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A Primer on China's Bribery Regulation: Status Quo, Development, Drawback, and Proposed Solution

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A Primer on China's Bribery Regulation: Status Quo, Development, Drawback, and Proposed Solution

Fanyu Zeng

Abstract

Today, the People's Republic of China (hereinafter China) has become one of the largest economic entities in the world. With the development of China, the problem of bribery has imposed more negative impacts on China's government and market. This paper is on China's current regulations on bribery.

This paper is divided into six parts: (1) Introduction to China's legal regulation on bribery; (2) Who can be bribed in China? (3) What constitutes bribery under China laws? (4) Defenses against bribery charges; (5) Punishment and Liability (Criminal Punishment, Administrative Punishment, and Private Action); and (6) Drawbacks and Proposals for China's anti-bribery laws.

I use a comparative-study methodology in this paper to compare China's anti-bribery laws with International anti-bribery conventions (like United Nations Convention Against Corruption and other countries similar laws (like Foreign Corruption Practice Act, UK Anti-Bribery Act 2010, California Unfair Competition Law, etc.)). Based the comparison, I identify China's anti-bribery laws' disadvantages in legal system and legal practice, and provide constructive advices.

Key Words: Briber and Recipient, Non-Property Interest, Specific-Intent Defense, Internal Control.

Part 1: Introduction to China's Legal Regulations on Bribery

Since 1978, China has been adopting the “Open and Reform Policy”. Under the policy, China has begun to rebuild its legal system destroyed by the Great Cultural Revolution. With the significant economic development based on the “Open and Reform Policy,” China is suffering the same problem as most economic high-growth countries: bribery. China is a socialist country led by the Chinese Communist Party (“CCP”), and there are many state-owned or controlled enterprises lacking effective supervision. A private person or a private company who wants to make a transaction with the state owned or controlled companies is very likely to bribe them. With the development of the globalization trend, more and more international companies have entered China. They have a strong incentive to open the market by illegal means, like bribing China's state officials. To cope with the above corruption problems, China paid more attention to make laws regulating bribery. In detail, regarding China's domestic anti-bribery regulations, China has established criminal punishment and administrative punishment against bribery violations in its Criminal Law and Anti-Unfair Competition Law, respectively. Furthermore, a private party is entitled to bring a civil lawsuit against a

briber when the briber makes him suffer damages. Regarding China's participation in international anti-bribery legal practice, China has become a member state of the United Nations Convention against Corruption (hereinafter UNCAC), and joined the working group of Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter OECD Anti-Bribery Convention). Although China has far to go in becoming a transparent country, it has made some achievements in anti-bribery practice.

Part 2: Who can be bribed in China?

On a private party's perspective, the burning question for them is to know who can he or she bribe in China? When you give a red packet (gift of money) to a Chinese friend, does it constitute a bribe? It depends on who receives a red packet and why you give the red packet to him or her. Thus, the first thing we need to know is who can become a target of a briber?

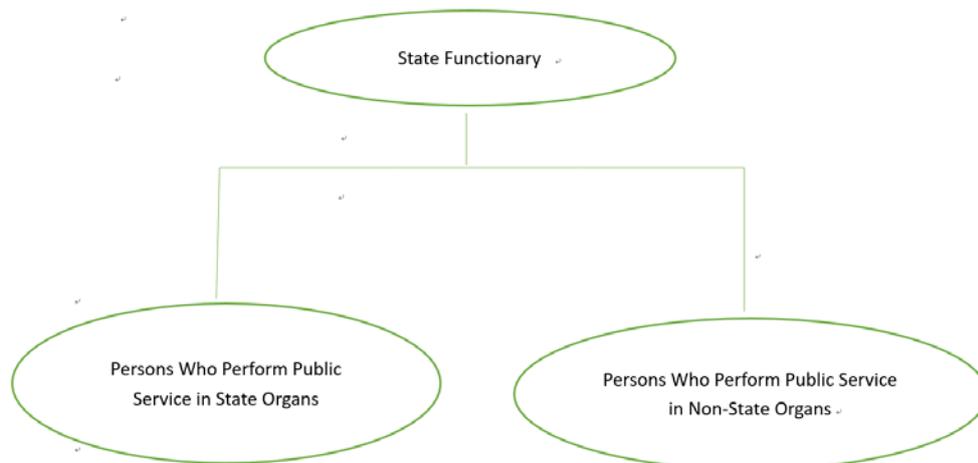
I. Bribing a China State Functionary

Unlike in the United States, China does not adopt "public official" in the crime of bribing a person. Instead, China uses the term "state functionary" to describe the person performing public power. When a

common person, especially a foreign person, first sees this term, he or she is very likely to feel confused: what is a state functionary? Is there any difference between the concept of government official and that of state functionary?

1. What is a state functionary under China law?

It is a common sense that to bribe a person exercising public power is illegal. Nevertheless, the question becomes a bit complex because there is a difference between “state functionaries” and “persons who perform public service in state organs.” Unlike the United States or the United Kingdom, China does not make a very clear line between government official and a non-government person. Under Article 93 of China’s Criminal Law, the concept of state functionaries is broader than the concept of “persons who perform public service in state organs.” The former concept also includes “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.” The relationship between the two concepts are showed by the following figure:



China is a socialist country. The public power is distributed to different organizations and people even though they are not working in the government, if we use a narrow perspective to define the concept of a government. We use China's village-committee system as an example. Under China's administrative law, a village cannot constitute a local government. A town is the basic-level government in China. A village is managed by its village committee. And the directors of the village are elected by the village's residents. Thus, theoretically we cannot say that the directors of the village committee are employed by the government of China or working for the China's government. Nevertheless, under China's judicial interpretation, a director of the village committee can become a target of a briber.¹ For example, in a village of Fanyu City, Guangzhou Province, all the residents of this village received about \$40 million as compensation for their taken property. Five directors of the

¹ Article 12 of The Interpretation of the Supreme People's Court and the Supreme People's Procuratorate of Several Issues Concerning the Specific Application of the Law in the Handling of Criminal Bribery (See https://www.cov.com/files/upload/Carlson_SPP_SPC_Judicial_Interpretation_on_Bribery_Enforcement.pdf)

village committee were responsible for keeping the huge amount of money. A bank officer gave \$250,000 to the five officers and asked them to invest about \$6 million in their finance management products as compensation. Ultimately, the five officers were convicted of receiving bribes as public functionaries. The reason why village committee officers can be deemed as state functionaries in particular circumstances is that the village committee is on behalf of the government to regulate the local society. Thus, it is reasonable that the Criminal Code regard the village committee officers as state functionaries when they are stand for the government to manage the grass-root society.²

The reasons that China's criminal law created two related and different concepts (State Functionary and Persons who perform public service in state organs):

a) Economic Reason

China has many state-owned or controlled enterprises because it is a socialist country. Under China's constitution, these public assets belong to the whole Chinese people.³ The directors of these state-owned enterprises are on behalf of whole Chinese people to keep and manage these public assets. Thus, it is reasonable to deem these state-owned or controlled enterprises as managers. It is also necessary to regulate and

² Article 111 of Constitution the People's Republic of China (See http://www.cpd.com.cn/gb/flfg/2003-04/11/content_1821.htm)

³ Article 7 of Constitution the People's Republic of China (See http://www.cpd.com.cn/gb/flfg/2003-04/11/content_1821.htm)

discipline bribery violations in the transaction when one side is a state-owned enterprise. In practice, China's state owned-enterprises are high-risk areas of bribery violations. For example, the former chairman of PetroChina Company Limited, Jiang Jiemin, was convicted of crime of receiving bribes, abusing power, and holding a huge amount of property with unidentified sources; The court determined that the bribes received by Jiang were worth more than \$2 million not including the huge amount of property with unidentified sources.⁴

b) Political Reason

The village committees are not deemed as an independent administrative level in China. The leader of a village committee is directly elected by the local residents. Nevertheless, these village committees receive lots of subsidies from the central government and the local governments. These village committees distribute the subsidies to the rural residents and assist the government in managing the rural society. Thus, under the interpretation of Standing Committee of the National People's Congress (a legislative interpretation that has the same effect as the enacted statutes), in particular circumstances, an officer of village committees can be regarded as a state functionary.

2. Foreign Countries' and International Organization's Legal Practice of the Term "Foreign Public Official"

⁴ https://en.wikipedia.org/wiki/Jiang_Jiemin

1) United States

A. FCPA

The FCPA does not adopt the term “state functionary”. Instead, the FCPA’s anti-bribery provision apply to corrupt payments to: (1) “any foreign political official;” (2) “any foreign political party or official thereof;” (3) “any candidate of foreign for foreign political office;” or (4) any person, while knowing that all or a portion of the payment will be offered, given, or promised to an individual falling within of these three categories.⁵

The FCPA defines “foreign official” as including: any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency or in instrumentality or for or on behalf of any such public international organizations.⁶

Foreign officials under the FCPA include officers or employee of a department, agency, or instrumentality of a foreign government. When a foreign government is organized in a fashion similar to the U.S. system, what constitutes a government department or agency is typically clear (e.g., a ministry of energy, national security agency, or transportation authority). For example, the United States has state-owned entities, like

⁵ Section 30A(a)(1)-(3) of the Exchange Act, 15 U.S.C. § 78dd-1(a)(1)-(3); 15 U.S.C. § 78dd-2(a)(1)-(3), 78dd(a)(1)-(3).

⁶ Section 30A(f)(1)(A) of the Exchange Act, 15 U.S.C § 78dd-1(f)(1)(A); 15 U.S.C. 78dd-2(h)(2)(A); 78dd-3(f)(2)(A).

the Tennessee Valley Authority, that are instrumentalities of the government.⁷

However, governments are organized in very different ways, like China.⁸ In a differently-structured foreign government, many bribes happen through state-owned and state-controlled entities, particularly in such areas as aerospace and defense manufacturing, banking and finance, healthcare and life sciences, energy and extractive industries, telecommunications, and transportation.⁹

For example, Petroleos Mexicanos ("Pemex") was a national oil company wholly owned by the government of the Republic of Mexico, and was an instrumentality of the Mexican government. Crawford Enterprises, Inc. ("CEI") was a corporation organized under the laws of Texas with its principal offices in Houston, Texas. CEI was in the business of selling compression equipment systems to Pemex for use in the exploration, production and transmission of Mexican oil and natural gas. Similarly, Ruston Gas Turbines, Inc. ("Ruston") and C.E. Miller Corporation ("Cemco") was a corporation engaged in the development, production, and sale of turbine compression equipment for use in the petroleum industry. In order to obtain purchase orders for turbine compression systems and related equipment, CEI, along with Cemco,

⁷ *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F. 3d 399, 411 n. 18.

⁸ See generally, World Bank, *Bureaucrats in Business: The Economics and Politics of Government Ownership*, World Bank Policy Research Report at 78 (1995); Sunita Kikeri and Aishetu Kolo,

⁹ *Id.* at 1.

Solar and Ruston, engaged in a conspiracy to pay Pemex officials bribes equal to approximately 4.5% to 5% of each Pemex purchase order for compression equipment systems in which CEI participated. On September 17, 1982, the US Department of Justice filed a criminal complaint against Cemco and the president, chairman of the board, and majority shareholder of Cemco, charging them with aiding and abetting under the anti-bribery provisions of the FCPA.¹⁰ Accordingly a state-owned company was deemed as a department, agency, or instrumentality of a foreign government. A foreign state-owned company is within the scope of the concept to the “foreign officials.” To bribe a foreign state-owned company’s official may trigger the FCPA’s anti-bribery provision.

B. Domestic Bribery Statute

The U.S. has a domestic bribery statute to regulate domestic bribery of public officials.¹¹ Under 18 U.S.C. 201, the domestic bribery statute uses the phrase “public official” to describe the person performing government power. This concept not only includes the officials or employees of the government, but also covers “any official function, under or by authority”.¹² Accordingly, to be a public official under the context of the United States law is not required to work in a particular department or agency.

¹⁰ United States of America v. C.E. Miller Corporation, et al., No. 82-cr-788 (C.D. Cal. Sept.17, 1982)

¹¹ 18 U.S.C. 201

¹² Id.

According to the FCPA and the domestic bribery statute, both the phrase “foreign official” and the phrase “public official” are broad concepts. Both of them hold an open attitude to include all the people exercising public power under the authority of the government into the scope of “public or foreign official”.

2) United Kingdom

The Bribery Act 2010 is the main act regulating bribery for the United Kingdom. Under Section 6 of the Bribery Act 2010, like the FCPA, the Bribery Act 2010 adopts the term “foreign public officials”.

“Foreign public official” means an individual who—

(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),

(b) exercises a public function

(i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or

(ii) for any public agency or public enterprise of that country or territory (or subdivision), or

(c) is an official or agent of a public international organization.¹³

We find that both UK Bribery Act 2010 and the FCPA define the “public official” in a broad context, which includes officers or employee

¹³ <https://www.legislation.gov.uk/ukpga/2010/23/section/6>

of a department, agency, or instrumentality of a foreign government.

3) UNCAC

Under Article 2 of UNCAC, the term “public official” shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person’s seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a “public official” in the domestic law of a State Party. However, for the purpose of some specific measures contained in Chapter II of this Convention, “public official” may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party.”

Additionally, the term “foreign public official” means any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.¹⁴

¹⁴ Article 2 of UNCAC (See—

On one hand, UNCAC tries to define the term “public official” based on where they work. If the person is “holding a legislative, executive, administrative or judicial office of a State Party,” he or she will be a “public official”. On the other hand, UNCAC does not ignore that the people “who perform a public function or provides a public service” or “exercise a public function” can constitute a “(foreign) public official even though he or she is not working in the “legislative, executive, administrative, or judicial office”.¹⁵ Thus, under UNCAC, whether a person is working in a legislative, executive, administrative, or judicial office is not a required element to be a (foreign) public official. Conversely, being a (foreign) public official requires authorization to perform or exercise a public function, or provide a public service.

3. A Comparative Perspective among Foreign Countries, International Public Organization, and China in how to Define People who Perform a Public Function or Provide a Public Service.

1) Difference

The United Kingdom, the United States, the UNCAC, and China used different phrases to describe the people using public power and performing a public service. Foreign countries and international public organizations prefer to use the term “Public Official.” Instead, China

¹⁵ https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

prefers to use term “State Functionary.”

2) Similarity

In a literal analysis, although they use different phrases to describe the people using public power and performing public service, we can find the literal similarity between the two phrases. Under the Black Law Dictionary, the phrase “official” is defined as “... a person elected or appointed to carry out some portion of a government’s sovereign powers.”¹⁶ The Black Law Dictionary defines the phrase “state” as “an institution of self-government within a large political entity.”¹⁷ Further, the phrase “functionary” is defined as “someone who fills a specific role in a political party or some other organization. We tend to picture them as people in gray suits who follow the boss's orders and don't think for themselves.”¹⁸ Comparing the two terms, we find the similarity is that both are describing people carrying out the sovereign power, performing public service, and exercising public functions.

In an empirical analysis of China law, the FCPA, the Anti-Bribery Act 2000, and the UNCAC include any officer or employee exercising public power or function.

4. Conclusion

Although China has more complicated regulation in some particular circumstances, like the directors of the village committee, which results

¹⁶ Black Law Dictionary, Forth Pocket Edition (2011)

¹⁷ *Id.*

¹⁸ <https://www.vocabulary.com/dictionary/functionary>

in China use different phrases to describe the people performing public service. Nonetheless, by the above comparison, the term “state functionary” and “public official” have basically a similar meaning: all of them are describing people exercising public power or function. Accordingly, we can say the term “state functionary” basically amounts to “public official” in most circumstances.

II. Bribing a China Public Sector

1. Introduction

Under China’s Criminal Code, it is illegal to bribe a public sector with a specific intent to pursuing an illegal interest.¹⁹

2. What is a Public Sector?

The Black Law Dictionary defines “public sector” as “the part of the economy or an industry that is controlled by the government.”²⁰

China is a socialist country and has more varieties in public sectors: state organ, state-owned company, enterprise, institution and people's organization.²¹

3. What is the Difference between Bribing a State Functionary and a Public Sector?

¹⁹ Article 391 of China’s Criminal Code (See <http://www.chinalawedu.com/new/23223a23228a2010/20101222shangf111042.shtml>)

²⁰ Black Law Dictionary, Forth Pocket Edition (2011)

²¹ Article 391 of China’s Criminal Law (See <http://www.chinalawedu.com/new/23223a23228a2010/20101222shangf111042.shtml>)

The main difference is the target. The target of bribing a state functionary must be a natural person. A legal person cannot be a target in a crime of bribing a state functionary. Conversely, the target of bribing a public sector are state organ, state-owned company, enterprise, institution and people's organization. Thus, a natural person cannot be the target of the crime of bribing a public sector.²²

III. Bribing a Private Person (Commercial Bribery)

1. Comparing Bribing a Private Person and Bribing a State Functionary

Comparing with bribing a state functionary, they have many similarities: both needs a specific intent of corruption; and in a criminal prosecution, both require the provided value cannot below a minimum threshold.²³ Nevertheless, they have some differences:

The difference between bribing a private person and bribing a public functionary is the target of the bribe. Whether the target of bribery is a public functionary or a private unit or person. Theoretically, this is a very distinctive and clear.

However, in practice it is a little confusing for a layperson to

²² Article 391 and Article 389 of China's Criminal Law ((See <http://www.chinalawedu.com/new/23223a23228a2010/20101222shangf111042.shtml>)

²³ Article 389 and Article 164 of China's Criminal Law (See <http://www.chinalawedu.com/new/23223a23228a2010/20101222shangf111042.shtml>)

distinguish them in a mixed ownership enterprise. The mixed ownership enterprise refers to an enterprise's share owned by China's government and other private people and or private entities. In a mixed ownership, you could find there are state functionaries appointed by China's government and private officers which are co-existing in the mixed ownership enterprise. In this scenario, if the briber's target is an appointed state functionary, the briber could commit a crime of bribing a state functionary. And if the bribery provider's target is private officer, he or she could commit a crime of bribing a private person.²⁴

The difference is important not only because the two situations constitute different crimes, but because the criminal penalties are different in the two crimes. Criminal penalties in the crime of bribing a state functionary is much heavier than that in the crime of bribing a private unit/person. In the former crime, the heaviest criminal penalty could carry life imprisonment while the later crime could carry a 10-year imprisonment. The reason for a huge difference in criminal penalty between the two crimes is that the crime of bribing a state function is more harmful because it could erode the public power system.

2. Foreign Countries' Legal Practice in Commercial Bribery

Unlike China, the United States is a federal country, meaning the federal government and the state government share the power in making

²⁴ Citation

legislation. For commercial bribery, the state government has the authorization to make laws. The California “Commercial Bribery” law is as an example:

1) Elements

Under Penal Code Section 641.3, the prosecution must each prove beyond a reasonable doubt, are as follows:

- An employee who with the intent to injure or defraud;
- Solicits, accepts, or agrees to solicit or accept;
- Money or anything else of value that is more than \$250;
- From someone who is not the employer;
- And does so without the knowledge or consent of the employer;
- and
- And is done so in return for using his/her position for the benefit of that person.

2) Defenses

Under Penal Code Section 641.3, there are two kinds of defenses in California against a commercial bribery charge:

First, the defendant can bring a no-corrupt-intent defense. Under Penal Code Section 641.3, a person cannot be a briber if the value provider does not provide the value “corruptly.” Under the Black Law Dictionary, the term “corruptly” means that “[it] indicates a wrongful

desire for pecuniary gain or other advantages.”²⁵ For example, a gift or offer of something, such as tickets to a sporting event or a case of wine, may have been offered or sent innocently and with no intent to influence the other person. Also, the employee or recipient of the gift may have accepted it with no intent to award a contract or do something in return. So long as there was no conduct or act taken that could be construed as undermining or damaging the interests of the employer, there is no criminal act. Second, under the Penal Code Section 641.3, a defendant can argue that the provided value is less than \$250.

3. A Comparative Perspective between China and California in Commercial Bribery Law.

1) Corrupt Defense

Both China and California have the corrupt defense. Under Article 164 of China’s Criminal Law, “whoever, for the purpose of seeking illegitimate benefits, gives money or property to any employee of a company or enterprise... shall be sentenced to fixed-term imprisonment of not less than three years but not more than 10 years and shall also be fined.”

If the value provider does not provide the value corruptly, the provider is not guilty. In other words, if the provider does not intend to

²⁵ Black Law Dictionary, Forth Pocket Edition (2011)

use the value to influence the value recipient, the value cannot be regarded as a bribe and the provider cannot be deemed a briber. The main reason of establishing the corrupt defense is that anti-bribery law should not punish a, innocent value provider, like if the provided value is a gift for friendship or the value provider is forced to give the value without intent to influence the transaction.

2) Minimum Value Threshold

Neither China nor California punish a value provider if the value is significantly small. Under Article 164 of China's Criminal Law, "whoever, for the purpose of seeking illegitimate benefits, gives money or property to any employee of a company or enterprise, if the amount involved is relatively large, shall be sentenced" Accordingly, the precondition for a criminal penalty is "the amount involved is relatively large." Likewise, under the Penal Code Section 641.3, if the provided value is less than \$250, the prosecutor of California cannot prosecute the value provider for commercial bribery. The main reason why the law does not use a criminal penalty to punish a small value bribe is that, compared to a relatively expensive briber, it is hard to prove a small bribe influenced a recipient's decision. It is a common sense that a cup of Starbucks coffee is hard to bribe a party to award you the contract in a transaction.

IV. Bribing a Foreign Government Official or International Public Official

1. Introduction

China's current criminal regulations on corruption and bribery are based on the 1997 version of China's Criminal Law. In 1997, China's does establish a criminal regulation on a bribery targeting a foreign state functionary or an international organization official. However, it does not mean China pays no attention in the bribery foreign public officials or public international organization officials. In 2003, China revised the Foreign Trade Law of the People's Republic of China. Under Article 33 of the Foreign Trade Law of China, a bribe is prohibited in a foreign trade transaction.

In 2005, China joined the UNCAC. Article 16 of UNCAC prohibits the bribery of foreign public officials and officials of international public organizations. As a member of UNCAC, China is obligated to adjust its domestic law to reflect the requirements of UNCAC. Thus, China revised its criminal law in 2005 and added a new crime to prohibit the bribery of foreign public officials or international public organization officials.²⁶

Most elements of this crime are similar with the crime of bribery of public functionary except the bribery target.

²⁶ Eighth Amendment to the Criminal Law of the People's Republic of China (See <https://www.cecc.gov/resources/legal-provisions/eighth-amendment-to-the-criminal-law-of-the-peoples-republic-of-china>)

2. Why China created the crime of bribery of foreign public officials or international organization officials:

First, China has joined the UNCAC and, as a member of UNCAC, China has a duty to adjust its domestic anti-corruption laws to the requirements of UNCAC.

Second, China joined the OECD Working Group of the OECD Anti-Bribery Convention. Under Article 1 of the OECD Anti-Bribery Convention, “Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official...”. Additionally, under Article 10, “Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.” As a member of the Working Group, China should adjust its domestic law to reflect the convention.

Third, with the increased development of China, China has become the one of the world’s two largest economies and more China local business entities have entered into the international market. Some businesses have strong incentives to use bribery to open other countries’ markets. For example, Hong Kong’s former Home Affairs Secretary and

the ex-Foreign Minister of Senegal was arrested by the United States for allegedly leading a multimillion-dollar bribery scheme in Africa on behalf of a top Chinese energy company.²⁷ Without the crime of bribery of foreign public officials or international organization officials, it would be hard for China's government to regulate corruption in the foreign markets between China's businessman and foreign public officials or international organization officials.

Part 3: What is a Bribe under China's Law?

I. Introduction to the Definition of Bribery under China's Law Context

The definition of "bribe" has been experiencing a dynamic development process. Under article 389 of China's Criminal Law, a bribe is defined as "money or property." At this stage, bribes are limited to currency money and property. This definition resulted in a problem of some people using intangible benefits to bribe. Thus, to fulfill the gap, China's Supreme People's Court and Supreme People's Procuratorate, holding power to interpret the legal scope of Chinese law, enacted a joint judicial interpretation.²⁸ According to the new judicial interpretation, the

²⁷

<http://www.scmp.com/news/hong-kong/law-crime/article/2120784/us-arrests-former-hong-kong-home-secretary-patrick-ho>

²⁸ Article 12 of The Interpretation of the Supreme People's Court and the Supreme People's Procuratorate of Several Issues Concerning the Specific Application of the Law in the Handling of Criminal Bribery (See https://www.cov.com/files/upload/Carlson_SPP_SPC_Judicial_Interpretation_on_Bribery_Enforcement.pdf)

definition of bribery expands to property interests, which is defined as the money-accountable interest, like tokens, free travel, etc. This expansion is a constructive development because the bribers and recipients have become cleverer by hiding their bribery. However, this interpretation also leaves behind a gap of non-property interest, which may not be accounted for by money. Suppose a male businessman gets a government contract at the expense of having a sexual relationship with a female government officer. Under China's current laws, the government officer may violate the governmental internal disciplines (which are not laws but nonetheless bound to all Chinese government officers) but it is hard to say the businessman has committed a bribery crime under Chinese current laws. This situation is not rare in China. Most Chinese government officers convicted of corruption are found in immoral sexual relationships with others simultaneously. Corruption and sex are inseparable. This gap of non-property interest is also identified in the Implement Review of the United Nations Convention against Corruption. From an economic perspective, bribery is regarded as a transaction: the briber is the supplier side, and the bribery recipient is the demand side. If we only punish one side and cannot prevent another side, illegal transactions are difficult to prevent.

As we have discussed before, China has experienced dynamic process in defining the scope of bribery. The below chart clarifies what

constitutes bribery in the context of China laws:

Types	Bribery or Not	Source of Law
Money	Yes	Article 389 of Criminal Code (1997)
Property (E.g., stock)	Yes	Article 389 of Criminal Code (1997)
Money Accountable Property Interest (E.g., free travel and a waiver of a debt)	Yes	Judicial Interpretation of the Supreme People's Court and the Supreme People's Court and the Supreme People's Procuratorate (2016)
Non-Property Interest (E.g., Sex Bribery)	No	If the bribery receiver is working for the government and related governmental organizations especially he or she has joined in the Chinese Communist Party, he or she will

		<p>be punished by the internal discipline rules. However, the non-property interest briber, at lease, will not be criminally liable.</p>
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II. Foreign Countries and International Organizations’ Legal Practice regarding the Definition of Bribery

1. United States

Under the FCPA, a bribe is defined as “anything of value.” Unlike China, the FCPA does not distinguish a property interest or a non-property interest. Anything which is valuable could be used as a bribe even if the value is just an internship opportunity.²⁹

2. United Kingdom

Under Section 1 of the UK Bribery Act 2010, a bribe is described as “a financial or other advantage.” Accordingly, in the United Kingdom, you can bribe a person with money or by offering other advantages, including non-property interest.

²⁹ UNITED STATES V. JPMORGAN CHASE BANK, N.A. (S.D.N.Y.)

3. UNCAC

Unlike the United States or the United Kingdom, the UNCAC adopted a different phrase, “undue advantage,” to describe “bribery”. Under Article 15 of the UNCAC, it is illegal to give or offer an undue advantage to an official to compel the official act or refrain from acting in the exercise of his or her official duties. On the other side, UNCAC does not distinguish property interest and non-property interest, either.

III A Comparative Perspective between China and Other Countries or International Organizations Regarding the Definition of Bribery.

1. Vertical Comparison

From 1997 to 2016, China has adopted a dynamic and developing attitude in identifying bribery. It is a development for China’s anti-bribery law to expand the scope of bribery from money and property to property interest.

2. Horizontal Comparison

However, comparing with the FCPA, the Anti-Bribery Act 2010, and the UNCAC, China law has an obvious gap: China law does not cover the non-property interest into the scope of China’s anti-bribery laws. To regulate the non-property interest is not only a requirement by UNCAC,

but also is based on practical need.³⁰

First, without the non-property interest, this gap results in sexual bribery being unregulated by China's current laws. Suppose the prosecutor prosecutes a businesswoman who received a contract from the public official at the expense of having a sexual relationship with him. Under China's current laws, the public official will be accused of abusing his power. However, it is hard to prove that the businesswoman is guilty.

Second, if Chinese law does not include the non-property interest in the scope of bribery, there leaves some grey areas. If a person receives a payment-free internship from *JPMorgan*, it is hard to determine that a payment-free internship is a property interest.³¹ The defendants could argue that they do not get any direct benefits like money, property, or property interest from the internship except the experience. It is difficult to evaluate the payment-free internship in terms of money. The prosecutor may argue that the internship experience in *JPMorgan* will be helpful for them to find a better job in the future. But the argument is uncertain. Maybe the experience is helpful but maybe not. In all fairness, how a court interprets a payment-free internship opportunity is a legal uncertainty.

³⁰ Article 15 of UNCAC

³¹ UNITED STATES V. JPMORGAN CHASE BANK, N.A. (S.D.N.Y.)

Part 4: Punishment and Remedy

I. Introduction

Under Article 12 of UNCAC, member nations of UNCAC can use civil, administrative, or criminal penalties for failure to comply with such measures. China's current legal regulations on bribery can be divided into three types: criminal sanctions, administrative regulations, and private enforcement (civil remedies), which constitute a system in regulating bribery.

II. Criminal Law Punishment

Under China's Criminal Law, the criminal law punishments imposed on bribers include criminal fines, criminal detention, fixed-term imprisonment, life imprisonment, and confiscation of property.

Generally, the criminal punishment for bribing a China's state functionary is harsher than that in a commercial bribery. That is because bribing a China's state functionary not only distorts the market competition, but also erodes the loyalty of the people to the government.

III. Administrative Law Punishment

1. Introduction

Before joining the UNCAC, China adopted administrative penalties in regulating bribery.

In 1993, China has issued the Anti-Unfair Competition Law (1993 version). Under article 8 of 1993 version, it is illegal to bribe your trading object party. In 2017, China amended the anti-unfair competition law (2017 version). The anti-unfair competition law is designed to regulate bribery in commercial transactions.

2. Developments of 2017 Version

1) More Detailed Definition of Commercial Bribery

The 2017 version inherits the anti-commercial-bribery clause of 1993 and expand it more comprehensive. In detail, the 2017 version divided commercial bribery into three types:

- Bribing the opposite party of the transaction;
- Bribing the party retained by the opposite party of the transaction (like the lawyer retained by the opposite party); and
- Bribing the person/unit having power to influence the transaction

The more detailed definition of commercial bribery is a significant development because in the 1993 version, there is a big gap: the legislature ignored that the bribery provider can bypass the regulation by

bribing the party retained by the opposite party of the transaction to achieve their purpose. The revised law has filled the gap by providing a more detailed definition of commercial bribery.

2) Harsher Administrative Punishment on Commercial Bribery

There is a 24-year distance between 1993 version and 2017 version. China has experienced a fabulous economic boom in the past 24 years. Both individuals and business entities have become richer and richer. According to IMF's survey, China's per capita GDP of 2017 is predicted to be about \$6000; in 1993, it was only \$377.

In the 1993 version, the administrative fine on commercial bribery ranges from RMB 10,000 (about \$1500) to RMB 200,000 (about \$30,000). This low fine makes it hard to deter and punish bribery violators in China. Accordingly, the 2017 version makes the administrative punishments harsher. First, it increases the maximum of the administrative fine to RMB 3 million (about \$500,000) and it added a new punishment, business license revocation, which is a very strict punishment that excludes the violating business entity from the market.³²

3. Boundary between Administrative Violation of Bribery and Criminal Violation of Bribery

³² Article 19 of China Anti-Unfair Competition Law (2017 Version).

Although both administrative violations and criminal violations are illegal, the penalties are significantly different. In the former, the violator may be punished by an administrative fine and or business license revocation; in the later, the violator may be punished by criminal fine and imprisonment.

Thus, it is important to know the boundary between the administrative violation and the criminal violation. Under China's current criminal code, the boundary is the bribery amount. In a natural person bribery providing scenario, if the worth of the bribe is more than RMB 10,000 (about \$1500), the briber could be prosecuted by China's prosecutors. In a unit-bribe providing scenario, if the worth of the bribe is more than RMB 200,000 (about \$30,000), the bribe provider could be prosecuted by China's prosecutors. This amount is calculated by the total amount of bribes one briber provides rather a single instance of bribery. Accordingly, for example, a briber bribed RMB 2,000 to ten of China's government officers, the briber is very likely to be charged of criminal bribery violation.

This is a very low threshold, which resulted in many international corporations being found to have committed criminal violations of providing bribes in China. For example, the GlaxoSmithKline, one of the largest drug companies, violated China's anti-bribery laws, and four senior executives of GlaxoSmithKline were sentenced guilty for

providing bribes to China's related governmental officials and hospital executives. In this case, some doctors in the hospitals received red package bribes with less than RMB 10,000. But all of them are calculated into the amount of the bribe provided by GlaxoSmithKline.

IV. Private Enforcement (Civil Remedy)

1. Introduction

Entitling private parties, including natural people and legal people, to standing in order to file a civil suit is a requirement of UNCAC.³³ This rule has been adopted by many countries. For example, in California, a private victim is entitled to recover his or her damages due to the bribery.³⁴ China also established its private enforcement system in anti-bribery laws. Under the 1993 version of anti-unfair competition law, a bribery victim has a standing to bring a civil lawsuit and ask for monetary damages and the damages could be the victim's actual damages. If the actual damages are difficult to calculate, the victim can ask the court to use benefits the bribery provider received from the bribery as a substitute of the actual damages. Once the defendant is held liable, he or she must be responsible for all of the plaintiff's reasonable costs of discovery and reasonable attorney fees.

In private enforcement, China adopts the torts law suit system: if a

³³ Article 12 of UNCAC

³⁴ Section 3281 of California Civil Code

merchant could show it lost a customer to a bribe-payer, it could sue the briber for tortious interference; and the merchant also can sue the bribe-taking employee for breach of fiduciary duty.

2. Developments

China has revised its anti-unfair competition law and issued its new version of anti-unfair competition law (2017 version). The biggest development of 2017 version in private enforcement is that 2017 version has established a statutory damage clause: under Article 17 of the 2017 version, if the court finds that the actual damages or the defendant's profits are hard to calculate, the court has discretion to grant a no-more-than RMB 3000,000 (about \$500,000) to the plaintiff.

The new statutory damages clause is a big achievement because in practice, sometimes the plaintiff cannot prove either actual damage or the defendant's profits. Generally, even though the plaintiff can spend much money in employing an expert as an expert witness to show the actual damages or the defendant's profits, it is hard to prove them in some complex transactions. Thus, the statutory changes could reduce the workload of the plaintiff and better compensate the plaintiff as well. In addition, establishing statutory damages has been adopted by many countries. For example, the California Unfair Competition Law has adopted a statutory-damage rule to compensate consumers who were

adversely affected by unfair business acts, including bribery violations.³⁵

Part 5: Defense: Specific Intent Defense

I. Introduction

The question is when a benefit provider provides benefits to a recipient, can he or she bring the defense that he or she did not have an intent to pursue an illegal interest? Regarding the question, the scholars in China are divided into two groups: general intent theory and specific intent theory.

II. Comparison: General Intent Theory and Specific Intent Theory

1. General Intent Theory

1) Definition

Under this theory, a bribery violation just needs the briber to be willing to provide the bribery or to provide the bribery knowingly.

2) Advantages and Disadvantages of General Intent Theory

Regarding the general intent theory, the advantages are: it decreases the workload of the investigator and the burden of proof of the prosecutor, and it could have a stronger deterring effects to the public. However, it has obvious disadvantages: (1) the general intent theory may confuse the

³⁵ Section 1780 of California Civil Code

distinction between a legal gift and an illegal bribe, and (2) the general intent theory may punish an innocent person who is forced to provide a bribe without a purpose to pursue an illegitimate interest, or who is willing to provide a bribe with an intent to pursue a legal interest.

2. Specific Intent Theory

1) Definition

Under this theory, a general intent alone is not enough to constitute a bribery violation. A briber must have a specific intent to pursue an illegitimate benefit.

2) Advantages and Disadvantages of Specific Intent Theory

The specific intent theory requires the court to distinguish between a legal gift and an illegal bribe, and protect the innocent bribery providers. However, the specific intent theory increases the workload of both investigators and prosecutors. However, a law which may deprive other people's liberty, property, or life must be modest; a law should not wrongfully include any innocent people.

III Foreign Law Practice

Unlike China's Criminal Law, the FCPA does not use the phrase "illegitimate gains" to describe bribery. Conversely, the FCPA uses the phrase "corruptly" to describe bribery. To violate the FCPA, an offer,

promise, or authorization of a payment, or a government official must be made corruptly.³⁶ Under the United States Congress notes, the word “corruptly” means an intent or desire to wrongfully influence the recipient. The word “corruptly” is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position. For example, to wrongfully direct business to the payor or his client, to obtain preferential legislation or regulations, or to induce a foreign official to perform or fail to perform an official function.³⁷

Under American law, a general intent (willingness to provide payment knowingly) is not enough to trigger the FCPA or the domestic bribery statute. The provider must have a specific intent to influence the recipient.

IV. Specific Intent Defense in China

In China, the majority trend in this question is regarding the specific intent theory. Under Article 389, “An act of giving state functionaries articles of property in order to seek illegitimate gain shall be considered a crime of offering bribes.”³⁸

³⁶ The FCPA does not explicitly define “corruptly”, but in drafting the statute Congress adopted the meaning ascribed to the same term in the domestic bribery statute, 18 U.S.C. Sec. 201.

³⁷ The House Report states in full: The word “corruptly” connotes an evil motive or purpose such as that required under 18 U.S.C. 201 (b) which prohibits domestic bribery. As in 18 U.S.C. 201(b) which prohibits domestic bribery. As in 18 U.S.C. 201(b), the word “corruptly” indicates an intent or desire wrongfully to influence the recipient. It does not require that the act [be] fully consummated or succeed in producing the desired outcome.

³⁸ <http://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm>

Here, a new question arises based on the specific intent theory: what is an illegitimate gain and what is a legitimate gain? In practice, the argument that the briber is pursuing legal interests is the most common argument. To deal with this problem, China's Supreme People's Court and Supreme People's Procuratorate enacted a joint judicial interpretation in 2012.³⁹ Under Article 12 of this judicial interpretation, the concept of pursuing illegal interest is defined as: “(1) to pursue interests violating laws, administrative regulations, or administrative rules, or to ask the state functionary to violate laws, administrative regulations, administrative rules, public policies, or industry standards for facilitating the bribery provider obtaining an illegal interest; or (2) to pursue competition advantages by violating the equality principle and the equity principle.

Accordingly, we can divide interests into three types: (1) legal interest, the interest you can get it without the bribe; (2) illegal interest: the interest you may obtain without the interest; and (3) the interest you cannot obtain without the bribery.

An example of a legal interest is if a person is disabled and he is eligible to receive a disability subsidy under Chinese law. If Chinese government officials demand him to provide a bribe for getting the disability subsidiary, he is not guilty because the subsidiary is an illegal

³⁹ http://www.spp.gov.cn/flfg/sfjs/201301/t20130101_52307.shtml

interest. An example of an illegal interest is how people wanting to apply for a vehicle license plate must attend the plate lottery and if the applicants have satisfied all the requirements the interest of a vehicle plate is likely to be obtained by the applicants. But if an applicant provides a bribe to the plate lottery officer for obtaining the plate, he or she will violate anti-bribery laws.

The below chart illustrates the relationship between different types of interests and bribery under the context of China’s anti-bribery law:

Types of Interest	Illegal or Legal
You cannot obtain the interest without the bribery	Illegitimate
You may obtain the interest without the bribery	Illegitimate
You can obtain the interest without the bribery	Legitimate

Accordingly, one can define the scope of a legal interest under the context of anti-bribery laws of China as the interest you can obtain without the bribery. And the scope of an illegal interest is that (1) you cannot obtain the interest without the bribery; or (2) you may obtain the interest with the bribery. Accordingly, if a person provides bribery with an intent to pursue a legitimate interest, he or she will not violate China’s anti-bribery laws.

Part 6: Drawbacks and Proposals

I. Redefine the Concept of Bribery

As discussed previously, the definition of the bribe in China's current law context does not contain the non-property interest. China has been criticized by the UNCAC Implement Review Group because of this gap, which could facilitate the bribe because of the non-property interest.

Regulating the non-property interest bribery is not only a requirement of the UNCAC, but also has been adopted by many countries. For example, FCPA does not distinguish property interest or non-property interest in the definition of bribery; rather, under the FCPA, giving anything of value to any foreign official may constitute bribery. Likewise, Article 15 of UNCAC defines bribery as any undue advantage. In practice, the briber has used non-property interest in bribing. For example, in *JPMorgan*, JPMorgan agreed to pay \$264.4 million to the Department of Justice, Securities and Exchange Commission, and Federal Reserve to resolve FCPA offenses for awarding prestigious jobs to relatives and friends of Chinese government officials in order to be awarded banking contracts.⁴⁰ In this case, it is hard to say that the prestigious jobs awards are property interests or could be calculated by money. However, it also constitutes bribery under American law.

⁴⁰ UNITED STATES V. JPMORGAN CHASE BANK, N.A. (S.D.N.Y.)

Accordingly, China should expand its definition of bribery and incorporate the non-property interest into its definition. In detail, regarding the definition of bribery, China should just use the term “undue advantage” or “anything of value” to describe what is bribery.

II. Compulsory Internal Control Mechanism

1. Foreign Country Experience in Internal Control Mechanism

If we compare the corruption to a pest on the apple, we can regard an internal control mechanism as a bottle of insecticide. Good insecticide could prevent the pest assaulting your fruits.

The accounting provision is one of the two main clauses in FCPA. It requires issuers to create and enforce an effective internal control system reducing and managing the corruption risks. In detail, it requires the issuers to make and keep books, records, and accounts accurately and fairly reflecting the transactions and dispositions of the issuer’s assets. Additionally, it also requires that the issuers create and maintain a good system of internal accounting. This provision pushes issuers in America to do more in self-management of risk of corruption. Likewise, a good accounting system could facilitate SEC and DOJ’s investigation against potential corruption violations. For China, a good internal accounting program is not difficult to implement. Many China’s big companies have

employed top accounting firms to keep books, records, and accounts accurately and fairly reflecting the transactions and dispositions of the assets of the issuer. The problem here is that China lacks a compulsory internal control provision that would require big companies, like issuers and state-owned or controlled companies, to establish a good internal control system.

2. Having Good Internal Control Program beyond Legal Requirement

Many big companies have established good internal control programs to reduce their internal corruption risks. The following reasons encourage the companies to establish higher-standard internal control systems:

First, an effective internal control program can eliminate the risks of embezzlement, self-dealing, bribery, etc.

Second, a good internal control program may help the company to mitigate and defended its legal liability. For example, under the FCPA, individuals are only subject to the FCPA's criminal penalties for violations of the accounting provisions if they acted "willfully."⁴¹ The term "willfully" means the company is voluntarily and intentionally failing to establish or implement the internal control program.⁴² A

⁴¹ 15 U.S. Code § 78ff

⁴² See Black Law Dictionary, Forth Pocket Edition (2011)

company could argue that it has tried its best efforts to establish and implement its internal control program and the failure is not its fault. In this scenario, the company is not willfully breaching the internal control provision. Thus, the FCPA may not impose criminal liability on the company. Accordingly, companies have the incentive to establish good internal control programs to mitigate or eliminate its potential liability.

3. China's Current Internal Control Practice

Some big companies in China have established compliance system designed to reduce the risk of corruption. However, China has not established a rule to require all the insurers and other big companies in China to establish internal control mechanisms. According, China's current regulations neglect corruption regulation.

4. Who should be Covered by the Internal Control Mechanism?

A. Issuers of Securities Registered in China's Security Stock Exchanges

Like FCPA, China's future accounting provision should require the listed companies to establish and enforce a good internal control mechanism. Because these companies are big companies and their stocks can be purchased by the public. Once corruption occurs, the corruption will not only erode the honesty and loyalty of the government and the

competition of the market, but also could affect huge middle and small sized stockholders' interest. Thus, the internal control's main target must be the issuers of securities.

B. State-Owned/Controlled Enterprises

Unlike the United States, China is a socialist country, which has lots of state-owned/controlled business enterprises. And compared with private companies, these state-owned or controlled business enterprises are more likely to have corruption scandals. Thus, China should establish a compulsory internal control rule in the future covering state-owned or controlled business enterprises. It not only because the state-owned or controlled enterprise have high incidence of corruptions but also because the wealth managed by the state-owned/controlled enterprises belongs to all citizens of China.