

# Endemic Corruption in the People's Republic of China

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## I. INTRODUCTION

As China grows in power in the global economy,<sup>1</sup> the need to address endemic corruption within the government has become increasingly important. Chinese officials regard corruption as one of the greatest threats to China's growing economy and the political stability of the Communist Party of China (CPC).<sup>2</sup> The indirect costs of corruption, including efficiency losses of goods and services, and damage to the environment and public health, are incalculable.<sup>3</sup> In 2013, China ranked 80th out of 177 countries and territories in Transparency International's Corruption Perceptions Index and scored 40 points on a scale of 0 (highly corrupt) to 100 (very clean).<sup>4</sup> Transparency International's Bribe Payer's Index for 2011 ranks China 27th out of 28 among the world's leading economies.<sup>5</sup>

The nature and development of corruption in China is deeply rooted in its culture and relates back to the Confucian concept of social hierarchy,<sup>6</sup> as well as in the social and cultural practices based on *guanxi*.<sup>7</sup> Directly translated to mean "relationship," *guanxi* describes special relationships that often extend beyond personal connections and can be more influential than laws and rules.<sup>8</sup> *Guanxi* relationships can develop through mutual interests or common goals, and cultivate through activities such as gift-giving.<sup>9</sup> The emphasis on relationships, especially in the business context, can ultimately lead to bribery and corruption as businesses and government officials seek to exploit their networks to gain private advantages.<sup>10</sup> Similarly, Confucianism defines individuals by their families and interconnections within a social network.<sup>11</sup> Businesses in traditional Chinese

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1. See WAYNE M. MORRISSON, CONG. RESEARCH SERV., RL33534, China's Economic Rise: History, Trends, Challenges, and Implications for the United States 1, 37–38 (2015), <http://fas.org/sgp/crs/row/RL33534.pdf>.

2. *Id.* at 37.

3. Minxin Pei, *Corruption Threatens China's Future*, Policy Brief No. 55, CARNEGIE ENDOWMENT FOR INT'L PEACE, 5 (Oct. 2007), [http://carnegieendowment.org/files/pb55\\_pei\\_china\\_corruption\\_final.pdf](http://carnegieendowment.org/files/pb55_pei_china_corruption_final.pdf).

4. *Corruption Perceptions Index 2013*, TRANSPARENCY INT'L, <http://www.transparency.org/cpi2013/results> (last visited Oct. 2, 2014) (stating that almost 70% of countries scored below 50 out of 100).

5. Deborah Hardoon & Finn Heinrich, *Bribe Payers Index 2011*, TRANSPARENCY INT'L 5 (2011), <https://www.transparency.org/bpi2011/results>.

6. See generally Patricia Pattison & Daniel Herron, *The Mountains Are High and the Emperor Is Far Away: Sanctity of Contract in China*, 40 AM. BUS. L.J. 459, 478–79 (2003).

7. See Micaela Tucker, "Guanxi!"- "Gesundheit!" an Alternative View on the "Rule of Law" Panacea in China, 35 VT. L. REV. 689, 693 (2011).

8. *Id.* at 694–95.

9. *Id.* at 696–97.

10. See *id.* at 698–700.

11. Pattinson, *supra* note 6, at 483.

culture, consequently, did not operate independently of family and social relationships.<sup>12</sup> Since these types of relationships often took precedent over contractual ones, preserving and maintaining connections within a community was important in order to gain benefits and privileges.<sup>13</sup>

Since taking office in 2013, President Xi Jinping has emphasized the importance of enforcing his campaign against corruption.<sup>14</sup> The number of bribery convictions issued in recent years and the possibility of receiving the death penalty for serious corruption-related crimes underscores the seriousness with which the CPC considers corruption.<sup>15</sup> The penalties for bribery are harsh compared to most other countries and serve as a strong method of deterrence.

Part II of this Article discusses the PRC's anti-corruption laws in the individual and commercial contexts and note the inherent problems in the CPC's enforcement efforts. Part III will discuss the impact of these provisions on China's economy, on China's rule of law, and on foreign businesses. Part IV will provide recommendations on how China can enhance its anti-corruption enforcement efforts and improve transparency of its laws, taking cues from the U.S. Foreign Corrupt Practices Act (FCPA) and the U.K. Bribery Act. Part V will conclude by explaining why China should join the Organization for Economic Co-operation and Development (OECD) Anti-Bribery Convention to guarantee implementation of its laws.

## II. ANTI-CORRUPTION LEGAL FRAMEWORK

Two separate sets of laws, PRC Criminal Law (“Criminal Law”)<sup>16</sup> and the Anti-Unfair Competition Law of the People's Republic of China (AUCL),<sup>17</sup> create the framework for China's anti-corruption laws. The

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12. *Id.*

13. *Id.* at 486.

14. *See infra* Part II.A.

15. *See* Ji Zhebu, *Crime and Punishment for Corrupt Officials*, CHINA DAILY (Aug. 29, 2013, 7:26 AM), [http://usa.chinadaily.com.cn/epaper/2013-08/29/content\\_16929435.htm](http://usa.chinadaily.com.cn/epaper/2013-08/29/content_16929435.htm).

16. Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) [hereinafter Criminal Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., on July 1, 1997, effective Mar. 14, 1997), arts. 163–64, 385–93, P.R.C. LAWS, <http://www.cecc.gov/resources/legal-provisions/criminal-law-of-the-peoples-republic-of-china>.

17. Zhonghua Renmin Gongheguo Fan Bu Zheng Dang Jing Zheng Fa (中华人民共和国反不正当竞争法) [Law Against Unfair Competition of the People's Republic of China] (promulgated by the Nat'l People's Cong., Sept. 2, 1993, effective Sept. 2, 1993), art. 8, P.R.C. LAWS, <http://www.cecc.gov/resources/legal-provisions/prc-unfair-competition-law-english-and-chinese-text>.

AUCL addresses commercial bribery, while the Criminal Law addresses both official bribery and commercial bribery.<sup>18</sup> Additionally, to comply with the United Nations Convention against Corruption (UNCAC) requirements,<sup>19</sup> the PRC amended the Criminal Law to prohibit bribery of foreign officials.<sup>20</sup>

These anti-corruption provisions prohibit state functionaries,<sup>21</sup> state-owned entities, non-state entities, and employees from taking advantage of their positions to demand bribes or illegally accept bribes to secure benefits for the briber.<sup>22</sup> They also prohibit individuals from receiving illegitimate benefits by giving bribes to state functionaries, state-owned entities, non-state entities, and employees, or from receiving improper commercial benefits through bribing foreign functionaries or officials of international public organizations.<sup>23</sup> Furthermore, individuals may not give and accept rebates or service charges while conducting economic activities.<sup>24</sup> Another set of disciplinary rules issued by the CPC Central Committee in 2010 provide guidelines for CPC leaders and cadres to follow.<sup>25</sup> Prohibited activities include accepting cash or financial instruments as gifts, engaging in profit-making activities, and taking advantages of their positions to receive illegitimate gains.<sup>26</sup>

Criminal penalties for parties accepting bribes (the “demand side”) are generally harsher than those for parties giving bribes, and fall within the

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18. See Criminal Law of the People’s Republic of China, *supra* note 16, arts. 163–64.

19. See G.A. Res. 58/4, United Nations Convention against Corruption, art. 16 (Oct. 31, 2003) [hereinafter UNCAC].

20. See Criminal Law of the People’s Republic of China, *supra* note 16, art. 164.

21. *Id.* art. 93 (“Persons who perform public service in State-owned companies or, enterprises, institutions or people’s organizations, persons who are assigned by State organs, State-owned companies, enterprises or institutions to companies, enterprises or institutions that are not owned by the State or people’s organizations to perform public service and the other persons who perform public service according to law shall all be regarded as State functionaries.”).

22. See Criminal Law of the People’s Republic of China, *supra* note 16, arts. 163, 385–88; Law Against Unfair Competition of the People’s Republic of China, *supra* note 17, art. 8.

23. Criminal Law of the People’s Republic of China, *supra* note 16, arts. 163–64, 389–93; Law Against Unfair Competition of the People’s Republic of China, *supra* note 17, art. 8.

24. Criminal Law of the People’s Republic of China, *supra* note 16, arts. 163, 387, 389, 391, 393; Law Against Unfair Competition of the People’s Republic of China, *supra* note 17, art. 8.

25. *Chinese Communist Party Issues Code of Ethics to Ensure Clean Governance*, XINHUA NEWS AGENCY (Feb. 23, 2010), [http://news.xinhuanet.com/english2010/china/2010-02/23/c\\_13184967.htm](http://news.xinhuanet.com/english2010/china/2010-02/23/c_13184967.htm) (stating that the Central Committee updated the Code of Ethics for CPC Leaders and Cadres on Clean Government on February 2010).

26. *Id.*

Criminal Law.<sup>27</sup> Notably, foreign official bribery cases seem to punish only the party that provides the bribe (the “supply side”).<sup>28</sup> For individuals accepting bribes, these sanctions include fines, criminal detention, fixed-term imprisonment, confiscation of property, and in the most serious circumstances, the death penalty.<sup>29</sup> State-owned organizations and companies convicted of bribery are subject to fines, and the employees who are directly responsible for the crime are subject to fixed-term imprisonment or criminal detention.<sup>30</sup> Cases that fall within the AUCL are generally less severe, subjecting them only to administrative penalties<sup>31</sup> and confiscation of illegal income.<sup>32</sup>

The Supreme People’s Court<sup>33</sup> and Supreme People’s Procuratorate<sup>34</sup> have recently clarified and expanded upon bribery enforcement, focusing on the penalties for bribe-givers.<sup>35</sup> The guidance establishes monetary thresholds for individual bribes to state officials, grading various ranges of payments from “serious circumstances” of bribery to “major loss to national interest” and pairing respective penalties for each offense.<sup>36</sup> It also expands the scope of “improper benefits” in bribery offenses to include “violating principles of fairness and justice to gain a competitive advantage [in] economic, organizational personnel management or other activity.”<sup>37</sup> One other notable section of the interpretation provides that any individual or corporate entity accused of bribery who voluntarily

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27. 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. COUNSEL, Aug. 2010, at 11, <http://www.metrocorpccounsel.com/pdf/2010/August/11.pdf>.

28. Criminal Law of the People’s Republic of China, *supra* note 16, art. 164.

29. *Id.* arts. 163–64, 383, 386.

30. *Id.* art. 387.

31. Griffith & Wang, *supra* note 27.

32. Law Against Unfair Competition of the People’s Republic of China, *supra* note 17, art. 22.

33. The Supreme People’s Court is the highest judicial court in China. XIANFA § 7, art. 127 (2004) (China), [http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content\\_1372991.htm](http://www.npc.gov.cn/englishnpc/Constitution/2007-11/15/content_1372991.htm).

34. The Supreme People’s Procuratorate is the highest agency in China that exercises and supervises prosecutorial authority at all state and local levels. *Id.* § 7, art. 132.

35. See The Supreme People’s Court and Supreme People’s Procuratorate Interpretation on Several Issues Regarding the Specific Application of Law in Handling Criminal Cases of Bribery (promulgated by the Sup. People’s Ct. and Sup. People’s Proc., effective Jan. 1, 2013) (China), <http://chinalawtranslate.com/en/spc-spp-interpretation-on-bribery-crimes>.

36. *Id.* arts. 1–4.

37. *Id.* art. 12.

confesses before prosecution begins may potentially receive a reduced punishment or a waiver of punishment.<sup>38</sup> The individual or entity may also receive some leniency if it truthfully confesses to bribery post-prosecution.<sup>39</sup>

### A. Bribery of Officials

The Central Commission for Discipline Inspection (CCDI) of the CPC regulates and enforces Party discipline.<sup>40</sup> The committee has the authority to implement anti-corruption policies, examine corruption cases, and punish corrupt members,<sup>41</sup> but the most it can do is expel officials from the CPC.<sup>42</sup> The CCDI operates outside of the legal system, so it does not require investigators to obtain warrants before seizing evidence.<sup>43</sup> Furthermore, it has the power to imprison and interrogate any Party official.<sup>44</sup>

Since China's current president, Xi Jinping, launched his anti-corruption campaign in late 2012,<sup>45</sup> the country has seen unprecedented targeting of government officials. The CCDI investigated approximately 182,000 party members in 2013 alone<sup>46</sup> and disciplined 62,953 officials from January to May 2014, an increase of 34.7% over the same period in 2013.<sup>47</sup> The CPC further stressed its focus on curbing corruption by establishing a five-year (2013-2017) plan to build a system to punish and prevent corruption.<sup>48</sup> The plan calls for more severe punishments and emphasizes dealing with cases that involve power-for-money deals, judicial

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38. *Id.* art. 7.

39. *Id.* art. 8.

40. Information Office of the State Council of China, *China's Efforts to Combat Corruption and Build a Clean Government (White Paper)*, EMBASSY OF CHINA IN THE REPUBLIC OF INDIA (Dec. 12, 2010), <http://in.china-embassy.org/eng/xwfw/xxfb/t782350.htm>.

41. *Id.*

42. William Wan, *Secretive Agency Leads Most Intense Anti-Corruption Effort in Modern Chinese History*, WASH. POST, July 2, 2014, available at [http://www.washingtonpost.com/world/asia\\_pacific/secretive-agency-leads-most-intense-anti-corruption-effort-in-modern-chinese-history/2014/07/02/48aff932-cf68-11e3-937f-d3026234b51c\\_story.html](http://www.washingtonpost.com/world/asia_pacific/secretive-agency-leads-most-intense-anti-corruption-effort-in-modern-chinese-history/2014/07/02/48aff932-cf68-11e3-937f-d3026234b51c_story.html).

43. *Id.*

44. *Id.*

45. Upon taking the Party leadership, President Xi Jinping vowed to catch both “tigers” and “flies”—both powerful and lowly officials. Andrew Jacobs, *China Presses Crackdown Against Graft*, N.Y. TIMES, Apr. 21, 2013, <http://www.nytimes.com/2013/04/22/world/asia/china-expands-crackdown-on-anticorruption-activists.html>.

46. Linling Wei & Bob Davis, *'Shock and Awe': Meet China's Top Enforcer*, WALL ST. J., Aug. 21, 2014, <http://online.wsj.com/articles/chinas-top-graft-buster-probing-thousands-1408588202>.

47. Russell Leigh Moses, *To No End: Why China's Corruption Crackdown Won't Be Stopping Soon*, WALL ST. J., July 21, 2014, <http://blogs.wsj.com/chinarealtime/2014/07/21/to-no-end-why-chinas-corruption-crackdown-wont-be-stopping-soon/>.

48. 2013-2017 Work Plan for Establishing and Completing Systems for The Punishment and Prevention of Corruption (promulgated by the 18th Nat'l Cong. of the CPC), <http://chinalawtranslate.com/en/2013-2017-anti-corruption-plan/>.

corruption, major violations of political discipline, corruption-induced mass incidents, commercial bribery, and official selection.<sup>49</sup>

Furthermore, President Xi is specifically targeting Party officials by passing regulations. For example, the anti-extravagance campaign prohibits officials from spending public money on luxury goods, and accepting expensive gifts.<sup>50</sup> This campaign attempts to combat the increasing wealth gap, diminish the appearance of official corruption in the country, and eliminate lavish gift-giving as a form of bribery.<sup>51</sup> The CPC is also attempting to impede formation of illegal deals between officials and business executives by advising them to refrain from inherently personal activities, such as vacationing with other party members, playing mahjong<sup>52</sup> and poker, and spending public money on “study visits” to famous attractions.<sup>53</sup> Additionally, to ensure that only those loyal to the party will manage them, the CPC will cut the salaries of top executives at some of China’s largest state-owned companies at the end of 2014.<sup>54</sup> These executives will also lose other benefits, such as golf-club memberships, gym memberships, and physical therapy cards.<sup>55</sup> Moreover, the CPC has extended its efforts to locate and capture several corrupt officials and suspects who have fled the country.<sup>56</sup>

The investigations of China’s most high-ranking officials, including Bo Xilai, Liu Tienan, Xu Caihou, and Zhou Yongkang, signify the CPC’s determination to eliminate corruption. The CPC sentenced Bo Xilai, a retired party chief of Chongqing, to life in prison for bribe-taking, embezzlement,

49. See *China Focus: China Maintains Pressure with 5-year Anticorruption Plan*, XINHUA NEWS AGENCY (Dec. 25, 2013), [http://news.xinhuanet.com/english/china/2013-12/26/c\\_132996415.htm](http://news.xinhuanet.com/english/china/2013-12/26/c_132996415.htm).

50. Laura Burkitt, *China’s Frugality Fight Claims New Casualties*, WALL ST. J. (Feb. 6, 2013), <http://blogs.wsj.com/chinarealtime/2013/02/06/local-figures-tv-ads-take-hit-from-corruption-push/>.

51. See *id.*

52. Chun Han Wong, *Chinese Communist Party Members Urged to Abstain from Mahjong, Other ‘Small Thrills,’* WALL ST. J. (Oct. 28, 2014), <http://blogs.wsj.com/chinarealtime/2014/10/28/chinese-communist-party-members-urged-to-abstain-from-mahjong-other-small-thrills> (defining mahjong as a tile-based game commonly played by four players).

53. See *id.*

54. Linling Wei & Bob Davis, *China’s Assault on Corruption Enters Executive Suite*, WALL ST. J. (Oct. 26, 2014), available at <http://online.wsj.com/articles/chinas-assault-on-corruption-enters-executive-suite-1414345082>.

55. *Id.*

56. See *88 nailed in China’s int’l manhunt for fugitives*, CHINADAILY.COM (Sept. 21, 2014), [http://www.chinadaily.com.cn/china/2014-09/21/content\\_18634312.htm](http://www.chinadaily.com.cn/china/2014-09/21/content_18634312.htm).

and abuse of power.<sup>57</sup> It also sentenced Liu Tienan, former deputy director of the National Development and Reform Commission and former head of the National Energy Administration, to life in prison<sup>58</sup> after he admitted at trial to accepting millions of dollars in bribes.<sup>59</sup> The CPC Political Bureau expelled Xu Caihou, the retired vice-chairman of China's Central Military Commission, from the CPC for accepting bribes for himself and through family members, and using his position to promote others.<sup>60</sup> Most recently, the CPC arrested Zhou Yongkang, a retired domestic security chief and formerly one of China's top nine leaders, in late 2014 for leaking state secrets and taking advantage of his position for financial gain.<sup>61</sup> The most notable aspect of these investigations is that the CPC is targeting senior officials who previously enjoyed de facto immunity.<sup>62</sup> By investigating Zhou Yongkang, the CPC rejected the decades-old unwritten rule that exempted incumbent and retired Politburo Standing Committee<sup>63</sup> members from investigation for corruption.<sup>64</sup> However, prosecution of these members will still require approval of the incumbent Standing Committee.<sup>65</sup>

While the Party tries corruption cases in court, the judiciary does not engage in independent decision making due to the construction of the judiciary and the CPC's absolute power.<sup>66</sup> The hierarchical structure of the judiciary permits Party-leaders or court-leaders to instruct a subordinate

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57. Michael Wines, *In Rise and Fall of Chinese Boss, a Ruthless Arc*, N.Y. TIMES, May 7, 2012, at A1; see also Edward Wong, *China: Court Rejects Appeal By Fallen Chinese Official*, N.Y. TIMES, Oct. 25, 2013, at A6.

58. See Josh Chin, *China Sentences Liu Tienan to Life in Prison*, WALL ST. J. (Dec. 10, 2014), available at <http://www.wsj.com/articles/china-sentences-liu-tienan-to-life-in-prison-xinhua-says-1418179307>.

59. See James Areddy, *World News: Chinese Ex-Official Admits to Corruption*, WALL ST. J., Sept. 25, 2014, at A16.

60. See An Baijie, *Top-level General Expelled for Graft*, CHINADAILY.COM (July 1, 2014), [http://www.chinadaily.com.cn/china/2014-07/01/content\\_17627820.htm](http://www.chinadaily.com.cn/china/2014-07/01/content_17627820.htm).

61. See James T. Areddy, *China's Communist Party Ejects Former Security Chief Zhou*, WALL ST. J. (Dec. 5 2014), available at <http://www.wsj.com/articles/chinas-communist-party-ejects-former-security-chief-zhou-1417798750>.

62. Minxin Pei, Opinion, *Crony Communism in China*, N.Y. TIMES, Oct. 17, 2014, <http://www.nytimes.com/2014/10/18/opinion/crony-communism-in-china.html>.

63. *Id.*

64. See Benjamin Kang Lim & Ben Blanchard, *China's Ex-Security Chief Helping Probe, Not Target: Sources*, REUTERS (Sept. 4, 2013), <http://www.reuters.com/article/2013/09/04/us-china-politics-idUSBRE9830D220130904>.

65. *Id.*

66. *Walking on Thin Ice: Control, Intimidation and Harassment of Lawyers in China*, HUMAN RIGHTS WATCH (2008) [hereinafter Human Rights Watch], <http://www.hrw.org/reports/2008/china0408/5.htm> (statement of former SPC President Xio Yang) (“The power of the courts to adjudicate independently doesn’t mean at all independence from the Party. It is the opposite, the embodiment of a high degree of responsibility vis-à-vis Party undertakings.”).



judge to rule on a case in a specific way.<sup>67</sup> This decision-making mechanism can allow the personal preferences of a leader or judge to prevail without regard to legal interpretation and adjudication.<sup>68</sup> Since these subordinate judges are required to follow the chief decision-maker's instruction, they are forced to either misrepresent the fact-finding process or the meaning of the law to support the predetermined outcome of a case, thus undermining the independence of both the judiciary and the rule of law.<sup>69</sup> As a result, application of this practice has perpetuated a form of corruption within the judicial system.<sup>70</sup>

The underlying reason for this approach lies within the principle of the "leadership of the Communist Party."<sup>71</sup> Historically, the CPC has opposed the idea of an independent judiciary<sup>72</sup> and has maintained unchallenged rule over China.<sup>73</sup> Furthermore, because the CPC is concerned with its reputation,<sup>74</sup> it will heavily censor information released to the public regarding corrupt Party members to avoid the possibility of humiliating the regime.<sup>75</sup> A related risk to the CPC in accusing a state official of bribery is that it may also implicate other Party members. Thus, any sensitive information concerning past investigations is kept under tight supervision and requires special clearance for access.<sup>76</sup> For these reasons, corruption cases begin with a pre-investigation phase which can only proceed to an official investigation if the high-ranking Party leaders, including members of the Standing Committee, approve it.<sup>77</sup> However, by the time it reaches that stage, a finding of guilt is often inevitable and the CPC has essentially

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67. See Ling Li, *The "Production" of Corruption in China's Courts*, 38 USALI (2011), <http://usali.org/wp-content/uploads/2011/07/The-production-of-corruption-in-Chinas-courts.pdf>.

68. See *id.* at 40.

69. *Id.*

70. See, e.g., CPC Names Corrupt Judicial Officials, CHINADAILY.COM (Sept. 29, 2014), [http://www.chinadaily.com.cn/china/2014-09/29/content\\_18682687.htm](http://www.chinadaily.com.cn/china/2014-09/29/content_18682687.htm).

71. See Human Rights Watch, *supra* note 66.

72. *Id.*

73. SUSAN V. LAWRENCE & MICHAEL F. MARTIN, CONG. RESEARCH SERV., R41007, UNDERSTANDING CHINA'S POLITICAL SYSTEM 14 (2013), <http://fas.org/sgp/crs/row/R41007.pdf>.

74. F. Joseph Warin, Michael S. Diamant & Jill M. Pfenning, *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 41 (2010), <http://www.gibsondunn.com/publications/Documents/Warin-Diamant-FCPAComplianceInChina.pdf>.

75. *Id.*

76. William Wan, *How the Secretive, Powerful Agency in Charge of Investigating Corrupt Chinese Officials Works*, WASH. POST (July 3, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/07/03/how-the-communist-party-investigates-its-own/>.

77. *Id.*

decided the disposition of the case.<sup>78</sup> As a result of censorship and secrecy, the courts and Party, more motivated by politics, often do not fairly adjudicate corruption cases involving Party officials.

Political motivations may also help explain why rampant corruption still exists despite the widespread publication of corruption cases.<sup>79</sup> In the past decade, the CPC's focus on capturing high-ranking individuals resulted because of internal power struggles and economic concerns.<sup>80</sup> The Party often targeted members of competing factions to weaken political rivals and their corporate supporters.<sup>81</sup> For example, the CPC convicted four employees of Rio Tinto, a British-Australian mining company, of bribery charges in 2009.<sup>82</sup> The Rio Tinto investigation was alleged to have been politically motivated because the company was competing with the government's steel industry over iron ore prices.<sup>83</sup> In the present context, many believe President Xi also had political motives to arrest Zhou Yongkang because Zhou worked closely with Bo Xilai—Xi's political adversary.<sup>84</sup> However, the incentives behind President Xi's anti-corruption drive remain unclear because the campaign still remains a high priority,<sup>85</sup> despite the fact that he has already captured and punished several high-ranking political enemies.

### B. Compliance with the UNCAC

The UNCAC has 140 signatories and 172 parties,<sup>86</sup> and it seeks to combat corruption by encouraging cooperation between participating countries and maintaining the ideals of fairness, responsibility, and equality.<sup>87</sup> The main goals of the Convention are prevention, criminalization, international cooperation, and asset recovery.<sup>88</sup> Member states are required to criminalize

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78. *Id.*

79. See David Barboza, *Politics Permeates Anti-Corruption Drive in China*, N.Y. TIMES (Sept. 3, 2009), <http://www.nytimes.com/2009/09/04/business/global/04corrupt.html>.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Andrew Browne, *Elites Tremble as Xi Cleans House*, WALL ST. J. (Aug. 5, 2014), <http://online.wsj.com/articles/elites-tremble-as-xi-cleans-house-1407222978>.

85. See *Highlights of Communique of 4th Plenary Session of CPC Central Committee*, XINHUA NEWS AGENCY (Oct. 23, 2014), [http://news.xinhuanet.com/english/china/2014-10/23/c\\_133737957.htm](http://news.xinhuanet.com/english/china/2014-10/23/c_133737957.htm).

86. *UNCAC Signature and Ratification Status as of 1 September 2014*, U.N. OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Oct. 14, 2014).

87. UNCAC, *supra* note 19, at preamble.

88. *Id.*

the bribery of national and foreign public officials<sup>89</sup> and to establish sanctions proportional to the seriousness of the bribery offense.<sup>90</sup>

The Convention requires member nations to develop a “comprehensive and multidisciplinary approach” to prevent and correct corruption.<sup>91</sup> Each party must also develop “effective, proportionate, and dissuasive criminal and non-criminal sanctions, including monetary sanctions.”<sup>92</sup> Since the UNCAC Conference of the States Parties did not discuss the topic of implementation in initial negotiations,<sup>93</sup> it therefore grants its members a large degree of discretion on the method of implementation and enforcement of the Convention’s requirements in their national laws.<sup>94</sup> Thus, while China has indeed amended its criminal law to conform to the requirements of the UNCAC, it has approached the implementation process rather cautiously and independently.<sup>95</sup> The country’s belief that implementation should only be assessed by the government itself contrasts with many Western countries’ advocacy of both peer and expert review.<sup>96</sup> The CPC is reluctant to engage in peer review most likely because it fears that it may uncover even greater deficiencies within the government and thereby expose how truly pervasive corruption actually is in PRC.<sup>97</sup>

### C. Commercial Bribery

The AUCL provides the primary legal framework for administrative liability and commercial bribery, and prohibits transactions in which a business operator gives the recipient a bribe in order to obtain business or some other illegitimate business benefit.<sup>98</sup> The AUCL also proscribes the use of off-the-books kickbacks to secure a sale.<sup>99</sup> The Criminal Law

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89. *Id.* arts. 15–16.

90. *Id.* art. 30.

91. *Id.* at preamble.

92. *Id.* art. 26.

93. Margaret K. Lewis, *Corruption: Spurring China to Engage in International Law*, China Rts. F., no. 1 90, 91 (2009), <http://ssrn.com/abstract=1432467>.

94. Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. INT’L ECON. L. 191, 221 (2005), [http://pustakahpi.kemlu.go.id/dir\\_dok/UNCAC-Global-Achievement-or-Missed-Opportunity.pdf](http://pustakahpi.kemlu.go.id/dir_dok/UNCAC-Global-Achievement-or-Missed-Opportunity.pdf).

95. Lewis, *supra* note 93, at 92.

96. *Id.* at 91.

97. *Id.* at 92.

98. See Law Against Unfair Competition of the People’s Republic of China, *supra* note 17, art. 8.

99. *Id.*

proscribes giving employees of companies, enterprises or other entities bribes for the purpose of obtaining unlawful benefits.<sup>100</sup> The AUCL provisions treat corruption cases differently from the Criminal Law because it does not set any thresholds for the monetary value of bribes involved and encompasses a broader scope of activities.<sup>101</sup>

The State Administration for Industry and Commerce (SAIC) and county-level and above Administrations for Industry and Commerce (AICs) enforce the AUCL.<sup>102</sup> The AICs conduct special enforcement campaigns to shut down public enterprises and other monopolized businesses that abuse their monopoly positions to conduct coercive transactions.<sup>103</sup> Additionally, the AICs seek to prevent, investigate, and conduct cases where local governments and their departments abuse their administrative powers to eliminate or restrict competition.<sup>104</sup> These agencies do not regularly publish decisions about AUCL violations, but occasional SAIC press releases and a book of select anti-monopoly cases published by the SAIC provide at least some insight into enforcement practices under the AUCL.<sup>105</sup>

There has been an increased emphasis on enforcement against commercial bribery in response to the business culture in China, particularly in the pharmaceutical industry.<sup>106</sup> After China began overhauling its healthcare industry in 2009, many multinational pharmaceutical companies have come under scrutiny.<sup>107</sup> The leading case in this matter is GlaxoSmithKline's (GSK) investigation and its subsequent conviction for bribery.<sup>108</sup> Following allegations of widespread bribery in June 2013, GSK's former China executive, Mark Reilly, hired investigator Peter Humphrey and his wife Yu Yingzeng to conduct an internal investigation, but the corporate

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100. Criminal Law of the People's Republic of China, *supra* note 16, art. 164.

101. See generally Law Against Unfair Competition of the People's Republic of China, *supra* note 17 (illustrating that the AUCL prohibits bribery by "other means," but neither explicitly defines this term nor provides examples).

102. H. STEPHEN HARRIS, JR. ET. AL., ANTI-MONOPOLY LAW AND PRACTICE IN CHINA 333, 344 (2011).

103. *Id.* at 333.

104. *Id.*

105. *Id.*

106. See Laurie Burkitt, *China Raises the Heat on Glaxo: State News Outlets Run Reports Saying Pressure to Sell Led to Corruption at Drug Maker*, WALL ST. J., Sept. 3, 2013, at A.18.

107. See Lauren Burkitt, *China: A Risky Bet for Drug Makers*, WALL ST. J. (Oct. 21, 2013), <http://blogs.wsj.com/chinarealtime/2013/10/21/china-an-increasingly-risky-bet-for-drug-makers/>.

108. See Laurie Burkitt & Jeanne Whalen, *China Targets Big Pharma; GlaxoSmithKline Hit With Bribery Allegations as Health-Care Sector Soars*, WALL ST. J. (July 16, 2013), <http://www.wsj.com/articles/SB10001424127887323664204578607502156860618>.

investigators found no evidence of corruption or bribery.<sup>109</sup> Chinese officials began a separate investigation one month later and accused GSK's senior executives of using travel agencies to offer kickbacks to government officials, hospitals, and doctors to sell more drugs at higher prices.<sup>110</sup> After a secret one-day trial, the court imposed a fine of approximately \$500 million on the company and sentenced five of GSK's company managers, including Reilly, to potential prison terms of up to four years for bribing nongovernmental officials.<sup>111</sup> GSK made a statement taking full responsibility of its actions, but did not make a statement regarding bribery of government personnel due to the sensitivity of the topic.<sup>112</sup> The CPC will expel Reilly, a British national, from China after his four-year suspended prison sentence.<sup>113</sup> The court gave Reilly a more lenient sentence because he voluntarily returned to China, assisted with the investigation and confessed to bribery.<sup>114</sup>

### III. IMPACT OF ANTI-CORRUPTION EFFORTS IN CHINA

Attempts to quell government spending by officials have had an unintended effect on China's economy, and the inconsistent practices of regulatory agencies have deterred many foreign companies from considering investing in China. Moreover, increasing public distrust with the CPC has forced the Party to consider developing a truly independent judiciary to demonstrate that it is providing a fair adjudication process for those accused of bribery. Lastly, the vague anti-corruption laws and unchecked power of the CCDI have dissuaded foreign countries from assisting China in capturing officials who have fled to those countries.

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109. Hester Plumridge, *GlaxoSmithKline Found Guilty of Bribery in China U.K. Drug Maker Handed Largest Ever Corporate Fine in China*, WALL ST. J. (Sept. 19, 2014), <http://online.wsj.com/articles/glaxosmithkline-found-guilty-of-bribery-in-china-1411114817>.

110. David Barboza, *Glaxo Used Travel Firms For Bribery, China Says*, N.Y. TIMES, July 16, 2013, at B1.

111. Keith Bradsher & Chris Buckley, *China Fines GlaxoSmithKline Nearly \$500 Million in Bribery Case*, N.Y. TIMES (Sept. 19, 2014), <http://www.nytimes.com/2014/09/20/business/international/gsk-china-fines.html>.

112. *Id.*

113. Plumridge, *supra* note 109.

114. *Id.*

## A. China's Economy

The CPC's campaigns to reduce extravagance and waste have caused the luxury industry to suffer in China.<sup>115</sup> According to an annual luxury goods study, growth in China's luxury market has slowed from 7% in 2012 to 2% in 2013.<sup>116</sup> The ban on giving and receiving gifts has eliminated much of the luxury good purchases in China, causing a large drop in sales particularly for the watch and menswear departments.<sup>117</sup> An estimated 2% drop in China's luxury goods sales marks the first decline in sales after over a decade of growth.<sup>118</sup> Wal-Mart Stores Inc. sales in China have declined 1.6% in 2014 from 2013 due to a decreased sale in gift cards, moon cakes, and other gift-giving goods.<sup>119</sup> The food and alcohol industries have also experienced significant deceleration of growth due to cuts on lavish spending, and five-star hotels have voluntarily demoted themselves to four-stars to appear less luxurious.<sup>120</sup>

Officials have significantly reduced government spending on receptions, travel, and vehicles, and the number of officials traveling overseas has been cut by 44% in 2013.<sup>121</sup> Fear of corruption has also prevented many officials from spending government money on new projects.<sup>122</sup> The reduction of Party officials' benefits and the risk of corruption accusations has also triggered several officials to leave their government positions for the private sector.<sup>123</sup> Thus far, the CPC has accused over 30,000 officials

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115. He Wei, *Luxury Market Cooling Down*, XINHUA NEWS AGENCY (Dec. 18, 2013), [http://news.xinhuanet.com/english/china/2013-12/18/c\\_132976573.htm](http://news.xinhuanet.com/english/china/2013-12/18/c_132976573.htm).

116. *Id.*

117. *Id.*

118. Manuela Mescio, *Luxury Goods Sales Set to Fall in Russia and China*, WALL ST. J. (Oct. 14, 2014), <http://online.wsj.com/articles/luxury-goods-sales-set-to-fall-in-russia-and-china-1413296208>.

119. Laurie Burkitt, *Wal-Mart Feels Pinch From China Austerity Campaign: Executive Cites Drop in Sales of Gift Cards and Goods Tied to Culture of Gift Giving*, WALL ST. J. (Nov. 9, 2014), <http://online.wsj.com/articles/wal-mart-says-china-sales-hurt-by-nations-austerity-campaign-1415550596>.

120. Adam Taylor, *No More Shark Fins, Whiskey and Prada: The Strange Signs of China's corruption Crackdown*, WASH. POST (Apr. 9, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/04/09/no-more-shark-fins-whiskey-and-prada-the-strange-signs-of-chinas-corruption-crackdown/>.

121. James T. Areddy, *New Frugality Puts Strain on Chinese Firms: Anticorruption Campaign Dashes Peak Holiday Sales*, WALL ST. J. (Jan. 22, 2014), <http://online.wsj.com/news/articles/SB10001424052702304027204579334162357059046>.

122. John Sudworth, *The Real Costs of China's Anti-corruption Crackdown*, BBC NEWS: CHINA BLOG (Apr. 3, 2014), <http://www.bbc.com/news/blogs-china-blog-26864134>.

123. Wei Gu, *Chinese Officials Are Fleeing the Public Sector for the Private: Anticorruption Campaign Has Led to Fewer Perks at Government Jobs*, WALL ST. J. (Sept. 4, 2014), <http://online.wsj.com/articles/chinese-officials-are-fleeing-the-public-sector-for-the-private-sector-1409835345>.

of violating the frugality regulation, but punished only about a quarter of them.<sup>124</sup>

China's GDP growth slowed down to 7.4%, its lowest level in 18 months, in the first quarter of 2014 due to decreased investment and consumption.<sup>125</sup> The reduction is a result of China's attempt to restructure its economy, as well as the reduction of investment and luxury goods sales.<sup>126</sup> Bank of America Merrill Lynch predicts that the anti-corruption drive will cost more than \$100 billion in 2014, and will have burdensome economic impacts.<sup>127</sup> Luxury spending prohibitions could subtract 0.6% to 1.5% from GDP growth by the end of 2014.<sup>128</sup>

### *B. Foreign Companies*

The GSK case marks a milestone for the enforcement of anti-corruption laws in China against foreign companies. Increased scrutiny within the pharmaceutical industry could also lead to inquiries within other commercial industries as well. The case suggests that the CPC requires multinational companies doing business in China to take precautions to prevent corruption within their China branches. However, as a result of the absence of SAIC interpretations and enforcement procedure publications, there are still few guidelines for corporations to follow to seek compliance with the AUCL.<sup>129</sup> Moreover, AIC enforcement practices vary greatly among the different provinces and even among cases within the same local authority.<sup>130</sup> Many U.S. companies find it difficult to conduct business in China because rules and regulations generally are neither consistent nor transparent, and the judicial system is not entirely independent.<sup>131</sup> Widespread corruption in China thus creates the unintended result of limiting competition and

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124. Areddy, *supra* note 121.

125. Mark Magnier, *China GDP Growth Slows to 7.4%*, WALL ST. J. (Apr. 16, 2014), <http://www.wsj.com/articles/SB10001424052702303663604579504400644326182>.

126. *Id.*

127. John Sudworth, *The Real Costs of China's Anti-Corruption Crackdown*, BBC.COM (Apr. 3, 2014), <http://www.bbc.com/news/blogs-china-blog-26864134>.

128. *Id.*

129. HARRIS ET. AL., *supra* note 102, at 362.

130. Lei Li, *Anti-Commercial Bribery Laws in China and Their Enforcement in the Pharmaceutical Company*, 2 Bloomberg L. Rep. no. 11, 2010, at 4, [http://www.sidley.com/files/Publication/acb54f59-1ed7-4b03-aa45-89295b99a2d6/Presentation/PublicationAttachment/4231337d-e8d1-4764-a2a0-8b4be13f5fc1/sidley\\_lei\\_li\\_article.pdf](http://www.sidley.com/files/Publication/acb54f59-1ed7-4b03-aa45-89295b99a2d6/Presentation/PublicationAttachment/4231337d-e8d1-4764-a2a0-8b4be13f5fc1/sidley_lei_li_article.pdf).

131. See MORRISSON, *supra* note 1, at 31.

undermines the efficient allocation of goods and services in the economy.<sup>132</sup> Moreover, government officials often do not enforce anti-corruption laws and regulations, so companies do not have any incentive to comply with industry regulations.<sup>133</sup>

In addition to concerns over the clarity of anti-corruption laws, international businesses believe China is unfairly targeting foreign companies.<sup>134</sup> A survey conducted by the American Chamber of Commerce in China revealed that 60% of companies feel less welcome in China, and 49% of companies believe China is targeting foreign firms.<sup>135</sup> The lack of transparency in enforcement efforts has caused many foreign companies to look less favorably upon China as an investment destination.<sup>136</sup>

The rising number of anti-corruption investigations also means that multinational companies under investigation will need to consider the possibility of handling parallel investigations of conduct by China and the entity's home country.<sup>137</sup> Companies may also need to reevaluate the strength and thoroughness of investigation standards within the company because they may not sufficiently meet China's standards.<sup>138</sup> Finally, as the media discloses more investigations, foreign companies may need to update their own programs to reflect industry-specific rules.

### C. China's Rule of Law

The powerful, yet secretive CCDI and the CPC-controlled judicial system are emblematic of the relative lack of rule of law in China. Widespread corruption in the judiciary during Zhou Yongkang's period in office as domestic security chief meant that the CPC's main priority was stability maintenance, not adherence to the rule of law.<sup>139</sup> Zhou's

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132. *Id.*

133. *Id.*

134. Andrew Browne & Laurie Burkitt, *U.S. Firms Feel Unwelcome in China, According to Survey; U.S. Companies Say They Have Become Targets of China's Antimonopoly and Anticorruption Campaigns*, WALL ST. J. (Sept. 1, 2014), <http://www.wsj.com/articles/u-s-firms-feel-less-welcome-in-china-1409624607>.

135. *Id.*

136. *Id.*

137. Henry Chen, *Pharma Bribe Probe Points to China Parallel Prosecutions*, FCPA BLOG (July 11, 2013, 2:18 AM), <http://www.fcpablog.com/blog/2013/7/11/pharma-bribe-probe-points-to-china-parallel-prosecutions.html>.

138. See Christopher Matthews & Jessica Hodgson, *GlaxoSmithKline Probes Bribe Allegations in China*, WALL ST. J. (June 12, 2013), <http://www.wsj.com/articles/SB10001424127887324798904578529413574312372> (discussing that GSK performed its own investigations before China stepped in, but found no evidence of bribery with respect to payments to doctors in China).

139. James T. Areddy, *Anticorruption Agency Gains Power in China*, WALL ST. J. (Oct. 17, 2014), <http://online.wsj.com/articles/anticorruption-agency-gains-power-in-china-1413590068>.



capture indicates how deeply ingrained corruption is within the Chinese government, but also demonstrates President Xi's commitment to eradicating it.

Thus far, the anti-corruption drive has focused on targeting and punishing high-ranking individuals. The process by which the CCDI investigates officials, termed "shang-gui,"<sup>140</sup> provides no due process and instills fear in Party members. While the CCDI's focus on harsh punishments for corruption undeniably deters officials from accepting bribes and solves some existing problems, the CPC must take stronger efforts to prevent the reemergence of corruption. Party officials want to comply with existing laws, but the lack of clarity of anti-bribery laws imposes unnecessary pressure on them.<sup>141</sup>

SPC President Zhou Qiang acknowledged the existing issues in the judicial system at the 12th National People's Congress.<sup>142</sup> He expressed interest in creating a more independent judiciary and preventing Party officials from influencing court decisions in order to protect the credibility of the court.<sup>143</sup> However, another problem lies in the fact that judges are appointed by local officials,<sup>144</sup> so regardless of whether officials interfere in decisions, judges may rule in favor of those officials due to Party loyalty. China has made prior judicial reform efforts in 2012,<sup>145</sup> but the recent charges of judicial corruption emphasize the need for more improvements and enforcement of the rules.

China's rule of law was the central theme at the 4th Plenary Session of the 18th CPC Central Committee, which began on October 20, 2014.<sup>146</sup> That meeting further advanced the concept of China's rule of law under the CPC leadership<sup>147</sup> and introduced experiments to reduce interference in the judicial system by local officials.<sup>148</sup> The Central Committee passed

140. Areddy, *supra* note 139 (describing "shang-gui" as a process by which the CCDI interrogates suspects for months without providing them access to lawyers).

141. *See supra* Part III.A.

142. Editorial Board, Opinion, *China Rethinks its Judicial System*, N.Y. TIMES (Mar. 17, 2014), <http://www.nytimes.com/2014/03/18/opinion/china-rethinks-its-judicial-system.html>.

143. *Id.*

144. *Id.*

145. *See* Information Office of the State Council of The People's Republic of China Judicial Reform in China, *White Paper: Judicial Reform in China* (Oct. 2012), [http://english.gov.cn/archive/white\\_paper/2014/08/23/content\\_281474983043170.htm](http://english.gov.cn/archive/white_paper/2014/08/23/content_281474983043170.htm).

146. Yang Yi, *CPC Sets New Blueprint for Rule of Law*, XINHUA NEWS AGENCY (Oct. 23, 2013), [http://news.xinhuanet.com/english/china/2014-10/23/c\\_133737845.htm](http://news.xinhuanet.com/english/china/2014-10/23/c_133737845.htm).

147. *Id.*

148. Areddy, *supra* note 139.

a Decision<sup>149</sup> and Communiqué<sup>150</sup> following the four-day meeting. Both reports reiterate the CPC's control over law and legal institutions.<sup>151</sup> Another focus of the meeting addresses the problem of extra-judicial interference by local officials, which has intensified public distrust with the CPC.<sup>152</sup> Proposed solutions include establishing circuit courts that operate across jurisdictions and directly report to Beijing, thereby transferring authority over financing and hiring staff from the local courts to the provincial level, and creating a system for tracking, reporting and punishing officials who attempt to influence cases.<sup>153</sup> Although the reports recognize the importance of creating an independent judiciary to maintain legitimacy, they also repeatedly emphasize that the CPC will maintain control over the legal system<sup>154</sup> as a “fundamental requirement” and “basic safeguard” of China's rule of law.<sup>155</sup> The Party also announced plans to combat corruption within the military by implementing stricter supervision methods and reforming its disciplinary scheme.<sup>156</sup>

#### *D. Developing Cooperation with Foreign Countries*

If China wants to capture individuals who have fled overseas, it must provide clear guidance to show how foreign countries can cooperate with China's laws. The opaque character of the CCDI and unfair legal system pose a problem for Western democracies, which results in an unwillingness to join forces with China. However, returning assets and fugitives from overseas is an important goal for the CPC. One study conducted by

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149. CPC Central Committee Decision concerning Some Major Questions in Comprehensively Moving Governing the Country According to the law Forward, CHINA COPYRIGHT AND MEDIA (Oct. 28, 2014), <http://chinacopyrightandmedia.wordpress.com/2014/10/28/ccp-central-committee-decision-concerning-some-major-questions-in-comprehensively-moving-governing-the-country-according-to-the-law-forward/> [hereinafter CPC Central Committee Decision].

150. Official Central Committee Communiqué on 4th Plenum, CHINA COPYRIGHT AND MEDIA (Oct. 23, 2014), <http://chinacopyrightandmedia.wordpress.com/2014/10/23/official-central-committee-communicue-on-4th-plenum/>.

151. Stanley Lubman, *Key Points in China's Flood of Legal Reform Rhetoric*, WALL ST. J. (Oct. 30, 2014), <http://blogs.wsj.com/chinarealtime/2014/10/30/key-points-in-chinas-flood-of-legal-reform-rhetoric/>.

152. *Id.*

153. *Id.*

154. CPC Central Committee Decision, *supra* note 149 (stating the words “under the leadership of the Party” several times throughout the Decision).

155. Josh Chin & James T. Areddy, *China Vows to Strengthen Judicial System*, WALL ST. J. (Oct. 23, 2014), <http://online.wsj.com/articles/china-vows-to-strengthen-judicial-system-1414065032>.

156. Josh Chin & Brian Spegele, *China Signals Greater Oversight of Military, Media*, WALL ST. J. (Oct. 28, 2014), <http://www.wsj.com/articles/china-signals-greater-oversight-of-military-media-1414508534>.

Global Financial Integrity estimated a \$2.83 trillion of illegal money flowed out of China between 2005 and 2011.<sup>157</sup> One example of a foreign country's reluctance to cooperate with China is the case of Lai Changxi, one of its most-wanted fugitives who organized a multi-billion dollar smuggling ring before fleeing to Canada.<sup>158</sup> Although officials arrested Lai in Canada one year after he fled, the Canadian courts had refused to return him to China for 11 years based on the fear that China's legal system could not guarantee Lai a fair trial.<sup>159</sup>

Consequently, the CPC has a strong motivation to implement transparent government systems and participate in international cooperation with other members of the UNCAC, which the Convention requires. Success in capturing officials and recovering assets will bolster the CPC's claim of its legitimacy and deter potential suspects from fleeing the country to avoid punishment.<sup>160</sup>

In order to provide incentives for countries to help China track down corrupt officials who have fled the country with their illegal assets, China recently adopted a common policy among other countries to share up to 80% of their forfeited assets.<sup>161</sup> Most countries require evidence that illegal assets exist before engaging in asset recovery,<sup>162</sup> but this type of evidence is typically difficult to prove because individuals often launder these assets in other countries.<sup>163</sup> Thus far, Canada and France have agreed to share forfeited assets with China.<sup>164</sup> China has also signed extradition treaties with 38 countries, but not with Canada, Australia, the United

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157. James Pomfret & Matthew Miller, *On China's Border Underground Banking Flourishes*, N.Y. TIMES (May 20, 2013), <http://www.nytimes.com/2013/05/21/business/global/on-chinas-border-underground-banking-flourishes.html>.

158. See Ian Johnson & Michael Wines, *Beijing Arrests Its Most-Wanted Fugitive After Canada Deports Him*, N.Y. TIMES (July 23, 2011), [http://www.nytimes.com/2011/07/24/world/asia/24lai.html?\\_r=0](http://www.nytimes.com/2011/07/24/world/asia/24lai.html?_r=0).

159. *Id.*

160. Lewis, *supra* note 93, at 93.

161. Cheng Muyang, *China to Share Assets from Fugitives Abroad with Other Countries*, CHINADAILY.COM (Nov. 3, 2014), [http://www.chinadaily.com.cn/china/2014-11/03/content\\_18856312.htm](http://www.chinadaily.com.cn/china/2014-11/03/content_18856312.htm).

162. *Id.*

163. Chen Heying, *China to share up to 80% of assets in global corruption manhunt: expert*, GLOBAL TIMES (Nov. 3, 2014), [http://www.bjd.com.cn/10beijingnews/focus/201411/03/t20141103\\_8185149.html](http://www.bjd.com.cn/10beijingnews/focus/201411/03/t20141103_8185149.html).

164. Hui Zhi, *China to Share Fugitives' assets with Countries assisting the 'Fox Hunt'*, FCPA BLOG (Nov. 13, 2014, 6:38 AM), <http://www.fcpablog.com/blog/2014/11/13/china-to-share-fugitives-assets-with-countries-assisting-the.html>.

States—three of the most favored places for Chinese fugitives to flee.<sup>165</sup> Australia and the United States refuse to extradite anyone convicted of corruption if there is a possibility that the person will receive the death penalty.<sup>166</sup>

The 21 Asia-Pacific nations of the Asia-Pacific Economic Cooperation (APEC) forum have also affirmed plans in November 2014 to combat regional corruption.<sup>167</sup> The anti-corruption network, called Act-Net, will be based in China and will run as a subdivision of the CCDI.<sup>168</sup> Designed to reinforce international agreements such as the UNCAC, Act-Net will build a cross-border network that promotes communication flow between law enforcement agencies.<sup>169</sup> The countries are “committed to denying safe haven to those engaged in corruption, including through extradition, mutual legal assistance, and the recovery and return of proceeds of corruption.”<sup>170</sup>

China initially resisted a proposal at the November 2014 G20 summit designed to facilitate tracing business ownership, but it eventually agreed to support these transparency measures.<sup>171</sup> Under this regime, countries will share information about the owners of shell companies and trusts between law enforcement agencies to pinpoint wealthy individuals who could potentially use those entities to evade taxes, launder money, and hide corruption.<sup>172</sup> China’s promise to disclose that level of information underscores its resolve to eradicate corruption. These measures will likely help the CCDI investigate individuals attempting to hide their investments through shell companies and cross ownership structures.<sup>173</sup>

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165. *Id.*

166. See MUYANG, *supra* note 161; FERGUS RYAN, *Australia Considers Extradition Treaty with China*, THE AUSTRALIAN (Nov. 10, 2014), <http://www.theaustralian.com.au/business/latest/australia-considers-extradition-treaty-with-china/story-e6frg90f-1227118652294>.

167. James T. Areddy, *China Set to Host Regional Anticorruption Network*, WALL ST. J. (Nov. 5, 2014), <http://online.wsj.com/articles/china-set-to-host-regional-anticorruption-network-1415176815>.

168. *Id.*

169. *Id.*

170. *Id.*

171. Daniel Stacy & Rob Taylor, *China Reverses Opposition to G-20 Anticorruption Plan*, WALL ST. J. (Nov. 16, 2014), <http://online.wsj.com/articles/china-reverses-opposition-to-g-20-anticorruption-plan-1416135168>.

172. *Id.*

173. *Id.*

#### IV. RECOMMENDATIONS FOR IMPROVEMENT UNDER THE FOREIGN CORRUPT PRACTICES ACT AND U.K. BRIBERY ACT

Congress enacted the Foreign Corrupt Practices Act (FCPA) in 1977<sup>174</sup> after a series of scandals in which hundreds of U.S. companies had paid millions of dollars in bribes to secure business from foreign officials.<sup>175</sup> It amended the FCPA twice: once in 1988 to add affirmative defenses,<sup>176</sup> and once in 1998 to comply with the OECD Anti-Bribery Convention's requirement to include bribery of foreign nationals.<sup>177</sup> Generally, the FCPA consists of anti-bribery provisions which prohibit the offering of bribes and accounting provisions.<sup>178</sup>

The United Kingdom passed the Bribery Act in 2010<sup>179</sup> to consolidate and revise its outdated corruption laws, and also to comply with the OECD Convention requirements.<sup>180</sup> Prior to this Act, the United Kingdom had utilized a patchwork of anti-bribery legislation dating as far back as 1889.<sup>181</sup> The new Bribery Act criminalizes three types of activities: (1) the giving and receiving of bribes; (2) the bribery of foreign public officials; and (3) the failure of commercial organizations to prevent bribery.<sup>182</sup>

The following sections will discuss select aspects of the U.S. and U.K. anti-corruption systems and recommend that China adopt or look to these provisions for future anti-corruption efforts. These provisions and enforcement methods provide for an efficient and balanced focus on bribery, though they may vary in their methods of accomplishing this goal. Because the U.S. and U.K. statutes focus on the supply-side of bribery, they complement

174. See generally Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78ff, 78m(b), (d)(1), (g)-(h) (2006 & Supp. 2010)) [hereinafter FCPA].

175. See CRIMINAL DIV. OF DEP'T OF JUSTICE & ENFORCEMENT DIV. OF THE SEC. AND EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT, 3 (Nov. 14, 2010) [hereinafter FCPA Resource Guide], <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

176. See Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, §§ 5001-5003, 102 Stat. 1415, 1424 (1988).

177. See generally International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, §§ 1-6, 112 Stat. 3302 (1998).

178. FCPA Resource Guide, *supra* note 175, at 2.

179. See generally Bribery Act, 2010, c. 23 [hereinafter Bribery Act], [http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga\\_20100023\\_en.pdf](http://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf).

180. Bruce W. Bean & Emma H. MacGuidwin, *Unscrewing the Inscrutable: The UK Bribery Act 2010*, 23 IND. INT'L & COMP. L. REV. 63, 67-68 (2013).

181. *Id.*

182. See generally Bribery Act, *supra* note 179.

China's heavy focus on the demand-side and provide ideas that China may borrow to obtain a balance between both aspects of bribery.

### A. Anti-Bribery Provisions Under the FCPA

The FCPA anti-bribery provisions prohibit the offer, payment, promise to pay, or authorization of payment of anything of value to any foreign official, foreign political party, official, or candidate, to obtain or retain business.<sup>183</sup> These provisions apply to issuers,<sup>184</sup> their employees, U.S. persons and businesses (“domestic concerns”),<sup>185</sup> and certain foreign persons or businesses.<sup>186</sup> Conduct both inside and outside of the U.S. is covered by the FCPA if issuers or domestic concerns use interstate commerce to further the corrupt payments to foreign officials.<sup>187</sup> Entities other than issuers or domestic concerns that directly or indirectly engage in any act in furtherance of a corrupt payment while on U.S. territory are also covered by the FCPA.<sup>188</sup>

The Department of Justice (DOJ), Securities Exchange Commission (SEC), and U.S. courts have interpreted the phrase “anything of value” to cover a broad range of subjects.<sup>189</sup> Forms of payment may include cash, charitable contributions, extravagant gifts, travel and entertainment expenses, luxuries such as food, travel, meal and lodging expenses, and promises of future employment.<sup>190</sup> While there is no minimum threshold amount for gifts or payments, the DOJ and SEC have historically focused on minor payments and gifts only when they are part of a larger and long-standing scheme of corruption.<sup>191</sup> Furthermore, the FCPA does not bar all forms of gift-giving—only those of a type used to disguise bribes.<sup>192</sup>

There are two affirmative defenses for the payment, gift, offer, or promise of anything of value. First, it is an affirmative defense if the laws

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183. 15 U.S.C. § 78dd-1(a); 15 U.S.C. § 78dd-2(a); 15 U.S.C. § 78dd-3(a).

184. See 15 U.S.C. § 78dd-1(a) (defining this group as including domestic and foreign companies listed on any U.S. stock exchange or which are required to file reports with the SEC).

185. See 15 U.S.C. § 78dd-2(h)(1) (including any individual who is a U.S. citizen, national, or resident and any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship, which has its principal place of business in the United States, or which is organized under U.S. laws).

186. See 15 U.S.C. § 78dd-3(f)(1).

187. See 15 U.S.C. § 78dd-2(h)(5).

188. See 15 U.S.C. § 78dd-3(a).

189. Sarah Bartle et. al., *Foreign Corrupt Practices Act*, 51 AM. CRIM. L. REV. 1265, 1277 (2014).

190. *Id.* at 1278; see also FCPA Resource Guide, *supra* note 175, at 15–19.

191. FCPA Resource Guide, *supra* note 175, at 15.

192. *Id.* at 16.

of the foreign official's country consider the conduct lawful.<sup>193</sup> Second, a defense exists when the act was a reasonable and bona fide expenditure incurred on behalf of the foreign official.<sup>194</sup> Companies are generally not subject to enforcement action by the DOJ or SEC if they pay for items of nominal value,<sup>195</sup> but they are encouraged to devise their own compliance programs and provide guidelines for acceptable gift-giving behavior to mitigate potential violations.<sup>196</sup>

### B. Anti-Bribery Provisions Under the Bribery Act

One notable difference between the FCPA and the Bribery Act is that the Bribery Act prohibits both the offer and acceptance of bribes, while the FCPA prohibits only the offer of bribes. Furthermore, the Bribery Act has merged both domestic and foreign corruption laws into one statute,<sup>197</sup> while the FCPA maintains separate statutes.<sup>198</sup> The Bribery Act prohibits a person from directly or indirectly offering, promising, or giving a financial or other advantage to a foreign public official for the purposes of obtaining or retaining business or a competitive advantage.<sup>199</sup>

Corporate entities and their officers are also liable for giving bribes, regardless of whether the acts take place within the U.K. territory,<sup>200</sup> as long as the organization or its agents have a "close connection" with the U.K.<sup>201</sup> However, it is an affirmative defense if the organization can prove that it had adequate measures in place to prevent its agent from undertaking corrupt conduct.<sup>202</sup> Under the FCPA, the Secretary of State<sup>203</sup> has published guidance on how commercial organizations can implement procedures to prevent bribery committed on their behalf.<sup>204</sup> The following

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193. 15 U.S.C. § 78dd-3(c)(1).

194. 15 U.S.C. § 78dd-3(c)(2).

195. FCPA Resource Guide, *supra* note 175, at 15 (categorizing items such as cab fare, reasonable meals and entertainment expenses as likely acceptable gifts).

196. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (U.S. SENTENCING COMM'N 2011).

197. *See generally* Bribery Act, *supra* note 179.

198. *See* 18 U.S.C. § 201.

199. Bribery Act, *supra* note 179, § 6.

200. *Id.* § 12(5).

201. *Id.* § 14.

202. *Id.* § 7(2).

203. *Id.* § 9.

204. *See* Ministry of Justice, *The Bribery Act 2010 Guidance*, GOV.UK (Mar. 2011), <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-recance.pdf>.

six principles are established: (1) proportionate procedures; (2) top-level commitment; (3) risk assessment; (4) due diligence; (5) communication (including training); and (6) monitoring and review.<sup>205</sup>

### *C. Recommended Anti-Bribery Provisions in China*

Similar to the Bribery Act, the AUCL and PRC Criminal Law prohibit both the giving and accepting of bribes by domestic individuals and corporations, and also prohibit the giving of bribes to foreign officials.<sup>206</sup> However, unlike the FCPA and Bribery Act, the Criminal Law neither mentions differences between direct and indirect giving nor criminalizes the offer of bribes to foreign officials.<sup>207</sup> In order to effectively enforce its laws regarding bribery of foreign officials and conform to domestic bribery standards,<sup>208</sup> the CPC should amend the existing Criminal Law to include these prohibited activities. Furthermore, it should also amend the current laws to meet UNCAC standards.<sup>209</sup>

The Criminal Law's jurisdictional principles govern foreign official bribery.<sup>210</sup> The SPC and SPP have yet to interpret the provisions governing extra-territorial jurisdiction, but the provisions appear to apply to Chinese citizens, entities formed under Chinese law, and possibly even individuals and entities whose corrupt acts implicate China.<sup>211</sup> Adding a provision that explicitly provides for extra-territorial jurisdiction may benefit China and encourage other countries to assist in the efforts to track down individuals who have fled the country.

The FCPA takes note of varying cultural values in its enforcement against corporate gifts or payments by allowing gifts or payments to foreign officials if they were reasonable and bona fide expenses, or if they were lawful under the laws of the foreign country.<sup>212</sup> The AUCL currently does not define the phrase “gift or other means” in relation to commercial bribery, meaning one can interpret it very broadly to encompass activities that are illegal in China, but legal in another country.<sup>213</sup> With President Xi's anti-

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205. *Id.*

206. *See supra* Part II.

207. *See* Criminal Law of the People's Republic of China, *supra* note 16, art. 164.

208. *Id.* arts. 392–93, 398 (stating that the domestic bribery provisions prohibit the “offer” and “introduction” of bribes to state officials).

209. UNCAC, *supra* note 19, art. 6 (requiring each country to define bribery as “the promise, offering, or giving to a foreign public official. . .directly or indirectly”).

210. Criminal Law of the People's Republic of China, *supra* note 16, arts. 6–8.

211. Samuel R. Gintel, *Fighting Transnational Bribery: China's Gradual Approach*, 31 WIS. INT'L L. J. 1, 14–15 (2013).

212. *See supra* Part IV.A.

213. Law Against Unfair Competition of the People's Republic of China, *supra* note 17, art. 8.



luxury campaign in place, companies and individuals currently do not spend money out of fear that the CPC will accuse them of corruption.<sup>214</sup> China's economy may benefit from a clearer definition of "gift or other means," especially since China has a gift-giving culture that is very important. This definition would also allow companies to conform to anti-corruption provisions while not preventing engagement in normal business courtesies, such as small gifts of esteem or gratitude.<sup>215</sup> Recent investigations into companies such as GSK could potentially lead to more judicial interpretations to resolve these vague points in the definition of commercial bribery.

#### *D. Accounting Provisions Under the FCPA*

FCPA accounting provisions require companies to make annual reports, keep accurate records of its transactions, and create internal accounting controls.<sup>216</sup> These provisions apply to issuers, domestic and foreign companies listed on any U.S. stock exchange, or those which are required to file reports with the SEC.<sup>217</sup> An issuer must comply with accounting provisions, regardless of whether it engages in foreign operations or bribery violations because the records are the main source of accounting fraud and issuer disclosure cases.<sup>218</sup>

The FCPA books and records provision requires all issuers to "make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer."<sup>219</sup> The reasonable detail standard is one that would "satisfy prudent officials in the conduct of their own affairs" and balances numerous relevant factors, including the cost of compliance.<sup>220</sup> The record-keeping and internal controls provisions also ensures that a company properly uses its assets, encourages accurate recording of improper payments, and prevents the mischaracterization of transactions.<sup>221</sup>

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214. *See supra* Part III.A.

215. FCPA Resource Guide, *supra* note 175, at 15.

216. *See* 15 U.S.C. § 78m(a).

217. *See* 15 U.S.C. § 78m(b).

218. FCPA Resource Guide, *supra* note 175, at 38.

219. 15 U.S.C. § 78m(b)(2)(A).

220. H.R. REP. NO. 100-418, at 917 (1988), <http://www.justice.gov/criminal/fraud/fcpa/history/1988/tradeact-100-418.pdf>.

221. FCPA Resource Guide, *supra* note 175, at 39.

The internal controls provision requires issuers to create internal controls that reasonably ensure the accurate execution and recording of transactions.<sup>222</sup> Companies have the discretion to develop their own controls to meet their particular needs and circumstances, but must take into consideration the realities and risks associated with their respective industries.<sup>223</sup> The Bribery Act does not have accounting provisions, but because it holds commercial organizations liable for the failure to prevent bribery,<sup>224</sup> companies are encouraged to implement their own record-keeping and internal controls.

#### *E. Recommended Accounting Provisions for China*

China's Criminal Law and AUCL currently have provisions that criminalize individuals for accepting off-the-book rebates or service charges,<sup>225</sup> and firms for paying kickbacks and accepting discounts without recording them.<sup>226</sup> However, China should adopt a more comprehensive record-keeping provision to help a company's compliance programs become more effective and ensure that a business accurately records its payments. Adopting provisions like those of the FCPA will warrant the accountability of companies and will also provide sufficient evidence for the CCDI to investigate and prosecute a company.

Additionally, record-keeping provisions create an objective mechanism for monitoring corruption because a company's internal investigators may themselves be corrupt. Providing an affirmative defense like the Bribery Act for companies that create adequate anti-bribery procedures and book-keeping measures would encourage companies to report costs truthfully and aid CCDI investigations. Regardless of whether China decides to implement these accounting provisions, corporations should still devise their own internal compliance programs.

#### *F. Enforcement and Penalties Under the FCPA*

The DOJ and SEC enforce the FCPA's provisions together and work with other federal agencies and law-enforcement partners to enforce FCPA violations.<sup>227</sup> The DOJ has the criminal and civil enforcement responsibility for U.S. citizens, nationals, residents, and U.S. businesses and their agents, as well as certain foreign persons and businesses.<sup>228</sup>

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222. 15 U.S.C. § 78m(b)(2)(B).

223. FCPA Resource Guide, *supra* note 175, at 40.

224. Bribery Act, *supra* note 179, § 7.

225. Criminal Law of the People's Republic of China, *supra* note 16, at 387.

226. Law Against Unfair Competition of the People's Republic of China, *supra* note 17, at 8.

227. FCPA Resource Guide, *supra* note 175, at 4.

228. *Id.*

Additionally, the DOJ has criminal enforcement responsibility over issuers and their agents, while the SEC is responsible for civil enforcement over issuers and their agents.<sup>229</sup> Furthermore, the DOJ maintains a website that publishes select FCPA-related prosecutions and resolutions, and copies of opinions issued in response to questions by companies and individuals that determine whether proposed conduct would be prosecuted under the FCPA.<sup>230</sup> The U.S. government also utilizes the Departments of Commerce and State to assist U.S. companies doing business abroad with corruption and bribery-related issues.<sup>231</sup> The Department of Commerce has published guidelines that help corporations comply with anti-corruption laws.<sup>232</sup>

Most cases of commercial bribery under the FCPA are resolved through deferred prosecution agreements (DPAs) or non-prosecution agreements (NPAs).<sup>233</sup> In order to obtain or qualify for a settlement agreement through these methods, the DOJ and SEC will consider: (1) a firm's willingness to cooperate in the underlying investigation and (2) whether the firm promoted a "culture of compliance."<sup>234</sup> While the prosecution still files a formal charging document with the court under a DPA, it defers that prosecution if the firm agrees to perform a variety of actions such as paying substantial fines, disgorging profits, implementing internal compliance programs, and cooperating with any ongoing investigations.<sup>235</sup> If the organization satisfactorily performs its duties under the agreement after a period of time (usually two to four years), the prosecution then dismisses the charges.<sup>236</sup> The process of obtaining a settlement under the NPA is similar to that of a DPA, but without the necessity for a formal court filing.<sup>237</sup> Companies benefit from settlements because they avoid formal prosecution and the risks of litigation, while the regulators benefit because settlements encourage cooperation with investigators.<sup>238</sup>

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229. *Id.*

230. *Id.*

231. *Id.* at 5–6.

232. See *Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies*, DEPARTMENT OF COMMERCE, [http://www.ita.doc.gov/good-governance/business\\_ethics/manual.asp](http://www.ita.doc.gov/good-governance/business_ethics/manual.asp) (last visited Nov. 6, 2014).

233. Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the "Culture of Compliance,"* 2012 WIS. L. REV. 689, 697 (2012).

234. *Id.* at 698–99.

235. *Id.* at 697.

236. *Id.*

237. Yockey, *supra* note 233 (stating that regulators still retain the right to file charges, but will not do so if the firm complies with the same terms as DPAs).

238. *Id.* at 698.

### G. Enforcement and Penalties Under the Bribery Act

The U.K. Serious Fraud Office (SFO) is the primary agency that investigates and prosecutes violations of the Bribery Act.<sup>239</sup> The SFO has issued informative guidance intended to provide insight as to how prosecutors will decide whether to prosecute a case.<sup>240</sup> The guidance notes that the Bribery Act focuses on commercial bribery, but also notes that the Government will gradually shift to combatting international bribery.<sup>241</sup> In deciding whether to prosecute a case, the prosecutor must consider, first, if there is sufficient evidence to justify a prosecution and, second, if public interest weighs in favor of prosecution.<sup>242</sup>

While the SFO has entered settlement agreements in the past with firms, the judiciary and the OECD have heavily criticized it for doing so.<sup>243</sup> Because of this reaction, the U.K. has been unable to conclude global settlement agreements in criminal proceedings.<sup>244</sup> Nevertheless, in February 2014, the Criminal Procedure Rule Committee added DPA agreements to the U.K. Criminal Procedure Rules as another method for dealing with corporate bribery cases.<sup>245</sup> Much like the U.S., the U.K. added DPAs to incentivize cooperation by offering court-sanctioned written settlements for companies and to avoid the risks inherent in litigation and the potentially fatal consequences of conviction in criminal courts.<sup>246</sup> Prosecutors now hope that having four High Court judges specially appointed to deal with DPAs and providing a formal, statutory basis for DPAs will also encourage resolutions between international investigations.<sup>247</sup>

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239. See *Who We Are, Serious Fraud Office*, SERIOUS FRAUD OFFICE, <http://www.sfo.gov.uk/about-us/who-we-are.aspx> (last visited Nov. 10, 2014).

240. See U.K. SFO & Crown Prosecution Service, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions*, 2, [http://www.sfo.gov.uk/media/167348/bribery\\_act\\_2010\\_joint\\_prosecution\\_guidance\\_of\\_the\\_director\\_of\\_the\\_serious\\_fraud\\_office\\_and\\_the\\_director\\_of\\_public\\_prosecutions.pdf](http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf).

241. *Id.* at 3.

242. *Id.* at 4–5.

243. Kevin Roberts & Duncan Grieve, *The American Way – DPAs arrive in the U.K.*, MORRISON & FOERSTER, Feb. 6, 2014, at 1–2, <http://media.mof.com/files/Uploads/Images/140206-DPAs-UK.pdf> (stating that Justice Thomas disapproved of the SFO Director’s choice to settle with a defendant company); see also Dominic Saglibene, *The U.K. Bribery Act: A Benchmark for Anti-Corruption Reform in the United States*, 23 TRANSNAT’L L. & CONTEMP. PROBS. 119, 134 (2014) (stating that the OECD criticized the SFO for overusing civil settlements for corporate cases of foreign bribery instead of criminal sanctions).

244. Roberts & Grieve, *supra* note 243, at 2.

245. See The Criminal Procedure Rules 2014, SI 2014/1610, pt. 12 (Eng. & Wales), [http://www.legislation.gov.uk/uksi/2014/1610/pdfs/uksi\\_20141610\\_en.pdf](http://www.legislation.gov.uk/uksi/2014/1610/pdfs/uksi_20141610_en.pdf).

246. Roberts & Grieve, *supra* note 243, at 1.

247. *Id.*

### *H. Recommended Enforcement Procedures in China*

Both the U.S. and U.K. have appointed independent agencies to enforce their anti-corruption laws and maintain a balance between investigating domestic and foreign entities. While China has appointed the CCDI to enforce its anti-corruption laws, the CCDI currently has too much power, conducts highly secretive methods to investigate suspects, and does not operate independently of the CPC.<sup>248</sup> Furthermore, rather than maintaining a balance between investigating foreign and domestic individuals, China has committed itself to unprecedented searches of domestic officials, making the convictions seem more politically motivated.<sup>249</sup>

China should consider adopting an independent agency in order to dispense justice fairly and encourage firms to further cooperate with investigators. Creating a website for the independent investigative agency similar to that maintained by the DOJ would allow individuals and companies to inquire about whether certain conduct is punishable by law. This instrument would not only provide a valuable source of information of individuals and companies, but also would help articulate and develop the PRC Criminal Law and AUCL anti-bribery provisions. Additionally, by publishing select prosecutions and resolutions online, the CPC can fully explain why it prosecuted certain individuals or companies, thus bolstering transparency in the anti-corruption framework. The CCDI may also consider constructing such a website regardless of whether the CPC establishes an independent agency, in order to fully explain its decision-making process and provide guidance on what types of practices are unacceptable.

Furthermore, China should create an independent judiciary to adjudicate a fair trial, which will lead to more transparency and effectiveness in enforcement efforts. Although newly announced reforms will assist in reducing officials from influencing judicial decisions, it is too early to determine how effective these measure will be because the CPC has continued to assert control over the judiciary.<sup>250</sup>

Currently, criminal charges are the principal means of enforcing anti-corruption laws, but China could also benefit from utilizing settlement agreements as an alternative to prosecution. This would correspondingly follow Confucian principles of conciliation. By offering DPAs, China can

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248. *See supra* Part II.

249. *See supra* Part II.

250. *See supra* Part III.C.

effectively provide companies with an opportunity to comply with anti-corruption laws, cooperate with investigators, and facilitate monitoring of businesses before inevitably resorting to prosecution. This will force the CPC to provide clear guidelines that will allow companies to implement suitable compliance programs. Appointing judges specifically charged to deal with settlements would also allow the judiciary to check the CCDI's power. At the very least, the CCDI should follow the DOJ and SFO's steps and publish guidance concerning the anti-corruption provisions of the Criminal Law and AUCL. More defined rules and increased effective enforcement will encourage more foreign companies to conduct business in China, thus boosting the economy's long-term prospects.<sup>251</sup>

## V. OECD ANTI-BRIBERY CONVENTION

The OECD, established in 1961 to promote global economic and social development, adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention") in 1997.<sup>252</sup> The convention obliges the parties to criminalize foreign public official bribery in international business transactions,<sup>253</sup> outline criminal penalties for these violations,<sup>254</sup> establish accounting provisions,<sup>255</sup> and provide assistance to other signatories in investigations and proceedings against those charged with bribery.<sup>256</sup> Currently, all 34 OECD members are parties to the Anti-Bribery Convention as well as seven non-member countries.<sup>257</sup> The OECD Working Group on Bribery, which is comprised of representatives from each of the member states, supervises the convention.

### A. Working Group on Bribery

The Working Group is responsible for monitoring the implementation of the Anti-Bribery Convention, the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International

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251. See *supra* Part III.B.

252. See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Organization for Economic Development, Nov. 21, 1997, 37 I.L.M. 1 (1998) [hereinafter OECD Convention], [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf).

253. See *id.* art. 1.

254. See *id.* art. 3.

255. See *id.* art. 8.

256. See *id.* art. 9.

257. See *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014*, OECD (May 2014), <http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf>.

Business Transactions,<sup>258</sup> and other related instruments. Its members meet quarterly to review and monitor implementation of the Anti-Bribery Convention by member states around the world. Each party undergoes three phases of periodic peer review. Phase 1 includes an in-depth evaluation of whether each country's domestic laws have met the standards set by the Convention.<sup>259</sup> Phase 2 assesses the effectiveness of each country's laws and anti-bribery enforcement efforts.<sup>260</sup> Phase 3 is a permanent cycle of peer review that involves a more intensive evaluation of a country's enforcement mechanisms than in Phase 2 and also analyzes the country's efforts to address weaknesses identified during the Phase 2 review.<sup>261</sup> One of the primary goals of Phase 3 review is to improve anti-bribery efforts in international business transactions by mutually evaluating parties through on-site visits and peer pressure.<sup>262</sup>

The Working Group publishes quarterly country monitoring reports for each signatory<sup>263</sup> and annual reports that explain how each signatory contributes to the global fight against corruption.<sup>264</sup> These official reports provide an independent evaluation of a country's enforcement status and offer data on how effective the convention is in prosecuting individuals and entities for foreign bribery.<sup>265</sup> Monitoring reports not only allow reviewing parties to assess and criticize the country under examination, but also keeps those countries accountable for maintaining and enforcing foreign bribery provisions. For example, the Working Group constantly

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258. See *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, WORKING GRP. ON BRIBERY IN INT'L BUS. TRANSACTIONS, OECD (Nov. 26, 2009), <http://www.oecd.org/daf/anti-bribery/44176910.pdf>.

259. See *Phase 1 Country Monitoring of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase1countrymonitoringoftheoecdanti-briberyconvention.htm> (last visited Jan. 10, 2014).

260. See *Phase 2 Country Monitoring of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase2countrymonitoringoftheoecdanti-briberyconvention.htm> (last visited Jan. 10, 2014).

261. See *Phase 3 Country Monitoring of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/phase3countrymonitoringoftheoecdanti-briberyconvention.htm> (last visited Jan. 10, 2014).

262. *Id.*

263. See *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, OECD, <http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm> (last visited Jan. 14, 2015).

264. See *OECD Working Group on Bribery—Annual Report*, OECD, <http://www.oecd.org/tax/crime/oecdworkinggrouponbribery-annualreport.htm> (last visited Jan. 14, 2015).

265. See *id.*

criticized the U.K.'s inadequate anti-bribery laws, forcing it to enact the Bribery Act to bring its laws into compliance with the Convention in 2008.<sup>266</sup>

### *B. Benefits of Joining the OECD Convention*

While China is not yet a member of the OECD, it could gain a number of benefits by joining the OECD Convention. Cooperation with other signatories and forced peer reviews may encourage other countries to aid China in fighting corruption in international business transactions. Although the OECD Convention does not have enforcement powers, peer-pressure from other members could influence China to further clarify its foreign anti-corruption provisions, thus providing more transparency and guidance for international companies to follow. Peer reviews, recommendations, follow-ups and critiques from the Working Group could present effective ideas for implementing new laws and additionally creates a mechanism that keeps China accountable for its anti-bribery provisions. Furthermore, receiving recommendations from these reviews may provide new insight from a different perspective that may garner more support from the public than policies that are currently in place. The review and follow-up mechanisms required by the OECD Convention also offset the absence of any similar processes in the UNCAC.

Conversely, China could potentially learn a lot of valuable information by conducting peer reviews itself if it joined the OECD Convention. China's own Working Group representatives can compare and observe another country's practices as well as learn from its experiences in the quarterly peer review examinations. Moreover, China can study what practices have and have not worked in other countries, thus saving time and experimentation costs in creating new national policies. Lastly, both receiving and providing critiques between countries makes the peer review process fair and equal because every country undergoes the same type of scrutiny; thus, China will not feel that it is being singled out for any shortcomings in its foreign anti-corruption framework.

Truly effective enforcement against corruption in multinational businesses requires active participation by both local and foreign governments. Thus, China also needs clearly articulated domestic legislation to discourage international and domestic businesses from resorting to bribery as a means of conducting business and to prevent the formation of *guanxi* relationships with government officials. By undergoing peer reviews and adopting recommendations by other OECD signatories, China may be able to

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266. Lindsey Hills, *Universal Anti-Bribery Legislation Can Save International Business: A Comparison of the FCPA and the UKBA in an Attempt to Create Universal Legislation to Combat Bribery Around the Globe*, 13 RICH. J. GLOBAL L. & BUS. 469, 472 (2014).



implement new policies that complement other foreign-reaching statutes such as the FCPA and UK Bribery Act, thus eliminating the vague laws currently in place and earning more international support for its policies.

Furthermore, implementing new policies that complement other foreign statutes could facilitate cooperative foreign investigations and effectively combat corruption by international businesses. The OECD Convention encourages its members “to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party.”<sup>267</sup> Hence, being a party to the convention will improve government coordination between countries to continually ensure that China will receive aid in combatting the supply side of corruption. Finally, as a member of the G20 and a major economic player in world trade and investment, China has a responsibility to participate in the OECD Convention and help other signatories and fellow G20 members combat the spread of global corruption and promote a fairer global economy.

## VI. CONCLUSION

President Xi once said that corrupt behavior, if unaddressed, “will evolve to be an invisible wall that separates the Party from the people, thus leaving the Party without root, lifeblood and power.”<sup>268</sup> His anti-corruption campaign remains in full force, but without further systemic change, public distrust of the CPC will continue to be an issue. Furthermore, while there are anti-bribery provisions in place, they lack any meaningful legal effect due to the ambiguous language and powerful CCDI. In order to develop a truly successful anti-corruption regime, China must increase transparency, implement strict enforcement mechanisms, and maintain balance between objectives. Rather than concentrating on deterring public officials from bribery, it must shift some of its focus to making widespread changes in order to achieve long-term success. By establishing clear rules, an independent investigative agency, and an independent judiciary, the CPC may be able to prove that it is truly seeking institutional change rather than punishing political rivals and thereby regain the public’s trust.

Some of these recommended changes would require a shift away from the principle of Party supremacy. While the CPC has recently affirmed

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267. OECD Convention, *supra* note 252, art. 9.

268. Lina Yang, *Xi Jinping vows “power within cage of regulations,”* XINHUA NEWS AGENCY (Jan. 22, 2013), [http://news.xinhuanet.com/english/china/2013-01/22/c\\_132120363.htm](http://news.xinhuanet.com/english/china/2013-01/22/c_132120363.htm).

its dominance over the legal system, these shifts demonstrate a necessary sacrifice in order for China to maintain a steady battle against corruption. Current measures have been successful in capturing several government officials and companies. However, many of the campaigns in effect, such as the anti-extravagance campaign, seem more like symbolic moves that have only short-term deterrent results that boost the Party's image. Developing an independent legal system will expose and investigate corruption cases without pressure from the CPC, ensure strong enforcement of anti-corruption laws, and bring about permanent change.

Due to longstanding historical, cultural, and political traditions, eradicating corruption in China will be a slow process. Fully stamping out corruption involves eliminating the conditions that facilitated corruption in the first place, meaning that changes in traditions are necessary. However, reforming legislation will yield numerous benefits for China. Clarifying and expanding upon existing anti-corruption provisions will encourage compliance and help government officials understand what types of conduct are and are not permissible. Maintaining a balance between regulating both the supply and demand side of bribery will also ensure that the burdens placed on individuals and businesses are not too great and that these burdens will not hinder economic activity. Moreover, domestic companies will be able to develop satisfactory internal anti-bribery and accounting procedures, thus promoting self-regulation and providing a more efficient investigation process. International businesses that are subject to the FCPA and Bribery Act and have invested in costly compliance programs will also benefit because China will provide a similar compliance environment.

These various matters represent some of the issues that surround China's developing anti-corruption movement. The battle against bribery will call upon changes in China's political, legal, and cultural framework, but adopting a more effective set of laws and implementing independent agencies will provide the domestic and international enforcement that China needs to finally eliminate corruption.