

**WHY CHINA’S CRACKDOWN ON COMMERCIAL BRIBERY  
THREATENS U.S. MULTINATIONAL COMPANIES  
DOING BUSINESS IN CHINA**

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**I. INTRODUCTION**

China’s recent anti-corruption campaign has drawn widespread media attention in the United States following a number of high-profile bribery investigations brought against multinational companies (MNCs) based in the United States and foreign countries. Unlike the previous anti-corruption campaigns, regularly launched by the Communist Party (the Party) throughout the nation’s history,<sup>1</sup> the present campaign is notable for its focus on commercial bribery, i.e. bribes paid by private businesses,<sup>2</sup> many of them MNCs. In previous campaigns, the Party focused on the recipient of the bribe, often a government or Party official.<sup>3</sup> In the present campaign, China now seems to be shifting its focus to the payor of the bribe, often a Chinese business entity owned by a private MNC.<sup>4</sup> For example, China recently launched an investigation into an elaborate bribery scheme, allegedly involving hundreds of millions of dollars funneled by the Chinese business entity of Glaxo Smith Kline (GSK), a pharmaceutical MNC, to Chinese doctors and administrators in China’s state owned hospitals for the purpose of inducing them to prescribe medications.<sup>5</sup> China has further announced an investigation of an additional sixty pharmaceutical companies.<sup>6</sup> In 2010, in a case that drew worldwide media attention, China imposed lengthy prison terms on executives from Rio Tinto, a mining sector MNC, for giving bribes.<sup>7</sup> According to China’s state-controlled media, China is cracking down on MNCs because

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<sup>1</sup> China periodically uses “strike hard” campaigns to crack down on various vices, such as corruption, violent crime, counterfeit products, and prostitution. Jin Zhu, “Strike Hard” Campaign Targets Violent Crimes, CHINA DAILY (June 15, 2010), [http://www.china.org.cn/china/2010-06/15/content\\_20267402.htm](http://www.china.org.cn/china/2010-06/15/content_20267402.htm).

<sup>2</sup> For an analysis of the PRC laws related to commercial bribery, see *infra* Part II.B. By “private businesses,” the text refers to a corporation that is owned by individuals as distinguished from a company that is owned by the state or the government.

<sup>3</sup> See *infra* Part III.C.1.

<sup>4</sup> See *infra* Part II.C.2.

<sup>5</sup> See Mark Thompson, *China Says Glaxo Smith Kline Ran a Huge Bribery Web*, CNN MONEY (July 15, 2013), available at <http://money.cnn.com/2013/07/15/news/companies/glaxosmithkline-china-bribery>.

<sup>6</sup> Jonathan Kaiman, *GSK Bribery Scandal: Beijing Tightens Grip on Multinationals in China*, GUARDIAN (July 15, 2013), <http://www.theguardian.com/business/2013/jul/15/gsk-bribery-scandal-multinational-china>.

<sup>7</sup> David Barboza, *China Sentences Rio Tinto Executives to Jail in Bribe Case*, N.Y. TIMES (Mar. 29, 2010), [http://www.nytimes.com/2010/03/30/business/global/30riotinto.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/03/30/business/global/30riotinto.html?pagewanted=all&_r=0).

commercial bribery by MNCs is on the rise;<sup>8</sup> the crackdown has subsequently given rise to a perception that MNCs “are under siege in China.”<sup>9</sup> These actions by the Chinese government have raised questions about (1) whether China is deliberately targeting U.S. and other foreign-based MNCs;<sup>10</sup> (2) China’s motives and goals in pursuing private businesses engaged in commercial bribery;<sup>11</sup> and (3) the long term consequences for MNCs doing business in China. These questions are being raised at a time when China’s political and economic rivalry with the United States appears to be increasing and when both countries are more publicly critical of each other than at any other time in recent memory.<sup>12</sup>

This article examines China’s recent intensified interest in commercial bribery cases involving MNCs and the underlying reasons why China is focused on bribery by private businesses. Contrary to the perception of China as intent on targeting MNCs for punishment, there are a number of legal and political reasons for China’s recent efforts, but none of them involve an overall goal of punishing MNCs to any serious degree, or even of disrupting the business of MNCs in any significant fashion.<sup>13</sup> Rather, China only intends to use a crackdown on commercial bribery against MNCs for symbolic and political purposes. In other words, China’s recent crackdown on commercial bribery by MNCs poses no real threat to MNCs doing business in China.<sup>14</sup>

If MNCs are not truly threatened by China’s crackdown on commercial bribery, then what are China’s goals in pursuing this current anti-bribery campaign?<sup>15</sup> One reason for recent emphasis on commercial bribery by MNCs lies in China’s natural expansion and development of its total anticorruption campaign. In any bribery transaction, there is both a supply side, and a demand side.<sup>16</sup> There are usually at least two parties involved: a payor, and a recipient of the bribe. As a result, two “choke” points exist that can be attacked by anticorruption enforcement actions: the payment of the bribe and the receipt of the

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<sup>8</sup> Jin Shanming, *Multinationals in China Must Operate According to Law*, CHINA TODAY (Sep. 25, 2013), [http://www.chinatoday.com.cn/english/economy/2013-09/25/content\\_569718.htm](http://www.chinatoday.com.cn/english/economy/2013-09/25/content_569718.htm).

<sup>9</sup> Simon Zadek, *The End of Irresponsible Business Practices by Multinationals in China*, S. CHINA MORNING POST (Aug. 22, 2013), <http://www.scmp.com/comment/insight-opinion/article/1298364/end-irresponsible-business-practices-multinationals-china?>.

<sup>10</sup> See CECC Hearing, *supra* note \*.

<sup>11</sup> See *infra* Part II.B.

<sup>12</sup> Mark Lander & David E. Anger, *China Pressures U.S. Journalists, Prompting Warning from Biden*, N.Y. TIMES, Dec. 6, 2013, at A1, available at <http://www.nytimes.com/2013/12/06/world/asia/biden-faults-china-on-foreign-press-crackdown.html>.

<sup>13</sup> See *infra* Part II.A.

<sup>14</sup> See *infra* Part IV.A.

<sup>15</sup> The arguments supporting the points in this paragraph are further developed *infra* Part III.C.

<sup>16</sup> See *infra* Part III.C.

bribe.<sup>17</sup> Until recently, as noted above, China's anticorruption efforts have been focused almost exclusively on the recipient of the bribe.<sup>18</sup> An effective overall anti-bribery strategy should attack both "choke" points.<sup>19</sup> Following similar developments on the international level within the recent past,<sup>20</sup> beginning in 2008, China enacted legislation specifically aimed at commercial bribery,<sup>21</sup> and in 2013, China enacted a new law that specifically targets the payor of the bribe.<sup>22</sup> When a private business gives a bribe for the purpose of obtaining business, this is an example of what China considers to be commercial bribery, as opposed to government graft or corruption.<sup>23</sup> This recent legislation, further discussed in Part II.B, appears to signal a shift to a focus on enforcement against commercial bribery, as well as pursuing the payor of the bribe.<sup>24</sup> Since the payor of the bribe is often an MNC, or its instrumentality or agent in China, China's recent emphasis on commercial bribery and the payor of the bribe could ensnare many MNCs doing business in China. The Chinese media has already identified MNCs as major culprits in commercial bribery.<sup>25</sup> As noted above, several high profile cases involving MNCs have already drawn worldwide media attention and could signal a continuing trend. But the trend can be explained, at least in part, as the natural expansion of the overall anti-bribery enforcement strategy that should focus both on the payor, often an MNC, as well as the recipient of the bribe.

While shifting focus to the payor of the bribe is part of the development of a comprehensive anti-bribery strategy, China's crackdown on MNCs also serves important political purposes for China's rulers, the Party.<sup>26</sup> Focusing on the payor of the bribe—often an MNC—can shift public attention away from the recipient of the bribe—often a government or Party official.<sup>27</sup> China can still

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<sup>17</sup> See *infra* Part III.C.

<sup>18</sup> See *infra* Part III.C.

<sup>19</sup> See *infra* Part III.C.

<sup>20</sup> See *infra* Part III.A.

<sup>21</sup> See Opinions on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery (promulgated by Sup. People's Ct. & Sup. People's Proc., Nov. 20, 2008, effective Nov. 20, 2008) [hereinafter 2008 Opinion]. The Supreme People's Court, the country's highest court, and the Supreme People's Procuratorate, the country's highest prosecutorial body, regularly exercise legislative power. See DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 174, 178-79 (2d ed. 2009) [hereinafter CHOW, *LEGAL SYSTEM OF CHINA*] (describing the legislative power of the Supreme People's Court and the Supreme People's Procuratorate but also noting that source of legislative power is unclear).

<sup>22</sup> See Interpretations on Several Issues Concerning the Specific Application of the Law in the Handling of Criminal Bribery Cases (promulgated by Sup. People's Ct. & Sup. People's Proc., Dec. 26, 2012, effective Jan. 1, 2013) [hereinafter 2013 Interpretation].

<sup>23</sup> See *infra* Part II.B.

<sup>24</sup> See *infra* Part II.B.

<sup>25</sup> Yin Pumin, *Clamping Down on Corporate Bribery*, BEIJING REV. (July 30, 2013), [http://www.bjreview.com.cn/business/txt/2013-07/29/content\\_557941.htm](http://www.bjreview.com.cn/business/txt/2013-07/29/content_557941.htm).

<sup>26</sup> See *infra* Part III.C.

<sup>27</sup> See *infra* Part III.C.2.

claim to be serious about eliminating corruption by attacking the choke point on the supply side, or the payor of the bribe, while avoiding the political embarrassment that flairs up whenever the recipient, i.e. a high level Party official, is exposed for accepting bribes or for other acts of corruption.<sup>28</sup> There is a widespread perception among the Chinese public that the Party is corrupt at all levels.<sup>29</sup> Shifting attention to greedy MNCs which initiate bribes might allow the Party to pursue an anti-bribery campaign with furor, but with less risk of embarrassing itself before an already cynical Chinese public.<sup>30</sup>

Although the United States has questioned whether China is deliberately targeting U.S. and other foreign-based MNCs,<sup>31</sup> this article argues that despite its recent focus on commercial bribery by MNCs, China has no interest in causing any significant harm to MNCs or in disrupting their businesses in any significant fashion.<sup>32</sup> MNCs are the primary source of foreign direct investment in China, which has been a major factor in China's economic growth over the last several decades.<sup>33</sup> MNCs have invested billions of dollars in establishing business entities in China and transferred valuable technology to the country, providing access to some of the world's most valuable intellectual property.<sup>34</sup> Any crackdown on commercial bribery that disrupts this influx of foreign direct investment from MNCs will only hurt China's own economic development in the long term.<sup>35</sup> While China may pursue civil and criminal penalties, including imprisonment, for the few individual executives of the Chinese business entities of MNCs, China is unlikely to attempt to disrupt or shut down the Chinese operations of these MNCs by suspending or revoking their business licenses.<sup>36</sup> Rather, China's pursuit of high profile MNCs' executives will serve China's political and strategic purposes, demonstrating to its public that China does not tolerate commercial bribery without any severe consequences for the business operations of MNCs in the near future or long term.<sup>37</sup>

While MNCs do not face significant threats in China from the nation's crackdown on commercial bribery, the crackdown may have the unintended consequence of creating greater exposure for U.S.-based MNCs under U.S. law.<sup>38</sup> As further explained below, the highest risk to MNCs is not China's enforcement of anti-bribery laws, but rather prosecution by the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) for violations of the

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<sup>28</sup> See *infra* Part III.C.2.

<sup>29</sup> See *infra* Part III.C.1.

<sup>30</sup> See *infra* Part III.C.2.

<sup>31</sup> See CECC Hearing, *supra* note \*.

<sup>32</sup> See *infra* Part IV.A.

<sup>33</sup> See *infra* Part IV.A.1.

<sup>34</sup> See *infra* Part IV.A.1.

<sup>35</sup> See *infra* Part IV.A.1.

<sup>36</sup> See *infra* Part IV.A.1.

<sup>37</sup> See *infra* Part IV.A.2.

<sup>38</sup> See *infra* Part IV.B.3.

Foreign Corrupt Practices Act (FCPA),<sup>39</sup> a set of federal laws that prohibits bribery of foreign officials by U.S. companies, including giving “anything of value” for the purpose of obtaining or retaining business.<sup>40</sup> As interpreted by the DOJ, the FCPA has a potentially broad application in China, and can capture many transactions occurring in China on a daily basis.<sup>41</sup> In addition, the sanctions under the FCPA include severe criminal penalties.<sup>42</sup> Business executives who are directly or indirectly involved in a bribe are subject to imprisonment. Monetary penalties can be in the hundreds of millions of dollars.<sup>43</sup> Moreover, an FCPA investigation that proceeds to trial can embroil the defendant company in years of time-consuming and disruptive litigation that can have serious adverse impacts on the public image of the company.<sup>44</sup> In many cases, the bribery schemes in China go unnoticed by the DOJ, as the DOJ has no investigative agents in China, and has no means to detect any of the elaborate and clandestine bribery schemes.<sup>45</sup> However, the crackdown by Chinese authorities could expose now hidden practices, which might be considered by the DOJ to violate the FCPA and result in an FCPA investigation.<sup>46</sup> The DOJ regularly monitors the Chinese media, and any crackdown on a U.S.-based company’s Chinese business operations will draw the attention of U.S. authorities. The U.S. authorities might then contact the MNC’s headquarters in the United States, demand explanations, and initiate an FCPA investigation.<sup>47</sup> Contrary to the perception that MNCs are threatened by China’s crackdown under Chinese law, the most significant threat lies in liability under the FCPA. The investigation of clandestine bribery and corruption schemes by Chinese enforcement authorities that leads to an FCPA investigation by U.S.

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<sup>39</sup> See 15 U.S.C. §§ 78dd-1 to -3, m. (2006). For a discussion of the specific legal issues that involve the application of the FCPA to China, see Daniel Chow, *China Under the Foreign Corrupt Practices Act*, 2012 WIS. L. REV. 573 (2012) [hereinafter Chow, *China Under the Foreign Corrupt Practices Act*].

<sup>40</sup> §§ 78dd-1 to -3.

<sup>41</sup> See *infra* Part IV.B.1. See also Chow, *China Under the Foreign Corrupt Practices Act*, *supra* note 39 at 578-600.

<sup>42</sup> See *infra* Part IV.B.3.

<sup>43</sup> A recent case involved a payment by a French company of almost \$400 million in penalties and disgorgement to the U.S. government to settle an FCPA case. Richard L. Cassin, *Total SA Pays \$398 Million to Settle U.S. Bribe Charges*, FCPA BLOG (Mar. 29, 2013, 12:18 PM), <http://www.fcpablog.com/blog/2013/5/29/total-sa-pays-398-million-to-settle-us-bribe-charges.html#> (discussing fines and disgorgement of profits by Total SA, a French corporation, to settle an FCPA investigation). The highest fine ever paid was \$800 million by Siemens in 2008. Richard L. Cassin, *France’s Total SA Cracks our Top Ten List*, FCPA BLOG (May 29, 2013, 12:38 PM), <http://www.fcpablog.com/blog/2013/5/29/frances-total-sa-cracks-our-top-10-list.html>.

<sup>44</sup> See *infra* Part IV.B.3.

<sup>45</sup> See *infra* Part IV.B.2.

<sup>46</sup> See *infra* Part IV.B.2.

<sup>47</sup> See *infra* Part IV.B.2.

authorities is the most significant threat faced by MNCs as a result of China's recent crackdown on commercial bribery.<sup>48</sup>

Part II of this article will examine China's periodic anti-corruption campaigns and why the current campaign focusing on MNCs is a departure from previous campaigns. Part II will also provide an overview of China's anti-bribery laws and focus on several recent laws that specifically target commercial bribery. Part III will examine reasons behind China's recent focus on commercial bribery. As set forth in Part III, it is impossible to determine whether commercial bribery, given its clandestine nature, has actually increased recently, as China claims, or whether attention to commercial bribery has increased, thus exposing bribery schemes and creating the false impression that bribery is on the rise. Part IV examines the consequences of China's recent crackdown on commercial bribery, both within China under Chinese law, and its consequences under the FCPA. Part V draws some conclusions concerning China's current crackdown and its effects on MNCs doing business in China.

## II. CHINA'S ANTI-CORRUPTION CAMPAIGNS AND THE CURRENT CRACKDOWN ON COMMERCIAL BRIBERY

### A. China's Periodic Anti-Corruption Campaigns

For several decades, China's leaders have periodically announced crackdowns on bribery and corruption.<sup>49</sup> Bribery and corruption involving international business, however, was not a concern for the first few decades after the nation's founding in 1949.<sup>50</sup> During that time, China pursued a path of self-sufficiency and isolation, and did not engage in international trade to any significant degree except with the Soviet Union (which lasted only until the 1960s, when China and the Soviet Union entered into a period of hostile relations).<sup>51</sup> From that point, until 1978, when the leadership of the Communist Party announced the watershed economic reforms that would open China's economy to international trade and investment,<sup>52</sup> China was almost completely

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<sup>48</sup> See *infra* Part IV.B.3.

<sup>49</sup> See DALI YANG, *REMAKING THE CHINESE LEVIATHAN: MARKET TRANSITION AND THE POLITICS OF GOVERNANCE IN CHINA* 221 (2006) (noting that in 1989 Deng Xiaoping, China's paramount leader, called for a crackdown on corruption and that since that time, China has had periodic anti-corruption campaigns).

<sup>50</sup> In 1980, an article stated that the government was "pretty clean" but that corruption was starting to creep into the bureaucracy because the government had taken the shackles off the economy, i.e. had opened up the economy to international trade. James Yuenger, *Unrest Feared in China as Elite Group Emerges*, CHI. TRIB., Apr. 7, 1980, at 4.

<sup>51</sup> DANIEL C.K. CHOW & ANNA M. HAN, *DOING BUSINESS IN CHINA: PROBLEMS, CASES, AND MATERIALS* 15 (2012).

<sup>52</sup> CHOW, *LEGAL SYSTEM OF CHINA*, *supra* note 21, at 27.



isolated from international trade and business.<sup>53</sup> In the mid-1960s, China also became embroiled in the upheaval and self-destructive chaos of the Cultural Revolution, a political movement designed to root out enemies of the state, and consolidate Mao Zedong's power over his political rivals.<sup>54</sup> From the mid-1960s until Mao's death in 1976, the nation was focused on self-purification and paralyzed by a campaign of political terror, purges, and vendettas.<sup>55</sup>

With the end of the Cultural Revolution after Mao's death in 1976, and the economic reforms that opened China's economy in 1978, China began to engage in international trade, and started to receive foreign direct investment in the form of foreign capital, as MNCs began to set up business operations in China.<sup>56</sup> As early as 1989, China's leaders announced that corruption would ruin the Party,<sup>57</sup> and ever since then political leaders have periodically called for crackdowns on corruption by government officials.<sup>58</sup> The most recent crackdown was the result of a campaign initiated by President Xi Jinping, who formally became China's head of state on March 14, 2013, a transition of power that occurs once a decade.<sup>59</sup> On November 18, 2012, he warned that corruption "could kill the Party and ruin the country,"<sup>60</sup> a sentiment reiterated repeatedly at local levels.<sup>61</sup> President Xi warned that he would target "tigers and flies"<sup>62</sup>—high level as well as low level officials involved in corruption. As part of this anti-corruption campaign, China now seems to be intensifying its crackdown on commercial bribery. On November 20, 2008, the Supreme People's Court and the Supreme People's Procuratorate jointly issued an opinion focusing on commercial bribery.<sup>63</sup> More recently, on December 26, 2012, both institutions also issued an Interpretation, effective as of January 1, 2013, focusing on the criminal

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<sup>53</sup> CHOW & HAN, *supra* note 51, at 15.

<sup>54</sup> CHOW, *LEGAL SYSTEM OF CHINA*, *supra* note 21, at 17.

<sup>55</sup> *Id.* at 17-18.

<sup>56</sup> *Id.* at 27, 34.

<sup>57</sup> YANG, *supra* note 49, at 221.

<sup>58</sup> *Id.*

<sup>59</sup> Chris Buckley, *China's New President Nods to Public Concerns but Defends Power at the Top*, N.Y. TIMES, Mar. 14, 2013, at A12, available at <http://www.nytimes.com/2013/03/15/world/asia/chinas-new-leader-xi-jinping-takes-full-power.html>.

<sup>60</sup> *China Media: Xi Jinping's Anti-Corruption Call*, BBC NEWS (Nov. 19, 2012), <http://www.bbc.com/news/world-asia-china-20405106>.

<sup>61</sup> See Xu Jingxi, *Guangdong Gets Tough on Economic Crime*, CHINA DAILY (Feb. 11, 2012), [http://usa.chinadaily.com.cn/business/2012-02/11/content\\_14583414.htm](http://usa.chinadaily.com.cn/business/2012-02/11/content_14583414.htm) (Local official describes commercial bribery and other economic crimes as "the cancer of the economy.").

<sup>62</sup> Tania Branigan, *Xi Jinping Vows to Fight "Tigers" and "Flies" in Anti-Corruption Drive*, GUARDIAN (Jan. 22, 2013), <http://www.theguardian.com/world/2013/jan/22/xi-jinping-tigers-flies-corruption>.

<sup>63</sup> See 2008 Opinion, *supra* note 21.



prosecution of the payor of the bribe.<sup>64</sup> Both documents are considered to have the binding force of legislative enactments.<sup>65</sup> China also recently announced a sweeping investigation of the pharmaceutical sector, focusing on MNCs giving bribes to doctors and administrators of state owned hospitals for the purpose of inducing the doctors and officials to buy their pharmaceuticals.<sup>66</sup> Recently, local officials in Guangdong Province, a regional economic powerhouse, publically announced their intention to crack down on commercial bribery, among other economic crimes.<sup>67</sup>

What is unusual about the current crackdown is the emphasis on commercial bribes paid by MNCs. The Chinese state-controlled media has noted that “[i]n recent years, so-called ‘commercial bribery’ has become prevalent in China.”<sup>68</sup> According to a scholar at a government research institute, “[e]ven worse, many cases involve multinational companies. Some multinational companies are taking advantage of our imperfect market economy system and laws to expand their presence in China.”<sup>69</sup> Another Chinese media report notes that “recent commercial bribery scandals have shown that those involving multinationals in China are on the rise—certain foreign enterprises, it seems, are now more emboldened to circumvent the law here.”<sup>70</sup> The Chinese media also seems to believe that MNCs are taking advantage of China’s developing economic system. As one source noted, “[m]ultinationals promoting business through bribery is nothing new; the concern is that they have moved their corruption battlefield to developing countries, especially emerging economies like China.”<sup>71</sup> The Chinese media has reported that China is particularly vulnerable because of weaknesses in its developing legal institutions: “China is currently in transition because of loopholes in its laws and systems. Vying competitors can more easily take advantage of institutional vulnerabilities and bribe their way through to fulfilling their overseas ambitions.”<sup>72</sup> A common perception in China is that the government has been “soft” on MNCs that give bribes, but a recent media report warns MNCs that now “their days of plenty are numbered,”<sup>73</sup> and calls for the Chinese government to crack down on commercial bribery by MNCs.<sup>74</sup> Of course, since all news media in China is controlled by the state, these statements represent the ostensible position of the Chinese government: that MNCs are the

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<sup>64</sup> See 2013 Interpretation, *supra* note 22.

<sup>65</sup> See CHOW, LEGAL SYSTEM OF CHINA, *supra* note 21, at 174.

<sup>66</sup> See Yin, *supra* note 25.

<sup>67</sup> Xu, *supra* note 61.

<sup>68</sup> Yin, *supra* note 25.

<sup>69</sup> *Id.* (quoting Hu Min, a researcher with the Economic Department of the Chinese Academy of Governance).

<sup>70</sup> Jin, *supra* note 8.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

main culprits in the recent rise in commercial bribery, and the current effort of the state is to focus on enforcing commercial bribery laws.

### **B. Relevant Laws Applicable to Commercial Bribery in China**

In the context of the current crackdown in China, commercial bribery refers to a transaction in which the payor, usually a business entity, gives the recipient, which can be either a state official or a private entity, a bribe in order to obtain an improper business benefit. Although the term “commercial bribery” was never actually used, the offense was first proscribed in Article 8 of the 1993 Anti-Unfair Competition Law (AUCP):

A business operator shall not commit bribery of offering property or by other means in order to sell or purchase commodities. Any business operator that secretly offers a rebate off the book to the other party’s organization or individual shall be treated as having offered bribes and be punished accordingly; the other party’s organization or individual that secretly accepts a rebate off the book shall be treated as having accepted bribes and be punished accordingly.<sup>75</sup>

The AUCP specifically proscribes kickbacks (bribes) given by a seller of products to induce a buyer, which can be an entirely privately-owned business entity,<sup>76</sup> to make a purchase.<sup>77</sup> This offense is punishable by civil and criminal penalties.<sup>78</sup> With rising concern about commercial bribery, in 2008, the Supreme People’s Court, the nation’s highest court, and the Supreme People’s Procuratorate, the nation’s highest prosecutorial body, jointly issued an opinion, “Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery,” which has the force of a legislative enactment.<sup>79</sup> The 2008 Opinion specifically states that “the Criminal Law recognizes eight crimes related to

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<sup>75</sup> Anti-Unfair Competition Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 2, 1993, effective Dec. 1, 1993), art. 8 [hereinafter Anti-Unfair Competition Law].

<sup>76</sup> Article 8 of the Anti-Unfair Competition Law is not specifically limited to any buyer and so includes all buyers.

<sup>77</sup> Anti-Unfair Competition Law, *supra* note 75, art. 8. The kickback could be given to a purchasing agent of the buyer. From the point of view of the purchasing agent, usually a low level employee of the buyer, it makes no difference whether the employee places the order with any particular seller so some sellers offered a bribe to induce the purchasing agent to place the purchasing order. The kickback is cash or a gift to the purchasing agent who personally benefits from placing a purchase order with the seller.

<sup>78</sup> *Id.* art. 22.

<sup>79</sup> CHOW, LEGAL SYSTEM OF CHINA, *supra* note 21, at 174.

commercial bribery,” citing to various enumerated articles of the PRC Criminal Law.<sup>80</sup>

The most relevant to the discussion in this article are the crimes of offering bribes to “non-state functionaries,”<sup>81</sup> and “state functionaries.”<sup>82</sup> Under Article 93 of the PRC Criminal Law, “state functionaries” refers to persons “who perform public service in State organs.”<sup>83</sup> This “include[s] persons who perform public service in state-owned companies or enterprises, institutions or people’s organizations.”<sup>84</sup> That last provision is important because it includes executives at China’s many state-owned enterprises (SOEs), which are companies engaged in business in all core industries, such as oil, banking, and telecommunications.<sup>85</sup> The PRC Criminal Law does not further define state functionaries, but it would appear that the definition is designed to distinguish those persons who perform some type of official or governmental duties—a form of public service in government entities and state-owned enterprises—from those who perform clerical duties or non-skilled labor within a state organ or enterprise, which are not considered to be a form of public service. Persons who perform clerical duties (e.g. secretarial work, typing, or filing), technical support, and non-skilled labor (e.g. janitorial and cleaning services) might not be considered state functionaries. The staff of a state-owned company or enterprise could include both state functionaries and non-state functionaries. Persons who occupy the managerial or executive positions might be considered state functionaries, while clerical

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<sup>80</sup> The 2008 Opinion states that there are eight crimes related to commercial bribery:

- (1) accepting bribes by non-state functionary (article 163 of the Criminal Law);
- (2) offering bribes to non-State functionary (article 164);
- (3) accepting bribes (article 385);
- (4) accepting bribes by organizations (article 387);
- (5) offering bribes (article 389);
- (6) offering bribes to organizations (article 39);
- (7) introducing bribes (article 392); and
- (8) offering bribes by organizations (article 393).

2008 Opinion, *supra* note 21, art. 1.

<sup>81</sup> 2008 Opinion, *supra* note 21, art. 1(2).

<sup>82</sup> *Id.* art. 1(5). Article 1(5) states that commercial bribery includes the “crime of offering bribes (Article 389 of the Criminal Law).” Article 389 of the PRC Criminal Law states “[w]hoever for the purpose of securing illegitimate benefits gives money or property to a state-functionary shall be guilty of offering bribes.” Criminal Law of the People’s Republic of China (promulgated by Nat’l People’s Cong., July 1, 1979, effective Oct. 1, 1997) [hereinafter PRC Criminal Law].

<sup>83</sup> PRC Criminal Law, *supra* note 82, art. 93.

<sup>84</sup> *Id.*

<sup>85</sup> State-owned enterprises and their pervasive role in commercial bribery are discussed *infra* Part III.B.

employees might be considered non-state functionaries.<sup>86</sup> The 2008 Opinion also specifically identifies commercial bribery in the medical and pharmaceutical sectors as areas of special concern.<sup>87</sup> State and non-state functionaries in state-owned hospitals, who solicit bribes from suppliers of medicines, medical equipment, and medical health materials, are subject to criminal and civil liability.<sup>88</sup> These suppliers of pharmaceuticals in China include MNCs, such as GSK, Eli Lilly, and Pfizer, all among the largest MNCs in the global pharmaceutical industry.

The definition of “commercial bribery” set forth in the 2008 Opinion includes at least two types of bribery scenarios relevant to MNCs doing business in China: a business-to-government bribe (i.e. a bribe given by an MNC to a government official who is a “state functionary”<sup>89</sup>), and a business-to-business bribe, which would include a bribe given by an MNC to any employee of a state-owned enterprise, regardless of whether the recipient is a “state functionary,” a “non-state functionary,” or “any” employee who works in a state owned enterprise.<sup>90</sup> In other words, under Chinese law, while a business-to-government

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<sup>86</sup> With the exception of Article 93, discussed above, the PRC Criminal Law or the Anti-Unfair Competition Law do not provide any further guidance on the definition of state functionaries and non-state functionaries.

<sup>87</sup> See 2008 Opinion, *supra* note 21, art. 4.

<sup>88</sup> Article 4 provides

Where any State functionary in medical institutions are involved in the activities of purchasing medical products such as medicines, medical equipment[,], medial health materials, etc., and take advantage of his/her position to extort money or property from the seller, or illegally accept the seller’s money or property in return for benefits to the seller, which constitutes a crime, he or she shall be convicted of accepting bribes in accordance with the provisions of Article 385 of the Criminal Law and punished accordingly.

Where any non-State functionary in medical institutions conducts any of the acts of the preceding paragraph with the amount being relatively large, he or she shall be convicted of accepting bribes by non-State functionary in accordance with the provisions of Article 163 of the Criminal Law and punished accordingly.

*Id.*

<sup>89</sup> Article 1(3) of the 2008 Opinion defines commercial bribery as the crime of accepting bribes under Article 385 of the PRC Criminal Law, which prohibits the accepting of bribes by a State functionary; Article 1(5) of the 2008 Opinion refers to the crime of offering bribes under Article 389 of the PRC Criminal Law, which prohibits the offering of bribes to a State functionary. *Id.* arts. 1(3) & (5).

<sup>90</sup> Article 1(1) of the 2008 opinion defines commercial bribery as “the crime of accepting bribes by a non-State functionary” under Article 163 of the PRC Criminal Law; Article 1(2) defines commercial bribery as “the crime of offering bribes to a non-State functionary” under Article 164 of the PRC Criminal Law. Article 164 of the PRC Criminal Law further makes clear that a bribe given to the “any” employee of a company is

bribe is an offense only if the government official qualifies as a state functionary, a business-to-business bribe is an offense regardless of the status of the person who receives the bribe. Regardless of the identity of the recipient of the bribe, a bribe given by an MNC to an SOE is considered to be commercial bribery under the 2008 Opinion. This point is significant because MNCs must constantly deal with SOEs, which are known for giving and demanding bribes as part of doing business.

On December 26, 2012, the Supreme People's Court and the Supreme People's Procuratorate jointly issued the "Interpretation on Several Issues concerning the Specific application of the Law in the Handling of Criminal Bribery Cases,"<sup>91</sup> which entered into force on January 1, 2013. The 2013 Interpretation specifically targets "[a]ny person who pays a bribe of more than RMB 10,000 to a state functionary to seek improper benefits."<sup>92</sup> Seeking "improper benefits" refers to a benefit in violation of any law, regulation, rule, or policy, or a competitive advantage in economic activities in violation of the principles of justice and fairness.<sup>93</sup> This definition is broad, leaving large areas of discretion to PRC enforcement authorities. The focus of the entire 2013 Interpretation is enforcement against the bribe-giver. While Article 1 of the 2013 Interpretation targets the payor of the bribe when the payment is to a state functionary, Article 3 of the 2013 Interpretation seems to encompass all bribes,<sup>94</sup>

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prohibited, including the clerical staff of a company. Article 3 of the 2008 Opinion further states that "the employees of a company, enterprise, or other units include the non-State functionaries in the state-owned companies and enterprises and other state-owned organizations." These provisions seem to indicate that a bribe given to any employee of a state-owned enterprise, even clerical staff, are considered to be commercial bribery under PRC Law.

<sup>91</sup> 2013 Interpretation, *supra* note 22.

<sup>92</sup> Article 1 of the 2013 Interpretation states "[a]ny person who pays a bribe of more than RMB 10,000 to a state functionary to seek improper shall be investigated for criminal liability in accordance with the provisions of Article 390 of the Criminal Law." At current exchange rates, RMB 10,000 is approximately US \$1,700. Article 390 of the Criminal Law sets forth terms of imprisonment of between 5 and 10 years as penalties. PRC Criminal Law, *supra* note 83, art. 390.

<sup>93</sup> Article 12 of the 2013 Interpretation states "[t]o 'seek improper benefits' in a bribery crime means that a briber seeks a benefit in violation of law, regulation, rule or policy, or requests any state functionary to provide him with any assistance or convenience in violation of law, regulation, rule, policy or industrial standard." Seeking competitive advantage in economic, organizational, personnel, administrative and other activities in violation of principles of justice and fairness shall be deemed "seeking improper benefits." 2013 Interpretation, *supra* note 22, art. 12.

<sup>94</sup> Article 3 of the 2013 Interpretation provides: "If bribes are offered to seek improper benefits and cause a direct economic loss of more than RMB 1 million, such a circumstance shall be deemed a 'major loss to the national interest' under Article 390(1) of the Criminal Law." *Id.* art. 3. Nothing in Article 3 limits its scope to bribes offered to state functionaries. Article 390(1) is also not limited to bribes given to state functionaries. *See*

and under existing law, payors are already liable for giving bribes to non-state functionaries.<sup>95</sup> These provisions together indicate that China is concerned with payors of all types of bribes, whoever might be the recipient. The issuance of an entire opinion by China's highest court and prosecutorial body, focused on the payor of the bribe, might be a signal that China intends to intensify its crackdown on all payors of commercial bribes.

Under the various applicable Chinese anti-bribery laws, and the general mood of the Chinese state-controlled media,<sup>96</sup> along with several recent high profile cases,<sup>97</sup> several issues should be clear for MNCs. China is intensifying its crackdown on commercial bribery and the payors of commercial bribes, which can often include MNCs. The recent criticism of MNCs in the Chinese state-controlled media adds to a growing atmosphere in which some MNCs can expect to be the subject of high profile investigations by PRC authorities for commercial bribery. These developments lead to immediate questions about the reasons for China's recent emphasis on commercial bribery, and how much of a threat is created by this crackdown for MNCs doing business in China. The impetus for China's recent emphasis on commercial bribery is further explored in the next Part of this article. Part IV of this article examines the level of risk, and the seriousness of this development as a threat to MNCs doing business in China.<sup>98</sup>

### III. CAUSES OF CHINA'S RECENT CRACKDOWN ON COMMERCIAL BRIBERY

The previous section of this article examined China's anti-corruption campaigns and the recent focus on commercial bribery involving MNCs. This part examines some of the reasons for China's recent interest in commercial bribery involving MNCs, and assesses the risks to MNCs from these developments. China's state-controlled media has announced that commercial bribery involving MNCs is on the rise because MNCs have become more emboldened to circumvent the law, and to take advantage of China's developing

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PRC Criminal Law, *supra* note 83, art. 390(1) ("Whoever commits the crime of offering bribes shall be sentenced to fixed-term imprisonment . . .").

<sup>95</sup> Article 22 of the 1993 AUCP provides: "where a business operator commits bribery by offering proper or other means in order to sell or purchase commodities," the operator will be subject to civil or criminal liability depending on the seriousness of the circumstances. *See* Anti-Unfair Competition Law, *supra* note 75, art. 22; *see also* PRC Criminal Law, *supra* note 83, art. 164 ("Whoever . . . gives money or property to *any* employee of a company or enterprise . . . shall be sentenced to fixed-term imprisonment . . ."). Article 3 of the 2008 Opinion makes clear that "any employee of a company, enterprise, or other unit" includes a non-State functionary. *See* 2008 Opinion, *supra* note 21, art. 3.

<sup>96</sup> *See supra* Part II.A.

<sup>97</sup> *See supra* Part I.

<sup>98</sup> *See infra* Part IV.

legal system.<sup>99</sup> While this seems to be the common official explanation, there are several other reasons.

### **A. Recent International Efforts at Curbing Commercial Bribery**

China's recent emphasis on commercial bribery is consistent with developments on the international level, and it is likely that China is responding to pressure from abroad, and from internal sources, to expand its enforcement efforts against MNCs. For example, within the past decade, the United States government has sharply increased enforcement of the FCPA, which prohibits U.S. companies from giving bribes to foreign officials for the purpose of obtaining or retaining business.<sup>100</sup> The focus of the FCPA is on the payor of the bribe.<sup>101</sup> Many of these recent FCPA cases involve MNCs giving bribes to foreign officials in China, a development that cannot escape China's attention.<sup>102</sup> On February 15, 1999, following ratification by key states of the Organisation of Economic Co-operation and Development (hereinafter "OECD"), the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter "OECD Convention") entered into force.<sup>103</sup> Thirty-four members of the OECD, and seven non-member countries, have adopted the OECD Convention.<sup>104</sup> A distinctive feature of the OECD Convention is that it is the first international treaty to focus on the "supply side" of the bribe, i.e. the payment of the bribe.<sup>105</sup> China is not currently a member of the OECD Convention but joined the OECD Convention Working Group as an observer, and engaged significantly

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<sup>99</sup> See Jin, *Multinationals in China Must Operate According to Law*, *supra* note 8.

<sup>100</sup> See 15 U.S.C. §§78dd-1 to -3 (1998). For a discussion of the rise in FCPA enforcement, see Chow, *China Under the Foreign Corrupt Practices Act*, *supra* note 39, at 574.

<sup>101</sup> See 15 U.S.C. §§78dd-1 to -3.

<sup>102</sup> Chow, *China Under the Foreign Corrupt Practices Act*, *supra* note 39, at 574.

<sup>103</sup> See *OECD Anti-Bribery Convention: Entry into Force of the Convention*, ORGANISATION FOR ECON. CO-OPERATION AND DEV., <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/oecdanti-briberyconventionentryintoforceoftheconvention.htm> (last visited Nov. 9, 2014). The Organisation of Economic Co-operation Development, based in Paris, is a grouping of industrialized nations that deals with social and economic issues of concern to its members. See Daniel C.K. Chow & Thomas J. Schoenbaum, *INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS* 18 (2d ed. 2012). The list of members has now grown to thirty-four countries, including the United States. See *List of OECD Member Countries – Ratification of the Convention of the OECD*, ORG. OF ECON. CO-OPERATION DEV., <http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm> (last visited Oct. 5, 2014).

<sup>104</sup> *OECD Convention on Combatting of Foreign Public Officials in International Business Transactions*, ORG. OF ECON. CO-OPERATION DEV., <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (last visited Sept. 28, 2014).

<sup>105</sup> *Id.*



with the OECD in 2008,<sup>106</sup> the same year that China's highest court and highest prosecutorial body issued the 2008 Opinion on commercial bribery.<sup>107</sup> On January 13, 2006, China ratified the United Nations Convention Against Corruption,<sup>108</sup> which goes beyond both the FCPA and the OECD Convention by providing for asset recovery, i.e. recovery of the ill-gotten gains of bribery, and returns the assets to the public.<sup>109</sup> No doubt these international efforts have increased China's awareness of the need to battle bribes paid by MNCs, and could be one impetus for China's increased focus on commercial bribery by MNCs. China's awareness of these international developments is evidenced by new significant commercial anti-bribery laws and high profile enforcement efforts against MNCs.

## **B. State-Owned Enterprises and Their Pervasive Culture of Business Corruption**

A second reason for China's emphasis on commercial bribery may be linked to China's desire to develop a smaller number of more powerful SOEs in key sectors of China's economy as part of long-term, strategic national goals.<sup>110</sup> State-owned enterprises are "business entities established by central and local governments and whose supervisory officials are from the government."<sup>111</sup> Although the role of SOEs in China's overall economy has diminished since the first few decades since the founding of modern China in 1949,<sup>112</sup> China has announced a national goal of strengthening larger SOEs in strategic areas and selling off smaller SOEs to private interests.<sup>113</sup> China's long-term goal is to create "national champions," large and powerful SOEs that can compete with the largest

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<sup>106</sup> OECD WORKING GROUP ON BRIBERY, ANNUAL REPORT 5 (2008), available at <http://www.oecd.org/daf/anti-bribery/44033641.pdf>.

<sup>107</sup> See 2008 Opinion, *supra* note 21.

<sup>108</sup> United Nations Convention Against Corruption Signature and Ratification Status as of 5 September 2014, U.N. OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Sept. 28, 2014).

<sup>109</sup> United Nations Convention Against Corruption art. 54, Dec. 9, 2003, 2349 U.N.T.S. 41, available at [http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026\\_E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf). Asset recovery is required by Chinese law. See 2013 Interpretation, *supra* note 22, art. 11.

<sup>110</sup> The name of this policy is "Zhua Da Fang Xiao"—grasping the larger, letting go the smaller. See *China's State-Owned Enterprises*, ECONOMIST, May 1, 1997, at 54, available at <http://www.economist.com/node/148434>.

<sup>111</sup> OECD WORKING GROUP ON PRIVATISATION AND CORPORATE GOVERNANCE OF STATE OWNED ASSETS, STATE OWNED ENTERPRISES IN CHINA: REVIEWING THE EVIDENCE 5 (Jan. 26, 2009), available at <http://www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/42095493.pdf>.

<sup>112</sup> CHOW, LEGAL SYSTEM OF CHINA, *supra* note 21, at 24-25.

<sup>113</sup> *China's State-Owned Enterprises*, *supra* note 110.

and most competitive MNCs in the world today.<sup>114</sup> This strategy seems to be bearing results, as China now has 67 SOEs on the Fortune 500.<sup>115</sup> This emphasis on creating powerful SOEs in strategic areas means that all core sectors of China's economy are controlled by SOEs: oil and gas exploration; banking; transportation, including air and rail transport; electricity and water supply; and telecommunications.<sup>116</sup> SOEs have the benefit of easy access to credit in the form of loans on favorable terms, provided by China's state-owned banks.<sup>117</sup> In 2013, PetroChina, an SOE that became the world's largest corporation by capitalization in 2007,<sup>118</sup> is expected to outspend Exxon-Mobil,<sup>119</sup> which is ranked number two on the U.S. 2013 Fortune 500 list.<sup>120</sup> PetroChina is expected to spend \$36.6 billion to expand international markets, ahead of Exxon-Mobil's \$33.9 billion.<sup>121</sup> A vast majority of the important executives in SOEs are members of the Communist Party, allowing the Party to control the SOEs.<sup>122</sup> As SOEs dominate in all-important sectors of the economy, the Party controls the core sectors of

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<sup>114</sup> China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy, Inv. No. 332-514, USITC Pub. 4199, at 5-6 (Nov. 2010) (amended), available at <http://www.usitc.gov/publications/332/pub4199.pdf>.

<sup>115</sup> *SOE Reform Essential to a Stable and Sustainable Economy*, PEOPLE'S DAILY ONLINE (Nov. 10, 2013, 9:25 AM), <http://english.people.com.cn/business/8451808.html>.

<sup>116</sup> See CHOW, LEGAL SYSTEM OF CHINA, *supra* note 21, at 25.

<sup>117</sup> Eve Cary, *Reforming China's State-Owned Enterprises*, DIPLOMAT (June 19, 2013), <http://thediplomat.com/2013/06/reforming-chinas-state-owned-enterprises/> (noting that 85 percent of loans in 2009 issued by state owned banks were to SOEs and that state owned banks were directed to let credit flow to other state owned businesses).

<sup>118</sup> *PetroChina Becomes World's Largest Listed Company*, CHINA VIEW (Nov. 6, 2007), [http://news.xinhuanet.com/english/2007-11/06/content\\_7018280.htm](http://news.xinhuanet.com/english/2007-11/06/content_7018280.htm).

<sup>119</sup> Jacqueline Sahagian, *Which Company is Expected to Spend More on Oil than Exxon-Mobil?*, CHEAT SHEET (June 5, 2013), <http://wallstcheatsheet.com/stocks/which-company-is-expected-to-spend-more-on-oil-than-exxonmobil.html>.

<sup>120</sup> See *Fortune 500 2013*, FORTUNE, <http://fortune.com/fortune500/2013/wal-mart-stores-inc-1/> (last visited Sept. 29, 2014).

<sup>121</sup> Sahagian, *supra* note 119.

<sup>122</sup> John Lee, *China's Rich Lists Riddled with Communist Party Members*, FORBES (Sept. 14, 2011, 3:30 AM), <http://www.forbes.com/2011/09/14/china-rich-lists-opinions-contributors-john-lee.html> (noting that over two-thirds of the boards of directors of SOEs and that three quarters of senior executives of SOEs are either Party members or officials). See also Duanjie Chen, *China's State-Owned Enterprises: How Much Do We Know? From CNOOC to its Siblings*, 6 U. CALGARY SCH. OF PUB. POL'Y RES. PAPERS 19, 1 (2013) (Chinese SOEs are run by appointees of the Communist Party), available at <http://www.policyschool.ucalgary.ca/?q=content/chinas-state-owned-enterprises-how-much-do-we-know-cnooc-its-siblings>; see also *id.* at 7 (table noting that in terms of government and discipline, the Communist Party takes the ultimate leadership role in China's SOEs).

China's economy.<sup>123</sup> The national strategy of simultaneously strengthening SOEs also helps to strengthen Party power and control. At the conclusion of the Third Plenum of the Communist Party in November 2013, the Party rejected calls to curb the power of SOEs, but pledged instead to "incessantly strengthen" the "vitality" of SOEs.<sup>124</sup>

### 1. The Need to Do Business with SOEs

Since SOEs dominate all core sectors of China's economy,<sup>125</sup> many MNCs doing business in China find that they must constantly have business dealings with SOEs, which often engage in procurement of products and services from MNCs. Most people in China believe that SOEs commonly give and receive bribes when they do business.<sup>126</sup> Most people in China are resigned to accept petty corruption by SOEs, i.e. the giving of kickbacks and bribes, as a way of doing business. When SOEs engage in procurement or selling commodities, they often use bribes, gifts, and favors as part of the transaction. When MNCs deal with SOEs, MNCs often face demands for payments, gifts, and favors made by employees at all levels of the SOE, even low-level employees. One media source noted that the culture of corruption in business is so ingrained in SOEs that Chinese companies trying to operate in other countries are shocked to find that bribery is not a common prerequisite to doing business, and are wary of any business opportunity that has not been obtained through a bribe.<sup>127</sup>

### 2. Common Bribery Schemes by SOEs

In a common commercial bribery transaction, a sales agent from an MNC might be asked to give a kickback or bribe to the purchasing agent of an SOE, to induce the purchasing agent to buy products from the MNC. From the perspective of the purchasing agent of the SOE, it makes little difference whether the agent places an order with any particular supplier, since the purchasing agent, a low-

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<sup>123</sup> See Chen, *supra* note 122, at 4 (noting that "the Chinese government's conviction in the ultimate dominance of SOEs and/or their leading role in the economy has been markedly reaffirmed").

<sup>124</sup> Bob Davis & Brian Spegele, *State Companies Emerge as Winners Following Top China Meeting*, WALL ST. J. (Nov. 13, 2013, 1:09 PM), <http://online.wsj.com/news/articles/SB10001424052702303559504579195551704526972>.

<sup>125</sup> Chen, *supra* note 122, at 4.

<sup>126</sup> See, e.g., Rowan Callick, *How Source Spilled Tomato Scam*, AUSTRALIAN (Nov. 8, 2013) (noting that China has "extremely corrupt" business practices" and noting that scams by SOEs are "quite common" in China).

<sup>127</sup> Victoria Clarke, *China 'Shocked' Australian Mining Companies Don't Take Bribes*, EPOCH TIMES (June 20, 2012), <http://www.theepochtimes.com/n2/australia/china-shocked-australian-mining-companies-dont-take-bribes-198834.html>.

level employee, receives a fixed salary. The kickback or bribe serves as an inducement to the purchasing agent to place the order with a particular seller because the kickback allows the purchasing agent to obtain extra cash. In a typical transaction, the sales agent of the MNC will submit a false expense report, such as for travel or expenses in connection with a business conference (room rental, refreshments, meals) that never occurred. The sales agent then uses the cash reimbursement for fictitious expenses to pay the kickback to the purchasing agent of the SOE. Or, the sales agent and the purchasing agent might agree on a price for the sale of the products but will inflate the price on the sales contract. For example, the parties might agree on a sales price of RMB 1.5 million (approximately U.S. \$250,000), but will enter a sales price of RMB 1.6 million (approximately U.S. \$267,000) in the sales contract or sales order. The SOE issues a payment of RMB 1.6 million as required under the terms of the contract of sale, but the MNC only receives RMB 1.5 million, and the purchasing agent keeps RMB 100,000 (approximately U.S. \$17,000). This type of kickback scheme allows both the payor of the bribe and the recipient of the bribe to benefit. The sales agent of the MNC, the payor, benefits from completing a sale. The sales agent might be able to meet quarterly sales targets, earn a bonus, or receive a promotion. The purchasing agent of the SOE benefits from receiving extra cash in the form of the kickback.

As MNCs became aware of these schemes, variations of this type of scheme have been created in the past several years to circumvent more rigorous international controls used by MNCs to deter bribes. One common variation involves the use of travel agencies.<sup>128</sup> Employees within an MNC will either work with confederates to set up a travel agency, or find a compliant travel agency willing to cooperate in a bribery scheme. The travel agency will then arrange for a trip and bill the MNC for the cost of the trip. The trip might be one that never occurs, the expenses for the trip might be inflated, or the actual persons traveling on the trip might not be the persons listed on the official itinerary. The travel agency can then funnel the extra cash received as payment for an inflated bill provided by the MNC to the recipient of the bribe. Or the persons traveling to a so-called "business" conference might instead be enjoying an all-expense paid junket to a resort location, such as Hong Kong or Macau, where the participants enjoy tourist and leisure activities, instead of taking part in business meetings. The Chinese media reported the use of travel agencies to funnel \$489.4 million to doctors and hospital administrators in an elaborate scheme by Chinese executives at Glaxo Smith Kline, to induce these persons to purchase pharmaceuticals.<sup>129</sup> In

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<sup>128</sup> David Voreacos, *China's Bribery Culture Creates Risks for Multinationals*, BLOOMBERG NEWS (Nov. 21, 2013), <http://www.bloomberg.com/news/2013-11-21/china-s-bribery-culture-poses-risks-for-multinationals.html>; see also Michael Martina, *GSK Used Travel Agencies for China Bribes: Police*, REUTERS, July 15, 2013, available at <http://www.reuters.com/article/2013/07/15/us-gsk-china-idUSBRE96E02520130715>.

<sup>129</sup> Yin, *supra* note 25.

addition to investigating GSK, the Chinese government announced that it would launch a probe into the financing practices of an additional 60 pharmaceutical companies.<sup>130</sup> This should not be surprising since the 2008 Opinion by the Supreme People's Court and the Supreme People's Procuratorate specifically identified the pharmaceutical sector as an area of commercial bribery and a focus of the new law.<sup>131</sup> While the crackdown on MNCs in the pharmaceutical sector has drawn widespread media interest, China's state-controlled media warns that all MNCs that engage in commercial bribery in China will be subject to more rigorous enforcement of China's anti-bribery laws.<sup>132</sup>

Given the clandestine nature of most bribery schemes, it is impossible to determine with any accuracy whether, as the Chinese media claims, "commercial bribery scandals . . . involving multinationals in China are on the rise."<sup>133</sup> These bribery schemes might have been occurring for years, but have only recently been exposed through more rigorous enforcement efforts. On the other hand, China's own national policies of building SOEs that will be "national champions" might have contributed to a possible increase in commercial bribery due to the pervasive culture of business corruption in SOEs, which are known to demand bribes and kickbacks when doing business with MNCs. While it is unclear whether MNCs are actually engaging in more commercial bribery than in past years, it is clear that China's state-controlled media is promoting the perception that commercial bribery by MNCs is on the rise in China. In addition, whatever the particular facts may be, it appears undisputed that commercial bribery is occurring on a frequent, and even daily basis, in business between MNCs and SOEs. The increasingly dominant role of SOEs in all core sectors of China's economy, the pervasive culture of corruption in business within SOEs, and the need for MNCs to deal with SOEs on a regular basis may be an additional explanation for what China claims to be an increase in commercial bribery by MNCs as the payor.

### **C. Cracking Down on Commercial Bribery Involving MNCs Entails Fewer Risks than Focusing on the Recipient of the Bribe**

#### 1. China's Historical Focus on the Demand Side, or Recipient, of Bribes

China's crackdown on commercial bribery by MNCs also serves important political and strategic purposes for the Communist Party. As discussed earlier, there are two "choke" points in any bribery transaction: the payment of the bribe, and the receipt of the bribe. Until recently, China has been focused on the receipt, and the recipient, of the bribe.<sup>134</sup> The troubling political issue for China is

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<sup>130</sup> *Id.*

<sup>131</sup> 2008 Opinion, *supra* note 21, art. 4.

<sup>132</sup> Jin, *supra* note 8.

<sup>133</sup> *Id.*

<sup>134</sup> *See supra*, Part II.A.

that the recipient of a commercial bribe paid by an MNC is often a Party member. Almost every high-level government official in China,<sup>135</sup> and most high-level executives in SOEs, are also members of the Communist Party.<sup>136</sup> The Party is able to control the government and the economy by placing Party members in all important government positions, and in all leading positions in SOEs.

China's public harbors a cynical, and common, perception that the Party is corrupt at all levels. A recent poll before the Third Plenum of the Communist Party, which ended on November 8, 2013, found that over fifty percent of the population believes that corruption is the second most serious problem in China today (behind inflation and rising prices), and that personal enrichment by China's ruling elite derived from its control of China's SOEs has made the issue an even greater concern for the public.<sup>137</sup> China's current head of state has declared that "corruption could 'kill the Party.'"<sup>138</sup> Corruption within the Party is subject to the supervision of the Central Commission for Discipline Inspection, an organ of the Communist Party. The Central Commission is headed by Wang Qishan, a member of the Politburo Standing Committee, the inner core of China's ruling elite, long known to be an opponent of corruption.<sup>139</sup> The term "disciplinary violation" is a commonly used surrogate for corruption.<sup>140</sup> The Central Commission handles all corruption cases involving Party members. In high profile and sensational cases, such as that involving the deposed Bo Xilai, a member of the Party's elite Central Committee, and a one-time candidate for the Politburo, the Party will conduct its investigations and deliberations in secret.<sup>141</sup>

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<sup>135</sup> CHOW, LEGAL SYSTEM OF CHINA, *supra* note 21, at 132-33.

<sup>136</sup> Lee, *supra* note 122; *see also* Chen, *supra* note 122, at 7 tbl. 1 (all SOEs are under the ultimate leadership of the Communist Party as to both issues of discipline and governance).

<sup>137</sup> Jacob Poushter, *Inflation, Corruption, Inequality Top List of Chinese Public's Concerns*, PEW RES. CENTER (Nov. 8, 2013), <http://www.pewresearch.org/fact-tank/2013/11/08/inflation-corruption-inequality-top-list-of-chinese-publics-concerns>.

<sup>138</sup> *China Media: Xi Jinping's Anti-Corruption Call*, *supra* note 60.

<sup>139</sup> *China's Mr. Clean Wang Qishan Catches Graft Tigers by the Tail*, FIRSTPOST (Sept. 12, 2013) available at <http://www.firstpost.com/world/chinas-mr-clean-wang-qishan-catches-graft-tigers-by-the-tail-1105885.html>.

<sup>140</sup> Chris Buckley, *Pursuing Graft Cases at Higher Levels, Chinese Leader Risks Unsettling Elites*, N.Y. TIMES, Sept. 26, 2013, at A6, available at <http://www.nytimes.com/2013/09/26/world/asia/pursuing-graft-cases-at-higher-levels-chinese-leader-risks-unsettling-elites.html> (noting that disciplinary actions usually mean corruption).

<sup>141</sup> *See High-Level Chinese Officials Fall in Graft Negotiations Handled in Secret*, FOXNEWS.COM (July 30, 2014), <http://www.foxnews.com/world/2014/07/30/how-high-level-chinese-officials-fall-in-graft-investigations-handled-in-secret/>. *See also* Andrew Jacobs, *China Casts Ex-Leader's Wife in a Familiar Role*, N.Y. TIMES, July 27, 2012, at A1, available at <http://www.nytimes.com/2012/07/27/world/asia/wife-of-disgraced-chinese-leader-charged-with-murder.html> (noting that after Bo's suspension from the

For example, Bo disappeared from public view for months.<sup>142</sup> Most legal experts believe that after the Party makes a decision on the outcome of the case, the Party will refer the case to the courts, which will follow a carefully created script in handing down a sentence.<sup>143</sup> The issue of guilt or innocence in a political corruption case is never decided by the courts, but by the Party, which then instructs the courts on the outcome, and how to hold what many consider to be a “show trial,” that lasts for a few days.<sup>144</sup> As part of the trial, the defendant is expected to confess to his crimes, and to show repentance in return for a more lenient punishment. In high profile cases, there is never a doubt that the court will find the defendant guilty.<sup>145</sup> After the Third Plenum of the Communist Party in November 2013, the Central Commission for Discipline reiterated its concern with rooting out corruption, and has issued several new guidelines to demonstrate the seriousness of its commitment.<sup>146</sup>

Of course, the public in China recognizes that the Party is, in essence, supervising itself on corruption issues. The Central Commission for Discipline is not an independent body, but an arm of the Party, and subject to control by the Party’s elite. As a result, some do not believe that investigations of corruption within the Party will ever systemically reach the level of the elites of the Party, but will rather be focused on the mid-level or lower cadres.<sup>147</sup> Moreover, even in an

Politburo in April that Bo “has not been heard from since” and that he “remained in a parallel justice system reserved for the party elite”).

<sup>142</sup> See *Settling Scores*, *ECONOMIST*, Aug. 24, 2013, at 41, available at <http://www.economist.com/news/china/21584047-trial-bo-xilai-reveals-much-about-state-chinese-politics-settling-scores> (noting Bo Xilai disappeared from public view for eight months).

<sup>143</sup> See Andrew Jacobs, *Fast-Paced Trial in China Murder Leaves Shadows*, *N.Y. TIMES*, Aug. 10, 2012, at A1, available at <http://www.nytimes.com/2012/08/10/world/asia/murder-trial-of-bo-xilais-wife-concludes.html> (noting that many legal analysts believe that the trial of Bo Xilai’s wife “will reinforce the widely held notion that . . . the Communist Party keeps an iron grip on many judicial proceedings and dictates a denouement that serves its political needs”).

<sup>144</sup> See *id.* (“Many legal analysts said the details that emerged on Tuesday were undoubtedly decided weeks ago by senior leaders.”).

<sup>145</sup> See *id.* (noting that weeks before the trial of Bo’s wife, “the official Xinhua news service telegraphed that the outcome had already been decided by announcing that the evidence was irrefutable and substantial”).

<sup>146</sup> An Baijie, *Anti-Graft Body to Issue New Inspection Guidelines*, *CHINA DAILY* (Nov. 15, 2013), [http://usa.chinadaily.com.cn/china/2013-11/15/content\\_17106788.htm](http://usa.chinadaily.com.cn/china/2013-11/15/content_17106788.htm).

<sup>147</sup> See, e.g., Robert H. Iseman, *Domestic Anti-Bribery Enforcement May be on the Rise in China: Multinationals Must Focus on Anti-Corruption Compliance*, *MONDAQ* (May 8, 2013), <http://www.mondaq.com/x/238034/Corporate+Crime/Domestic+AntiBribery+Enforcement+May+Be+On+The+Rise+In+China+Multinationals+Must+Focus+On+AntiC> orruption+Compliance. In a recent development, however, the Party leadership might be signaling that it is willing to go after Party elites. Michael Forsythe et al., *Investigating Family’s Wealth, China’s Leader Signals a Change*, *N.Y. TIMES*, April 20, 2014, at A1, available at <http://www.nytimes.com/2014/04/20/world/asia/severing-a-familys-ties->



unusual case when events might compel the Party to investigate an elite Party member, the Chinese public believes that the ultimate goal of the Central Commission on Discipline is to protect the Party, so the trial becomes carefully scripted and the defendant is expected or allowed to say at trial only what is agreed on by the Party in advance. Media coverage of the trial is either limited or not permitted.<sup>148</sup>

Although punishing corruption among Party cadres is an express goal of the Central Committee for Discipline, the goal carries with it serious political risks. The Party realizes that exposing corruption among Party officials causes embarrassment, as it reinforces a common perception among the public in China that Party officials are corrupt. Although many people in China now enjoy rising incomes and a standard of living that was unimaginable just several decades ago, exposing corruption at higher levels could cause great shock, outrage, and embarrassment because of the sheer size, scale, and audacity of the corruption and the enormous sums of money and value of property involved. For example, one official was found to own a multi-million dollar villa on the Riviera in Cannes, France.<sup>149</sup> There are also cases involving “moral depravity,” a surrogate for debauchery involving mistresses and prostitutes. Another risk is the possibility of a widening scandal. Since one official often has knowledge about the illegal activities of other officials, pursuing a Party official risks exposing corruption further up the ladder. At the higher levels, Party corruption could involve vast sums of money that might outrage Chinese citizens. These types of cases could cause extreme distress and consternation among Party officials, and exasperation among China’s public, which has grown extremely cynical about corruption within the Party and the government that it controls. Moreover, a commonly held view is that the goal of the Central Commission on Discipline is not truly to

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chinas-president-signals-a-change.html. The Party is currently investigating the billions in assets accumulated by the family of Zhou Yong Kang, a former member of the ruling Politburo Standing Committee and a former head of China’s powerful Ministry of Public Security. *Id.* Zhou is not himself being investigated but members of his family have been detained by Chinese authorities. *Id.* This could signal a decision by President Xi Jing Ping that the Party will no longer tacitly approve the use of powerful positions by officials, such as Zhou, to benefit their families. *Id.* Since using family influence to accumulate wealth is a common practice, such a move could be a significant shift in the Party’s willingness to tolerate corruption among its elites. *Id.* On the other hand, some experts believe that the investigation is motivated by Xi’s belief that Zhou poses a direct threat to him; in other words, the investigation is motivated by a desire to destroy a political rival. *Id.* If that is the case, then this investigation does differ in any fundamental aspect from the investigation corruptions in the past. *Id.*

<sup>148</sup> See Jacobs, *Fast-Paced Trial in China Murder Leaves Shadows*, *supra* note 143 (noting trial of high ranking party official’s wife was “closed to the foreign news media and shown on television only in carefully packaged snippets”).

<sup>149</sup> Jeremy Page & Noémie Brisserbe, *French Villa Linked to Fallen China Leader*, WALL ST. J. (Aug. 6, 2013), <http://online.wsj.com/news/articles/SB10001424127887323420604578650071253073626>.

eliminate corruption within the Communist Party, but rather that it is intent on making only a symbolic point by creating examples of some guilty cadres. Experts believe that the Central Commission will pursue corruption within the Party up to a certain level, but will not reach the elites. Some critics have argued that Chinese authorities have focused on cases involving government or Party cadres that are high profile because of their scandalous nature, but the cases in fact involve low to mid-level Party officials, and the current campaign seems more interested in catching “flies” than “tigers.”<sup>150</sup>

## 2. Shift in Focus to the Supply Side of Bribes

By contrast, an investigation of senior executives at a powerful MNC for commercial bribery can serve the Party’s political purpose of showing that it is serious in pursuing an anti-corruption campaign, without incurring the risk of potential political scandal and embarrassment. Members of the Party are involved in a number of schemes of corruption but one prominent type of corruption is the acceptance of bribes from MNCs or their agents. If China focuses on the bribe giver, or payor, China will be able to shift attention away from the more politically volatile and risky issue of the guilt of the recipient of the bribe, often a Party official. The authorities that investigate MNCs include the Public Security Bureau (the police), the Administration of Industry and Commerce (a government bureau), and the Procuratorate, China’s prosecutorial and supervisory arm, as well as other regulatory bodies. All of these are government entities, not Party organs. The use of government bureaus helps to create an atmosphere of greater transparency, as government bureaus have been willing to share more information with the media than the inner core of the Party, which is notoriously secretive. In addition, the most sensitive and important issue for the Party is its ability to hold on to power. This is threatened if the public loses confidence in the Party due to corruption—this is what China’s leaders mean when they say “corruption will kill the party.”<sup>151</sup> However, commercial bribery by MNCs is a business issue; MNCs have been portrayed as greedy culprits, exploiting a still naïve China. Cracking down on greedy MNCs could be viewed by the public as progress in the commercial rule of law, by eliminating the ability of MNCs to take advantage of China’s still-developing legal system.<sup>152</sup>

For these reasons, powerful and wealthy MNCs can provide a convenient target of anti-bribery campaigns. Exposing corporate greed and abuse is a less risky strategy for the Party than pursuing corruption among government and Party cadres. Of course, this does not suggest that China will cease to pursue corrupt government and Party officials, but the simultaneous pursuit of MNCs and an emphasis on the payor of the bribe could shift some of the focus away from

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<sup>150</sup> Iseman, *supra* note 147.

<sup>151</sup> *China Media: Xi Jinping’s Anti-Corruption Call*, *supra* note 60.

<sup>152</sup> Jin, *supra* note 8.

corruption within the Party itself, the most sensitive area of political concern for Party leadership.

#### IV. CONSEQUENCES OF THE CRACKDOWN ON COMMERCIAL BRIBERY AND RISKS TO MNCs

This part examines the consequences of China's crackdown on commercial bribery by MNCs and the risks that the campaign creates for MNCs doing business in China. Contrary to appearances, the greater risk to U.S.-based MNCs is not the enforcement of Chinese anti-bribery laws by China, but the enforcement of the FCPA by the United States.

##### A. Risks Within China

China's recent crackdown on commercial bribery raises questions concerning the severity of risks to MNCs in China, and whether, as one media report notes, MNCs "are under siege in China."<sup>153</sup> A closer examination of China's enforcement against commercial bribery by MNCs indicates that up to the present, no MNC has suffered a serious setback or disruption to its business operations. In a notorious case, several Chinese-born executives from Rio Tinto were given lengthy jail sentences and had their assets confiscated in 2010.<sup>154</sup> The case was unusual because it involved allegations that the Chinese executives had arranged bribes to obtain state secrets involving China's steel sector; suspicions also arose that the investigation was politically motivated to pressure MNCs to reduce their iron ore prices.<sup>155</sup> What is perhaps more significant is that while the executives were imprisoned and their personal assets confiscated, China never charged Rio Tinto itself with any wrongdoing.<sup>156</sup> While Rio Tinto conceded that the behavior was deplorable, the company immediately distanced itself from the accused executives, stating "the illegal activities were carried out wholly outside our systems,"<sup>157</sup> and it was determined to ensure that the incident would not affect the company's "important relationship" with China.<sup>158</sup> In fact, during the month before the sentences were handed down, Rio Tinto signed an agreement with

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<sup>153</sup> Zadek, *supra* note 9.

<sup>154</sup> *Rio Tinto Executives Handed Lengthy Jail Terms*, BBC NEWS (Mar. 29, 2010), <http://news.bbc.co.uk/2/hi/business/8592226.stm>.

<sup>155</sup> David Barboza, *China Sentences Rio Tinto Executives in Bribe Case*, N.Y. TIMES (Mar. 29, 2010), [http://www.nytimes.com/2010/03/30/business/global/30riotinto.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/03/30/business/global/30riotinto.html?pagewanted=all&_r=0).

<sup>156</sup> *Id.*

<sup>157</sup> *Rio Tinto Executives Handed Lengthy Jail Terms*, *supra* note 154.

<sup>158</sup> *Id.*

Chinalco, a state-owned mining company, to develop a copper mine in Guinea.<sup>159</sup> In addition to the Guinea project, worth \$1.35 billion,<sup>160</sup> in November 2011, about a year after the prison sentences were handed down, the Chinese government officially registered a joint venture between Chinalco and Rio Tinto, clearing the way to search for copper deposits abroad.<sup>161</sup> This prompted one report to note that “Beijing’s go-ahead seems to draw a line under the troubled relationship between Rio Tinto and China over [the] past several years.”<sup>162</sup> While other MNCs, such as Johnson & Johnson, Nike, Ericsson, and Rolls-Royce, have been investigated by Chinese authorities during 2010-2011, there is no indication that China ever filed charges against any of the companies.<sup>163</sup>

### 1. China’s Treatment of MNCs

Although China’s investigation of GSK’s alleged commercial bribes—totaling \$489 million—drew sensational news coverage and four of the company’s top Chinese executives were arrested in July 2013, no charges of any kind have been filed against the executives, or against GSK.<sup>164</sup> Moreover, although GSK sales have declined significantly in China since the eruption of the scandal, GSK’s business prospects do not appear to be seriously threatened, as “many investors shrugged off the likely direct financial impact” of China’s investigations.<sup>165</sup> GSK’s Chief Executive has reiterated that despite the investigation, there was “absolutely no question” of GSK withdrawing from China, and GSK was “totally committed to China.”<sup>166</sup> The company has been actively negotiating with Chinese authorities to resolve the case,<sup>167</sup> with the British media reporting that the investigation might be politically motivated by remarks made by David Cameron, the U.K. Prime Minister, which were critical of China’s human rights record.<sup>168</sup>

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<sup>159</sup> *Id.*

<sup>160</sup> Natalie Rodriguez, *Rio Tinto, Chalco Top Off \$1.35B African Iron Ore Venture*, LAW360 (Apr. 25, 2012, 1:40 PM), <http://www.law360.com/articles/333892/rio-tinto-chalco-top-off-1-35b-african-iron-ore-venture>.

<sup>161</sup> Alan Tovey, *Rio Tinto Joins up with Chinalco to Explore for Copper*, TELEGRAPH (Nov. 21, 2011, 7:41 PM), <http://www.telegraph.co.uk/finance/newsbysector/industry/mining/8915027/Rio-Tinto-joins-up-with-Chinaclo-to-explore-for-copper.html>.

<sup>162</sup> *Id.*

<sup>163</sup> Iseman, *supra* note 147.

<sup>164</sup> Andrew Jack, *Q&A: China’s Investigation into GlaxoSmithKline*, FIN. TIMES (Dec. 4, 2013), <http://www.ft.com/intl/cms/s/0/3ed58d8c-5cef-11e3-81bd-00144feabdc0.html#axzz2mzRc7qRB>.

<sup>165</sup> *Id.*

<sup>166</sup> Ben Hirschler, *Bribery Scandal Slashes GlaxoSmithLine’s Chinese Drug Sales*, REUTERS, Oct. 23, 2013, available at <http://www.reuters.com/article/2013/10/23/us-gsk-earnings-idUSBRE99M0DB20131023>.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

If China wanted to impose serious consequences on MNCs for commercial bribery, China could, of course, easily damage or suspend the operations of GSK and others. All business entities in China, including domestic and foreign-invested enterprises, must have a valid business license issued by the Administration of Industry and Commerce authorities in order to operate lawfully in China.<sup>169</sup> If China suspended or revoked the business license of an MNC's Chinese business entity, the MNC would have to immediately cease all operations. The effect of the suspension or revocation of a business license would be to immediately shut down the business entity. To date, to the best of the author's knowledge, China has never suspended or revoked the business license of an MNC's Chinese business entity, due to commercial bribery.<sup>170</sup> In fact, up to the present, while charges have been filed against individual executives, no charges have ever been filed against a business entity itself.<sup>171</sup> Moreover, China has never formally arrested any business executive in connection with a commercial bribery case who was not a Chinese citizen, or a Chinese-born citizen who became a naturalized citizen of another foreign country. All four arrested GSK executives are Chinese citizens.<sup>172</sup> Three of the imprisoned Rio Tinto executives are Chinese citizens, while the fourth is a naturalized citizen of Australia.<sup>173</sup>

If China were to suspend or revoke the business license of an MNC's China-based entity, such an action would damage China's own long-term interests. The news could send shock waves throughout the entire investment world, and would immediately chill any further foreign direct investment in China. MNCs have invested billions of dollars in China by establishing Chinese business entities, such as joint ventures and wholly foreign-owned enterprises (WFOEs).<sup>174</sup> Foreign direct investment has been singled out by China as a national priority.<sup>175</sup> Not only does foreign direct investment involve the investment of billions of dollars in capital, but it also leads to technology transfer,

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<sup>169</sup> CHOW & HAN, *supra* note 51, at 97.

<sup>170</sup> Cf. Adam Jourdan, *GSK's Chinese Executives, but not Company, Likely to Face Charges in China*, REUTERS, Nov. 4, 2013, available at <http://www.reuters.com/article/2013/11/04/us-gsk-china-idUSBRE9A307Y20131104> (noting that it would be "unprecedented" for the Chinese government to lay criminal charges against a foreign company).

<sup>171</sup> *See Id.*

<sup>172</sup> Jack, *supra* note 164.

<sup>173</sup> *Rio Tinto Executive Jailed for 10 Years in China*, TELEGRAPH (Mar. 29, 2010), <http://www.telegraph.co.uk/finance/china-business/7533790/Rio-Tinto-executive-Stern-Hu-jailed-for-10-years-in-China.html>.

<sup>174</sup> *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 488 (2d ed. 2010) [hereinafter CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS].

<sup>175</sup> *Id.* at 489 ("In China, FDI is considered a matter of national policy and is considered to play a vital role in the nation's continued economic development.").

allowing China to access the world's most advanced technologies.<sup>176</sup> When an MNC sets up a joint venture or a WFOE in China, the MNC will often also license its technology to the Chinese business entity.<sup>177</sup> For example, in a common scenario, an MNC with valuable patents and trademarks will set up a Chinese business entity.<sup>178</sup> The MNC then registers the patents and trademarks in China in its own name, and then licenses the rights to the Chinese business entity.<sup>179</sup> Without access to the knowledge contained in the patents, the joint venture or WFOE would be unable to manufacture the product, and without the use of the trademark, the MNC's Chinese business entity would not be able to capitalize on the goodwill of the brand among Chinese consumers.<sup>180</sup> China seems to have no interest in seriously disrupting the process of foreign direct investment, which has allowed China to close the gap with many developed countries in just a few decades and to emerge as one of the world's most powerful economies. In the case of GSK, a withdrawal from China would make no sense for either side, as China is a growing market for GSK's products, and GSK is a source of scientific expertise for China.<sup>181</sup> The same considerations apply for many MNCs.

## 2. Emerging Pattern of Treatment of MNCs Accused of Bribery

Rather than filing formal charges against the MNC, the emerging pattern is to target individual executives working for MNCs in China. The MNC immediately begins to distance itself from the accused individuals who are portrayed as rogue employees, pledges to work with the Chinese government, and proclaims that it is committed to China for the long term and is eager for further business opportunities. To date, this pattern does not appear to pose a serious threat to the Chinese business operations of MNCs, which do not seem to believe that the current crackdown will have a meaningful impact on their financial performance.<sup>182</sup> For MNCs like Glaxo Smith Kline, the threat of enforcement of Chinese laws by Chinese authorities against commercial bribery does not seem to be the most serious concern raised by China's current campaign against

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<sup>176</sup> CHOW & HAN, *supra* note 51, at 319 ("From China's perspective, one of the key benefits of foreign direct investment is access to advanced technology.").

<sup>177</sup> *Id.* at 317, 320-22.

<sup>178</sup> CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 174, at 489-90.

<sup>179</sup> CHOW & HAN, *supra* note 51, at 320-21 (giving the example of a typical technology transfer agreement involving a MNC in the pharmaceuticals sector).

<sup>180</sup> Since the technology belongs to the MNC because the patents and trademarks are registered in its name, its joint ventures or WFOEs—both considered separate legal entities—are without any authority to use the technology with permission (e.g., a licensing agreement) from the MNC.

<sup>181</sup> Jack, *supra* note 164.

<sup>182</sup> *See Id.*

commercial bribery.<sup>183</sup> Rather, “[t]he greater concern is if U.S. . . . anti-corruption probes begin.”<sup>184</sup> The next section of this article examines the risks to MNCs if the United States initiates an investigation under the FCPA.

## **B. Risks to MNCs under the FCPA**

Under the FCPA, covered entities are subject to two sets of provisions: the books and records provisions, which require the keeping of accurate accounts of transactions, and the anti-bribery provisions.<sup>185</sup> Any company with shares listed on a U.S. stock exchange, or otherwise required to file reports with the SEC, is subject to both the books and records and anti-bribery provisions.<sup>186</sup> All other U.S. companies and their employees, including officers and directors, are prohibited from paying or offering to pay a bribe, or give “anything of value” to “foreign officials” for the purpose of obtaining or retaining business.<sup>187</sup> Under the FCPA, a “foreign official” includes “any officer or employee of a foreign government or any department, agency, or instrumentality thereof.”<sup>188</sup> An instrumentality of a foreign government includes state-owned or state-controlled entities.<sup>189</sup> Moreover, the DOJ considers the FCPA to apply to “any” officer or employee of an SOE, including “low-ranking and high ranking employees alike.”<sup>190</sup> These positions could lead to the conclusion that any employee of an SOE is a foreign official, from the high-ranking executives to the low-ranking clerical employees. Given the position of the DOJ, some companies feel compelled to take the position that “everyone they deal with is a ‘foreign official’ because they work for an SOE.”<sup>191</sup>

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 2.

<sup>185</sup> 15 U.S.C. § 78m(a)-(b) (2012) (books and records and internal controls provisions); §§ 78dd-1(a)(1), -2(a)(1), -3(a)(1) (anti-bribery provisions).

<sup>186</sup> *See* § 78dd-1(a).

<sup>187</sup> *See* §§ 78dd-1(a)(1), -2(a)(1), -3(a)(1).

<sup>188</sup> § 78dd-1(f)(1).

<sup>189</sup> CRIMINAL DIV. OF THE U.S. DEP’T OF JUSTICE AND THE ENFORCEMENT DIV. OF THE U.S. SEC. AND EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 20 (Nov. 14, 2012), *available at* <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf> [hereinafter FCPA RESOURCE GUIDE].

<sup>190</sup> *Id.*

<sup>191</sup> *See* Declaration of Prof. Michael J. Koehler in Support of Defendants’ Motion Counts One through Ten of the Indictment at para. 447, *United States v. Carson*, No. SACR 09-0077-JVS (C.D. Cal. Feb. 21, 2011).



### 1. Exposure in Dealing with SOEs Under the FCPA

This article has already emphasized the dominant role of SOEs in all core sectors of China's economy, the necessity for MNCs to do business with SOEs on a regular basis, and the pervasive culture of business corruption that permeates China's SOEs. These conditions create many opportunities for potential FCPA violations. As an example previously discussed, a purchasing agent at an SOE might demand a kickback from the sales agent of an MNC in order to complete a sale. Although the sales agent of the SOE is a low-level employee, under the FCPA's broad definition of a "foreign official," which includes low-ranking employees, the purchasing agent might be a "foreign official" within the meaning of the FCPA, and the kickback might be a bribe within the meaning of the FCPA's anti-bribery provisions.<sup>192</sup> SOEs may not only demand kickbacks or bribes as a part of doing business with MNCs, but SOEs that partner with MNCs in joint ventures can directly implicate an MNC in the payment of the bribe. In this context, the joint venture is a Chinese business entity formed under Chinese law, which is jointly owned by the MNC and the local partner, often an SOE.<sup>193</sup> The MNC contributes capital and technology, and the local partner contributes in-kind, such as land, buildings, machinery, and equipment.<sup>194</sup> The local partner also has knowledge of the market and could have contacts with local government officials, which can help with the approval process.<sup>195</sup> In some industries, joint ventures are required by law; an MNC is not permitted to set up a wholly foreign owned subsidiary, but must instead partner with a local Chinese company.<sup>196</sup> If the local partner is an SOE, the SOE might be accustomed to giving bribes as part of conducting business in the past, and once it becomes a partner in the joint venture, the SOE local partner might continue to give bribes to secure business from other SOEs, or from government entities.

This is exactly what happened to RAE Systems (RAE), a Delaware corporation, which formed several joint ventures with local SOEs.<sup>197</sup> RAE had a

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<sup>192</sup> See *supra* Part III.B.2.

<sup>193</sup> CHOW & HAN, *supra* note 51, at 88.

<sup>194</sup> *Id.* at 101.

<sup>195</sup> CHOW & SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS, *supra* note 174, at 490.

<sup>196</sup> See Catalogue for the Guidance of Foreign Investment Industries (promulgated by the Nat'l Dev. & Reform Comm'n, and the Ministry of Com., Dec. 24, 2011, effective Jan. 30, 2012). A number of provisions restrict foreign investment to joint ventures in certain industries. For example, under Article II (Mining and Quarry Industries) all sectors are limited to joint ventures, and under Article X (Education) any advanced educational institution must be set up as a joint venture.

<sup>197</sup> Letter from the U.S. Dep't of Justice to Carlos F. Ortiz & Roy K. McDonald, attorneys for RAE Systems Inc. app. A at para. 10 (Dec 10, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/cases/rae-systems/12-10-10rae-systems.pdf>. The RAE Systems case considered the books and records provisions of the FCPA, 15

majority interest in the joint ventures, while the SOEs had a minority interest.<sup>198</sup> The joint venture made chemical and radiation detectors and sold them to various government bureaus and departments.<sup>199</sup> Before they entered into the joint ventures with RAE, the Chinese SOEs were paying bribes (kickbacks) to government bureaus to obtain sales.<sup>200</sup> After they entered into the joint ventures, the Chinese employees from the SOEs continued to give kickbacks, not only money, but in the form of jade, fur coats, kitchen appliances, and business suits.<sup>201</sup> The actions of the joint ventures (as the agents of RAE) were attributable to RAE, the parent company under the FCPA.<sup>202</sup> The U.S. DOJ and RAE ultimately agreed to settle the case in a non-prosecution agreement.<sup>203</sup> RAE agreed to pay a \$1.7 million fine,<sup>204</sup> and to institute a corporate compliance program subject to periodic reports to the DOJ.<sup>205</sup>

## 2. Increased Attention by the DOJ as a Result of China's Crackdown

China's recent crackdown on commercial bribery by MNCs creates the risk that the U.S. DOJ and the SEC might be alerted to potential violations of the FCPA that these authorities would not otherwise be able to discover. For example, after Chinese authorities began the investigation of GSK for commercial bribery, the United States began an investigation of GSK's practices under the FCPA.<sup>206</sup> Although GSK is a British company, it has shares listed on the New York stock exchange and is thus directly subject to the books and records and

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U.S.C. §§ 78m(b)(2)(A)-(B), 78m(b)(5), and 78ff(a), but also seems to support the view that the DOJ viewed the same actions as violating the anti-bribery provisions. *Id.* app. A.

<sup>198</sup> *Id.*, app. A at para. 10.

<sup>199</sup> *Id.*, app. A at para. 2.

<sup>200</sup> *Id.*, app. A at paras. 8-10.

<sup>201</sup> *Id.*, app. A at para. 22.

<sup>202</sup> The FCPA prevents "any officer, director, or agent" of an issuer (15 U.S.C. § 78dd-1) or of any domestic concern (15 U.S.C. § 78dd-2) to make a prohibited payment. Here the joint venture can be considered to be an agent of RAE.

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<sup>204</sup> Press Release, Dep't of Justice Office of Pub. Affairs, RAE Systems Agrees to Pay \$1.7 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (Dec. 10, 2010), available at <http://www.justice.gov/opa/pr/2010/December/10-crm-1428.html>.

<sup>205</sup> Letter from the U.S. Dep't of Justice to Carlos F. Ortiz & Roy K. McDonald, *supra* note 197.

<sup>206</sup> *Id.* app. B (corporate compliance program); *Id.* app. C (corporate compliance program reporting to U.S. DOJ).

anti-bribery provisions of the FCPA.<sup>207</sup> The United States could consider doctors and administrators of China's state-owned hospitals to be "foreign officials," and kickbacks given to them to be bribes under the FCPA. Note that if China had not launched an investigation of GSK in China, the U.S. DOJ might not have brought an action against GSK. The use of Chinese travel agencies to funnel money and free trips to doctors was clandestine, and it would have been difficult for the U.S. DOJ to uncover any documentary evidence of the schemes. In China, it appears that one or more disgruntled former employees provided documents to the Chinese authorities who launched a probe.<sup>208</sup> Once China's investigation exposed the commercial bribery scheme, the DOJ was alerted to the fraudulent scheme and launched its own investigation. Given China's announced investigations into 60 more pharmaceutical companies,<sup>209</sup> the DOJ might well begin other investigations into companies with a U.S. nexus that bring them within the jurisdiction of the FCPA. China's general crackdown on commercial bribery might lead to similar results in other sectors as well. The trigger can often be a disgruntled employee who was involved in and has inside knowledge of the bribery scheme, and who provides documentary evidence to the Chinese authorities who then launch an investigation. The investigation by Chinese authorities uncovers more documentary evidence of the scheme. The activities of the Chinese enforcement authorities then triggers a U.S. investigation based on the FCPA. Without the investigation by the Chinese authorities that can expose the bribery scheme, the U.S. DOJ might be unable to uncover the scheme on its own.

### 3. Penalties under the FCPA

Unlike Chinese authorities who have, to date, never directly charged an MNC with any criminal wrongdoing,<sup>210</sup> U.S. authorities have the practice of charging the company directly under an FCPA complaint. Any company that is subject to a formal investigation and a trial under the FCPA would become immediately embroiled in time-consuming litigation concerning the company's activities, which could undoubtedly be disruptive and burdensome. Moreover, a company convicted of a criminal violation under the FCPA could face

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<sup>207</sup> See *GlaxoSmithKline, PLC Company Information*, N.Y. STOCK EXCH., <http://www.nyse.com/quote/XNYS:GSK/company> (last visited Aug. 22, 2014) (public information about GSK's NY Stock Exchange listing). GSK might also be subject to prosecution under the UK Anti-Bribery Act, the UK's own version of the FCPA, which came into effect on July 1, 2011.

<sup>208</sup> Jack, *supra* note 164, at 1.

<sup>209</sup> Yin, *supra* note 25.

<sup>210</sup> See *id.*

“catastrophic financial penalties.”<sup>211</sup> To avoid a trial, companies have been willing to settle cases with the U.S. DOJ and the SEC for hundreds of millions of dollars. In a recent case, on May 29, 2013, Total SA, a French company subject to a ten-year FCPA investigation, paid \$398 million to settle charges by the DOJ and SEC.<sup>212</sup> In 2008, Siemens paid \$800 million to settle FCPA charges.<sup>213</sup> In addition to the settlement, the cost of the Siemens investigation was approximately \$1 billion, involved approximately 1,750 interviews, over 1,000 information briefings, 82 million documents electronically searched, 14 million documents reviewed, 38 million financial transactions analyzed, and 10 million bank records reviewed.<sup>214</sup> Beyond the resources and time needed to defend an FCPA investigation that can create an onerous burden, the DOJ and SEC could insert clauses in the settlement agreements that require the company to pay for an independent monitor to ensure compliance.<sup>215</sup> This requirement means that a company will have to maintain continuous contact with the DOJ or SEC, and bear the costs of an FCPA violation for many years after a settlement is concluded.<sup>216</sup>

While the costs of settlement are high, the consequences of liability under the FCPA can be far reaching. In addition to financial penalties, companies can be subject to bans on doing business with the U.S. federal government, a ban on export licenses (which effectively precludes the company's ability to export goods), and could be de-listed by the SEC.<sup>217</sup>

One of the greatest concerns under the FCPA is the possibility of criminal convictions for individual executives of companies based in the United States. Under the FCPA, any “officer, director, employee, or agent” who directly or indirectly authorizes the payment to a foreign official, is subject to criminal prosecution.<sup>218</sup> The company's officers or directors are also subject to criminal liability if they directly or indirectly authorized payment to a third party, or an intermediary (such as a travel agency, consultant, or a law firm), knowing that the party would pass the payment through to a foreign official.<sup>219</sup> Even though the company's executives are based in the United States and may have never traveled to China, the executives could be subject to FCPA prosecution so long as the

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<sup>211</sup> Leslie Wayne, *Hits, and Misses, in War on Bribery*, N.Y. TIMES, Mar. 11, 2012, At BU1, available at [http://www.nytimes.com/2012/03/11/business/corporate-bribery-war-has-hits-and-a-few-misses.html?pagewanted=all&\\_r=2&](http://www.nytimes.com/2012/03/11/business/corporate-bribery-war-has-hits-and-a-few-misses.html?pagewanted=all&_r=2&).

<sup>212</sup> Cassin, *Total SA Pays \$398 Million to Settle U.S. Bribe Charges*, *supra* note 43.

<sup>213</sup> Wayne, *supra* note 211.

<sup>214</sup> Elizabeth Stern & Jane W. Chen, *Foreign Corrupt Practices Act Compliance - Managing the Global Visa Process and Global Operations*, BAKER & MCKENZIE, <http://www.bakermckenzie.com/RROrganizingForeignCorruptPracticesFeb10/> (last visited Sept. 9, 2014).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> 15 U.S.C. §§ 78dd-1(a), -2(a) (2012).

<sup>219</sup> §§ 78dd-1(a)(3), -2(a)(3).

commercial bribery scheme has some nexus to U.S. commerce, such as an email or a wire transfer. Given China's recent enforcement history,<sup>220</sup> it is highly unlikely that China's crackdown on commercial bribery will involve foreign executives based in the United States. China has never arrested any business executive other than Chinese-born executives living in China, and it seems unlikely that China would attempt to reach any foreign-born executives living in the United States. Under the FCPA however, U.S. executives have been convicted and sent to prison.<sup>221</sup> Of course, any conviction under the FCPA and a term of imprisonment, entails personal and professional ruin, and thus "criminal liability . . . strikes fear and terror through the corporate suite."<sup>222</sup>

## V. CONCLUSION

China's recent intensified crackdown on commercial bribery, which often involves an SOE as the recipient of the bribe, and a shift in emphasis on enforcement against the payor of the bribe (as opposed to the recipient), might pose significantly higher risks to MNCs doing business in China. The highest risk to MNCs doing business in China, however, is not prosecution under China's anti-bribery laws for commercial bribery.

China's goals in pursuing a crackdown on commercial bribery are complex and could involve a political and strategic goal of shifting emphasis away from enforcement against the recipient of the bribe, which could involve a member of the Communist Party, to enforcement against the payor of the bribe, which could often involve an MNC. Enforcement against the payor could serve the Party's goal of demonstrating to China's public that it is serious about cracking down on bribery, without the risk of political scandal and embarrassment that could erupt whenever a Party official is exposed as corrupt. While there are some indications that China's crackdown on commercial bribery involves such complex political and strategic goals, there are no indications that China wants to shut down or seriously disrupt the business operations of MNCs in China. An examination of China's recent pattern of enforcement seems to confirm this conclusion. This examination indicates that up to the present, China has seemed content with targeting a few Chinese-born executives for investigation and punishment. To date, China has never formally charged any MNC, or its Chinese business entity directly, with the violation of any Chinese anti-bribery law. No fines have been imposed directly on an MNC or its Chinese business entity, and no foreign-born executive has ever been arrested or imprisoned in China. For their part, MNCs have been able to prevent the investigations from escalating into a direct threat to their Chinese business operations. Rather than confront the

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<sup>220</sup> See *supra* Part IV.A.

<sup>221</sup> Wayne, *supra* note 211 (former chief executive of U.S. oil company sentenced to 36 months in prison).

<sup>222</sup> *Id.*

Chinese authorities, MNCs have been quick to be contrite, apologize to the Chinese government, distance themselves from rogue employees, and reaffirm their commitment to China. Although this scenario may change in the future, the current pattern of enforcement indicates that MNCs do not face a serious threat to their businesses in China.

China's crackdown on commercial bribery may, however, expose bribery schemes to investigation and prosecution by the U.S. government under the FCPA. Most of the bribery schemes in China are carried out clandestinely and under effective secrecy precautions, which are usually only exposed to Chinese authorities by a disgruntled ex-participant in the bribery scheme. Once Chinese authorities investigate the commercial bribery scheme, now a focus of law enforcement in China, the scheme might become exposed and draw the interest of the United States enforcement authorities, who might bring an investigation under the FCPA. Recent cases indicate that, unlike enforcement by China of its anti-bribery laws, an investigation under the FCPA could involve serious consequences to both the company and U.S. business executives. A review of the recent developments in China indicates that an increase in FCPA enforcement against U.S.-based MNCs, not the consequences under Chinese law, is likely the most serious consequence of China's crackdown on commercial bribery by MNCs doing business in China.



