

FIGHTING TRANSNATIONAL BRIBERY: CHINA'S GRADUAL APPROACH

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ABSTRACT

The People's Republic of China (PRC) adopted legislation in 2011 that criminalizes bribery of foreign public officials and officials of public international organizations, and which potentially joins China with the likes of the United States, United Kingdom and other countries that invoke extraterritorial jurisdiction over various acts of bribery. Despite the PRC's current role as a leader in the global supply of transnational bribes (much of which would seem to be subject to this new law) and its international commitments under the United Nations Convention Against Corruption (UNCAC) to combat them, China's foreign official bribery provision appears intentionally designed to be narrowly interpreted and weakly enforced.

The weak framework that governs China's new bribery provision, highlighted by interpretational ambiguities and a limited investigative and enforcement mechanism, is reflective of a greater degree of tolerance toward foreign official bribery under current Chinese law, at least in comparison to other domestic PRC bribery laws. Additionally, the new provision fails to encompass the full range of conduct intended to trigger criminal liability under UNCAC Article 16, and therefore falls short of true implementation. Nevertheless, the foreign official bribery provision represents the PRC's latest step in its gradual approach to fighting transnational bribery, and an addition to an overall framework that is developing increasing importance as corruption continues to become a

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defining issue that threatens the Chinese Communist Party's legitimacy and monopoly on power in China.

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INTRODUCTION

The extraordinarily public nature of the recent Bo Xilai scandal, involving tales of murder, bribery, and other allegations of abuse of power by a member of the powerful Politburo of the Chinese Communist Party ("CCP" or "the Party"), his family and other associates,¹ serves as the latest reminder of the People's Republic of China's ("PRC") great struggle with endemic corruption. The CCP leadership's scramble to erase Bo's legacy² in the wake of China's biggest political scandal in

¹ Evan Osnos, *Corruption Nation: Why Bo Xilai Matters*, Blog post to *Letter from China Blog*, NEW YORKER (Apr. 16, 2012), <http://www.newyorker.com/online/blogs/evanosnos/2012/04/chinas-public-servants-why-bo-xilai-matters.html>.

² See Dan Levin, *China, in Old Tradition, Races To Airbrush Fallen Leader out of Public Life*, N.Y. TIMES (May 5, 2012) at A10, <http://nyti.ms/16RKFVY> (reporting that Bo Xilai's "legacy" ironically involves aggressive and brutal anti-corruption campaigns that contributed in part to his rise to power in the first place).

decades³ exemplifies the Party's uncomfortable awareness of its tenuous claim to legitimacy and hold of political power in China in the face of what seems to be a plague of widespread corruption.

Corruption is regarded as one of the biggest threats to future political stability and economic development in China.⁴ Rampant corruption has triggered social unrest and public resentment and is widely to blame for many of China's recent high-profile problems, including poor monitoring and enforcement of workplace, infrastructure, food, and product safety regulations and standards.⁵ The total costs are staggering. According to Professor Minxin Pei, director of the Kreck Center for International and Strategic Studies at Claremont McKenna College, the direct economic losses as a result of corruption amount to a transfer of as much as 3 percent of the PRC's GDP per year to "a tiny group of elites," an annual transfer that is "fueling China's rapid increase in socioeconomic inequality and the public's perception of social injustice."⁶ There are also incalculable indirect costs, including efficiency loss, waste, and damage to public health, the environment, education, institutional credibility, and civil servant morale, much of which result in spillover effects beyond China's borders.⁷ In 2012, China ranked 80th out of 174 countries surveyed in Transparency International's Corruption Perceptions Index ("CPI"),⁸ and consistently placed among the many countries that fall in the bottom third of the utilized range in the CPI scale in the period between 2001 and 2011.⁹

³ Will Hutton, *Beyond the Scandal Lies a Crisis at the Heart of China's Legitimacy*, THE OBSERVER (Apr. 14, 2012), <http://www.guardian.co.uk/commentisfree/2012/apr/15/will-hutton-chinese-spring-inevitable>.

⁴ See MINXIN PEI, CARNEGIE ENDOWMENT FOR INT'L PEACE, CORRUPTION THREATENS CHINA'S FUTURE 1 (2007), available at http://carnegieendowment.org/files/pb55_pei_china_corruption_final.pdf.

⁵ F. Joseph Warin et al., *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 36 (2010).

⁶ PEI, *supra* note 4, at 5.

⁷ *Id.*

⁸ 2012 Corruption Perceptions Index, TRANSPARENCY INT'L, <http://cpi.transparency.org/cpi2012/results/> (last visited Apr. 3, 2013).

⁹ PEI, *supra* note 4, at 1–2; see also TRANSPARENCY INT'L, *supra* note 8 (explaining that the scale of the CPI "ranks countries and territories [from 0 to 100] based on how corrupt their public sector is perceived to be," 0 being "highly corrupt" and 100 being "very clean;" of all 174 countries indexed in 2012, Denmark, Finland, and New Zealand are tied for 1st with a score of 90, Afghanistan, North Korea, and Somalia are tied at 174th with a score of 8, and China ranks 80th with a score of 39. In previous years, the CPI scale ranked countries and territories on a 10 point scale, 0 being "highly corrupt" and 10 being "very clean."); see also, e.g., *Corruption Perceptions Index 2009*, TRANSPARENCY INT'L, http://archive.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table (last

The CCP's general approach to combating this threat to its legitimacy appears to be two-fold. First, the Party tries to minimize the tarnishing effects of corruption that it can hide by quickly cracking down on public exposés in an effort to forestall the growth of protests and discontent,¹⁰ as well as distancing itself from CCP members whose involvement in corruption cannot be concealed.¹¹ Second, the Party aims to bolster its claim to legitimacy by gradually strengthening China's anti-corruption legal framework and to increasingly use it to crack down on violations, especially those that particularly tarnish the government's image.¹²

The first method, however, is shortsighted at best. Concealing corruption is becoming more and more likely to backfire, and might actually serve to further delegitimize the Party as some of these cover-ups eventually receive public exposure. The fallout from the Bo Xilai scandal illustrates this point quite well, where years ago CCP leaders imprisoned a Chinese journalist for suggesting Bo's involvement in corruption rather than pursuing the allegations.¹³ The Party's current efforts to erase Bo's legacy and distance itself from him—which ironically seems like a mere continuation of a cover-up—serves to magnify the damage to the Party's reputation, at least to those with access to media coverage of the events. This harm to the Party's reputation, although chiefly relegated to the international arena outside the purview of CCP censors, also occurs domestically in China where there seems to be a growing sense of cynicism in regards to the Chinese

visited Apr. 6, 2013) (placing China in the bottom 30% of the scale's utilized range); *Corruption Perceptions Index 2011*, TRANSPARENCY INT'L, <http://www.transparency.org/cpi2011/results> (last visited Apr. 6, 2013) (also placing China in the bottom 30% of the scale's utilized range).

¹⁰ Margaret K. Lewis, *Corruption: Spurring China To Engage in International Law*, CHINA RTS. F., no. 1, 2009 at 92.

¹¹ See Levin, *supra* note 2 (quoting Minxin Pei as saying that “[t]here is a manual on how to delete the legacies of a fallen leader, and they’ve got it down to the smallest details”).

¹² According to reports, in 2010, over 24,000 criminals were sentenced for embezzlement and bribery by PRC courts (marking 6.83 and 9.41 percent increases over prior years), over 146,000 people received disciplinary punishments from the Chinese Communist Party (CCP) Central Commission for Discipline Inspection, and since 2003, the number of criminal bribery cases involving government officials has increased by at least 13 percent. *Over 24,000 Criminals Sentenced for Embezzlement and Bribery in 2010*, GLOBALTIMES.CN (May 25, 2011), <http://www.globaltimes.cn/china/society/2011-05/658940.html>; *139,621 Corruption Cases Handled in 2010*, CHINA.ORG.CN (June 22, 2011), http://www.china.org.cn/china/2011-06/22/content_22836606.htm; Zhang Yan, *Bribery Cases on the Rise in China*, CHINADAILY (Sept. 8, 2010), http://www.chinadaily.com.cn/china/2010-09/08/content_11271378.htm.

¹³ Nicholas D. Kristof, Op-Ed, *A Body, a Scandal and China*, N.Y. TIMES (Apr. 22, 2012) at SR11, <http://www.nytimes.com/2012/04/22/opinion/sunday/kristof-a-body-a-scandal-and-china.html>.

justice system.¹⁴ China's leadership is increasingly aware that manipulation of the media is becoming less and less viable as an option, and consequently, it is becoming more and more likely that the CCP will have to rely instead on greater transparency and meaningful legal solutions to minimize public discontent.

Part I of this article provides a background on China's political structure, placing particular emphasis on the hurdles the CCP faces in achieving and sustaining the degree of legitimacy that maintains most western democratic governments and recent efforts made by the CCP toward gaining and retaining that legitimacy, namely in the fight against corruption. Part I concludes by orienting the reader toward one of China's most recent legislative efforts to combat corruption in its adoption of a provision that criminalizes commercial bribery of foreign officials and officials of public international organizations. Part II analyzes how Chinese prohibitions on domestic bribery compare to its foreign official bribery provision and argues that the new provision and its framework are of a less aggressive design in comparison to China's other domestic bribery laws. Part III examines how the foreign official bribery provision measures up to China's United Nations Convention Against Corruption ("UNCAC" or "the Convention") implementation obligations and finds that while perhaps a step in the right direction, the PRC's provision falls flat of truly satisfying the requirements of the Convention. Part IV concludes with a brief analysis of some of the present and future implications concerning China's continuing effort to implement obligations under the UNCAC and to partake in the global fight against corruption.

I. BACKGROUND

The CCP has ruled China as a one-party state since its 1949 victory in the final stages of the communist revolution,¹⁵ ushering in the "dawn of an egalitarian paradise in which the [P]arty as champion of the proletariat was to govern the economy and society harmoniously in the

¹⁴ See Andrew Jacobs, *In China, Gu Kailai's Reprieve Reinforces Cynicism*, N.Y. TIMES (Aug. 21, 2012) at A6, <http://www.nytimes.com/2012/08/21/world/asia/in-china-gu-kailais-reprieve-reinforces-cynicism.html>.

¹⁵ SUSAN V. LAWRENCE & MICHAEL F. MARTIN, CONGRESSIONAL RESEARCH SERV., UNDERSTANDING CHINA'S POLITICAL SYSTEM 1 (2013), available at <http://www.fas.org/sgp/crs/row/R41007.pdf>.

name of all.”¹⁶ In the decades since, China has experienced remarkable growth under the leadership of the Party, where over 400 million people have been lifted out of poverty.¹⁷

Nevertheless, the explosive growth that China experienced has had “plainly very little to do with socialism or an egalitarian paradise.”¹⁸ On the contrary, the excesses of the Maoist era during the Cultural Revolution led to the emergence of a so-called “market socialism” in China in the late 1970s and early 1980s as a reactionary measure meant to improve economic growth and worker productivity while allowing the Party to maintain its political control.¹⁹ Much like other communist regimes of the east during the Cold War, the CCP’s legitimacy was grounded in it having been the heroic victors of the revolution,²⁰ but solidified through material economic improvements that were provided for the majority of the population.²¹ This enabled the regime to avoid (or at least postpone) providing the basic civil liberties and access to institutions that act as checks on the arbitrary exercise of power, like free trade unions and collective bargaining, that helped to legitimize western capitalism.²²

China established a variety of new structures to foster these material improvements. Massive legal reforms paved the way for investment in foreign capital markets alongside the creation of domestic ones, making room for a private sector and the foreign investment that drove economic growth in China.²³ While Professor Stephen Diamond of Santa Clara University School of Law acknowledges that an attempt to tap foreign capital markets can be seen as a way to promote an era of renewed economic growth, he argues that “this strategy can also be viewed as an attempt by a dying bureaucratic regime, one that has outlived its social and economic relevance, to preserve its privileges.”²⁴

Much has changed in China in the sixty years since the establishment of the PRC. The communist revolution’s leaders are long

¹⁶ Hutton, *supra* note 3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Stephen F. Diamond, *The PetroChina Syndrome: Regulating Capital Markets in the Anti-Globalization Era* 21–22 (Cornell Law Faculty Working Papers, Paper 11, 2003), available at http://scholarship.law.cornell.edu/clsops_papers/11.

²⁰ *See* Hutton, *supra* note 3.

²¹ *See* DIAMOND *supra* note 19, at 8.

²² *Id.* at 9.

²³ *See id.* at 21–22.

²⁴ *Id.* at 24.

dead and Party officials can no longer stake their claim as legitimate officer holders on the basis of being revolutionary heroes.²⁵ Additionally, the PRC's brand of "market socialism" has spawned an emerging "murky corporatist economic model" in China "in which insiders, especially so-called princelings—sons and daughters of former revolutionary leaders such as Bo Xilai and his wife (both are children of revolutionary generals)—feather their nests with impunity."²⁶ China has continued to experience the astonishing growth that allows the CCP leadership to deliver the "quid pro quo of rising living standards" to its people;²⁷ nevertheless, the Party has been aware for some time that this level of economic progress is unsustainable in the long run. And while the CCP's efforts over the past decade have shifted toward "rule of law" reform in order to soften the landing during an inevitable economic slowdown,²⁸ China remains "mired in closed-door deliberations, backroom deals and purges."²⁹ As the focus turns to greed, the exposure of high-level Party misconduct poses a renewed threat to the CCP's legitimacy by drawing attention to the widening gap between the poor and the elite.³⁰ Increasing reliance on "rule of law" rhetoric, therefore, almost compels constant legal reform, especially in the area of anti-corruption, as a method of maintaining Party legitimacy.

Interestingly, many of the recent adjustments to China's anti-corruption legal framework over the past several years have been expressly grounded in, and influenced by, international law. Professor Margaret Lewis of Seton Hall School of Law argues that "the volatile situation on the ground in China presents an underappreciated opportunity for greater participation in the international legal arena. . . . [as] Beijing is acutely aware that it must harness all available means to quell this outcry that could shake, or even dislodge, the Party's grip on power."³¹ Specifically, the United Nations Convention Against

²⁵ See Hutton, *supra* note 3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See generally RANDALL PEERENBOOM, UCLA SCH. OF LAW, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002).

²⁹ William Pesek, *Billionaires Make Killing Amid China Murder Tale*, BLOOMBERG (Apr. 17, 2012), <http://www.bloomberg.com/news/2012-04-17/billionaires-make-killing-amid-china-murder-tale.html>.

³⁰ *Id.*

³¹ Lewis, *supra* note 10, at 90.

Corruption,³² which China ratified in early 2006,³³ has become a tool that “is stimulating domestic legal initiatives that have the potential to benefit [China’s] citizens.”³⁴ These domestic initiatives, including the establishment of the National Bureau of Corruption Prevention (“NBCP”) in 2007,³⁵ as well as numerous amendments to the bribery provisions of the *Criminal Law of the People’s Republic of China*³⁶ (“Criminal Law”),³⁷ were all undertaken with reference to the UNCAC.³⁸

China’s most recent amendment to the bribery provisions of its Criminal Law, adopted under the auspices of continued implementation of UNCAC obligations³⁹ in February 2011, effective May 2011,⁴⁰

³² United Nations Convention Against Corruption, G.A. Res 58/4, U.N. Doc. A/RES/58/4 (Nov. 21, 2003) [hereinafter UNCAC].

³³ *United Nations Convention Against Corruption: UNCAC Signature and Ratification Status As of 24 December 2012*, U.N. OFF. ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Feb. 14, 2013) (listing signatories and ratification dates of members).

³⁴ Lewis, *supra* note 10, at 91.

³⁵ *China Establishes National Bureau of Corruption Prevention*, PEOPLE’S DAILY ONLINE ENG. (Sept. 13, 2007, 10:20 AM), <http://english.peopledaily.com.cn/90001/90776/90785/6261846.html>.

³⁶ Zhonghua Renmin Gongheguo Xing fa (97 xiu ding) (中华人民共和国刑法(97修订)) [Criminal Law of the People’s Republic of China (1997 Revision)] (promulgated by Order No. 5 of the Chairman of the Standing Comm. of the Nat’l People’s Cong. on July 6, 1979, effective Jan. 1, 1980 and amended by the Fifth Session of the Eighth Nat’l People’s Cong. on March 14, 1997) (LawInfoChina) (China) [hereinafter Criminal Law], *translated in* <http://lawinfochina.com/display.aspx?id=354&lib=law>.

³⁷ Zhonghua Renmin Gongheguo Xing fa xiu zheng ‘an (liu) (中华人民共和国刑法修正案(六)) [Amendment VI to the Criminal Law of the People’s Republic of China] (promulgated by Order No. 51 of the President of the People’s Republic of China on June 29, 2006, effective June 29, 2006) §§ VII, VIII & XVI (LawInfoChina), *translated in* <http://www.lawinfochina.com/display.aspx?id=5300&lib=law>; Zhonghua Renmin Gongheguo Xing fa xiu zheng ‘an (qi) (中华人民共和国刑法修正案(七)) [Amendment VII to the Criminal Law of the People’s Republic of China] (promulgated by Order No. 10 of the President of the People’s Republic of China on Feb. 28, 2009, effective Feb. 28, 2009), §§ XIII – XIV, *translated in* https://www.unodc.org/tldb/pdf/ChineseLegislation/China_Criminal_Law_Amendment_VII_EN.pdf.

³⁸ Lewis, *supra* note 10, at 92.

³⁹ Li Enshu (李恩树), *Hui lu wai guo gong zhi ren yuan ru zui qian que shi cao xing* (贿赂外国公职人员入罪欠缺实操性) [Incriminating Foreign Public Officials Lacks Operability], LEGALDAILY.COM.CN (Oct. 12, 2011), http://www.legaldaily.com.cn/News_Center/content/2011-10/12/content_3038745.htm (featuring excerpts of interviews with various Chinese judges and prosecutors concerning China’s new foreign official bribery provision).

⁴⁰ Zhonghua Renmin Gongheguo Xing fa xiu zheng ‘an (ba) (中华人民共和国刑法修正案(八)) [Amendment VIII to the Criminal Law of the People’s Republic of China] (promulgated by Order No. 41 of the President of the People’s Republic of China on Feb. 25, 2011, effective May

expands the scope of PRC anti-bribery legislation. Where bribery laws of the PRC had previously focused exclusively on bribes involving domestic officials, business persons, and corporate entities, the new provision now criminalizes active commercial bribery of foreign public officials and officials of public international organizations (herein referred to as China's "foreign official bribery provision").⁴¹ The provision's expanded scope is significant in light of other countries' increasing development and aggressive application of extraterritorial jurisdiction over bribery and corruption involving foreign officials, such as the United States through its Foreign Corrupt Practices Act⁴² ("FCPA"), and, as many legal scholars widely believe will be the case, in the United Kingdom through its Bribery Act 2010⁴³ ("UK Bribery Act").

At least one Chinese judge and one Chinese prosecutor have observed that, unlike the FCPA and UK Bribery Act (both of which are, or are likely to be, aggressively applied), China's foreign official bribery provision will not have much direct legal effect as written, and is rather more of symbolic importance.⁴⁴ One prosecutor has downplayed the importance of the new law, suggesting that it should be handled differently than laws concerning domestic officials because bribing foreigners will not have the same kind of tarnishing effect on the government's image as bribery of domestic officials.⁴⁵ Others, such as Judge Liu Shuo, who presides in Beijing Number 2 Intermediate People's Court, call for more detailed judicial interpretations to resolve the new law's weak operability and to thereby demonstrate China's dedication to cracking down on commercial bribery, protecting domestic industries that compete legally, and safeguarding the orderly processes of the world economy.⁴⁶

1, 2011), § 29 [hereinafter Amendment VIII], *translated in* http://www.hxlawyer.com/en/newsinfofg.asp?c_id=381&b_id=18&s_id=0.

⁴¹ "Whoever, for the purpose of seeking an improper commercial benefit, gives money or property to any foreign public official or official of an international public organization shall be punished in accordance with [the provision that punishes active bribery of domestic non-officials]." Sherry Yin, et. al., *China Outlaws Bribery Overseas*, MORRISON FOERSTER (Aug. 8, 2011), *available at* <http://www.mofo.com/files/Uploads/Images/110808-China-Outlaws-Bribery-Overseas.pdf>.

⁴² Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 to 78dd-3 (2006).

⁴³ *See* Bribery Act 2010, c. 23, § 6 (Eng.), *available at* <http://www.legislation.gov.uk/ukpga/2010/23>.

⁴⁴ Li, *supra* note 39.

⁴⁵ *Id.*

⁴⁶ *Id.*

In the two years since China's foreign official bribery provision has come into effect, it appears that no investigations or prosecutions have occurred under the new law, at least not publicly. Admittedly, this does not necessarily indicate that the provision will have *no* legal effect, considering the time it takes to investigate and build a case. Nevertheless, given that the Chinese appear to be significant contributors to the global supply of the type of bribery that the provision supposedly prohibits,⁴⁷ it seems reasonable to presume that PRC authorities would have had ample opportunity to test the new law. Having not done so, and unlikely to do so with any force anytime soon, China finds itself in a precarious situation. Its international commitment to fight these bribes under the UNCAC, as well as a recent growing "trend" of more aggressive extraterritorial application and enforcement of foreign official bribery laws by certain other countries, almost demand a more aggressive stance.

Yet this so-called "trend," highlighted by more frequent investigations, prosecutions, and settlements, along with increasingly severe penalties in some countries for violations of foreign official bribery provisions, has by no means become the established norm. While over fifty countries have criminalized the bribery of foreign officials, only a handful of them (approximately seven) were "actively" prosecuting individuals or legal persons for the offense as of the end of 2010.⁴⁸ Thus China, in enacting a weak foreign official bribery provision, is not an outlier per se, but rather appears to be following the "norm." Of the five largest economies in the world (measured by GDP), however, China is the only one that does not actively prosecute foreign official

⁴⁷ According to Transparency International's most recent Bribe Payers Index (BPI), released in November 2011, companies from China ranked second worst (after Russia) as most likely to pay bribes when doing business abroad, and that they pay bribes to government officials almost as regularly as they do to other business. See TRANSPARENCY INT'L, BRIBE PAYERS INDEX 2011 5 (2011), available at <http://www.transparency.org/content/download/63863/1022714>; see also *Russian and Chinese Companies 'Most Likely To Bribe'*, BBC NEWS (Nov. 1, 2011, 8:04PM), <http://www.bbc.co.uk/news/business-15544841>.

⁴⁸ WORKING GRP. ON BRIBERY, ORG. FOR ECON. COOPERATION & DEV., 2010 ANNUAL REPORT 17 (2011). As used here, " 'actively' prosecuting," includes countries that have prosecuted at least five individuals and/or legal persons for bribery of a foreign public official, based on data collected by OECD as of the end of 2010. These include Hungary, Germany, Italy, Japan, Norway, South Korea, and the United States. *Id.* Additionally, France, Portugal, Sweden, and Switzerland have each prosecuted fewer than five individuals for the offense, the United Kingdom has prosecuted fewer than five individuals and legal persons for the offense, and Canada has prosecuted one legal person for the offense. *Id.*

bribery.⁴⁹ The following section outlines China's various bribery provisions and their categories, focusing on how and why the foreign official bribery provision is designed to be interpreted and enforced more narrowly than other categories of bribery under Chinese law.

II. CHINA'S FOREIGN OFFICIAL BRIBERY PROVISION COMPARED TO OTHER DOMESTIC PRC BRIBERY LAWS

Although prosecutorial discretion and resource allocation issues will naturally play a factor in how China's new bribery provision (or any law for that matter) is enforced, the intentionally narrow design of the framework itself is suggestive of greater tolerance toward foreign official bribery on paper, at least in comparison to instances of active official and non-official bribery. Given the fact that the Chinese leadership has focused most of its anti-bribery efforts on cracking down on passive rather than active forms of bribery (because doing so serves the CCP's interest in protecting its status as the legitimate ruling party),⁵⁰ it is even less likely that the foreign official bribery provision, which prohibits only active forms of the offense, will receive the same level of attention that China's other domestic bribery laws get.

Section A begins with a description of China's bribery provisions, outlining their basic application and penalties. Section B focuses on the language of the bribery provisions and discusses how some of the elements of foreign official bribery are likely to be interpreted more narrowly than the corresponding elements for active domestic official and non-official bribery. Section C discusses how the investigative and enforcement framework governing the foreign official bribery provision seems more lenient than the corresponding mechanisms under China's other bribery laws.

⁴⁹ Compare *id.* with *World's Largest Economies*, CNN MONEY, http://money.cnn.com/news/economy/world_economies_gdp/ (last visited Mar. 4, 2013) (based on 2013 data).

⁵⁰ Amy L. Sommers & David D. Zhang, *Anti-bribery Enforcement with Chinese Characteristics: Not All Official*, in K&L GATES GLOBAL GOVERNMENT SOLUTIONS 2012: ANNUAL OUTLOOK 44, 44–45 (2012); see also Ren Jianming (任建明), "Xing fa" di ba xiu zheng an jian zhi hai wai hui lu (《刑法》第八修正案剑指海外贿赂) [Amendment VIII to the Criminal Code Directly Addresses Overseas Bribery], FANFU.PEOPLE.COM.CN (Apr. 11, 2011), <http://fanfu.people.com.cn/GB/14359776.html> (Ren Jianming is a professor at Tsinghua University). "Active bribery" refers to the donation of bribes, while "passive bribery" refers to the receipt of bribes. See Sommers & Zhang, *supra*, at 44.

A. CHINA'S BRIBERY PROVISIONS

The PRC's various anti-bribery legal provisions are contained within the Criminal Law⁵¹ and the *Anti-Unfair Competition Law of the People's Republic of China* ("AUCL").⁵² The Criminal Law and AUCL generally prohibit passive bribery⁵³ of PRC state functionaries and domestic officials, including state-owned or related entities and units, as well as domestic non-officials, such as non-state entities and personnel. Passive bribery occurs when such persons take advantage of their position to demand or extort bribes or illegally accept bribes to secure benefits for the briber or for third parties.⁵⁴ The provisions also forbid active bribery, prohibiting individuals and entities from securing either improper benefits through bribes to PRC state functionaries or non-state personnel, or, as recently amended, improper *commercial* benefits through bribes to foreign public officials or officials of public international organizations.⁵⁵ Additionally, in commercial contexts, it is illegal for any state functionary or non-state personnel or entity to give or receive rebates or service charges that violate state regulations (e.g., off-book kickbacks).⁵⁶ Committing any of these acts constitutes bribery under Chinese law.

More severe cases of bribery are generally dealt with under the Criminal Law and are subject to criminal penalties, including fines, confiscation of property, imprisonment, and even the death penalty.⁵⁷ Milder cases are subject to administrative and civil penalties (e.g., fines

⁵¹ Criminal Law, arts. 163–164, 385–393.

⁵² Zhonghua Renmin Gongheguo Fan bu zheng dang jing zheng fa (中华人民共和国反不正当竞争法) [Anti-Unfair Competition Law of the Peoples Republic of China] (promulgated by Order No. 10 of the President of the People's Republic of China on Sept. 2, 1993, effective Dec. 1, 1993), art. 8 (LawInfoChina) (China) [hereinafter AUCL], *translated in* <http://lawinfochina.com/display.aspx?id=648&lib=law>.

⁵³ Part III, *infra*, discusses the definition of "bribe" under PRC law in more detail.

⁵⁴ See Criminal Law, arts. 163, 385–388. "Passive bribery" and "active bribery" are terms defined for this discussion; the Criminal Law does not define them; AUCL, art. 8.

⁵⁵ See Criminal Law, arts. 163–164, 389–393; AUCL, art. 8.

⁵⁶ Criminal Law, arts. 163–164; Guan yu jin zhi shang ye hui lu xing wei de zan xing gui ding (关于禁止商业贿赂行为的暂行规定) [Interim Provisions on Banning Commercial Bribery] (promulgated by Order No. 60 of the Dir. General of the State Admin. for Indus. and Commerce on Nov. 15, 1996, effective Nov. 15, 1996), art. 5 (China), [hereinafter Interim Provisions Banning Commercial Bribery] *translated in* <http://ccip.sjtu.edu.cn/article/?NewsID=3027>.

⁵⁷ Spencer S. Griffith & Yuanming Wang, *Chinese Anti-Bribery Law: An Overview of the Chinese Laws and Their Importance to Foreign Companies Doing Business in China – Part I*, METRO. CORP. COUNS., Aug. 2010, at 11.

and confiscation of improper gains) under the AUCL.⁵⁸ In lieu of, or concurrently with, criminal, civil and administrative penalties, Chinese Communist Party members that commit bribery offenses may face disciplinary actions by the CCP Central Commission for Discipline Inspection.⁵⁹ These actions may include fines or more serious consequences, such as suspension of CCP membership and political rights.⁶⁰

Three categories of bribery exist within the Criminal Law and AUCL and are definable depending on the party receiving the bribe. The first category is contained within Articles 385 through 393 of the Criminal Law, which prohibit bribery of state functionaries (herein referred to as “official bribery”).⁶¹ The second category appears in Articles 163 and 164 of the Criminal Law and Article 8 of the AUCL, which prohibit bribery of non-state company and enterprise personnel, as well as state-owned companies and enterprise personnel not engaged in public service (herein referred to as “non-official bribery”).⁶² Finally, the recent amendment to Article 164 of the Criminal Law adds a third category, prohibiting bribery of foreign public officials and officials of public international organizations (herein referred to as “foreign official bribery”).⁶³ The criminal penalties for non-official and foreign official bribery are generally less severe than those concerning official bribery.⁶⁴

⁵⁸ *Id.*

⁵⁹ See generally Zhongguo Gongchandang Dang yuan ling dao gan bu lian jie cong zheng ruo gan zhun ze (中国共产党党员领导干部廉洁从政若干准则) [CPC Party Member Cadre Code of Ethics]; *CPC Issues Code of Ethics To Ensure Clean Governance*, CHINA.ORG.CN (Feb. 23, 2010), http://www.china.org.cn/china/2010-02/23/content_19463034.htm; Spencer S. Griffith & Yuanming Wang, *Chinese Anti-Bribery Law: An Overview of the Chinese Laws and Their Importance to Foreign Companies Doing Business in China – Part II*, METRO. CORP. COUNS., Sept. 2010, at 14.

⁶⁰ See, e.g., *Bo Xilai Expelled from CPC, Public Office*, CHINADAILY, http://www.chinadaily.com.cn/china/2012-09/28/content_15791527.htm (last updated Sept. 28, 2012); *Local Official Given Suspended Death Sentence for Bribery*, ENGLISH.NEWS.CN (July 5, 2012), http://news.xinhuanet.com/english/china/2012-07/05/c_131697735.htm; *Tianjin City Official Given Suspended Death Sentence*, NEWS OF THE COMMUNIST PARTY OF CHINA (Aug. 13, 2010), <http://english.cpc.people.com.cn/66102/7104396.html>; *High-ranking Cadres Expelled from CPC for Graft*, WANT CHINA TIMES (July 23, 2011), <http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20110723000057&cid=1101>.

⁶¹ Criminal Law, arts. 383–393.

⁶² *Id.* at art. 163–164; see also AUCL, art. 8.

⁶³ Yin, *supra* note 41.

⁶⁴ Compare Criminal Law art. 390 (setting a maximum punishment of ten years to life imprisonment in cases of extremely serious domestic active official bribery), and Criminal Law art. 386 (setting a maximum punishment of death for cases of especially serious domestic passive official bribery), with Criminal Law art. 164 (setting a maximum punishment of three to ten

Of note, the official and non-official bribery provisions broadly prohibit both active and passive forms of bribery, while the foreign official bribery provision only prohibits active forms of the offense. By focusing solely on the supply-side of the bribes, this new provision brands as criminals only those who give the bribes and does not punish the foreign officials or officials of public international organizations who receive them (the demand-side). This approach, however, remains in line with global standards. No international anti-bribery convention in force to date *requires* that states adopt domestic laws criminalizing passive forms of foreign official bribery,⁶⁵ and with obvious concerns for territorial sovereignty and diplomatic immunity, no state has tried to enforce such a law abroad. The analysis in this section, therefore, largely focuses on comparing the foreign official bribery provision to the other active forms of bribery under Chinese law.

Additionally, since the foreign official bribery provision appears under the Criminal Law, the Criminal Law's jurisdictional principles govern. The Criminal Law provides for jurisdiction over: (1) individuals and entities, both domestic and foreign, who commit crimes within (or onboard a ship or aircraft in) the territory of the PRC;⁶⁶ (2) individuals and entities, both domestic and foreign, who commit crimes abroad, the consequences of which take place within the territory of the PRC;⁶⁷ and (3) citizens of the PRC who commit crimes under Chinese law abroad.⁶⁸ The foreign official bribery provision, therefore, would seem to apply extraterritorially to PRC citizens, is widely believed to apply to entities (domestic, wholly foreign-owned, as well as Sino-foreign joint ventures) formed under Chinese law,⁶⁹ and is potentially applicable to foreign

years imprisonment in cases of domestic active non-official bribery and foreign official bribery involving a "large amount"), and Criminal Law art. 163 (setting a maximum punishment of five years to life imprisonment in cases of domestic passive non-official bribery involving a "large amount"); see also Griffith & Wang, *supra* note 57, at 11.

⁶⁵ The UNCAC does, however, provide that "[e]ach State Party shall *consider* adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties." (emphasis added). UNCAC, *supra* note 32, at art. 16, ¶ 2.

⁶⁶ Criminal Law, art. 6.

⁶⁷ *Id.* at arts. 6, 8.

⁶⁸ *Id.* at art. 7.

⁶⁹ Eric Carlson et al., *China Amends Criminal Law To Cover Foreign Bribery: Bribery of Non-PRC Government Officials Criminalized*, 3 FIN. FRAUD LAW REP. 517, 517-18 (2011).

individuals or entities in the PRC or whose acts of bribery have consequences in China.⁷⁰ The Supreme People's Court⁷¹ and Supreme People's Procuratorate⁷² have yet to comment on the intended extraterritorial applicability of the provision. Nevertheless, there is no reason why the law should not be applicable to acts of foreign official bribery that occur abroad, at least theoretically (regardless of whether the provision is actually enforced), given both the extraterritorial potential written into the general jurisdictional provisions of the Criminal Law and China's stated motivation to implement its treaty obligations by way of adopting this new provision.⁷³

If actually enforced, individuals who are found guilty under China's foreign official bribery provision face penalties of up to three years in prison or criminal detention if the amount of the bribe is "relatively large," and may face imprisonment of three to ten years and a fine if the amount is "huge."⁷⁴ Entities that are found guilty are subject to criminal fines, and the supervisor chiefly responsible and other personnel directly responsible face criminal detention or imprisonment.⁷⁵ Criminal fines, unspecified in the provision as to their amount, have not been staggeringly high when applied in the domestic context for official and non-official bribery, at least not high enough to garner the kind of media attention that recent FCPA penalties have received.

B. INTERPRETATIONAL AMBIGUITIES

The foreign official bribery provision includes elements that are likely to be interpreted with differing, and probably narrower, scopes than the corresponding elements under China's other domestic bribery provisions. Referring to officials in the domestic context as "state functionaries" and officials in the foreign context as "public officials" or

⁷⁰ PETER YUEN, FRESHFIELDS BRUCKHAUS DERINGER LLP, CHINA'S TIGHTENING LAW ON BRIBERY OF OFFICIALS 1 (2011), *available at* <http://www.lexology.com/library/detail.aspx?g=db239b2f-7205-4cc4-8840-b18d054a554c>.

⁷¹ The Supreme People's Court is the highest court in the PRC. XIAN FA [CONSTITUTION] § 7, art. 127 (2004) (LawInfoChina) (China), *translated in* <http://lawinfochina.com/display.aspx?id=3437&lib=law>.

⁷² The Supreme People's Procuratorate is the highest agency at the national level responsible for both investigation and prosecution in the PRC. *Id.* § 7, art. 132.

⁷³ *See supra* notes 32–39 and accompanying discussion; *see also infra* notes 87–89 and accompanying discussion.

⁷⁴ Amendment VIII, *supra* note 40, § 29.

⁷⁵ *Id.*

“officials of public international organizations”⁷⁶ provides an opportunity for Chinese courts to apply terms that refer to similar concepts with varying scopes, perhaps more narrowly in the foreign official bribery context. Additionally, the requisite intent for foreign official bribery—“to secure improper *commercial* benefits”—seems facially narrower in scope in comparison to the requisite intent for active forms of criminal official and non-official bribery (“to secure improper benefits”), and similarly provides for a more circumscribed application.

1. “STATE FUNCTIONARY” VERSUS “PUBLIC OFFICIAL”

The Criminal Law uses the term “state functionaries” when referring to domestic officials in the context of official bribery, but uses different terms—“foreign public officials” and “officials of public international organizations,”—when referring to non-domestic officials in the context of foreign official bribery.⁷⁷ Although the scope of the terms used in both contexts may not actually be particularly dissimilar (aside from the obvious nationality differences), usage of different terms in each context appears to be intentional, which suggests that the terms may be applied with varying scopes.

“State functionary” under Article 93 of the Criminal Law is broadly defined to include (1) persons who perform public service in state organs,⁷⁸ wholly state-owned companies,⁷⁹ enterprises,⁸⁰

⁷⁶ Interestingly, the terms for “state functionary” and “public officials” in Mandarin Chinese sound much more similar than they do in English. The provisions in Articles 163 – 164 and 385 – 389 of the Criminal Law dealing with official and non-official bribery use “工作人员,” pronounced “gōngzuòrényuán,” which means “state functionary.” The amended portion of Article 164 of the Criminal Law that deals with foreign official bribery uses the term “公职人员,” pronounced “gōngzhírényuán,” which means “public official.” The fact that the terms sound more alike in Chinese, however, does not suggest that the terms are conceptually any more similar than they are in English – the nature of Chinese as a tonal language makes many words sound like other words. While Westerners that hear the two terms spoken in Chinese may believe that the terms sound almost identical, the terms probably sound rather different to native Chinese ears.

⁷⁷ Criminal Law, arts. 383–393; *see also* Yin, *supra* note 41.

⁷⁸ *See* Liang Genlin, *A Review of the Crime of Bribery in China* 3 (Asia Law Inst. Working Paper Series No. 008, 2010), available at <http://law.nus.edu.sg/asli/pdf/WPS008.pdf> (defining “state organs” as referring to authorities that exercise state power according to law, including the national legislative, executive, judicial and military authorities).

⁷⁹ *Id.* at 4 (defining “state-owned corporations” to include “solely state-owned limited liability companies and joint stock limited companies sponsored solely by state-owned corporations”).

⁸⁰ *Id.* (defining “state-owned enterprises” to include “economic entities which belong to the state”).

institutions,⁸¹ or people's organizations;⁸² (2) persons who are assigned by state organs, wholly state-owned companies, enterprises, or institutions to perform public service in companies, enterprises, or institutions that are non-state owned or people's organizations; and (3) any other persons who perform public service⁸³ according to law.⁸⁴ The terms "foreign public officials" and "officials of public international organizations," on the other hand, are not defined in the Criminal Law, nor anywhere else under Chinese law for that matter.⁸⁵

Given that China's adoption of the foreign official bribery provision was made in reference to implementing treaty obligations under the UNCAC, it appears that Chinese legislators intentionally incorporated the terms "foreign public officials" and "officials of public international organizations" in the context of this crime in an effort to more closely track the language of the relevant UNCAC provision.⁸⁶ This may suggest that Chinese courts are to apply the UNCAC's definitions of those terms. According to Article 2 of the UNCAC, "foreign public official" includes "any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise."⁸⁷ Additionally, "official of a public international organization" under Article 2 of the UNCAC includes "an international civil servant or any person who is authorized by such an organization to act on behalf of that organization."⁸⁸ These definitions, foreign context aside, do not appear to be particularly unlike in scope, either broader or narrower, than what the term "state functionary" encompasses in the domestic Chinese context.

⁸¹ *Id.* (defining "state-owned institutions" to include "those engaged in science, education, cultural, health, sports, broadcast and publishing which are established and managed by the state").

⁸² *Id.* (defining "people's organizations" to include organizations that are "financed by the state, and are responsible for organizing and coordinating social and public affairs, such as the Communist Youth League, Trade Unions, and Women's Federations, etc.>").

⁸³ *Id.* (defining "any other persons who perform public service according to law" as staff elected or appointed according to the law that perform public service, e.g., representatives of various levels of the People's Congress and jurors); *see also* Daniel F. Roules & Zijie (Leslie) Li, *China, in GETTING THE DEAL THROUGH: ANTI-CORRUPTION REGULATION IN 51 JURISDICTIONS WORLDWIDE* 58, 60 (Homer E. Moyer Jr. ed. 2011).

⁸⁴ Criminal Law, art. 93.

⁸⁵ *See e.g.*, Carlson et al., *supra* note 69, at 520.

⁸⁶ *See* Li, *supra* note 39.

⁸⁷ UNCAC, *supra* note 32, at art. 2(b).

⁸⁸ *Id.* at art. 2(c).

Nevertheless, using different terms in each context, especially given the fact that the terms in the foreign context continue to remain undefined under Chinese law, theoretically allows Chinese courts to interpret the terms with varying scopes. By continuing to leave the terms undefined, regardless of whether the UNCAC's definitions are utilized or not, Chinese courts may possess a greater ability to apply the terms non-uniformly in different cases that are more or less politically sensitive, depending on need. For example, in instances where it is not so clear whether the recipient of the bribe is in fact a foreign public official, such as a low-level employee or other tangential affiliate of a foreign state-owned enterprise, Chinese courts may utilize this vagueness in the law to eliminate the potential criminality of conduct of a Chinese state-owned enterprise that stands accused of violating the provision in order to safeguard state-owned assets and avoid potential embarrassment for the government. A private enterprise, on the other hand, especially one that competes with Chinese state-owned enterprises, may not receive such favorable treatment. Therefore, the CCP, through the courts that it controls has more power to determine whom it does and does not want to punish under the foreign official bribery provision. And because the government has tremendous equity interests in many partially or completely state-owned PRC enterprises that operate transnationally, there is a real incentive to leave the terms undefined to better shield these interests from the law.

2. "IMPROPER BENEFITS" VERSUS "IMPROPER *COMMERCIAL* BENEFITS"

To establish the crime of active official and non-official bribery under Chinese law, generally, the prosecutor must show that the party giving the bribe had the intent "to secure improper benefits."⁸⁹ To establish the crime of foreign official bribery, however, the provision requires a bribe payer to have had the intent "to secure improper

⁸⁹ See Griffith & Wang, *supra* note 57, at 11. In practice, however, proving the offender's "intent" is not an absolute prerequisite for a finding of bribery in China, and most bribery cases are prosecuted without establishing that the briber indeed intended to secure improper benefits. *Id.* Additionally, in commercial contexts, giving kickbacks, service charges, and rebates, as well as giving a "relatively large amount" of money or property (over 10,000 RMB) to state functionaries, are per se unlawful and constitute the crime of bribery under Article 389 of the Criminal Law regardless of intent. *Id.* Consequently, defendants charged with bribery in China usually cannot rely on the argument that they did not have the requisite illegal or improper intent to give or accept bribes as a defense. *Id.*

commercial benefits.”⁹⁰ The scope of “to secure improper *commercial* benefits” has not yet been defined under Chinese law; nevertheless, with the addition of the “commercial” qualifier, the requisite intent for foreign official bribery, at least facially, appears to be more limited than the requisite intent for active forms of official and non-official bribery.

It therefore appears that giving a bribe to a foreign public official to secure non-commercial benefits, which would be prohibited in the domestic context, may be permissible in a foreign context.⁹¹ According to excerpts of a recent interview published in the *Legal Daily*,⁹² Liu Shuo, a presiding judge in Beijing Number 2 Intermediate People’s Court believes that the lack of a clear-cut definition of “improper *commercial* benefits” may result in possible controversies in judicial practice due to competing points of view among China’s criminal legal scholars on whether the term should or should not limit the crime of foreign official bribery to contexts of “international commercial activities.”⁹³

Perhaps Chinese legislators added the “commercial” qualifier in an effort to track the language of the requisite intent of the offense under the UNCAC.⁹⁴ This may suggest that prior judicial interpretations concerning the scope of the term “to secure improper benefits” in the domestic commercial context⁹⁵ are applicable to cases of foreign official bribery. According to those interpretations, in commercial bribery contexts, the term “to secure improper benefits” means that a briber either: (1) seeks benefits that are in violation of law, regulations, rules, or state policies; or (2) seeks benefits that are themselves legitimate, but are to be obtained by means of violating laws, regulations, rules, state

⁹⁰ See Criminal Law at arts. 389–391, 393; see also Yin, *supra* note 41.

⁹¹ Carlson et al., *supra* note 69, at 519.

⁹² The *Legal Daily* is a newspaper published under the supervision of the PRC Ministry of Justice. *Legal Daily Newspaper Information*, EPAPERS TODAY, <http://www.epaperstoday.com/china/legal-daily.php> (last visited Apr. 7, 2013).

⁹³ Li, *supra* note 39.

⁹⁴ See UNCAC, *supra* note 32, at art. 16, ¶ 1 (requiring an intent “to obtain or retain business or other undue advantage in relation to the conduct of international business”).

⁹⁵ See generally, e.g., Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Guan yu yin fa “guan yu ban li shang ye hui lu xing shi an jian shi yong fa lu ruo gan wen ti de yi jian” de tong zhi (最高人民法院、最高人民检察院关于印发《关于办理商业贿赂刑事案件适用法律若干问题的意见》的通知) [Notice of the Supreme People’s Court and the Supreme People’s Procuratorate on Issuing the Opinions on Issues Concerning the Application of Law in the Handling of Criminal Cases of Commercial Briberies] (promulgated by the Sup. People’s Court and the Sup. People’s Proc., 2008) (China) [hereinafter Commercial Bribery Opinions], translated in http://www.procedurallaw.cn/english/law/200812/t20081218_114772.html.

policies, or industrial norms.⁹⁶ The former situation occurs where the benefit involves something illegal or the recipient is not entitled to the benefit.⁹⁷ The latter occurs, for example, where an applicant is entitled to the benefit, such as a business license, but pays a bribe to an official to obtain it in advance of a required approval period.⁹⁸ Additionally, in the context of commercial activities, including bidding and government procurement, giving money or property “in violation of the principle of fairness so as to secure a competitive advantage” is within the meaning of “to secure improper benefits.”⁹⁹

The “commercial” qualifier also suggests that judicial interpretations concerning the scope of “to secure improper benefits” in the context of domestic official bribery may *not* apply to cases of foreign official bribery.¹⁰⁰ According to those interpretations, it is immaterial whether an official is actually in office when he receives a bribe or secures the benefit for the briber so long as either the bribe or the benefit is procured through taking advantage of his position.¹⁰¹ Therefore, if these judicial interpretations do not apply in the context of foreign official bribery, it may make a difference whether or not the foreign official is still in office when the bribe is given, and more importantly, whether or not the benefit was secured while still in office. In other words, it may be legal to bribe a foreign official in the commercial context so long as the bribe is given or the benefit is secured after the foreign official leaves office, whereas the same conduct is explicitly prohibited in the domestic official bribery context.

If the above is true, the difference would appear to reflect a policy of taking a relatively weaker stance against bribery in the foreign context because there is less potential for direct harm to China’s domestic interests as a result of corruption that occurs mainly outside of

⁹⁶ *Id.* § IX.

⁹⁷ Roules & Li, *supra* note 83, at 61.

⁹⁸ *Id.*

⁹⁹ Commercial Bribery Opinions, *supra* note 95, § 9.

¹⁰⁰ Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Guan yu yin fa “guan yu ban li shou hui xing shi an jian shi yong fa lu ruo gan wen ti de yi jian” de tong zhi (最高人民法院、最高人民检察院关于印发《关于办理受贿刑事案件适用法律若干问题的意见》的通知) [Notice of the Supreme People’s Court and the Supreme People’s Procuratorate on Issuing the Opinions on Issues Concerning the Application of Law in the Handling of Criminal Cases Involving the Acceptance of Bribes] (promulgated by the Sup. People’s Court and the Sup. People’s Proc. Jul. 8, 2007, effective Jul. 8, 2007) (LawInfoChina) (China) [hereinafter Acceptance of Bribes Notice 7/8/07], translated in <http://lawinfochina.com/display.aspx?id=6192&lib=law>.

¹⁰¹ *Id.* at art X.

its borders, as well as a desire to promote Chinese businesses interests abroad. For example, it is not particularly uncommon for retired Chinese officials to continue to exercise varying degrees of influence behind the scenes after leaving office.¹⁰² If it were only illegal to receive bribes or procure benefits while in office, these retired officials would enjoy immunity under the law so long as bribes are received while “retired” because they would possess the ability to plan the receipt of these bribes with retirement.¹⁰³ The concerns of direct harm to Chinese domestic interests as a result of corruption are arguably diminished when bribes are given to foreigners, especially if the conduct occurs entirely abroad, and, therefore, any attending threat to CCP legitimacy posed by acts of foreign official bribery would be much more limited. On the other hand, presumably, most of the individuals and entities that are to be punished for violating the foreign official bribery provision would be Chinese citizens and businesses that are unlikely to be very fond of a CCP that makes it more difficult to do business abroad. Further, it is conceivable that a foreign official that promises to secure a benefit after leaving office may actually fail to procure that benefit, and, therefore, punishing PRC individuals and entities for giving bribes when receiving no actual benefit in return would be even more of a lose-lose situation.¹⁰⁴ Most importantly, as mentioned above, many of those Chinese businesses are likely to be partially and even completely state-owned, giving the CCP a strong incentive as an equity interest holder to refrain from hindering itself. The following section explores how this policy of taking a weaker stance against bribery in the foreign context is also reflected in the design of the investigation and enforcement mechanism of the foreign official bribery provision.

C. INVESTIGATIVE AND ENFORCEMENT DIFFERENCES

The framework that governs the investigation and enforcement of foreign official bribery appears relatively lenient in comparison to the

¹⁰² See *Alive and Kicking in the Cadres' Memorial Home*, ASIA TIMES ONLINE (Sept. 2, 2011), <http://www.atimes.com/atimes/China/MI02Ad01.html>.

¹⁰³ I am envisioning a lavish retirement party where former state functionaries collect on their “Bribes Accounts Receivables” rather than get the customary gold watch and hearty handshake.

¹⁰⁴ Concededly, this can also happen in the domestic context. Nevertheless, this consideration is less important because of the greater incentive to punish domestic officials that engage in bribery that harms domestic interests.

corresponding mechanisms governing other forms of bribery under Chinese law.

Local and provincial level Economic Crime Investigation Departments (“ECIDs”) of the Public Security Bureaus (“PSBs”)¹⁰⁵ and People’s Procuratorates¹⁰⁶ have jurisdiction to investigate and file criminal cases¹⁰⁷ of bribery under PRC law.¹⁰⁸ Although all three categories of bribery have the same specified monetary thresholds of criminality for active versions of the offense before PSBs and People’s Procuratorates are to file cases for investigation and prosecution (at least 10,000 RMB¹⁰⁹ worth of bribes by individuals, and 200,000 RMB¹¹⁰ by

¹⁰⁵ Public Security Bureaus are police departments in China. *See* Zhonghua Renmin Gongheguo Xing shi su song fa (96 xiu zheng) (中华人民共和国刑事诉讼法(96 修正)) [Criminal Procedure Law of the People’s Republic of China (1996 Amendment)] (adopted at the Second Session of the Fifth Nat’l People’s Cong. on July 1, 1979, and Revised in According with the Decision on Revising the Criminal Procedure Law of the People’s Republic of China Adopted at the Fourth Session of the Eighth Nat’l People’s Cong. on Mar. 17, 1996), art. 3 (LawInfoChina) (China) [hereinafter Criminal Procedural Law], *translated in* <http://lawinfochina.com/display.aspx?id=347&lib=law>.

¹⁰⁶ People’s Procuratorates are prosecuting bodies in China, and a local Procuratorate is similar, conceptually, to a district attorney. *See id.*

¹⁰⁷ Note that administrative and civil cases of official and non-official commercial bribery that fall below criminal thresholds are handled by the State Administration of Industry and Commerce (SAIC) at municipal levels. *See* Interim Provisions Banning Commercial Bribery, *supra* note 56, at arts. 9–10.

¹⁰⁸ Criminal Procedural Law at art. 18; *see also* Zuigao Renmin Jianchayuan, Gong’anbu Guan yu yin fa “Zuigao Renmin Jianchayuan, Gong’anbu Guan yu gong’an ji guan guan xia de xing shi an jian li ‘an zhui su biao zhun de gui ding (er)’ de tong zhi (最高人民法院、公安部关于印发《最高人民法院、公安部关于公安机关管辖的刑事案件立案追诉标准的规定(二)》的通知) [Notice of the Supreme People’s Procuratorate and the Ministry of Public Security on Issuing the Provisions (II) of the Supreme People’s Procuratorate and the Ministry of Public Security on the Standards for Filing Criminal Cases Under the Jurisdiction of the Public Security Organs for Investigation and Prosecution] (promulgated by the Sup. People’s Proc. and Ministry of Pub. Sec. May 7, 2010, effective May 7, 2010) (LawInfoChina) (China) [hereinafter Criminal Case Filing Standards Notice 5/7/10], *translated in* <http://lawinfochina.com/display.aspx?id=8252&lib=law>; Zuigao Renmin Jianchayuan, Gong’anbu Guan yu yin fa “Zuigao Renmin Jianchayuan, Gong’anbu Guan yu gong’an ji guan guan xia de xing shi an jian li ‘an zhui su biao zhun de gui ding (er) de bu chong gui ding’ de tong zhi (最高人民法院、公安部关于印发《最高人民法院、公安部关于公安机关管辖的刑事案件立案追诉标准的规定(二)的补充规定》的通知) [Notice of the Supreme People’s Procuratorate and the Ministry of Public Security on Issuing the Supplementary Provisions to the Provisions (II) of the Supreme People’s Procuratorate and the Ministry of Public Security on the Standards for Filing Criminal Cases Under the Jurisdiction of the Public Security Organs for Investigation and Prosecution] (promulgated by the Sup. People’s Proc. and Ministry of Pub. Sec. Nov. 14, 2011, effective Nov. 14, 2011) (LawInfoChina) (China) [hereinafter Criminal Case Filing Standards Notice 11/14/11], *translated in* <http://lawinfochina.com/display.aspx?id=11256&lib=law>.

¹⁰⁹ “RMB” stands for the *Renminbi*, China’s currency, and at an approximate exchange rate of \$1 USD to 6.2 RMB on April 4, 2013, 10,000 RMB was worth approximately \$1,613 USD. *See XE*

entities),¹¹¹ lower thresholds may in fact trigger prosecution for active official bribery,¹¹² and at the very least, in commercial contexts, official and non-official bribery that fall below criminal thresholds are administratively punishable by municipal level State Administrations of Industry and Commerce (SAICs) under the AUCL.¹¹³ People's Procuratorates and PSBs also have greater authority to file cases for active forms of official bribery that do not meet the monetary thresholds than they have for cases of foreign official bribery that similarly fall below thresholds. Specifically, People's Procuratorates may prosecute individuals or entities who give bribes to state functionaries even if the bribes have a value of less than 10,000 RMB, or 200,000 RMB, respectively, if: (1) the purpose of the bribe is to gain illegal benefits; (2) bribes are paid to three or more state functionaries; (3) bribes are paid to CCP or government leaders, judicial officials, or law enforcement officials; or (4) the bribe causes severe damage to national or social interests.¹¹⁴ No similar allowance is explicitly afforded when it comes to the investigation and enforcement of foreign official bribery that fall below criminal thresholds.¹¹⁵

Moreover, the domestic official bribery provisions prohibit individuals from "brokering" (i.e., acting as intermediaries) bribes to state functionaries, and criminal liability in this context attaches to brokers once the value of the bribes reach 20,000 RMB.¹¹⁶ The foreign official bribery provision, on the other hand, does not explicitly provide

Currency Charts (USD/CNY) available at
<http://www.xe.com/currencycharts/?from=USD&to=CNY&view=10Y>.

¹¹⁰ On April 5, 2013, 200,000 RMB was worth approximately \$32,258 USD. *See id.*

¹¹¹ Zuigao Renmin Jianchayuan Guan yu xing hui zui li 'an biao zhun (最高人民检察院关于行贿罪立案标准) [Standards of the Supreme People's Procuratorate on the Crime of Bribery] (promulgated by the Sup. People's Proc., effective Dec. 1, 2000) (China) [hereinafter Standards of the Supreme People's Procuratorate on the Crime of Bribery] available at http://www.law-lib.com/law/law_view.asp?id=502; *see also* Criminal Case Filing Standards Notice 5/7/10, *supra* note 108, at art. 11; Criminal Case Filing Standards Notice 11/14/11, *supra* note 108, § 1.

¹¹² Standards of the Supreme People's Procuratorate on the Crime of Bribery, *supra* note 111.

¹¹³ *See generally* Criminal Case Filing Standards Notice 11/14/11, *supra* note 108; Interim Provisions Banning Commercial Bribery, *supra* note 56, at arts. 9–10.

¹¹⁴ Standards of the Supreme People's Procuratorate on the Crime of Bribery, *supra* note 111.

¹¹⁵ *See generally* sources cited *supra* note 108.

¹¹⁶ Criminal Case Filing Standards Notice 11/14/11, *supra* note 108; Criminal Law at art. 392; Wu Wei, *Elements of a Crime of Commercial Bribery*, KING & WOOD MALLESONS, <http://www.kingandwood.com/Bulletin/ChinaBulletinContent.aspx?id=8933b5a2-de37-4f83-9b71-61d70d5ebe86> (last visited Apr. 7, 2013).

for the prohibition of “brokering” bribes to foreign public officials and officials of public international organizations.¹¹⁷

Furthermore, although People’s Procuratorates and PSBs may lack the authority to file cases for investigation and prosecution of active non-official bribery that falls below criminal thresholds,¹¹⁸ at the very least, SAICs have the authority to administratively sanction those instances and cases of active official commercial bribery that do not quite reach criminal levels. And even if SAICs do in fact have implicit authority to sanction instances of foreign official bribery that fall below criminal thresholds, it is likely that most instances of the offense, which likely occur abroad, would go unsanctioned because the personnel and financial resources needed to fight this kind of bribery on an international level far outweigh the perceived harm to domestic interests (if any) that result from these relatively minor instances that do not trigger criminal liability.

In other words, it almost seems to be legal for individuals or entities to give upwards of 9,999 RMB or 199,999 RMB in bribes, respectively, to foreign public officials or officials of public international organizations. But, giving the same amounts, or even far less, in the contexts of official and non-official bribery is punishable under Chinese law. Professor Kevin Davis, currently at NYU Law School, argues that “[e]ven if it is not in the interest of a pay[e]r state to deter a given form of transnational bribery outright, the state will have an interest in deterring its nationals from paying bribes that are excessively large.”¹¹⁹ Only providing for criminal liability once certain thresholds are exceeded, therefore, may be an example of that interest in action. On the other hand, perhaps the motivation arose out of other concerns, such as the conservation of investigative and judicial resources for larger and arguably more important cases. Regardless of the true motivations, the strict monetary thresholds for criminality of foreign official bribery written into the framework, with little-to-no other avenue of recourse for bribes below those thresholds, are reflective of a greater degree of tolerance toward foreign official bribery under Chinese law, at least in comparison to the law concerning domestic official and non-official bribery.

¹¹⁷ See Amendment VIII, *supra* note 40 at § 29.

¹¹⁸ See generally Criminal Case Filing Standards Notice 5/7/10, *supra* note 108.

¹¹⁹ Kevin E. Davis, *Self-Interest and Altruism in the Deterrence of Transnational Bribery*, 4 AM. L. & ECON. REV. 314, 326 (2002).

China has also historically focused most of its anti-bribery efforts on cracking down on passive bribery rather than active forms of the offense, and it has further concentrated those energies on investigating and punishing domestic officials, as opposed to non-officials, that received the bribes.¹²⁰ Moreover, of the non-officials that have been punished for receiving bribes, few have been foreign nationals.¹²¹ Even when foreign nationals are investigated and convicted of domestic non-official bribery, it seems to be the case that the punishments may be more politically motivated than for the actual deterrence of the bribery itself. In one recent example of a foreigner being punished for committing passive domestic non-official bribery, an Australian employee of Rio Tinto was found guilty in closed proceedings of accepting millions of dollars in bribes and was sentenced to ten years in prison.¹²² According to Professor Jerome Cohen, an expert on the Chinese legal system currently at NYU Law School, the trial appeared to favor the prosecution and seemed to be more about retaliation for the PRC's tough negotiations with foreign suppliers over iron ore prices that, as the Chinese government claimed, resulted in Rio Tinto allegedly passing secrets to foreign negotiators.¹²³ Other legal analysts believe that the conviction may have been retaliation against Rio Tinto for its decision in 2009 to scrap plans to accept almost \$20 billion USD in investment from one of China's biggest mining companies.¹²⁴ Either way, an internal investigation by Rio Tinto after the arrests found no evidence of wrongdoing,¹²⁵ and the conviction, therefore, appears to have had little to do with whether the bribery was actually committed. In the context of active foreign official bribery, where only the bribe payer is to be punished, and where the recipient does not work for a company that competes with China's enterprises but is a foreign official receiving bribes from the Chinese individuals and entities themselves, the political motivations to investigate and prosecute the bribery as retribution for some other kind of perceived transgression is likely to be absent. The

¹²⁰ SOMMERS & ZHANG, *supra* note 50, at 44–45; *see also* Ren, *supra* note 50.

¹²¹ Lester Ross et al., *China's Own FCPA*, WILMERHALE (Aug. 1, 2011), <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9903>.

¹²² David Barboza, *China Sentences Rio Tinto Employees in Bribe Case*, N.Y. Times (Mar. 29, 2010), <http://www.nytimes.com/2010/03/30/business/global/30riotinto.html>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

following section explores whether China's foreign official bribery provision lives up to its UNCAC obligations to adopt such a provision.

III. CHINA'S FOREIGN OFFICIAL BRIBERY PROVISION AND ITS OBLIGATIONS TO IMPLEMENT THE PROVISION UNDER THE UNCAC

Of the major international anti-bribery treaties that exist today,¹²⁶ the most widely subscribed to is the UNCAC, with 140 state signatories and 165 parties.¹²⁷ The UNCAC generally obligates its member states to: (1) adopt and implement preventative measures, including policies concerning anti-corruption; (2) criminalize bribery and other types of corruption; (3) cooperate with other member states on the international level, including adopting "provisions on extradition, mutual legal assistance, and joint investigations;" (4) assist other member states to recover stolen assets; and (5) work cooperatively with other member states by developing training and technical assistance programs and exchanging information.¹²⁸

UNCAC implementation review has been a "hotly contested issue" among members.¹²⁹ While western states have tended to push for a dynamic mechanism based on peer or expert review, China and other developing countries have firmly opposed review mechanisms that go beyond self-assessment.¹³⁰ The decision to ratify the UNCAC first and figure out an appropriate mechanism for implementation later, therefore, has "left a hole in UNCAC that remains unfilled" because consensus has been difficult to come by with such a large number of diverse member

¹²⁶ Jennifer Zerk of the Harvard Corporate Social Responsibility Initiative noted in 2010 that "[a]ll of [the treaties] either require or permit some degree of extraterritorial jurisdiction over foreign private entities or conduct. However, these treaties have differing scopes in terms of the activities and actors covered. In addition, these treaties offer states a fair amount of flexibility regarding the implementation of their treaty obligations. The result is a very complex regulatory picture, with different states regulating foreign bribery to different degrees, with varying definitions of what will (and will not) constitute an offence and a wide variety of sanctions, but all under the umbrella of a number of different, but overlapping, multilateral regimes." Jennifer A. Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* 30 (Harvard Corp. Soc. Responsibility Initiative Working Paper No. 59, 2010) (footnotes omitted).

¹²⁷ See *supra* notes 32–33 and accompanying text.

¹²⁸ Lewis, *supra* note 10, at 91.

¹²⁹ *Id.*

¹³⁰ *Id.*

states.¹³¹ Consequently, the absence of a vigorous review mechanism has allowed China to approach implementation in a gradual and cautious manner.¹³²

The UNCAC relies primarily on criminal enforcement to combat foreign official bribery,¹³³ and member states are required to take steps to bring their own domestic laws in line with their treaty obligations.¹³⁴ According to UNCAC, Article 16:

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.¹³⁵

As mentioned above, China adopted its foreign official bribery provision in an effort to implement its obligation to do so under UNCAC Article 16. China's foreign official bribery provision states in relevant part: "[w]hoever, for the purpose of seeking an improper commercial benefit, gives money or property to any foreign public official or official of an international public organization shall be punished in accordance with [the provision that punishes active bribery of domestic non-officials]."¹³⁶

This Part analyzes whether China's provision lives up to the standards of UNCAC Article 16 and argues that China's statute is much narrower as written, and therefore falls short of true implementation. Section A notes that the definition of a "bribe" under Chinese law does not include bribes of a non-pecuniary nature and is therefore narrower in scope than what is required under the UNCAC. Section B recognizes that

¹³¹ *Id.*

¹³² *Id.* at 92.

¹³³ Zerk, *supra* note 126, at 49. "[The UNCAC] also contemplates a range of other regulatory initiatives to deal with 'demand side' problems, including improving systems for hiring public officials, developing codes of conduct for public officials, improving the way public finances are managed and improving governmental transparency." *Id.*

¹³⁴ *Id.*

¹³⁵ UNCAC, *supra* note 32, at art. 16, ¶ 2.

¹³⁶ Yin, *supra* note 41.

the scope of prohibited conduct under China's provision only seems to cover the actual "giving" of bribes in this context and does not include "promising" or "offering," nor does it include "indirectly" giving, and is therefore narrower in scope than the prohibited conduct intended to be encompassed under Article 16.

A. THE DEFINITION OF "BRIBE"

China's foreign official bribery provision explicitly prohibits the giving of "property" to foreign public officials or officials of public international organizations.¹³⁷ A "bribe," under Chinese law, therefore, refers specifically to "property," and whatever is given must qualify as such to constitute the crime of bribery.¹³⁸ As a result, the scope of the term "property" is a crucial jurisdictional concept in the PRC anti-bribery legal framework. China's narrow definition of the term, and consequently its narrow definition of "bribe," has become a source of criticism among Chinese and international legal scholars as a great weakness of the PRC anti-bribery framework.¹³⁹

In the context of commercial bribery,¹⁴⁰ "property," under Chinese law, includes: (1) money; (2) property in kind; and (3) property benefits that have an actual measurable value in money, such as a "provision of housing decoration, membership cards containing money, token cards (money), and travel expenses," the value of which is determined based on actual costs and expenses.¹⁴¹ To qualify as a "bribe" under Chinese law, therefore, the "property" exchanged must be of a measurable pecuniary value.

¹³⁷ *Id.*

¹³⁸ Liang, *supra* note 78, at 1. It should be noted that the other bribery provisions in the Criminal Law concerning official and non-official bribery refer to a "bribe" as "money or property." The scope, however, appears to be the same, as "money" is included within the definition of "property." *See id.*

¹³⁹ *See* Liang, *supra* note 78, at 1; *see also* Griffith & Wang, *supra* note 57.

¹⁴⁰ While interpretations of "property," jointly issued by the Supreme People's Court and Supreme People's Procuratorate, refer specifically to non-official commercial bribery and therefore might seem inapplicable to foreign official bribery, the interpretations nonetheless may be applicable to cases of foreign official bribery because the foreign official bribery provision "specifically references 'improper commercial benefit,' is drafted in the same article that prohibits giving commercial bribes, and references the penalties for commercial bribery regulations." Sommers & Zhang, *supra* note 50, at 62.

¹⁴¹ Commercial Bribery Opinions, *supra* note 95, at art. VII.

The UNCAC, on the other hand, uses the term “undue advantage” to refer to a “bribe” in the foreign official bribery context.¹⁴² This term, while undefined in the UNCAC, appears to be quite broad and, at the very least, does not seem limited to undue advantages of a pecuniary nature. Additionally, the UNCAC broadly defines “property” to include “assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible,”¹⁴³ which certainly looks broader than China’s definition of the term.

China’s definition of “bribe,” therefore, falls below UNCAC standards because it does not include the giving of non-pecuniary interests and focuses too heavily on the monetary value of the “property” given.¹⁴⁴ Professor Liang Genlin at Peking University Law School suggests that many domestic officials escape criminal punishment for “forms of bribery that are not committed by directly trading ‘public power’ with ‘private wealth.’”¹⁴⁵ This occurs in circumstances where the illegal gains demanded or received are not directly translatable into some value in money, and therefore fail to qualify as “property” for purposes of bribery.¹⁴⁶ Some examples include benefits in the form of the settling of claims, the reduction of interest on loans, the transfer of personnel, job promotions, chances to study abroad, free entertainment, and sexual services.¹⁴⁷ If domestic Chinese officials are escaping punishment for accepting such benefits, those who provide them—already more tolerated in the domestic context—are even more likely to proceed unabated in the foreign context where less harm can be done to the CCP’s reputation and to domestic PRC interests generally.

To improve the law, Liang suggests that the definition of “bribe” be expanded to explicitly include non-pecuniary interests, or that, at the very least, the existing definition should be interpreted broadly so that those types of illegal gains “could reasonably be construed as relating to ‘property.’”¹⁴⁸ Liang also proposes that the definition of “bribe” take the social implications of the bribe into account and that the value of the bribe should be only one of a number of factors considered, along with the means by which, and circumstances under which, the bribe is made,

¹⁴² UNCAC, *supra* note 32, at art. 16, ¶ 1.

¹⁴³ *Id.* at art. 2(d).

¹⁴⁴ Liang, *supra* note 78, at 1–2; *see also* Griffith & Wang, *supra* note 57.

¹⁴⁵ Liang, *supra* note 78, at 1.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 2.

as well as the extent to which the bribe damages society and the integrity of the system.¹⁴⁹ Without incorporating at least some of these changes into the scope of “bribe,” the PRC’s foreign official bribery provision, and its anti-bribery framework in general, falls short of full implementation of UNCAC obligations.

B. THE SCOPE OF PROHIBITED CONDUCT

As a result of definitional discrepancies, China’s foreign official bribery provision also only appears to proscribe the actual “giving” of bribes to foreign officials.¹⁵⁰ Unlike Article 16 of the UNCAC, China’s provision does not mention whether “promising” or “offering” bribes to foreign officials is prohibited and is silent as to whether “indirectly” giving, promising, or offering bribes is also within the realm of forbidden conduct.¹⁵¹ The absence of these (or similar) terms, therefore, suggests that China’s foreign official bribery provision, at least facially, falls below UNCAC standards.

This oversight on the part of Chinese legislators, however, appears to be intentional. In the domestic context, for example, “offering” and “introducing” bribes to officials, as well as “making use of influence to take bribes” through persons who have close relationships to officials (i.e., indirectly), are all expressly prohibited under the Criminal Law.¹⁵² This intentional oversight, therefore, suggests that China’s foreign official bribery provision may be interpreted narrowly so as not to encompass the full scope of criminal conduct specified under UNCAC Article 16. Prosecutorial discretion in enforcement aside, by limiting the scope of prohibited conduct and consequently minimizing the extent of culpability under the law, the result may be that the provision will have less of a deterring effect than it otherwise could have if the omitted terms had been included. This appears to be incongruent

¹⁴⁹ *Id.*

¹⁵⁰ Amendment VIII, *supra* note 40, § 29.

¹⁵¹ *See id.*

¹⁵² Criminal Law, arts. 388A, 389, 392, and 393; *see also* Zuigao Renmin Fayuan, Zuigao Renmin Jianchayuan Guan yu zhi zing “Zhonghua Renmin Gongheguo Xing fa” que ding zui ming de bu chong gui ding (si) (最高人民法院、最高人民检察院关于执行《中华人民共和国刑法》确定罪名的补充规定(四)) [Supplementary Provisions IV of the Supreme People’s Court and the Supreme People’s Procuratorate on the Determination of Crime Names in the Enforcement of the Criminal Law of the People’s Republic of China] (promulgated by the Sup. People’s Proc., Oct. 14, 2009, effective Oct. 16, 2009) (LawInfoChina).

with the goals of seeking to maximize the deterrence of bribery on a global level under the UNCAC.

Yet, intentionally limiting the scope of the provision, at least initially, may serve the interests of the CCP in the long run. On the one hand, it appears that limiting the scope on paper would remove some discretionary leeway and make it more difficult to ramp up enforcement in the future when need be. After all, from a logical standpoint, it is easier to weakly enforce a broadly written law in order to take a softer stance against the prohibited conduct at first and then allow for more aggressive application down the road once policies change, than it would be to try to aggressively enforce or amend a narrowly written law in order to be tougher on bribery later on. Drafting a broadly written law at the outset, however, would rob the Party of the precious opportunity in the future to bolster its claim to legitimacy by amending the law to make it more robust in the name of taking a tougher stance.

Nevertheless, while criminalizing the “giving” of bribes to foreign officials is certainly a step in the right direction, the PRC’s foreign official bribery provision as written fails to encompass all types of conduct that are intended to establish culpability under the UNCAC and, therefore, falls short of true implementation of Article 16.

IV. PRESENT AND FUTURE IMPLICATIONS

Despite China’s professed resistance to a more rigorous implementation mechanism, there is no evidence that China committed to the UNCAC with an intention of not complying with its treaty obligations.¹⁵³ To the contrary, as described above, China has made efforts to gradually implement its obligations under the UNCAC by establishing an anti-corruption body (the NBCP) as well as through numerous amendments to its Criminal Law. The recent adoption of the foreign official bribery provision is just the latest step in China’s gradual approach. The PRC’s resistance to a more internationally scrutinized implementation mechanism, on the other hand, is likely to be grounded in the CCP’s fear that a robust review process will expose even greater problems in China and provide for more ammunition for public resentment domestically.¹⁵⁴

¹⁵³ Lewis, *supra* note 10, at 92.

¹⁵⁴ *Id.* at 92–93.

Nonetheless, China does have a strong incentive to continue to actively participate in the development of the UNCAC in order to seek the return of assets and fugitives that have, and continue to, flee abroad.¹⁵⁵ According to a study posted (briefly and then quickly removed) on the People's Bank of China website in 2011, from the mid-1990s to 2008, between 16,000 and 18,000 corrupt officials and employees of state-owned enterprises fled China with over \$120 billion USD they had stolen, many of whom ended up in the United States, Australia, Canada, and the Netherlands.¹⁵⁶ For some perspective, \$120 billion USD averages out to about \$7 million USD per official and is roughly equal to the PRC's total allocation to education from 1978 to 1998.¹⁵⁷ Success in recovering assets and fugitives who have fled abroad, therefore, would provide the CCP with an opportunity to receive positive publicity, thereby bolstering its claim to legitimacy and deterring those who would otherwise seek to flee as a way of avoiding punishment.¹⁵⁸ Lewis sums it up quite well: "China does not want to air its dirty laundry to the world, but it does want help washing it."¹⁵⁹ Therefore, while the PRC may not be expected to lead the way in the demand for peer review of treaty implementation anytime soon, continued participation in the UNCAC does provide hope that China will gradually increase its efforts in the fight against global corruption.

Furthermore, a once-a-decade transition at the top of the CCP leadership just occurred in November 2012,¹⁶⁰ which only heightens concerns about maintaining and improving the Party's claim to legitimacy. In his first two speeches since formally taking over as General Secretary of the Communist Party, Xi Jinping promised to tackle the pressing problem of corruption, the spread of which he cautioned

¹⁵⁵ *Id.*

¹⁵⁶ *Chinese Officials Stole \$120 Billion, Fled Mainly to U.S.*, BBC NEWS (June 17, 2011), <http://www.bbc.co.uk/news/world-asia-pacific-13813688>.

¹⁵⁷ Xin Haiguang, *China's Great Swindle: How Public Officials Stole \$120 Billion and Fled the Country*, TIME, June 26, 2011, available at <http://www.time.com/time/world/article/0,8599,2079756,00.html>.

¹⁵⁸ Lewis, *supra* note 10, at 93.

¹⁵⁹ *Id.* at 92.

¹⁶⁰ Edward Wong, *Ending Congress, China Presents New Leadership Headed by Xi Jinping*, N.Y. TIMES (Nov. 14, 2012), <http://www.nytimes.com/2012/11/15/world/asia/communists-conclude-party-congress-in-china.html>; see also William Wan & Keith B. Richburg, *Xi Jinping Takes Over Reins of Chinese Communist Party at Time of Heightened Anxiety*, WASH. POST (Nov. 14, 2012), http://articles.washingtonpost.com/2012-11-14/world/35503315_1_xi-leadership-transition-week-long-party-congress.

could “doom the Party and the state.”¹⁶¹ Although Xi’s warnings may be consistent with those that Chinese leaders have delivered in recent years,¹⁶² some analysts believe the remarks to be a sign of the new leadership’s determination to fight corruption in the years to come.¹⁶³ Whatever the case may be, the more the CCP continues to rely on this kind of rhetoric and develop its anti-corruption legal framework in an effort to legitimize itself, the more likely it is going to have to actually use the framework to earn the needed legitimacy boost. This method will only truly serve the Party in the long run if it actually produces some kind of meaningful deterring effect on the corruption that harms its image domestically and abroad. And in order to have such an effect, the laws must, at least eventually, be operational and enforced.

CONCLUSION

The CCP will be in constant legitimacy limbo so long as the Party continues to monopolize power in China in the face of allegedly abusing that power. The explosive growth that the PRC has experienced over the past few decades that has prolonged a model where, no matter how wealthy Party leaders make themselves, the average person in China remains content in the fact that he or she is better off now, economically, than before, is unsustainable. The model invariably risks implosion once China’s economy decelerates, and the Party is cognizant of this as it uses every tool at its disposal to delay the inevitable slowdown. Ultimately, however, Party leadership understands that the only way to soften the blow and sustain a baseline level of legitimacy needed to continue to monopolize power in China in the long run is to actively seek to eliminate the abuses and corruption that would fuel discontent.

China’s recently enacted foreign official bribery provision, although apparently lacking in inherent legal effect for now, is nonetheless important for what it represents: CCP leadership is trying to curb corruption and is aware that it will have to continue to try harder. Moreover, the PRC is engaging the fight against corruption on the international level, and there is some hope, therefore, that China may

¹⁶¹ Edward Wong, *New Communist Party Chief in China Denounces Corruption in Speech*, N.Y. TIMES (Nov. 19, 2012), <http://www.nytimes.com/2012/11/20/world/asia/new-communist-party-chief-in-china-denounces-corruption.html>.

¹⁶² *Id.*

¹⁶³ Zhao Yinan, *Xi Repeats Anti-graft Message to Top Leaders*, CHINADAILY (Nov. 20, 2012), http://www.chinadaily.com.cn/cndy/2012-11/20/content_15942984.htm.

eventually become not only a global leader in the supply of these bribes, but a global leader in the fight as well.

Additionally, and perhaps more importantly, the days of the CCP's two-fold approach to minimizing the delegitimizing effects of corruption are numbered. Sweeping the secrets under the rug is becoming too risky, as the recent slow-moving train wreck that ended Bo Xilai's political career and continues to cause embarrassment for the CCP carries on down its destructive path. Nevertheless, although greater transparency and increasing reliance on legal solutions are expected down the road, the CCP is unlikely to stray from the tempered gradual approach that has served it well so long as the PRC continues to experience the high rate of economic growth that ultimately sustains the Party's legitimacy in China.