

# BRIBE, SWINDLE OR STEAL

---



## Spotlight on Hong Kong – Wendy Wysong

[00:00:07] Welcome back to Bribe, Swindle or Steal. This is Alexandra Wrage, and it's Hong Kong week for the podcast. I'm spending the week here with a full schedule of meetings organized by the Independent Commission Against Corruption, the ICAC. We're launching the week with a look at the compliance landscape of Hong Kong, and joining me for this is Wendy Wysong from TRACE's partner firm, Clifford Chance. Wendy leads the Asia-Pacific Anti-Corruption and Trade Controls Practice for Clifford Chance. She joined the firm after serving first as an AUSA in Washington and then as the deputy assistant secretary for export enforcement at the Bureau of Industry and Security at the Department of Commerce. Wendy, thank you for joining me.

[00:00:47] Thank you.

[00:00:48] Can you start by describing the compliance environment in Hong Kong?

[00:00:53] Sure. Generally, with regard to anti-corruption, as one would expect for a country that ranks in the top 15 or 16 for risk, Hong Kong is very much perceived to be quite compliant. The primary piece of legislation in Hong Kong is the Prevention of Bribery Ordinance, or the POBO. It's an interesting law. It's primarily focused on public sector bribery. It uses a very broad term to characterize what a bribe could be. It uses the word "advantage," and that basically means anything of value. It's defined a lot like the same terms that the FCPA would cover.

[00:01:39] Except it's really detailed, right? I saw the definition at the Department of Justice, and I don't think I've seen as comprehensive a definition as that.

[00:01:50] That is true. It's a very long laundry list, just in case there's any room for doubt as to what might be encompassed within an advantage. But interestingly, they do exclude entertainment that is consumed on site. Just as under the FCPA, you have the exception for entertainment for a marketing purpose, they assume and decided that if you have an entertainment that occurs on site, if you're offering hospitality of whatever nature — if it's being undertaken right there on site, then it's not within the definition of an advantage, the theory being that hospitality is such an integral part of how Hong Kong does business.

[00:02:38] Does "on-site" mean at the workplace?

[00:02:40] No, no, no. It means if you were at a hotel or you were at some venue at a sporting event or at a restaurant, so long as they're not giving you a bottle of something to carry off the premises.

[00:02:52] OK, so long as you're sharing it with them and not sending them home with it.

[00:02:55] Correct. So it is the same concept that if someone's hosting a meal, you're building a good business relationship. You're establishing yourself with that particular individual. That's fine, and it's sort of the same way that the exception applies for the FCPA. There is no de minimis. Anything of value would be encompassed. The other very broadly defined term is "public officials" because it not only includes legislators and judges and the folks that you would normally consider. It also includes employees of state-

owned entities, just in the same sense that the FCPA does. But it also includes employees and members of clubs because in Hong Kong, there's a lot of clubs that really perform public functions, and so they are brought within that definition of public officials as well, which is much broader, I think.

[00:03:53] I've heard you say this before that that would include the Jockey Club.

[00:03:57] Right.

[00:03:58] What services is the Jockey Club providing that would be equivalent to a public official?

[00:04:02] They fund everything. If you look around — and again, it's one of the interesting things about Hong Kong. There's a lot going on under the surface, and you wouldn't know it unless you'd been here for any length of time, but if you start walking around, you'll see a number of things that are funded by the Hong Kong Jockey Club. It's a huge operation, and that's sort of where a lot of the public functions, where the money comes from because they do millions of dollars every night that there's a race. That money gets funded back into the public purse, and so they are the ones that are deciding how it's disbursed, so they are regarded as public officials. Now, where it gets a little bit narrower: It is extraterritorial against Hong Kong public officials but not foreign public officials. There's a provision that will reach foreign public officials as agents, but it generally would only be extraterritorial as against their own public officials. It does include both the bribers and the recipients, so it's a little bit broader there, but then it excludes, from some of the offenses, the chief executive of Hong Kong, some of them explicitly of the offenses that are listed under the POBO.

[00:05:23] The chief executive is the title to the senior-ranking elected official of Hong Kong. I don't think that's always intuitive. It's a very corporate term — "the chief executive." So the head of — it's not a state. It's obviously the "two systems, one country." But the head of this region is exempted? What's the rationale for that?

[00:05:45] I don't know the rationale, but under some of the provisions, there's an explicit carve-out for the chief executive, and that's interesting how it comes into play. There is one material provision that is very different for being in possession of unexplained property. They don't have to prove bribery. They don't have to prove how you got the property. If you are in possession of unexplained property — you're living beyond your means — the burden of proof shifts to that public official to prove how it is they were able to afford whatever is coming to question.

[00:06:24] Instead of the state having to prove their case by saying, "You have ill-gotten gains," the burden shifts to the government official to explain away that wealth, whether inheritance or gambling win or however they're able to explain it.

[00:06:38] Right, and the explanations on their face sometimes don't hold up when you're just reading about a newspaper, but they're accepted as legitimate because it might be a very traditional way of doing business. It's charged, and people are very concerned about it, but obviously, people live very lavishly here. Again, I think that this law is very much crafted to address the particular ways of living here in Hong Kong and ways of doing business, so I think that's an example of that. With regard to private sector bribery, employees of private companies are investigated and are encompassed as agents. This, again, is sort of a broader term, so this is how you would get the foreign public officials. They would be covered as agents. Anyone acting on behalf of another who accepts an advantage would be encompassed within that concept. That's how they deal with private sector bribery and bribery of foreign public officials. Now,

there is a limitation here in jurisdiction because the actual bribe has to have been committed in Hong Kong for there to be jurisdiction over the foreign public official.

[00:07:52] Is there a discussion about changing that? I know that a number of countries have been pretty seriously beaten up by the OECD — or, in this case, that would be the UN Commission Against Corruption — because there was no extraterritorial reach. Is there a discussion in Hong Kong about extending jurisdiction?

[00:08:10] I think when that decision was reached, there was quite a bit of commentary about that because it was surprising. People said, "Wait a second. We can conspire here? This is sort of a safe haven in Hong Kong to plan your bribery as long as you take a boat over to Macau and actually pay the bribes."

[00:08:28] It does seem to be a loophole.

[00:08:30] This is the way the law was drafted, and this is how the judges have interpreted the law. It'll be a matter of discussion. There's another gap in the law because there is no provision for corporate criminal liability. You can only prosecute individuals theoretically — under theories of vicarious liability or directing mind. You can prosecute corporations, but there haven't been corporations that have been prosecuted for bribery to date. There's these two loopholes that there's a lot of discussion and debate about, but so far we haven't seen amendments introduced to try and change that that have moved anywhere. At this point, those loopholes exist, and they stay that way. The laws are enforced by — as you said, you've met with the ICAC. They're a very respected, very diligent enforcement agency that has really embraced their responsibilities. They will investigate any complaint. Doesn't matter how serious it might appear to be, or if it's not serious, or it's very serious — they take their responsibilities very seriously.

[00:09:43] You mentioned that there was no de minimus. There was no minimum standard, and that's true in a lot of countries — it is true in the United States — but it doesn't have, I think, the same meaning here because the ICAC has to investigate every viable report, and then they have to explain to their supervisory board if they decide not to open a file, so the "no de minimus" has real meaning here. It can be a fairly trivial amount. Now, the law is still balanced with, "There has to be a public interest," so I suppose a single cake wouldn't rise to that, but they have to explain themselves when they don't proceed with investigation, which is, I think, possibly unique in the world.

[00:10:23] I don't know if it's unique in the world, but as a former prosecutor, I know I had a lot of discretion as to which cases I was going to bring. Today, it's interesting you bring up the example of a mooncake. There was a case where there was a police force that provided some security and, as a thank you, the business owner had sent over a truckload of mooncakes, and the police officers right away turned around and sent it back. But nevertheless, that got reported, and the ICAC investigated and ended up prosecuting the business owner, and so he spent some time in jail. Again, they take this very, very seriously. I can't use the mooncake example anymore because there was that situation.

[00:11:07] On Wednesday, we'll have a podcast with the commissioner of the ICAC, so it'll be interesting to have Simon Peh's response from the other side of this. Moving back to the compliance field for a moment: Can you help people who don't practice on a regular basis or don't have direct responsibility in Hong Kong identify some of the trends that you're seeing here?

[00:11:31] People would be kind of surprised as far as the compliance. There's a little bit of complacency. If you come Hong Kong, it's very safe here. There's video cameras everywhere. You can go out in the middle of the night and walk home, and you're pretty much going to be okay. But there's a lot going on under the surface that you wouldn't necessarily see unless you've been here for a while. There's not a lot of transparency. The legal system is very open, and they are very independent, but in terms of things that are maybe decision-making, you just aren't going to get an insight into that.

[00:12:13] What do you mean by that — when you say on the one hand, there's a lot of transparency, but on the other hand, you can't get this insight? Would that be into procurement processes, or?

[00:12:23] It's the whole gamut. It's everything from the fact that gambling is illegal, but if you look out the window, there is a ship right out there that every night goes offshore, and everybody is offshore gambling, and then they come back the next morning. There's things like that.

[00:12:42] A workaround.

[00:12:43] Yes. They're compliant — sort of — and it's those kinds of things. It's the money laundering that comes through Hong Kong, comes through Macau, and it's sort of the fuel that keeps Macau afloat, in some respects — that people, if they're not really aware of what's happening, they can get into trouble just because it's an accepted way of transacting business. If you just go along, and you're not keeping your own standards of compliance to the fore, it's pretty easy to turn a blind eye to things. That, I think, is kind of surprising to folks when they're doing business in Hong Kong. You can't really make all the assumptions that you're making just because it has a very low risk of corruption.

[00:13:34] Following on from that, when I talk to people who don't have a lot of experience of Hong Kong, there is a perception that Hong Kong's independence is being eroded by the mainland. That's not what I've been hearing in meetings this week. Obviously, my meetings have been with representatives of the Hong Kong government, so they have a stake in that. Do you agree with that assessment? You've been here now —

[00:14:01] Seven years.

[00:14:02] Seven years. What have you seen?

[00:14:04] I wouldn't say that the independence has been eroding because the legal system, the lawyers involved, the judges are very proud — and rightfully so — of the independence of the judiciary. There's a lot of resistance to any sort of encroachment. That said, this is a special administrative region. It is part of China, and so there's understandably cooperation and ways of trying to reach mutually beneficial enforcement efforts. For example, Hong Kong cooperated in the PRC's anti-corruption crackdown. They were participants in the Operation Sky Net and trying to get the PRC public officials who had taken money repatriated back to the mainland for prosecution. There was a lot of tigers, probably a lot of flies, foxes — spiders, I think, is the one I just recently heard of folks with these webs of financial investments. There's a lot of cooperation, but it's following legal processes. We are seeing that, and to the extent that there is a deviation from that, it gets an enormous amount of coverage. We don't know exactly the rationale for certain things. Some would say that the U.S. has some of the same issues that it raised with their extraordinary rendition. We don't know. We don't have a lot of insight into that.

[00:15:48] You were at the Four Seasons when there was an incident — exactly what you've described. Are you willing to describe that for us?

[00:15:56] I don't have personal information of all of the details, but there was an individual who, as I understand it, was a Chinese citizen who lived over here in Hong Kong in the Four Seasons and

[00:16:11] Very early in the morning, was taken from his apartment and repatriated back to the mainland. There's reports that he's cooperating in various investigations. There was reports that his passport had to be recovered, and that no one had accompanied him back across the border. We don't know. Again, we're watching what happened there, and it received a huge amount of publicity. But apparently, there were ties to the mainland, but he was described as a "Hong Kong tycoon." The only thing anybody knows about it is what's been reported in the press, but yeah, we were there.

[00:16:53] The fact that it makes the headlines shows how jealously Hong Kong is working to guard its independence even while it navigates its way through this unusual relationship with the mainland.

[00:17:07] I do think that that's very indicative of how concerned people are that the things that were put in place, the systems that were put in place in Hong Kong remain so, but with an understanding that the PRC does have its interests. There's a lot of countries that are cooperating with the PRC in terms of what it's trying to do in this anti-corruption crackdown. They're seeking cooperation from Australia, from the United States, the UK. There's a lot of Chinese officials who are coming back voluntarily to the PRC. It's an interesting thing to watch, and something people who've lived here for a long time that heard this refrain about corruption and anti-corruption, but we're seeing it happen to the scale that, I think, really is quite surprising and should be encouraging, I think, in some respects.

[00:18:02] The other thing that I've heard a great deal this week that surprised me is about China's Belt and Road. It surprised me because, of course, in Beijing, that's a central theme, and it's been made a big part of President Xi's platform. But Hong Kong is positioning itself to play a role as a hub, a bundler of services in support of Belt and Road. Do you have any thoughts on the likelihood of the success of that, but also whether that will land some compliance credibility to some of these projects?

[00:18:39] I think absolutely. In both respects, I think you're exactly right, Alexandra, because Hong Kong basically wants to be designated as the international hub. They're in direct competition in many respects with Singapore. There's other countries that they would like to distinguish themselves to. This is such an important initiative for China, but for all the countries that are linked by this, it's incredible. They're going to be able to bring development at a pace that is unprecedented. That very pace, of course, brings with it compliance challenges because if you're trying to do something fast, that can get expensive, and people cut corners, and it's incredibly lucrative. There's huge risks, obviously, with this whole project. They're in risky countries. They're risky industries. There's folks that are participating that have been blacklisted in other countries. Right now, there's 1,700 projects that are already under way. You can imagine the scope for oversight on here would just be enormous. You have different legal systems. You have common law. You have civil law. You have Sharia law. You've got different regulatory regimes and outlooks and enforcement for anti-corruption.

[00:20:14] There's no question at all that it's a regulatory and compliance challenge. Is there currently some sort of designated oversight body for these, or is it entirely ad hoc?

[00:20:24] It is. Right now, it's ad hoc. I was looking into this and thinking, "There's just a recipe for disaster here, really."

[00:20:34] Seems to be, yes.

[00:20:35] If companies that are subject to the compliance laws in the U.S. or the UK want to get involved — and they should be involved, they have enormous expertise — they should have the advantage of competing for these projects. But they're going to be held back for being concerned, or they're going to suffer for having been involved in it if they don't comply. I was trying to figure out what mechanisms were in place, and I think the multilateral development banks are going to be the key to that because they impose standards and oversight. If you get debarred by one of the banks, most of the banks have signed on to the cross-debarment agreement. The Asia Investment Bank hasn't done that yet, but they've basically said that if an entity gets debarred under their agreement, they're going to recognize that debarment. You've got the multilateral development banks that are going to exert some sort of control. If a body, such as the ICAC, takes an active role, gets designated, in some way is given some authority, I think that would be a mechanism so that they can try and police this. We do know that the PRC had five state-owned entities — construction companies — that signed on to a pilot compliance management system, and they are sort going to be seen as, I guess, the "compliance champions" of this project.

[00:22:10] Are they expected to expand to more companies? Five is a start, but it's not very many.

[00:22:14] Well, these are big, big companies, and they're companies that have enormous tentacles. They say it's the China National Petroleum Corporation, but that's not just all it does. They'll say it's an energy company, but it's all over into so many different industries. I think when we say five, it doesn't sound that that much, but the multiplier — the way that these corporations are organized — you say five, but it's probably 500.

[00:22:44] If they can push this pilot program down through their supply and subcontracting chain, then obviously that will have a huge reach.

[00:22:52] I think everybody is watching this, watching how this is playing out, watching how it's actually coming to fruition so quickly and watching how many red flags there are involved in this. I think there would be a great amount of pride in being able to carry this out compliantly and disgrace if it isn't. I do think there is some self-policing going on by the governments who are involved in this. Nobody wants to be another oil-for-food situation, Bonny Island or any of the big developments, the big cases that have so many feelers. I think there's a huge incentive. The PRC wants this to be a success. It's going to be linking them with everyone — Africa, the Middle East, into Eastern Europe. It's an amazing project. They want that to be successful.

[00:23:51] When they've staked their country's reputation on it in many respects — they've called so much attention to this, made it such a central part of the government's platform — for it to be tainted by one or by multiple corruption scandals would be really damaging.

[00:24:07] On the same hand, so has the anti-corruption crackdown. That is one of the key pinnacles. You've got the two playing, perhaps not against each other. Perhaps they'll be interwoven.

[00:24:21] But even there is the Chinese government. The PRC government and the Hong Kong government have done a phenomenal job of cracking down on corruption and bringing enforcement cases within their own borders. But neither Hong Kong nor the PRC has brought any cases for corruption outside of their borders. Belt and Road is not just international. It's international, and it's a really tough neighborhood. I think one of the measures of success, it seems to me, will be whether they take seriously enforcement against Chinese companies outside of China.

[00:24:56] Paying bribes to foreign public officials.

[00:24:59] Yes, exactly. Paying bribes in one of these Belt and Road countries.

[00:25:01] As I explained, Hong Kong is not going to be able to do that.

[00:25:05] By the nature of the law. The Chinese law doesn't empower them to do it. They just haven't ever.

[00:25:11] I think that's going to be interesting because they've shown no fear in going after the corporations internally, so it would be the next logical step to look at what they're going to be doing on a systematic basis. I would think that by virtue of them awarding various projects, there is going to be oversight into that, that the companies don't comply with the laws.

[00:25:35] Just to wrap up and bring it back to Hong Kong again: Hong Kong. Low levels of red tape fares very well on ease of doing business. High levels of enforcement within its borders. A very sophisticated, well paid, competitive civil service. Sorry to make this a negative note to end on: What are the challenges here from a corruption perspective? Where are the weak links?

[00:26:03] I think, obviously, it's when you come in here, when you're understanding what you're doing here. You have to understand that, more than likely, there's ties to the mainland, so you're going to have state-owned cities. We always have interesting issues on due diligence over third parties and understanding who actually owns and controls third parties and what the third parties are doing to the distributors. We've done a number of investigations. American companies that come over here, and they think their distribution supply chain is very safe, and then they find out their products are going places where they shouldn't go, and they're getting through customs where they shouldn't get through customs. It's very much a problem with low-level payments to people and those kinds of things. It's the same kind of problems that you have anywhere. It's just that you don't see them as much, and there's a level of complacency here: "I'm in Hong Kong, so nobody's really asked. This can't be a bribe that I'm being asked for." The hospitality is such a huge part of the culture here. Where does it go from having hospitality onsite to getting tickets to places overseas that you ought not be? It's the same challenges, and I just think what concerns me is the complacency and the feeling that, "They're covered. They're not going to be interested in bribery. It just doesn't happen. So why are you talking to me about bribery?"

[00:27:33] It's an interesting phenomena more generally. When you talk to people in countries that are generally perceived as pretty clean — this is certainly true of Canada — they just don't recognize the risk. When you see the work of the ICAC and the number of files that are opening and resolving, I can imagine that it would be really easy to become complacent. It's an interesting point. In a week of meetings, nobody made that point, and I think it's important one. As we look at next generation development of countries' efforts to combat corruption, I think that's something to keep an eye on.

[00:28:08] It's a wonderful, wonderful place to do business. You just can't abandon the principles of compliance that you brought over here, to think that you are not going to be subject to compliance enforcement.

[00:28:22] That's very interesting, thank you. Thank you, Wendy, and thank you to Clifford Chance for being TRACE's partner firm here in Hong Kong for well over a decade now. We really appreciate that.

[00:28:32] We appreciate the opportunities, and we will do anything we can to help you out.

[00:28:38] Thank you.