The Eighth Amendment to Article 164: Window Dressing or New Era of Anti-Bribery Enforcement

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There is intrinsic value in being an ethical corporate citizen in light of the recent global campaign against corruption and bribery. China has joined the growing list of nations to criminalise the bribery of foreign officials through the Eighth Amendment to its Criminal Law. The Amendment is somewhat a Chinese counterpart to the extraterritorial laws of other jurisdictions, such as the FCPA and the BA 2010. The effort presents greater challenges for multinationals incorporated under Chinese law and the evolving enforcement requires them to update global corporate risk management. Theoretically, the change represents a significant step to bring China’s bribery laws in line with the well-established international standard. Due to the lack of specifics, the Amendment may give prosecutors broad discretion, and its virtual efficacy depends largely upon how it will be interpreted and enforced.

Introduction

China’s fast-growing economy has made it one of the most attractive counties for Western MNCs to develop business. The globalisation of business combined with the complexity of financial markets presents genuine corporate liability risks as a result of corruption; especially for those multinationals with operations in China. The corruption is an official’s appropriation of a public right for personal gain. It is the misuse of public power, office or authority for private benefit through bribery, which is interpreted as being the offering, promising or giving of something so as to influence a public official in the execution of their
official duties.\footnote{China Criminal Law Article 93: (1) an offer of property; (ii) to a member of the personnel of the state or government, or a state-owned enterprise, (iii) in return for a benefit or for assistance in obtaining a benefit.} A pervasive corruption not only causes public resentment and social unrest, but also shatters market confidence and increases the business costs.\footnote{Jeremy Horder, ‘Bribery as a Form of Criminal Wrongdoing’ (2011) 127 Law Quarterly Review 37, 55} While globalisation has opened up the world for business and has created a more level, worldwide economic market, Chinese companies, including the state-owned enterprises (SOEs) are increasingly engaged in outbound investments overseas. China, ranked 75 out of 182 in the 2011 Corruption Perception Index,\footnote{The World Bank estimated the figure at an extra 10% of the cost of doing business. The reality is that because the vast majority of corruption is kept secret, an accurate assessment of the true cost of corruption may not be possible.} is generally regarded as one of the world’s most challenging business environments. The underdeveloped anti-bribery regime does not match China’s status as the world’s second largest economy. The state image has been tarnished as a result of the commercial transactions in China being notorious for being tainted with corruption. Since the stringent anti-bribery law may protect society from the risk of harm which widespread, undetected bribery would pose, China has joined an expanding group of nations that prohibit bribery through broadening its anti-corruption efforts beyond its own borders. The Standing Committee of the National People’s Congress amended the Criminal Law in February 2011 to apply China’s anti-bribery laws to the bribery of foreign officials.\footnote{Transparency International, ‘Corruption Perception Index 2011’ <http://cpi.transparency.org/cpi2011/results/> accessed 13 February 2012} With an aim to explore whether the Western multinationals’ competitiveness is genuinely jeopardised and as to whether the newly-promulgated Amendment would level the playing field of the global anti-bribery campaign.

This paper develops as follows: Part I confines one of the factors that pose MNCs enormous challenges doing business in China and looks at the deep-rooted cultural context where the prevalence of corruption is anatomised. Part II takes an overall view of China’s recent
statutory development of the Amendment 2011 vis-à-vis the UK’s Bribery Act (BA 2010) and the FCPA. Part III examines the integral elements, such as the criminal intent and the threshold for the offence, and ascertains whether the SOEs’ employees can be judicially recognised as foreign officials. Part IV discusses the feasibility as to whether certain defences or exceptions could be resorted for mitigation. Part V affirms the Amendment’s extraterritorial effect in comparison to its counterpart under the FCPA. Part VI analyses the proactive efforts of the selected jurisdictions to level the playing field and proposes how multinationals can develop sophisticated compliance procedures to mitigate the liability risk of becoming ensnared in corruption probes. This part also aims to address the most contentious issue, i.e. whether Anglo-American companies are genuinely disadvantaged. A tentative conclusion is given based upon the above arguments that China’s Amendment is still at its infancy stage and its efficacy largely depends upon how it is interpreted and enforced.

**A. The Culture of Gift-Giving**

Cultural norms always come into play. Chinese commerce is largely unregulated by formal law and is intensely relational. A general approach toward business transactions enormously values guanxi, growing out of the exchange of favours and gifts. Such a tradition is deeply rooted in the culture of guanxi building, which drives successful business development. The issue is particularly sensitive given that China’s gift-giving culture and guanxi form the social foundation for conducting business. The gift-giving poses cultural challenges in China where gifts and entertainment are expected just for business to get a foot in/through the door. Although not necessarily impermissible, the gift-giving and hospitality culture serves to

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exacerbate China’s most challenging anti-corruption compliance environment, where gifts are given far more frequently than is customary in the West. Western companies may find it difficult to distinguish between customs of gift-giving and bribery. They are always confronted with the conundrum of deciding whether a gift is a permissible business courtesy or (or whether it would in fact cross the line…) whether it has crossed the line into being an illegal bribe. In consequence, Guanxi can present a tangible corruption risk and MNCs must pay particularly close attention to business courtesy expenditures. Managing liability risks is thus extremely complicated for foreign multinational companies (MNCs) in China where culture and customs impact daily business. In view of this unique culture alongside the prevalence of corruption, MNCs should tailor their global compliance regimes to operations in China compatibly for the sake of mitigating any potential legal risks.

It might be arguable that the prevalence of corruption arises from China’s transition from communism to capitalism, which helps grease the wheel of commerce. The unethical practices of bribing foreign officials are increasingly and inherently prevalent with China’s aggressive engagement in overseas mergers and acquisitions (M&As) of oil, gas and mining assets. Chinese MNCs being seen as most likely to pay bribes abroad enormously tarnishes China’s global image. On the other hand, there is intrinsic value in being a good corporate citizen with the globalisation of business and complexity of anti-bribery regimes, hence an increasing trend for MNCs looking more favourably towards doing business with those who have in place appropriate anti-corruption regimes. A legal framework with extraterritorial effect

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8 May-Lee Chai and Winberg Chai, China A to Z: Everything You Need to Know to Understand Chinese Customs and Culture (Penguin, 2007) 113: you should expect to give out symbolic gifts to any officials who may be helping you.
9 Shaun Rein, ‘How To Deal With Corruption In China’ Forbes (7 October 2009)
is necessary in tackling the corruption of foreign officials by those business entities established under Chinese law, which, as a result, will improve China’s reputation and moralise its MNCs’ overseas behaviour.

B. Global Campaign against Bribery

Apart from the well-established Foreign Corrupt Practices Act (FCPA), there is continuing development of global anti-bribery laws with the UK’s newly-enacted BA 2010. Both the Amendment 2011 and the BA 2010 along with the FCPA, have some overlap in terms of the statutory prohibitions, but contain significant differences that may have far reaching implications for multinational companies (MNCs). The challenge for MNCs is to manage the risk of corporate liability under these statutes, which are aimed at preventing bribery and corruption on a world scale, while operating in China where bribes may be widely accepted as a means of developing business.

1. The Foreign Corrupt Practices Act (FCPA)

The initial breakthrough in the field came through the establishment of the substantial legislation against the use of bribery, i.e. the Foreign Corrupt Practices Act (FCPA).\textsuperscript{11} It was centred on restoring public confidence in the integrity of commercial transactions. The anti-bribery statute has been in force since 1977, but the Securities and Exchange Commission (SEC) and the DoJ’s recent enforcement efforts have made MNCs subject to the FCPA increasingly aware of the risks for significant liability. The FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or retaining business. It’s all-encompassing.

inclusion of “anything of value” casts a wide net. Any gift given to a foreign official exposes the company to potential liability. To incentivise the reporting of corporate malfeasance, the SEC has set up FCPA enforcement with a whistleblower programme. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), qualifying whistleblowers will be rewarded between 10–30% of sanctions in cases where over US$1 million is collected in successful enforcement actions.\(^{12}\) The scheme may make the SEC well-informed of potential misconduct and help it expand enforcement efforts by identifying possible securities laws violations as well as accounting provisions of the FCPA.

2. **The Bribery Act 2010 (BA 2010)**

The UK’s previous laws are not adequate in dealing with the rising demands presented by international commerce.\(^{13}\) The application of the common law and previous Acts\(^{14}\) led to diverse interpretations of bribery, creating uncertainty in anti-bribery law. A company could only be held liable if the “controlling mind” requirement was met.\(^{15}\) The onus was on the prosecution to prove that the offence was committed by someone central to the company and who reflected the company’s direction and will.\(^{16}\) The high threshold was criticised by the Organisation for Economic and Cooperation Development (OECD) that it had the effect of shielding commercial organisation from liability.\(^{17}\) The BA 2010 is expected to achieve a more consistent judicial interpretation of the UK anti-bribery regime. According to Section 7,

\(^{12}\) Dodd-Frank Wall Street Reform and Consumer Protection Act Section 922


\(^{14}\) Public Bodies Corrupt Practices Act 1889; The Prevention of Corruption Act 1906; The Prevention of Corruption Act 1916


\(^{17}\) GR Sullivan, ‘The Bribery Act 2010: (1) An Overview’ (2011) 2 Criminal Law Review 87, 100; Transparency International, ‘Bribery Act: Myth and Reality’ (February 2011): There were only 10 cases of bribery offences in the UK compared to 168 in the US and 47 in Germany.
a new offence is created whereby an MNC can be held liable if it fails to prevent bribery carried out on its behalf.\textsuperscript{18} This offence is one of strict liability, as it does not matter whether or not the company intended the offering or receiving of bribes, and whether the MNC was aware of such conduct. It is conceived that the BA 2010, as one of the most stringent anti-corruption legislation in the world,\textsuperscript{19} is bound to raise enormous challenges for MNCs, which, in part, arise from the broad jurisdictional reach of the new Act. As one of the most controversial elements, Section 7 lengthens the jurisdictional reach of the law.\textsuperscript{20} A company is covered by the Act should it fail to prevent bribery anywhere in the world if it simply carries on business in the UK. It is a big stick but with it comes an enormous carrot of a defence of having adequate procedures to prevent bribery.\textsuperscript{21} A company may face obstacles in proving the adequacy of their procedures when bribery had in fact taken place.\textsuperscript{22}

Apparently, neither the FCPA nor the Amendment 2011 prohibits commercial bribery between private parties which the BA 2010 reaches. The BA 2010 prohibits a broader scope of conduct that creates additional liability risk. The FCPA only applies to the bribery of foreign public official outside the US, whilst the BA 2010 criminalises the bribing of public officials inside and outside the UK.\textsuperscript{23} For instance, a US company could be prosecuted in the UK for an act of bribery in China, even if the act was committed by an individual employee without the company’s knowledge, so long as the company has an office or is registered to do business in the UK. In this regard, the FCPA’s absence of an offence which criminalises the

\textsuperscript{18} The Bribery Act 2010 became effective on 1 July 2011.
\textsuperscript{20} Rhys Novak, Paul Henty and Charlotte Tullis, ‘The Bribery Act and Its Interaction with the Public Procurement rules in the UK’ (2011) 5 Public Procurement Law Review 230, 236
\textsuperscript{23} BA 2010 s6(5)(a)
bribing of private individuals undermines the spirit of a level playing field in international commerce.


China has enacted its own version of the FCPA, prohibiting the bribery of foreign officials. According to Article 164, if the payer is an entity, criminal penalties will be imposed against the violating entity and the supervisor chiefly responsible personnel may also face imprisonment of up to 10 years. The newly-enacted Amendment adds a new offence to Article 164 that criminalises bribes given to foreign officials:

“Whoever, for the purpose of seeking illegitimate commercial benefit, gives property to any foreign public official or official of an international public organization, shall be punished in accordance with the provisions of the preceding paragraph [i.e., the pre-existing Article 164].”

Modelled after Article 16 of the United Nations Convention against Corruption (UNCC), the Amendment 2011 was partly motivated by China’s international treaty commitments. This is the first time that China will address cross-border bribery of foreign officials, which illustrates that China has joined an expanding club that broadens its anti-corruption efforts beyond its own borders. Prior to the Amendment of Article 164, Chinese laws only criminalised the paying of bribes to Chinese government officials. The Amendment 2011 prohibits companies from providing money or property to any foreign party performing

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24 The Criminal Law of the People's Republic of China (CCL), enacted originally in October 1997, has been subsequently amended, with the most recent amendment (CCL’s Eighth Amendment) passed by the Standing Committee of the National People’s Congress on 25 February 2011, and took effect from 1 May 2011; Article 164 of the CCL makes it unlawful for one to offer “money or property to the staff of a company or enterprise in order to make illegitimate benefits”.

25 In October 2005, China acceded to the United Nations Convention against Corruption (UNCC) and ratified it in 2006.

26 China Criminal Law Article 385, 389
official duties or an official of international public organizations for the purpose of “seeking illegitimate business benefits”. Violations may result in “fines and a prison sentence of up to 10 years”.

The Amendment will apply to companies organised under China’s laws. It is clear that companies incorporated in China will be potentially subject to penalties for bribing foreign public officials, i.e. not only does it subject Chinese companies to criminal liability for bribery, but it also affects foreign companies in a joint-venture form and foreign representative offices in China. So the MNCs must take seriously the Amendment’s far-reaching implications into account when operating in China.

1. Proof of Intent

Despite the highly-debated innovation of criminal penalty without proof of intent, it seems that the supplier of the bribe shall have a corrupt intent and the payment must be intended to induce the recipient to misuse his/her position for improper business advantages. The FCPA prohibits the payment of anything of value to foreign officials with corrupt intent to influence the official in the exercise of his official duties to assist the payer in obtaining or retaining business. Since the FCPA has no exception for items of de minimis value, corrupt intent could be inferred on an ad hoc basis. Since knowledge is defined broadly to include conscious disregard or deliberate ignorance, criminal liability can only be imposed on issuers or persons that “knowingly” violate the books-and-records provision, even though there is no analogous intent requirement for civil enforcement. As the prosecution need to

27 Supreme People’s Procuratorate 2011: Individuals offering bribes of more than RMB¥10,000 and entities over RMB¥ 200,000 may be prosecuted under Article 164; Joe Palazzolo, ‘China Criminalizes Foreign Bribery’ The Wall Street Journal (2 March 2011)
28 Jeremy Horder, ‘Bribery as a Form of Criminal Wrongdoing’ (2011) 127 Law Quarterly Review 37, 55
30 15 U.S.C.§§ 78dd-1(a), (g); 78dd-2(a), (i); 78dd-3(a) (2006)
establish a higher degree of intent under the FCPA than under the BA 2010, it follows that it will be easier for companies to be prosecuted under the latter.

According to the Amendment, the crime of bribing a foreign official contains a subjective factor, that is, the intention of “seeking improper commercial benefits”. Notably, Article 389 of the China Criminal Law (CCL) applies a test of “seeking improper benefits”.33 Despite the absence of what constitutes “seeking illegitimate benefit” in the Amendment, the Supreme People’s Court (SPC) and the Supreme People’s Procuratorate (SPP) have jointly issued an opinion in the context of commercial bribery laws that may hint at a possible interpretation:

“a briber seeks any advantage in breach of laws, regulations, rules or policies; or requires the other party to provide assistance or facilitation that is in breach of laws, regulations, rules, policies, or industry codes of practice.”34

The Amendment 2011 intentionally confine the crime to circumstances where the offering a bribe is to seek “unjust commercial benefits”. The scope has been broadened to encompass offers of money or property to foreign public officials or officials of an international public organization in pursuit of improper commercial benefits. The scope of the phrase in the Amendment “to obtain an improper commercial benefit” appears as broad as similar terms contained in the UNCC. “…to obtain or retain business or other undue advantage in relation to the conduct of international business.”35 Similarly, the FCPA provides that it is unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business.36 Whether the Amendment will be as extensive in effect as the anti-corruption measures adopted in the UK and the US remains to be seen. It seems that an

33 SPC and SPP, ‘Opinion on Some Issues Concerning the Application of the Law in Criminal Commercial Bribery Cases’ (28 November 2010): “seeking illegitimate benefits means seeking any advantage in violation of law, regulations or requiring other party to provide assistance or facilitation in violation of laws and regulations.”
34 Supreme People’s Court and Supreme People’s Procuratorate, Opinions on Issues Concerning the Application of Law in the Handling of Commercial Bribery Cases (No. 33, 20 November 2008) Article 9
35 UNCC Article 16.1
36 15 U.S.C.§§78dd-1, et seq
offence will only be committed when the purpose of the bribe is of a commercial nature. Although it appears consistent to the concept in other of China’s laws and regulations concerning commercial bribery,\(^{37}\) such an approach will constitute an enormous uncertainty as to the subjective intent to which degree it will be sufficient to constitute the offence. Put differently, it renders it rather unrealistic to ascertain the adequate circumstances under which the bribery is perceived as purely commercial or other objectives. It lacks practicability, to a great extent, because it is difficult to distinguish whether a non-commercial bribery would result in a commercial one particularly in an increasingly complicated geopolitical context.

2. **Threshold for Criminal Offence: A Quantitative Assessment**

The jurisdictional nexus is a very low threshold against the FCPA anti-bribery provisions, which prohibits companies from providing anything of value to a foreign official for the purpose of obtaining or retaining a business advantage.\(^{38}\) The statute encompasses “anything of value,” and there is no exception for items of \textit{de minimis} value.\(^{39}\) The Amendment takes a quantitative approach by assessing the monetary value of bribes, although it is silent on the definition of the term “property”. A previous regulation on commercial bribery may be used to interpret the term as

“cash and cash in-kind, including properties offered by a business operator to a counterparty entity or individual, for purpose of sale or purchase of commodities, disguised as a promotional fee, publicity fee, sponsorship fee, research fee, labour fee, consulting fee, commission etc., or by way of reimbursement of various fees.”\(^{40}\)

\(^{37}\) China’s Anti-Unfair Competition Law, Article 2: Companies should abide by generally-accepted business ethics, and play fairly in the marketplace.


\(^{39}\) 15 U.S.C.§§78dd-1(a), (g); 78dd-2(a), (i); 78dd-3(a)

\(^{40}\) State Administration for Industry and Commerce (SAIC), \textit{Interim Provisions on Forbidding Commercial Bribes} (15 November 1996) Article 2
It seems that the People’s Court will not interpret “money or property” similarly to the way “anything of value” is interpreted under the FCPA. The concept has also been interpreted by the Supreme People’s Court (SPC) to include any tangible or intangible good that can be quantified with a monetary value.\footnote{Opinions on Some Issues Concerning the Application of Law in the Handling of Commercial Bribery Cases 2008 §7} Under the original Article 164, criminal liability only applied where the value of the bribe in question met prescribed thresholds. Those individuals offering bribes valued at more than RMB¥10,000 and entities more than RMB¥200,000 will be subject to criminal prosecution.\footnote{The PRC Supreme People’s Procuratorate (SPP) and the Ministry of Public Security, ‘Provisions on Prosecution of Criminal Cases under the Jurisdiction of Public Security Bureaus (II), Article 11’ (7 May 2010); Regulation of the Supreme People’s Procurators on Criminal Investigation Standards 1999: the criminality threshold for taking a bribe and offering a bribe are RMB¥5000 and RMB¥10,000 respectively. These thresholds should apply to Article 164.} It remains unclear whether such thresholds will continue to apply to the Amendment.

### 3. Foreign Public Officials

SOEs present a particularly difficult challenge for application of the Amendment as well as the FCPA because the anti-bribery provisions fail to concretely define a government “instrumentality.” For the first time used in the Amendment, a most controversial term of “foreign official” may be interpreted by referring to more established anti-bribery laws and conventions, such as the FCPA and the UN Convention which China ratified in 2006. The relevant provision defining the “foreign public official’ shall mean:

“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.”\footnote{UNCC Article 2}
This explanation implies that companies must be careful when dealing with any persons who have any connection to the public functions of a foreign country. Similarly, the definition of “foreign official” is significantly broader, enshrined in the FCPA as:

“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 instrumentality, or for or on behalf of any such public international organization.”

In the course of enforcement, the term “foreign official” is broadly interpreted by SEC and DoJ to include individuals working for state-owned entities (SOEs).

Western MNCs must be particularly sensitive to operations in China with prevalence of state owned enterprises (SOEs). The Chinese government “wields power through the allocation of massive state resources and effective control of large-scale SOEs, which continue to dominate key sectors of the economy.” Most primary sectors, such as banking, power, telecommunication, oil and gas are predominantly state-owned. The government’s broad ownership and control of commercial enterprises qualifies a significant percentage of the country’s workforce as “foreign officials” under the FCPA. This makes the anti-corruption landscape a minefield for large companies with a presence in China, magnifying Western companies’ compliance challenges. It is notable that MNCs should focus on adapting their existing compliance policies. It remains unclear as to whether SOEs’ employees are regarded as “foreign public officials” under the Amendment 2011. The lack of clarity affords

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46 Lynn Walsh, ‘China’s Hybrid Economy’ Socialism Today (October 2008); The central government exercises control over key enterprises through the State-Owned Assets Supervision and Administration Commission (SASAC), which has authority over nearly 150 Central Enterprises, including China’s five large electricity conglomerates.
47 Z Chen, ‘Privatisation Would Enrich China’ Financial Times (7 August 2008): The Chinese government is thought to own more than 70% of the country’s productive wealth, and it is the majority shareholder of 31% of publicly listed companies.
prosecutors a broad discretion with respect to the interpretation and enforcement. The government’s enforcement priorities will determine the types of conduct that are likely to result in liability. Chinese multinationals should also be well aware that the Amendment has an extraterritorial reach and should tailor their compliance accordingly. A sophisticated compliance programme may prevent the risk of criminal sanctions, but also avoid potential damage to an MNC’s reputation arising from a bribery investigation.

As mentioned above, the interpretation of certain wording within the Amendment remains arbitrary thanks to the undefined key terms. The Amendment 2011 provides little guidance on specifics. Until judicial interpretations are promulgated, the People’s Court may rely upon the relevant provisions of the Criminal Law, previous judicial interpretation and even look to the UN Convention for guidance. The Amendment’s impact will depend heavily upon interpretative guidance to be issued by the Supreme People’s Court (SPC) and the Supreme People’s Procuratorate (SPP) in the future.

D. Defences

Under the BA 2010, the only defence to an allegation of violating the Act is its previous implementation of adequate procedures to prevent bribery. The FCPA does not contain such an adequate procedures defence, but both the SEC and DoJ do take compliance and

48 It is estimated that over 60% of the investigations involved foreign companies; J Lu, ‘Commercial Bribery: What Are the Boundaries’ China Law & Practice (March 2007); T Yu, ‘Multinationals Have Thrived in Loose Policy Environments’ China Daily (20 August 2009); J Kang, ‘Harsher Corporate Penalties Urged in Bribery Cases’ Global Times (11 August 2009); Foreign companies generally enjoy relaxed corruption oversight, Chinese authorities appear more cautious and decline to give harsh punishments over foreign multinationals.’ Patti Waldmeir and Peter Smith, ‘Sinopec Urges Curb on “Corrupt Foreigners” Financial Times (26 March 2010); Sinopec called upon the Chinese government to crack down on multinational corporations paying bribes in China.

cooperation efforts of companies into consideration when making enforcement decisions. With regard to statutory exceptions, it is worth examining the facilitation payment and the affirmative defences enshrined in the FCPA.

1. Facilitation Payment

The FCPA explicitly permits facilitation or grease payments, which must be made “to expedite or to secure the performance of a routine governmental action.” The contours of such an exception have been ill-defined, and have always been narrowly construed. It remains uncertain as to what would qualify as facilitation or expediting payments to secure a routine governmental action. There has been so far no justified guidance as to what constitutes a nondiscretionary action by foreign officials such that the exception would apply. Reliance on the exception may jeopardise internal control and compromise the efforts to build a corporate culture of compliance. The facilitation payment has generally been banned by international communities like the Organisation for Economic Cooperation and Development (OECD). It is perceived as corrosive on sustainable economic development and the rule of law.

A statutory exclusive exception under the CCL may apply resulting from the Chinese officials’ blackmail, i.e. no criminal liability will be incurred in circumstances where property is provided to a Chinese official under extortion and no improper gains have been obtained through the bribery. This exception remains consistent with the compulsory requirement of criminal intent. If a bribe is paid out of extortion, the briber may lack the corrupt intent necessary for the criminal liability. It is unclear at this early stage whether this exception will

50 15 U.S.C. §§ 78dd-1(b); 78dd-2(b); 78dd-3(b) (2006)
51 Dionne Searcey, ‘Small-Scale Bribes Targeted by OECD’ Wall Street Journal (11 December 2009)
52 CCL Article 389
also apply to bribery of foreign officials and whether this will be added to the amended provision in the future. More significantly, Article 389 of the CCL prohibits giving money or property to a government official to seek improper benefit, and does not virtually carve out an exception for facilitation. Since it is not differentiated from other bribes under Chinese law, the resort to the facilitation payment may not be a viable safe harbour for MNCs in China to engage in the practices necessary to build guanxi.

2. Affirmative Defences

The first is that payment is lawful under the written law of the foreign official’s country. Reasonable and bona fide expenditures constitute another affirmative defence if directly related to the promotion of payer’s products or services, or performance of a contract. The provisions on affirmative defences are nuanced and should be construed narrowly, as the lack of a sophisticated anti-bribery law in the host country should be by no means justified for defence, which is, otherwise, in contrast with the spirit of the global anti-bribery campaign. The Amendment 2011 does not contain any affirmative defences or exceptions to, or exemptions from the provisions of Article 164, which only provides for leniency if the perpetrator voluntarily reports the violation before an investigation has been initiated. Such efforts can mitigate liability for MNCs in the event that misconduct does occur. Penalties may even be reduced or waived if the violator discloses the crime before being charged.

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55 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c) (2006)
E. Extraterritorial Enforcement

China is taking an extraterritorial, “long-arm” jurisdiction when it comes to the prosecution of bribery of foreign public officials. The notable legislative development via amending the CCL highlights greater challenges for multinational companies arising from the potential broad jurisdiction reach. It is worth looking into where multinationals sit in terms of potential enforcement actions given the extraterritorial cross-over of the FCPA, the BA 2010 and China’s new anticorruption law. Put differently, it remains unclear as to whether future cases involving alleged bribery of officials in China will be subject to liability under the FCPA and the BA 2010.

1. Multiple Prosecutions

An MNC’s international activities may potentially face scrutiny and charges under the anti-bribery regimes of multiple jurisdictions. Prosecution in one jurisdiction for anti-bribery violations does not preclude another jurisdiction from pursuing charges against an MNC based on the same conduct, so long as the conduct falls within the jurisdiction of the nation’s respective anti-bribery laws. Investigations will increase enormously because of greater interaction between the US, UK and China law enforcement agencies. There will clearly be overlap in anti-corruption enforcement between the three jurisdictions. In terms of jurisdictional lead, the question of where to report will normally be resolved by negotiation at the starting point, such as the engagement with the enforcement agency where the offence takes place. The pandemic bribery and anti-corruption regimes cannot be cured without greater multi-jurisdictional cooperation. For instance, the SFO signed a Memorandum of
Agreement with China’s enforcement authorities in 2010, of which the emphasis is on intelligence sharing between enforcement agencies. Some MNCs have entered into settlement agreements with both US and UK enforcement agencies to resolve charges arising out of the same conduct. This has been well articulated in the case of BAE.\textsuperscript{56}

The SEC and the DoJ alleged that BAE Systems concealed and misreported corrupt payments made to foreign officials in lease applications and export license applications, which enabled it to earn more than US $200 million from contracts obtained through improper means. BAE Systems pleaded guilty to one charge of conspiring to make false statements to the US government. Finally the BAE Systems agreed to plead guilty and pay US $400 million to the DoJ and US $47 million to the SFO to settle FCPA-related charges. This case along with the recent enactment of the BA 2010 and the Amendment 2011 raise the issue as to how enforcement agencies can interact in order to increase efficiency and limit over-deterrence. It may be worth exploring whether the updated anti-bribery laws could be instituted to curb multiple prosecutions of a single defendant based upon the same offence. With increasing intertwinements between the multiple jurisdictions among the US, UK and China, it remains unaddressed as to whether a principle similar to double jeopardy could apply to limit multiple enforcement actions of anti-bribery laws.\textsuperscript{57}

2. The Amendment’s Extraterritorial Effect

In theory, the CCL should have extraterritorial effect if an entity bribes a foreign official outside of China. However, the extraterritorial effect of the Amendment is far from clear if


\textsuperscript{57} Brandon L. Garrett, ‘Globalised Corporate Prosecutions’ (2011) 97 (8) Virginia Law Review 1775, 1875 at 1844
the offences were committed outside of China. It may be inferred from the relevant provisions indicating the issue. It is generally considered that the CCL applies to citizens/entities of China who commit, outside of China’s territory, crimes which are specified per se.\(^{58}\) It is also deemed a criminal offence when a crime takes place outside of China, but has “consequences” within China.\(^{59}\) Conceivably, a China-registered entity in order to obtain an unfair commercial benefit, bribes a foreign public official, which can be said to have consequences in China. The recent changes present challenges for MNCs to reassess their compliance schemes and to update internal controls in light of the evolving enforcement environment. Prior to the promulgation of judicial interpretations, the effective risk mitigation policy must be made global, accounting for anti-corruption measures under all laws of the covered jurisdictions. In particular, it is conducive to tailor the MNCs’ compliance compatibly if their target jurisdictions are regarded as being high-risk for corrupt activities. It remains to be seen whether the Amendment 2011 will be so broadly construed by People’s Court as to capture bribery committed by entities established under China law.

F. Would Anglo-American MNCs be disadvantaged?

Western MNCs may be more likely to fall under the remit of the FCPA and the BA 2010 than their Chinese counterparts. This raises the question as to the impact these anti-bribery regimes have had on the competitiveness of the Anglo-American companies (AACs) on the global market. A most contentious issue is focused on whether they would be at a disadvantage if they operate ethically in comparison with other international MNCs who routinely use bribes as a way of boosting business. The OECD Convention 1997 aims to create a level playing field so that Western MNCs would not be unfairly disadvantaged.

\(^{58}\) CCL Article 7
\(^{59}\) CCL Article 6
Although China ratified the United Nation Convention against Corruption (UNCC), it remains the only major economy that has not signed the OECD Convention. It is interesting to explore whether the threat over Western companies is genuinely true or just exaggerated ostensibly.

1. **The Increasingly Rigorous Scrutiny over Chinese MNCs**

Bound to have a far-reaching impact, the change to the CCL indicates the significant potential liability for corrupt conduct both in China and overseas. The Amendment 2011 empowers the Chinese authorities to exercise greater vigilance in monitoring its own MNCs’ overseas activities, explicitly prohibiting from providing money or property to any foreign officials for the purpose of seeking illegitimate business benefits. Chinese MNCs will need to adopt compliance systems similar to their Western counterparts to ensure their overseas subsidiaries conduct business in complying with the Amendment. Apart from its anti-bribery provisions, the FCPA contains accounting provisions pertaining to companies whose securities are listed in the US.\(^{60}\) The prohibition applies to all companies that have securities registered on the US exchanges. Some Chinese government-controlled oligopolies which are competitive on a global stage, such as China Mobile, CNOOC, PetroChina and Sinopec have already been subject to the BA 2010 and the FCPA due to their presence in the UK and status as issuers of US securities.

2. **Integrate Global Compliance Strategies into China’s Context**

\(^{60}\)15 U.S.C.§78m
The prevalent role of business courtesies require MNCs to tailor their global compliance regime to address the risks posed by gift-giving expenditures. Considering the pervasiveness of corruption and the degree to which China’s business culture accepts some level of gift giving and reciprocal exchange of favours as perfectly acceptable, ensuring that non-Chinese companies operating in China comply with the FCPA requires constant diligence.\(^{61}\) Bribery of Chinese officials has already placed Western MNCs at great risk under the US or UK laws. As mentioned above, the FCPA prohibits providing money, gifts, or anything else of value to foreign officials for the purpose of obtaining or retaining business.\(^{62}\) As an extension of China’s efforts to address bribery, the Amendment is meant to prevent companies incorporated under China law, including joint ventures, from obtaining unfair business advantages by bribing foreign officials.\(^{63}\) The People’s Court normally consider two elements, i.e. whether the company has benefited from the bribery and whether the bribery had been endorsed by the company explicitly or implicitly. The Amendment does not clarify the ambiguity of China’s Criminal Law as to the extent to which an individual’s crime can be attributed to his company. Such ambiguity may increase the compliance costs, especially in joint ventures where it is hard to control the activities of Chinese party-appointed directors. Western companies should be vigilant about corruption in their operations in China. The Amendment highlights how important it is for Western MNCs to choose their business counterparts in China. It also incentivises them to conduct due diligence on any company with which they seek to form a joint venture. A most effective step in avoiding criminal liability is to establish a robust internal compliance programme, which should address third party relationships by requiring their potential joint venture partners to certify their


\(^{63}\) The Amendment 2011 applies to companies organised under China law regardless of where they operate, including joint ventures, wholly foreign-owned enterprises and representative offices of non-PRC companies.
compliance with the Amendment.\textsuperscript{64} It is indispensible for Western MNCs to conduct a nationwide check to ensure that their potential parities and intermediaries have not been found guilty of bribery offences.\textsuperscript{65}

3. Levelling the Playing Field

China has increased its efforts in combating corruption. The Amendment 2011 represents the first time that Chinese law has addressed the bribery of foreign officials. All the business entities established under China law must remain cognizant of the dramatic change. In the global markets, its long-arm jurisdictional reach will be conducive to levelling the playing field in overseas competition between Chinese MNCs and their western counterparts, which have long been subject to tougher anti-bribery laws. The Amendment should contribute to improving ethical practices of Chinese MNCs that have been severely criticised for engaging in overseas corruption, particularly in developing countries where Chinese MNCs have a substantial presence and facilitating payments are often seen as necessary for conducting business. With this Amendment, no company subject to the FCPA and the BA 2010 can afford to ignore the potential risk in China.

Previously, Western companies may not face rigorous scrutiny from Chinese authorities, as the Chinese government is generally reluctant to prosecute foreign companies for bribery. China has not taken action even after investigations by other countries with respect to bribery.

\textsuperscript{64} On 16 February 2012, China’s Supreme People’s Procuratorate (SPP), the main investigatory and prosecutorial arm of the Chinese government, in conjunction with other PRC anti-corruption agencies, announced that a database listing individuals and companies found guilty of certain bribery offenses now has nationwide scope. Companies and individuals can now apply to have the SPP check nationwide to determine whether a particular individual or company has been convicted of certain bribery offenses in mainland China.

\textsuperscript{65} ‘Chinese Government Centralises Database of Bribery Convictions: Companies can now apply for nationwide check of bribery convictions’ <http://www.cov.com/files/Publication> accessed 21 February 2012
in China has become public. The Amendment diminishes any reluctance that Chinese authorities may have had in the past to prosecute foreign parties which have engaged in bribery of officials. The Amendment 2011 highlights China’s efforts to increase its role in international cooperation concerning anti-corruption. It remains to be seen whether the Amendment will virtually develop into China’s analogue to the FCPA and the BA 2010. Although China’s prevalent corruption business environment presents enormous challenges, an effective compliance programme can help an MNC manage its risk of liability by preventing corruption in the first instance and remediating misconduct when it does occur. MNCs should centre on governance as a key development concept deserving prominence. Efforts to promote good governance are most likely to level the playing field such that corruption is by no means permitted.

**Conclusion**

China has been engaging in a serious effort to increase its anti-corruption enforcement. The Amendment demonstrates China’s continued determination to crackdown on corruption, through which China has joined an expanding club that prohibit bribery and broadened its anti-corruption efforts beyond its own borders. The Amendment has been conceived as the latest move to fulfil China’s obligation under the UN Convention against Corruption, and an affirmation of China’s determination to tackle corruption carried out both inbound and outbound. The Amendment appears to be an attempt to bring China’s anti-corruption laws into closer alignment with the provisions of multilateral conventions and those under the BA 2010 and the FCPA. If seriously enforced, the Amendment will certainly help build China’s position and reputation on the world stage, and on the back of its overseas investment and
acquisition trail. The ultimate effectiveness in preventing overseas bribery, however, will depend on how the Amendment is interpreted and enforced.