangkat Boeung  
Pralit  
Khan 7 Makara  
Phnom Penh, Cambodia  
Tel: +855 23 964 210  
Fax: +855 23 964 215

**David Mol**  
david.m@tilleke.com

[www.tilleke.com](http://www.tilleke.com)

Established in 1890, Tilleke & Gibbins is a leading South East Asian regional law firm with over 150 lawyers and consultants practising in Bangkok, Hanoi, Ho Chi Minh City, Jakarta, Phnom Penh, Vientiane and Yangon.

Our firm represents the top investors and the high-growth companies that drive economic expansion in Asia in the key areas of commercial transactions and M&A, dispute resolution and litigation, and intellectual property.

Tilleke & Gibbins advises clients on anti-corruption matters in South East Asia. Many countries we work in are attractive destinations for foreign investment. They are also high-risk environments for corruption, asset concealment, fraud and other forms of economic crime. The US government has made prosecutions under the Foreign Corrupt Practices Act (FCPA) a national priority, and more cases under the UK Bribery Act are expected. In addition, ASEAN governments are increasing their own anti-corruption efforts. Failing to curb or prevent corruption can have devastating economic, legal and reputational consequences.

Through our multi-jurisdictional presence, we assist clients seamlessly across borders. Our attorneys and consultants are deeply knowledgeable about local business practices and cultures, which allows us to provide a unique blend of legal and practical advice in this complex field. Our anti-corruption services include:

- Advising clients on local anti-corruption laws, regulatory regimes and business culture.
- Designing, advising and implementing compliance programmes.
- Advising clients on the FCPA and the UK Bribery Act.
- Conducting anti-corruption due diligence on agents, partners and M&A targets.
- Performing anti-corruption risk assessments.
- Overseeing internal corporate investigations.
- Defending and prosecuting corruption-related allegations.
- Assisting with asset recovery and protection.

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