
How China's Crackdown on Corruption Has Led to Less Transparency in the Enforcement of China's Anti-Bribery Laws

Daniel C.K. Chow*

China's recent crackdown on government corruption and commercial bribery by multinational companies is widely known. As part of this campaign against bribery, the Chinese government has promulgated a number of new laws against corruption and bribery as well as lengthy and binding interpretations of existing laws. The Chinese state-controlled media is also full of reports of convictions of corrupt officials and hefty fines imposed on greedy multinationals trying to bribe their way to business success in China. Although these developments may indicate an increase in transparency in the enforcement climate against corruption and commercial bribery, ironically the crackdown on corruption has led to less transparency in China's enforcement of its anti-bribery laws. The reason is that as cases of government corruption and commercial bribery become more important and the stakes become higher, the Communist Party believes that it must take a more hands on approach to these cases by directing their outcomes from behind the scenes. Since the Party controls all government enforcement authorities and the courts, the Party is able to dictate the outcome of cases in secrecy. As these cases have grown in number and importance, the role of the Party has also grown adding to the political intrigue, bargaining between rival factions of the Party, and the settling of old scores playing out behind the scenes in these cases in secretive Party proceedings. Once the Party makes a decision, it will then direct a public entity, a government enforcement authority or a

* Copyright © 2015 Daniel C.K. Chow. Frank E. and Virginia H. Bayzler Chair in Business Law, The Ohio State University Michael E. Moritz College of Law. The author lived and worked in China for several years as in-house counsel for a multinational with substantial operations in China. As part of his duties, the author dealt firsthand with commercial bribery matters.

court, on how to dispose of the case. But the real reasons for the disposition of the case by the Party are never revealed to the public or to the parties leading to less transparency in the enforcement of China's anti-bribery laws. The lack of transparency means that the Chinese public and multinational companies doing business in China never know the real rationale for the outcome of corruption cases. This only deepens the mistrust of the Communist Party already harbored by the Chinese public and further contributes to the climate of uncertainty and unpredictability that many multinational companies already experience in China.

TABLE OF CONTENTS

| | |
|--|-----|
| INTRODUCTION | 687 |
| I. CHINA'S NEW CAMPAIGN AGAINST GOVERNMENT CORRUPTION AND COMMERCIAL BRIBERY | 690 |
| II. WHY MORE ENFORCEMENT HAS LED TO LESS TRANSPARENCY IN ENFORCEMENT AGAINST GOVERNMENT AND PARTY CORRUPTION | 693 |
| A. <i>The Pervasive Role of the Party in Government and the Economy and How This Leads to Official Corruption.....</i> | 693 |
| B. <i>Increased Lack of Transparency as a Result of the Crackdown on Government Corruption</i> | 696 |
| III. WHY MORE ENFORCEMENT LEADS TO LESS TRANSPARENCY IN PROSECUTIONS OF MNCs FOR COMMERCIAL BRIBERY | 697 |
| CONCLUSION..... | 700 |

INTRODUCTION

The People's Republic of China ("PRC") is in the midst of a highly publicized crackdown on corruption and bribery that has drawn media attention from around the world.¹ Unlike past anti-corruption campaigns, China's current crackdown is wide-ranging and delves deeply into the affairs of officials and multinational companies ("MNCs"). China is targeting government and Communist Party officials for misappropriating or misusing public funds for their own personal benefit. Crackdowns on government corruption are not novel. China has engaged in periodic crackdowns on official corruption for decades, and the warning that corruption "could prove fatal to the Party" has been widely used since the 1980s.² In this current crackdown on public or Party officials, President Xi Jinping, the paramount leader of China, has announced that China will go after "tigers" and "flies," meaning both higher and lower level officials.³ In the past, Chinese crackdowns on public corruption have focused on lower level officials ("flies") to demonstrate seriousness about corruption but have not pursued higher-level officials. Unlike past campaigns, the current crackdown seems to have ensnared a number of "tigers," i.e., high-level officials. The effect of this crackdown on

¹ See, e.g., Keith Bradsher & Chris Buckley, *China Fines GlaxoSmithKline Nearly \$500 Million in Bribery Case*, N.Y. TIMES (Sept. 19, 2014), <http://www.nytimes.com/2014/09/20/business/international/gsk-china-fines.html>; *China's Corruption Crackdown*, NEWSWEEK (Dec. 23, 2014, 7:40 PM), <http://www.newsweek.com/chinas-corruption-crackdown-294568>; Megha Rajagopalan & Michael Martina, *China Launches Crackdown on Pharmaceutical Sector*, REUTERS (July 17, 2013, 6:25 AM), <http://www.reuters.com/article/2013/07/17/us-china-multinationals-crackdown-idUSBRE96G06C20130717>.

² Former President Hu Jintao made this warning when he addressed this issue in his address to the 18th Communist Party Congress on November 27, 2012. Hu Jintao, President, China, Report at 18th Communist Party Congress (Nov. 27, 2012), available at http://www.china-embassy.org/eng/zt/18th_CPC_National_Congress_Eng/t992917.htm (corruption "could prove fatal to the Party and even cause the collapse of the Party"). "As early as 1983 in China Supreme People's Procurate Working Report, the Grand Procurator Huang Huoqing stated that economic criminal activities (the term corruption was not used in 1983, but economic criminal activities was an earlier form of corruption) had had a significant negative and devastating impact on the party, the government, the military, and the nation's reputation." QINGLI MENG, CORRUPTION IN TRANSITIONAL CHINA: A 33-YEAR STUDY 3 (2013). Shortly thereafter, former Party General Secretary Hu Yaobang stated, "Corruption is like cancer cells, if not curbed immediately and effectively, it will spread across all kinds of different aspects of Chinese society." *Id.* at 3-4. See also DALI L. YANG, REMAKING THE CHINESE LEVIATHAN: MARKET TRANSITION AND THE POLITICS OF GOVERNANCE IN CHINA 220-21 (2004).

³ Tania Branigan, *Xi Jinping Vows to Fight 'Tigers' and 'Flies' in Anti-Corruption Drive*, GUARDIAN (Jan. 22, 2013, 12:44 PM), <http://www.theguardian.com/world/2013/jan/22/xi-jinping-tigers-flies-corruption>.

official corruption is apparent to any visitor to China in the past two years. Restaurants that once catered to tables full of officials enjoying extravagant meals now sit empty; expensive nightclubs, once bustling with officials in their after-work hours are quiet; and even the gambling revenues in Macau are sharply down.⁴ The crackdown seems to be reaching higher-level officials, although it is not yet clear if the crackdown will reach the top echelon or the true elites of the Party,⁵ including the allies of President Xi.

What also makes the current crackdown unusual is that China is not just focusing on the role of government officials in accepting bribes (the demand side of the bribe), but also on commercial bribery (the supply side or the payor of the bribe). The payor is often an MNC that makes a payment to Party, government, or private individuals for the purpose of gaining some business advantage. In a recent case, the China subsidiary of Glaxo Smith Kline (“GSK”) was fined a record \$492 million for giving illegal bribes to doctors and hospitals in exchange for prescribing its medications.⁶ In the past, Chinese enforcement authorities might have just focused on the recipients of the bribe (the hospital officials and doctors), but in this case the enforcement officials chose to pursue GSK. Five of GSK’s top executives, including Mark Reilly, a U.K. national, were convicted of bribery-related crimes and received suspended sentences.⁷ China has also announced a sweeping investigation of the pharmaceutical sector focusing on MNCs giving bribes to hospitals, administrators, and doctors to induce them to buy their pharmaceuticals.⁸

The crackdown on commercial bribery means that China’s anti-bribery laws now reach both the supply side (the payor) of the bribe and the demand side (the recipient) of the bribe and constitute a comprehensive anti-bribery law. China has traditionally focused only on the demand side — the government or Party officials who receive

⁴ See Kate O’Keeffe, *Macau Gambling Revenue Suffers First Full-Year Fall*, WALL ST. J. (Jan. 2, 2015, 5:18 AM), <http://www.wsj.com/articles/macau-gambling-revenue-down-30-on-year-in-december-1420178456>.

⁵ See *infra* Part II.A.

⁶ See Bradsher & Buckley, *supra* note 1; Hester Plumridge & Laurie Burkitt, *GlaxoSmithKline Found Guilty in China*, WALL ST. J. (Sept. 19, 2014, 2:15 PM), <http://www.wsj.com/articles/glaxosmithkline-found-guilty-of-bribery-in-china-1411114817>; *Xinhua Insight: GSK China Hit with Record Fine, Apologizes*, XINHUA (Sept. 19, 2014, 8:52 PM), http://news.xinhuanet.com/english/indepth/2014-09/19/c_133656872.htm.

⁷ Reilly was deported from China and returned to the UK. See Bradsher & Buckley, *supra* note 1; Rajagopalan & Martina, *supra* note 1.

⁸ See Yin Pumin, *Clamping Down on Corporate Bribery*, BEIJING REV. (July 29, 2013), http://www.bjreview.com.cn/business/txt/2013-07/29/content_557941.htm.

the bribe — but not the payor. As an indication of China's new focus on the payor of the bribe, China has enacted new laws that focus on the payor.⁹ China has also enacted legislation that further details the elements of a criminal bribery offense.¹⁰ Furthermore, in 2006 China enacted legislation consistent with its international obligations under the United Nations Convention Against Corruption by enacting a law that prohibits Chinese companies from giving bribes to foreign official when these companies do business overseas.¹¹ The Chinese state-controlled media has also warned public officials and MNCs of the continuing crackdown on bribery.¹² The main argument of this article is that while new laws and media campaigns have increased transparency, the intense focus on anti-corruption and anti-bribery has led to less transparency in the enforcement of these new laws. As the stakes grow higher in the anti-corruption and anti-bribery campaign, the Party becomes more involved in behind-the-scenes decision-making in high-profile official corruption cases as well as in commercial bribery cases involving MNCs.

These developments set forth above are further discussed in detail as follows in the sections below. Part I will discuss in detail some of the new laws that have been enacted and the recent media campaign that creates more transparency in the current crackdown. Part II will discuss some examples of recent cases and how the Party's involvement in the cases as a behind-the-scenes decision-maker has led to less transparency, not more, in the prosecution of government and Party officials for accepting bribes. Part III will discuss the

⁹ See Guanyu Banli Xinghui Xingshi Anjian Juti Yingyong Falu Ruogan Wentide Jieshi (关于办理行贿刑事案件具体应用法律若干问题的解释) [Interpretations on Several Issues Concerning the Application of the Law for Handling Criminal Cases of Bribe-Offering] (promulgated by Sup. People's Ct. & Sup. People's Proc., Dec. 31, 2012, effective Jan. 1, 2013) [hereinafter Interpretations on Bribe-Offering]. This Interpretation specifically focuses on the payor of bribes.

¹⁰ See Guanyu Banli Shangye Huilu Xingshi Anjian Shiyong Falu Ruogan Wentide Yijian (关于办理商业贿赂刑事案件适用法律若干问题的意见) [Opinion on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery] (promulgated by Sup. People's Ct. & Sup. People's Proc., Nov. 20, 2008, effective Nov. 20, 2008) [hereinafter Opinion on Commercial Bribery].

¹¹ See Xingfa (刑法) [Criminal Law] (promulgated by the Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997) art. 164 [hereinafter Criminal Law]. Article 164 reads: "Where a person gives money or property to an employee of a company, enterprise or other unit for the purpose of seeking illegitimate benefits, if the amount involved is relatively large, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention."

¹² See *infra* Part I.

increased lack of transparency for MNCs as China cracks down on the payor of the bribe.

I. CHINA'S NEW CAMPAIGN AGAINST GOVERNMENT CORRUPTION AND COMMERCIAL BRIBERY

Since as early as 1989, China's leaders emphasized that corruption will ruin the Party and ever since China has launched periodic anti-corruption campaigns against Party and government officials.¹³ These campaigns have all followed a similar pattern. A few low-level officials are punished in highly publicized criminal prosecutions, but then the campaign fades until a new campaign is announced. These anti-corruption campaigns were largely symbolic and fooled no one. Rampant corruption became the norm in China and most people were resigned to accept it. On November 18, 2012, President Xi Jinping, China's current paramount leader, announced a new anti-corruption campaign that would catch both "tigers" and "flies"¹⁴ — both high-level and low-level state officials involved in corruption. Consistent with this recent approach, China added new legislation that supplements existing legislation on government corruption¹⁵ and commercial bribery.¹⁶ In 2011, China amended its 1979 Criminal Law to include new articles 382–386 on crimes of graft and bribery by government officials.¹⁷ In 2006, the Supreme People's Court and the Supreme People's Procuratorate issued its Opinions on Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery.¹⁸ Interpretations issued by the Supreme People's Court and the Supreme People's Procuratorate (China's highest prosecutorial body) are considered to be binding laws with legislative force equivalent to laws passed by China's legislature.¹⁹ The

¹³ See YANG, *supra* note 2, at 220-21 (stating that Deng Xiaoping, China's paramount leader, called for a crackdown on official corruption, and noting that periodic anti-corruption campaigns have been launched ever since).

¹⁴ Branigan, *supra* note 3.

¹⁵ See Criminal Law, *supra* note 11, arts. 163–69. These articles deal mostly with bribes demanded and paid to state-owned enterprises.

¹⁶ See Opinion on Commercial Bribery, *supra* note 10.

¹⁷ DANIEL C.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA: IN A NUTSHELL 331-32 (3d ed. 2015) (discussing new crimes such as insider trade and price manipulation (Articles 180–82), financial fraud (Articles 192–98) and computer fraud and computer hacking (Articles 285–86)). These new provisions are consistent with other revisions that target economic crimes that reflect China's economic development. See Criminal Law, *supra* note 11, arts. 382–86.

¹⁸ See Opinion on Commercial Bribery, *supra* note 10.

¹⁹ See CHOW, *supra* note 17, at 175-77.

interpretations expand the scope and details of existing laws. A discussion of a few examples follow below.

The 2008 Opinion offers a binding interpretation of eight crimes of commercial bribery under China's criminal law.²⁰ The Opinion also singles out the medical and pharmaceutical sectors as a specific area of concern.²¹ The Opinion specifically states that state-owned hospitals that solicit bribes from suppliers of medicines and pharmaceuticals, medical equipment and other medical materials are subject to criminal liability.²² Pharmaceutical companies that offer bribes are also subject to criminal punishment.²³ The 2008 Opinion may have foreshadowed the current crackdown on the MNC pharmaceutical industry, which has ensnared GSK, and 60 other pharmaceutical companies.²⁴ On December 26, 2012, the Supreme People's Court and the Supreme People's Procuratorate issued the Interpretation on Certain Issues Concerning Specific Application of the Law in Handling Criminal Cases Involving Bribery.²⁵ The law became effective on January 1, 2013, and focuses on the payor of the bribe. The 2013 Interpretation also contains specific details on the punishments associated with specific amounts of the bribes that would constitute a violation of Article 390 of the basic PRC Criminal Law proscribing bribes.²⁶ China is also currently considering enacting a new set of anti-corruption laws containing harsher penalties.²⁷

²⁰ See Opinion on Commercial Bribery, *supra* note 10, art. 1 (stating that the Criminal Law, *supra* note 11, provides for eight crimes related to commercial bribery, including (1) the crime of accepting bribes by non-state functionaries (Article 163 of the Criminal Law); (2) the crime of offering bribes to non-state functionaries (Article 164); (3) the crime of accepting bribes (Article 385); (4) the crime of accepting bribes by organizations (Article 387); (5) the crime of offering bribes (Article 389); (6) the crime of offering bribes to organizations (Article 391); (7) the crime of introducing bribes (Article 392); and (8) the crime of offering bribes by organizations (Article 393).

²¹ See *id.* art. 4.

²² See *id.*

²³ See Criminal Law, *supra* note 11, art. 389.

²⁴ See Jonathan Kaiman, *GSK Bribery Scandal: Beijing Tightens Grip on Multinationals in China*, GUARDIAN (July 15, 2013, 10:45 AM), <http://www.theguardian.com/business/2013/jul/15/gsk-bribery-scandal-multinational-china>.

²⁵ Interpretations on Bribe-Offering, *supra* note 9.

²⁶ *Id.* For example, Article 390 of the Criminal Law specifies criminal punishment when the bribe involves "serious circumstances." The January 1, 2013 opinion specifically states that a bribe of not less than RMB 200,000 and not more than RMB 1 million constitutes "serious circumstances" and therefore a crime under Article 390 of the Criminal Law. Other provisions in the January 1, 2013, opinion also define specific thresholds that constitute crimes.

²⁷ *China Mulls Harsher Anti-Corruption Laws*, XINHUA (Mar. 9, 2015, 5:28 PM), http://news.xinhuanet.com/english/2015-03/09/c_134051873.htm; see also *China to*

In a separate movement, the Chinese state-controlled media has widely reported China's crackdown on official corruption.²⁸ In addition, the Chinese media has identified MNCs as the culprits behind the surge in commercial bribery. One source notes that "recent commercial bribery scandals have shown that those involving multinationals in China are on the rise — certain foreign enterprises, it seems, are now more emboldened to circumvent the law here."²⁹ The Chinese media blames MNCs for exploiting China's weaknesses in its still developing legal system: "China is currently in transition, which means possible loopholes in its laws and systems. Vying competitors can more easily take advantage of institutional vulnerabilities and bribe their way to fulfilling their overseas ambitions."³⁰ The media have identified MNCs as using bribery as a main strategy for doing business in China: "Multinationals promoting business through bribery is nothing new; the concern is that they have moved their corruption battlefield to developing countries, especially emerging economies like China."³¹

In summary, there are several factors that create greater transparency in the current crackdown on government corruption and commercial bribery. First, China has passed new laws that deal specifically with official graft and corruption, or the demand side, or the recipient of the bribe.³² Second, China has also enacted new laws that deal specifically with commercial bribery that focuses on the supply side or payor of the bribe.³³ These new laws are detailed and set specific guidelines for what constitutes a bribe and for punishments for bribes.³⁴ Third, China has also made it widely known through the media that the country intends to punish government corruption.³⁵ As an example, China has recently imposed a \$492 million fine on GSK's

Speed Up Drafting Anti-Corruption Law, XINHUA (Mar. 8, 2015, 4:16 PM), http://news.xinhuanet.com/english/2015-03/08/c_134048517.htm.

²⁸ See, e.g., *China Enhances Crackdown on Corruption: Reports*, XINHUA (Mar. 12, 2015, 8:23 AM), http://news.xinhuanet.com/english/2015-03/12/c_134059857.htm (describing the results of increased efforts to fight corruption and graft).

²⁹ Jin Shanming, *Multinationals in China Must Operate According to Law*, CHINA TODAY (Sept. 25, 2013), http://www.chinatoday.com.cn/english/economy/2013-09/25/content_569718.htm.

³⁰ *Id.*

³¹ *Id.*

³² See *Opinion on Commercial Bribery*, *supra* note 10.

³³ See *Interpretations on Bribe-Offering*, *supra* note 9.

³⁴ See *id.*

³⁵ See Bradsher & Buckley, *supra* note 1; *China's Corruption Crackdown*, *supra* note 1; Rajagopalan & Martina, *supra* note 1.

China subsidiary,³⁶ and it has announced an investigation of an additional 60 pharmaceutical companies.³⁷ China's state-controlled media has singled out MNCs as the main culprits in commercial bribery.³⁸ All of these developments should provide clear and unmistakable signals to state officials and MNCs alike that China is cracking down on government corruption and commercial bribery. The new laws also create greater transparency by providing expansive interpretations of legal terms and details lacking in prior legislation. As the number of cases being prosecuted against public officials and MNCs are on the rise, one would also expect that these cases would set clear precedents for those who wish to avoid prosecution. However, while these new developments have created greater transparency in awareness of China's serious intentions concerning government corruption and commercial bribery, there is now less transparency in the enforcement of these laws.

II. WHY MORE ENFORCEMENT HAS LED TO LESS TRANSPARENCY IN ENFORCEMENT AGAINST GOVERNMENT AND PARTY CORRUPTION

China's recent campaigns against both government corruption and against commercial bribery have led to new national legislation that creates greater transparency for potential transgressors and the public. The recent crackdown has led to more prosecutions of government officials³⁹ and MNCs for violations of these new laws. In the following discussion, this article will first discuss why prosecutions of state officials are non-transparent and a subsequent section discusses why the investigations of MNCs are cloaked in secrecy subject to behind-the-scenes Party control.

A. *The Pervasive Role of the Party in Government and the Economy and How This Leads to Official Corruption*

Almost all important government posts in China are held by members of the ruling Communist Party.⁴⁰ Most important posts in

³⁶ See *supra* note 6 and accompanying text.

³⁷ See Rajagopalan & Martina *supra* note 1.

³⁸ See *supra* notes 29–31 and accompanying text.

³⁹ See *China Enhances Crackdown on Corruption: Reports*, *supra* note 28 (noting that the work reports of the Supreme People's Procuratorate and the Supreme People's Court reported a sharp increase in the number of prosecutions and convictions in cases involving graft and bribery in 2014).

⁴⁰ See CHOW, *supra* note 17, at 119-20, 133-34.

China's massive state-owned enterprises ("SOEs")⁴¹ are also held by Party members.⁴² By placing its members in all-powerful positions in government and in SOEs, the Party is able to control the government and the economy.⁴³ An important consequence of this pervasive control is that many corruption cases involve a member of the Party. Party members, like all members of Chinese society, are subject to the laws against bribery and corruption.

Corruption within the Party is administered by the Central Commission for Discipline Inspection ("CDI"), an organ of the Communist Party. The Central Commission is headed by Wang Qishan, a member of the Politburo Standing Committee, the inner core of China's elite, and has been long known as a strong opponent of corruption.⁴⁴ The Central Commission for Discipline Inspection handles all corruption cases; instead of openly referring to the cases as concerning corruption, a politically sensitive term, the CDI uses the less provocative term "discipline" as a surrogate for corruption.⁴⁵ All of the inner working of the Central Commission for Discipline Inspection, like all Party work, is held in secrecy.

All corruption cases involving Party members at any level are considered to be sensitive as they reinforce the common perception of the Chinese public that the Party is corrupt. The Party is especially concerned when a high-level official is involved in a corruption scandal. In sensational and high-profile cases, such as that involving Bo Xilai, a member of the Party's elite Central Committee and a one-time candidate for China's Politburo, the highest body within the

⁴¹ SOEs are companies that are owned and controlled by the State. All vital sectors of the economy are controlled by SOEs. For example, SOEs are involved in banking, telecommunications, steel production, oil and gas exploration, electricity and water supply, rail and air transport. See CHOW, *supra* note 17, at 22-24.

⁴² See *id.*

⁴³ As all important posts are controlled by Party members, the Party controls the government. For example, Xi Jinping holds the government position of President, the highest post in government, but he is also the general secretary of the Communist Party, the highest post in the Party. Xi can implement the policies of the Party through his position as President. See CHOW, *supra* note 17, at 134 (explaining in further detail the intertwining of the Party and the government). The same is true of SOEs. The general manager and all executive positions in SOEs are held by Party members. By controlling SOEs, the Party controls the economy.

⁴⁴ See John Ruwitch, *Mr. Clean Catches Graft Tigers by the Tail*, REUTERS (Sept. 12, 2013), <http://www.reuters.com/article/2013/09/12/us-china-politics-wang-idUSBRE98B17420130912>.

⁴⁵ See Chris Buckley, *Pursuing Graft Cases at Higher Levels, Chinese Leader Risks Unsettling Elites*, N.Y. TIMES (Sept. 25, 2013), <http://www.nytimes.com/2013/09/26/world/asia/pursuing-graft-cases-at-higher-levels-chinese-leader-risks-unsettling-elites.html>.

Communist Party, Bo disappeared from public view for months.⁴⁶ With the accused held in an undisclosed location, the Party will make its deliberations and come to a resolution after a long and carefully drawn out process. The reason for the secrecy is that in cases involving Party members, especially high-profile Party members, the accused might have knowledge of the involvement by other Party members that could cause embarrassment and a widening scandal. Many Party members also have allies as well as enemies within the Party leadership so bargains must be struck between the Party's senior leadership in the case of Bo and other high-profile cases. The machinations that occurred as part of the resolution of the case against Bo were never made public. In Bo's case, the Party took months to deliberate on how to handle his case and these deliberations were held in secrecy without any leaks of any kind to the public.⁴⁷ Once the Party makes a decision on the case, the Party then refers the case to the courts with detailed instructions on how to decide the case.⁴⁸ Many observers believe that the trial itself is a kind of show trial with the final decisions already made by senior Party leaders.⁴⁹

It should be noted that not just high-profile Party leaders are subject to the Central Commission for Discipline Inspection; all Party members of any rank are subject to its jurisdiction. This is because the Party disciplines itself and then uses the judicial system to validate its own internal conclusions. Although the inner workings of the Party's discipline system are unknown to outsiders, the Party is known to use discipline proceedings to settle political scores. For example, Xi's

⁴⁶ See Andrew Jacobs, *China Casts Ex-Leader's Wife in a Familiar Role*, N.Y. TIMES (July 26, 2012), <http://www.nytimes.com/2012/07/27/world/asia/wife-of-disgraced-chinese-leader-charged-with-murder.html> (noting that following Bo's suspension from the Politburo in April 2012, Bo "has not been heard from since").

⁴⁷ See Simon Denyer, *China's Ousted Official Bo Xilai Convicted, Sentenced to Life in Prison*, WASH. POST (Sept. 22, 2013), http://www.washingtonpost.com/world/asia_pacific/chinas-ousted-official-bo-xilai-convicted-of-corruption-sentenced-to-life-in-prison/2013/09/21/88b8d190-22b9-11e3-ad1a-1a919f2ed890_story.html (Bo's "prosecution and trial is thought to have involved months of behind-the-scenes negotiations between his former backers and his opponents within the party and has been one of the foremost challenges for President Xi Jinping since he took over as general secretary of the party in December.").

⁴⁸ See Editorial, *China's Anti-Corruption Campaign Is Not All It Seems*, FIN. TIMES (Aug. 4, 2014), <http://www.ft.com/cms/s/0/2ebe2150-1970-11e4-8730-00144feabdc0.html#ixzz3q1lVcJNM> ("The way justice is dispensed in China undermines the claim that this is an even-handed exercise. Courts are not independent, but answer to the Communist party. Judgments are often reached behind closed doors. Conviction rates are above 99 per cent.").

⁴⁹ See *id.*

campaign has been criticized for not being truly about eliminating corruption but as yet another power struggle as Xi seems to be targeting his enemies and not his allies.⁵⁰ This raises the issue of whether the current anti-corruption gain is truly a crackdown on all corruption as opposed to a tool to settle political scores and to consolidate Xi's control.

Since Xi gained power in November 2012, nearly 63,000 party officials have been punished, including 30 very senior officials.⁵¹ In addition, a formal investigation has been launched against Zhou Yongkang, who was a member of the Politburo Standing Committee of the Communist Party.⁵² Zhou's investigation crosses an important line: for 25 years present and former members of the Politburo were thought to be immune from prosecution.⁵³ However, while this might seem significant, Zhou is also viewed as a political rival to Xi, so it is still unclear whether the anti-corruption campaign is a genuine effort to eliminate corruption or a vehicle used to settle political vendettas.⁵⁴

B. Increased Lack of Transparency as a Result of the Crackdown on Government Corruption

The discussion above identifies several factors that have led to a greater lack of transparency as China continues its crackdown on government corruption. As almost all government officials are members of the Communist Party, they are subject to internal party discipline. These proceedings occur in secrecy with the accused sometimes held in an undisclosed location.⁵⁵ No records of any kind

⁵⁰ See *id.* ("Even if Mr. Xi is genuine about tackling corruption, the suspicion is his allies will not be touched. His adversaries, on the other hand, are far from safe."); see also Xin Lin & Ho Shan, *Death of Former China Military Top Brass Under Graft Probe Prompts Questions*, RADIO FREE ASIA (Mar. 16, 2015), <http://www.rfa.org/english/news/china/china-xucaihou-03162015142646.html> ("But critics say the campaign is highly selective, and only targets Xi's political rivals or their supporters.").

⁵¹ See Editorial, *supra* note 48.

⁵² *Id.*

⁵³ See John Garnaut, Op-Ed., *China's Power Politics*, N.Y. TIMES (Aug. 11, 2014), <http://www.nytimes.com/2014/08/12/opinion/chinas-power-politics.html> ("Stability prevailed but so too did corruption. Bureaucracies and state-owned companies became empires unto themselves. Leaders' families grew fabulously rich. The compact of market opportunity and political immunity held for members of the Politburo Standing Committee for 25 years, until Mr. Xi tore it up late last month.").

⁵⁴ See Editorial, *supra* note 48.

⁵⁵ See Jeremy Page, *Chinese Trial's End Brings New Questions*, WALL ST. J. (Aug. 26, 2013, 2:08 PM), <http://www.wsj.com/articles/SB10001424127887323407104579035852585755002> (noting that Bo was held in an undisclosed location before trial).

are made available to the public. In addition, most people in China believe that the proceedings involve political intrigue, bargains struck, and vendettas settled.⁵⁶ No one really believes that the Party's disciplinary proceedings are applying China's new laws against bribery and graft. Only when the Party has already decided the outcome of the case will the Party refer the case to the courts.⁵⁷ As the courts are under the control of the Party, the courts will follow a carefully scripted scenario in holding what is in essence a show trial.⁵⁸ As the number of disciplinary proceedings increase with China's continuing drive against corruption, the number of political scores being settled and the amount of political intrigue will only increase. In this sense, the lack of transparency will only increase with the increasing number of prosecutions of government officials for corruption.

III. WHY MORE ENFORCEMENT LEADS TO LESS TRANSPARENCY IN PROSECUTIONS OF MNCs FOR COMMERCIAL BRIBERY

The current crackdown on government corruption focuses on the demand side of the bribe. China is now also emphasizing cracking down on the supply side (the payor of the bribe), which also leads to less transparency. In usual cases dealing with the supply side of the bribe, the payor is a multinational company or a privately owned Chinese company. China refers to this type of bribery as commercial bribery because the briber is paying the bribe in order to obtain some type of business benefit.⁵⁹

⁵⁶ See *id.* (describing how Party leaders control the judiciary and decide cases in advance of show trials).

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ Zhonghua Renmin Gongheguo Fan Buzhengdang Jingzheng Fa (中华人民共和国反不正当竞争法) [Law of the People's Republic of China Against Unfair Competition] (promulgated by People's Republic of China Presidential Order No. 10, Sept. 2, 1993, effective Dec. 1, 1993). China's first law against commercial bribery is contained in Article 8 of the Anti-Unfair Competition Law enacted in 1993, which provides in relevant part as follows:

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

The commercial bribery case involving GSK, discussed above, involved a year-long investigation by the Public Security Bureau (“PSB”), China’s police, and then a prosecution by the Procuratorate, China’s prosecutorial organ, and then a record fine of nearly \$500 million imposed by a Chinese court.⁶⁰ The Chinese media hailed this development as a triumph of the rule of the law. According to Xinhua, the official news agency, the GSK case showed that “an open China is not a lawless one.”⁶¹ Moreover, as noted earlier, the Chinese government has called for an industry-wide crackdown on the pharmaceutical sector, including many MNC pharmaceutical companies.⁶² A state news agency has reiterated that a “crackdown on commercial bribery by multinationals is deeply significant to safeguarding the order of the market economy and protecting an environment of fair competition.”⁶³

As in the case of the crackdown of official corruption, the crackdown on commercial bribery will likely lead to less transparency in China’s business environment. Although China’s enactment of more specific laws and interpretations of existing laws appear to create more transparency, the enforcement of the laws against MNCs encounters a similar problem that the result of increased enforcement is less transparency. The lack of transparency is created by the Party’s desire to become directly involved in important cases involving MNCs.

In the GSK case,⁶⁴ for example, the decision to investigate and prosecute was one made at the highest levels of the Communist

The Anti-Unfair Competition Law is still currently under revision, a process that has taken many years. *Id.*

⁶⁰ See Bradsher & Buckley, *supra* note 1.

⁶¹ See *id.*

⁶² See Yin, *supra* note 8.

⁶³ See Rajagopalan & Martina, *supra* note 1.

⁶⁴ Other MNC pharmaceutical companies that have been targets of the current anti-corruption campaign are Eli Lilly, Novartis, and Sanofi. See Denise Roland, *China Pharma Scandal Widens as Eli Lilly Accused of Bribery*, TELEGRAPH (Aug. 22, 2013, 2:08 PM), <http://www.telegraph.co.uk/finance/newsbysector/pharmaceuticalsandchemicals/10259473/China-pharma-scandal-widens-as-Eli-Lilly-accused-of-bribery.html>. Companies in other sectors such as Microsoft, Qualcomm, and Daimler (the manufacturer of Mercedes-Benz automobiles) have also been targeted. See Natasha Bertrand, *Why China Is Raiding Foreign Companies at Dawn*, BUS. INSIDER (Jan. 16, 2015, 12:15 PM), <http://www.businessinsider.com/china-raiding-foreign-companies-in-anti-corruption-crackdown-2015-1> (noting that MNCs “with Chinese outposts have become increasingly aware that the Chinese government will investigate them for corruption”). Another sensational case involved Rio Tinto, a mining company. Four Chinese-born executives of Rio Tinto received lengthy jail sentences and had their assets confiscated. See *Rio Tinto Executives Handed Lengthy Jail Terms*, BBC NEWS (Mar. 29, 2010, 7:23 PM), <http://news.bbc.co.uk/>

Party,⁶⁵ not by the local level PSB and Procuratorate. Both the PSB and the Procuratorate at all levels are controlled by the Party. The leading officials of the PSB and the Procuratorate are Communist Party members, and it is likely that they received instructions from Party elders to proceed with the investigation. Presidents of courts in China are most likely to be Party members, and each court has an adjudication committee that often decides the case (before it is tried) and will instruct the trial court on how to conduct the case and on its resolution.⁶⁶ The adjudication committee is also controlled by the Party.⁶⁷ In the GSK case, the Changsha Intermediate People's Court, imposed a fine of \$500 million after a one-day trial held in secrecy.⁶⁸ Changsha is the capital of Hunan Province and is not viewed as a particularly powerful city, such as Beijing or Shanghai. Moreover, an Intermediate People's Court would be viewed as a rather minor unit in China's government bureaucracy. It would be impossible for judges from such a minor court to impose a record fine of \$500 million unless the decision were already approved and mandated by the highest levels of the Party. China has an interest in its relationships with MNCs like GSK, and it is a matter of national importance to carefully regulate the influx of foreign investment and technology from GSK and other MNCs. No decision of this magnitude would be left to judges sitting on a minor court. The real decision-makers are unknown members of the Party and their reasons remain clouded in secrecy, leading to less transparency in the legal environment for MNCs doing business in China.

As in the case of the crackdown on government corruption, some observers believe that China's general crackdown on MNCs is politically motivated. Many MNCs have complained about China's overly harsh and seemingly overtly discriminatory behavior in the antitrust and competition law environment.⁶⁹ Whether China is

2/hi/business/8592226.stm.

⁶⁵ See Andrew Gilholm, *Rise of the Red Regulators: Multinationals Beware?*, INTEGRITY MATTERS (July 2014), <https://www.controlrisks.com/en/newsletters/integrity-matters/issue-13/corruption-crackdown-in-china> ("The recommendation [to investigate and bring charges] has almost certain been approved at the highest levels of government.").

⁶⁶ See CHOW, *supra* note 17, at 216-17.

⁶⁷ See Sui-Lee Wee, *China Unveils Legal Reform Plans, but Says Party to Remain in Control*, REUTERS (Oct. 28, 2014, 8:52 AM) (discussing how the Communist Party exerts "full control over the courts").

⁶⁸ See Bradsher & Buckley, *supra* note 1.

⁶⁹ See *Unequal Before the Law: China's Antitrust Crackdown Turns Ugly, with Foreign Carmakers at the Forefront*, ECONOMIST (Aug. 23, 2014) ("Chinese authorities

targeting MNCs for commercial bribery is unclear but one commentator has noted that while GSK was given a record fine, domestic Chinese pharmaceutical companies have been spared prosecution even though they are “guilty of much more egregious behavior.”⁷⁰ As the Party is notoriously secretive in its policy decisions, there is no documentary proof that MNCs are being targeted, but the general sentiment in the Chinese media towards MNCs has turned decidedly negative⁷¹ and MNCs feel that they are unwelcome in China.⁷² These attitudes of fear and uncertainty are heightened by the understanding by MNCs that most of the major decisions are made by Party leaders behind closed doors and under a cloak of secrecy.

CONCLUSION

China’s crackdown on government corruption and commercial bribery by MNCs has led in one sense to greater transparency. New laws have been enacted that ostensibly provide clearer guidelines in determining legal and illegal behavior. New interpretations by China’s highest court and prosecutorial body also add clarity to existing laws. China is considering a new set of more stringent laws on anti-corruption that will further clarify the scope of this offense. The state-controlled media is full of news stories about convictions of corrupt public officials and greedy MNCs willing to evade the law to achieve their business goals. All of these developments help to create greater transparency in China concerning the current campaigns against corruption.

Ironically, the increase in the number of detailed laws and regulations targeting corruption and the heightened attention of the media have led to less transparency in the enforcement of the new

have been singling out foreign firms in various industries around the country, harassing them for allegedly breaking the country’s antitrust laws, conducting spot inspections of their hard drives and reportedly busting them without due process.”).

⁷⁰ See Benjamin Shobert, *Three Ways to Understand GSK’s China Scandal*, FORBES (Sept. 4, 2013) (arguing that while GSK was prosecuted for paying bribes, domestic Chinese companies were spared prosecution even though they have been “guilty of much more egregious behavior”).

⁷¹ See *supra* note 29 and accompanying text.

⁷² See Simon Zadek, Op-Ed., *The End of Irresponsible Business Practices by Multinationals in China*, S. CHINA MORNING POST (Aug. 22, 2013), <http://www.scmp.com/comment/insight-opinion/article/1298364/end-irresponsible-business-practices-multinationals-china>; *Freaking Out*, ECONOMIST (Sept. 14, 2013) (“Foreign firms are, in the words of one adviser, “freaking out”. No one knows who is next. Some suggest the campaign is a way to settle scores or to cripple specific foreign competitors.”).

laws. As the number of prosecutions of cases of government corruption and commercial bribery by MNCs continue to increase in size, the Party feels that it needs to take control over more and more cases. The Party is not interested in cases involving minor stakes, such as a small fine or cases of petty corruption. These cases are handled by the legal system with little Party supervision or input. The Party is simply not interested in minor cases of corruption. When the stakes are higher because an important government official is involved, or because an MNC has engaged in widespread corruption, the Party feels that it needs to have direct control over the outcome of the case. The Party believes that high-stakes cases could have an important impact on Chinese society. So, it believes that it must exercise direct control over the case to avoid an outcome that could cause social unrest. In any case the Party directly controls the case, and the outcome of the case and the decision-making process becomes non-transparent to the public. The Party leadership works in secrecy and no one really knows why decisions are made. In other words, when government corruption and commercial bribery did not dominate the national agenda in China, Party leaders did not believe that they needed to play an important role. However, as these cases have continued to escalate in numbers and in importance, the Party now believes that it must assume a greater role. In all cases involving the discipline of Party members, the Party's own internal process, a secret process that appears to be parallel to the judicial process, will handle the problem. As these cases involve high-profile members accused of corruption (the "tigers"), the Party leadership feels the need to carefully orchestrate the outcome of these cases to avoid escalating the public embarrassment that accompanies any scandal involving high-ranking Party members. In cases involving prominent MNCs, such as GlaxoSmithKline, and fines in the hundreds of millions of dollars, the Party will want to be involved in every step of the investigation and outcome. The current crackdown on commercial bribery involving high-stakes cases has led to Party involvement in a greater number of cases. The pervasive behind-the-scenes role of the Party, which controls the government enforcement authorities and the courts, is why the increasing emphasis on cracking down on government corruption and commercial bribery is leading to less transparency in the enforcement of China's anti-bribery laws.