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## China's Deliberate Non-Enforcement of Foreign Corruption: A Practice That Needs to End

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# China's Deliberate Non-Enforcement of Foreign Corruption: A Practice That Needs to End

GERRY FERGUSON\*

## I. Introduction

Corruption is commonly defined as the abuse of entrusted power for private gain. It includes bribery, embezzlement by public officials, trading in influence, and unjustified patronage and nepotism. Global corruption is still not seen or accepted as a major evil in the eyes of most governments and individuals even though its negative effects have been frequently noted. Research shows that corruption increases the cost of doing business (on average by about ten percent), leads to waste and inefficient use of public resources, creates and perpetuates poverty, and corrodes public trust by delegitimizing the state.<sup>1</sup> Ultimately, corruption undermines human rights, economic growth, and public confidence in government, its institutions, and the rule of law.<sup>2</sup> These adverse effects of corruption are as diverse as they are destructive, but this article is not focused on delineating these consequences in greater detail.<sup>3</sup> For this article, I leave it to the reader to accept on faith the views of many others, including World Bank President Jim Yong Kim, who said that “corruption is public enemy number one” in the developing world and UN High Commissioner for Human Rights, Navy Pillay, who warned, “Let us be clear. Corruption kills.”<sup>4</sup>

Although regional conceptions of what constitutes corrupt behavior may vary in some respects, there is nonetheless widespread consensus as to what behaviors constitute the “core of corrupt conduct.” The proliferation of

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1. CLEANGOVBIZ, ORG. FOR ECON. CO-OPERATION AND DEV., THE RATIONALE FOR FIGHTING CORRUPTION (2014), <http://www.oecd.org/cleangovbiz/49693613.pdf>.

2. See Keith Thompson, *Does Anti-Corruption Legislation Work?*, 16 INT'L TRADE & BUS. L. REV. 99, 135 (2013).

3. For further discussion of these and other adverse consequences and references to other sources on these consequences, see generally GERRY FERGUSON, GLOBAL CORRUPTION: LAW, THEORY AND PRACTICE (2d ed. 2017), <https://track.unodc.org/Academia/Pages/TeachingMaterials/GlobalCorruptionBook.aspx>.

4. See *id.* at 4, 7.

international anti-corruption instruments illustrates that there is widespread international agreement on forms of corrupt conduct that are generally understood as undesirable and inconsistent with principles of fairness, good governance, and global economic relations. That international agreement is found in a number of anti-corruption instruments which bind signatory countries to implement a range of anti-corruption laws and practices.<sup>5</sup> Unfortunately, ratifying an international convention does not necessarily mean that a ratifying country will always develop effective laws, policies, procedures, and institutions to meet its international obligations. In regard to combatting corruption, a lack of political will to implement meaningful enforcement mechanisms is the norm rather than the global exception.

In this article, I intend to demonstrate that in the past few years, China has pursued inconsistent approaches to combatting domestic and foreign bribery by aggressively and publicly pursuing corruption at home while totally ignoring the bribery committed by its enterprises and officials carrying on business abroad. What accounts for China's non-enforcement of foreign bribery? In addressing that question, I provide, in Part Two, a brief summary of China's recent attempts to reform its corruption laws and enforcement practices. Part Three provides evidence that China is one of the most corrupt countries in the world in the context of foreign business activities when compared to the other countries that are major world economic actors. Part Four describes China's very different approaches to domestic and foreign bribery and suggests that these different approaches can be explained, though not justified, by reference to certain social, political, and economic goals of the Chinese Communist Party ("CCP"). Part Five demonstrates that China's attempts thus far at combatting foreign bribery are entirely insufficient to satisfy its international obligations. Finally, Part Six proposes a few reforms that could pave the way forward, although the author recognizes that such reforms are unlikely to be implemented any time soon.

Although this article is primarily about China's inadequate foreign anti-corruption enforcement activities, China is not the only major country that should be criticized for ignoring foreign corruption. Similar failure to seriously pursue bribery of foreign officials can be documented in many other leading export countries around the world.<sup>6</sup> This widespread global failure is also briefly discussed in Part Six of this article. What is striking

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5. See *generally* Organization for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Feb. 15, 1999, [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf); Organization of American States, Inter-American Convention Against Corruption, *adopted* Mar. 29, 1996, S. Treaty Doc. No. 105-39; Council of Europe, Criminal Law Convention on Corruption, Jan. 27, 1999, E.T.S. No. 173; African Union Convention on Preventing and Combating Corruption, July 11, 2003, 43 I.L.M. 5; United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 42146.

6. See FRITZ HEIMANN ET AL., *TRANSPARENCY INT'L, EXPORTING CORRUPTION: PROGRESS REPORT 2015* (2015).

about China is that its recent and robust campaign against domestic corruption sits side-by-side its policy of total disregard for its widespread foreign corruption.

## II. Recent Reform of Corruption Laws and Practices in China

In the years following the death of Mao Zedong in 1976, China began to liberalize its markets in order to promote growth and pacify social discontent. Since then, the Chinese economy has become increasingly mixed, with the private sector now accounting for roughly two-thirds of China's Gross Domestic Product ("GDP") and employing over seventy percent of China's labor force.<sup>7</sup> Notably, China has reformed the ownership structure of its State Owned Enterprises ("SOEs"): Chinese SOEs are now permitted to raise large amounts of private capital through access to banks and the stock market.<sup>8</sup> It is telling that in 2007, the twelve biggest initial public offerings on the Shanghai Stock Exchange were state enterprises.<sup>9</sup> Nonetheless, China's system remains fundamentally communist, and the CCP maintains control over economic affairs. China's large SOEs have been said to represent "state tools toward driving economic development and a Chinese presence in [strategic] industries."<sup>10</sup> Importantly, China's modern economic reforms are steeped in political goals: kick-starting economic growth, influencing the global economy, and consolidating the power of the CCP.

Generally, advanced economies engender lower levels of corruption than less developed economies. Despite exponential economic growth in recent years, China continues to face very high levels of corruption. This level of corruption may be explained, in part, by the rapidity of China's growth: economic growth has outpaced the development of regulatory institutions that are capable of responding to emerging opportunities for crime.<sup>11</sup> Scholars have argued that this process over the past twenty-five years has led to the institutionalization of corruption within the government.<sup>12</sup> And although corruption is arguably more "pervasive, serious, and regime-threatening" today than at any time before, it existed long before the post-

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7. James Leung, *Xi's Corruption Crackdown: How Bribery and Graft Threatens the Chinese Dream*, FOREIGN AFFAIRS, May-June 2015, at 32.

8. MARTIN JACQUES, *WHEN CHINA RULES THE WORLD: THE RISE OF THE MIDDLE KINGDOM AND THE END OF THE WESTERN WORLD* 184 (2009).

9. *Id.* One important consequence of SOE reform was the laying off [xiagang] of up to sixty percent of SOE workers.

10. Gordon Redding & Michael Witt, *Post-Transition China* 8 (INSEAD, Working Paper No. 2012/25/EPS/EFE, 2010), [http://flora.insead.edu/fichiersti\\_wp/inseadwp2010/2010-25.pdf](http://flora.insead.edu/fichiersti_wp/inseadwp2010/2010-25.pdf).

11. See JACQUES, *supra* note 8, at 225.

12. "Corruption in the PRC under its Communist regime resulted from policies, institutions, and norms underlain by a process of involutory development of the regime organization; this development was due largely to its failure to adapt to a changing environment in the post-revolutionary period." XIAOBO LÜ, *CADRES AND CORRUPTION: THE ORGANIZATIONAL INVOLUTION OF THE CHINESE COMMUNIST PARTY* 229 (2000).

Mao reforms began in the late 1970s, albeit in different forms.<sup>13</sup> Nevertheless, recognizing some of the pitfalls of corruption and embracing its rising position among global economies, China has doubled-down and undertaken a well-publicized campaign to address the culture of graft in the government. In warning that endemic corruption could lead to “the collapse of the [CCP] and the downfall of the state,”<sup>14</sup> Chinese President Xi Jinping has cast corruption as a very significant threat to his country. Indeed, since becoming President, he has undertaken an ambitious anti-corruption campaign within China.<sup>15</sup> He famously announced that the fight against corruption would extend to both “tigers and flies,” meaning that the campaign would target both high-level officials and petty bureaucrats.<sup>16</sup>

Some China observers suggest that China’s anti-corruption reforms are driven by two primary objectives. First, the increased anti-corruption efforts are being used as a policy tool for galvanizing public support and for rebuilding the CCP’s legitimacy. Because corruption and economic inequality are seen as closely related, recent efforts are designed to restore dwindling faith in the integrity of government at the local, provincial, and national levels. Second, it is suggested that the anti-corruption campaign advances certain economic and political objectives of the CCP leadership, discussed more fully in Part Four below.<sup>17</sup>

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13. “[The CCP] has created for itself, first, in the absence of a market, corruption of cadres, mainly [ . . . ] in forms of prebendalism. Later, with the weakening of the planned economy and advent of the market, cadre corruption [mainly manifests] in forms of rent-seeking.” *Id.* at 29.

14. Leung, *supra* note 7.

15. See Michael Forsythe, *Database Tracks ‘Tigers and Flies’ Caught in Xi Jinping’s Corruption Crackdown*, N.Y. TIMES (Jan. 21, 2016), <https://www.nytimes.com/2016/01/22/world/asia/china-database-tigers-and-flies-xi-jinping.html>.

16. See *id.*

17. See Elizabeth MacArthur, *Ni si wo huó (“You Die, I live”): Xi Jinping’s Anti-Corruption Campaign as Power Consolidation*, ASIA PACIFIC MEMO (May 16, 2014), <http://www.asiapacificmemo.ca/n%C7%90-s%C7%90-w%C7%92-huo>.

While the primary purpose of President Xi Jinping’s power struggle may not be to strengthen the rule of law, his anti-corruption campaign may help to institutionalize important norms surrounding judicial practice, and the rule of law more generally. For example, to date, notable efforts to deepen judicial reform include: (1) increasing the judicial independence of local courts by delinking their pay from the local state; (2) weakening the power of the government to control legal outcomes at the local level by ending “administrative detention”; (3) and enhancing the ability of the CCP to prosecute corrupt local officials by having the Local Discipline Inspection Committees report to their direct superiors in the Discipline Inspection system before sharing their findings with the local governments they are investigating. *Accord* DAVID ZWEIG, *BREAKING THE BUREAUCRATIC BLOCKS TO CHINA’S DEVELOPMENT: COMMENTS ON THE THIRD PLENUM OF THE 18TH CENTRAL COMMITTEE 4* (2013). Notwithstanding the above reforms, China’s ranking in the World Justice Project’s Rule of Law Index is quite low: 71 out of 102 countries with a score of .48 out of 1. WORLD JUSTICE PROJECT, *RULE OF LAW INDEX 2015 6* (2015), [http://worldjusticeproject.org/sites/default/files/roli\\_2015\\_0.pdf](http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf).

In 2011, the Bank of China inadvertently released information indicating that between 1994-2008, “as many as 18,000 corrupt officials had fled the country [. . .] plundering an estimated \$120 billion from state-owned enterprises and other criminal activities.”<sup>18</sup> In 2012, President Xi’s inaugural year in office, China’s domestic security budget exceeded the defence budget for the first time, in part due to concerns about “the growth of mass protests, fraud, corruption and organized crime, and the need to strengthen [stability] and social harmony.”<sup>19</sup> Xi also established the Central Discipline Inspection Committee (“CDIC”), headed by Xi’s trusted friend, Wang Qishan, whose mandate is to root out corruption at all levels.<sup>20</sup> Three years later, in 2015, the CCP reported that 668,429 public employees had been given “Party or administrative punishment” for corruption related offences from 2010 to 2015, and 24,584 of those cases were handed over to judicial authorities for criminal investigation.<sup>21</sup> This represents more than triple the rate of public employees (approximately 200,000) punished for corruption or regulatory infractions between 2000 and 2005.<sup>22</sup>

This level of increased enforcement against corrupt bureaucrats has not gone unnoticed in the international community, and some commentators have noted that China is making laudable progress.<sup>23</sup> Data on China’s campaign against domestic corruption is recorded in a Report, *China’s Fight Against Corruption Underway* (“China Corruption Report”), released in November 2015 at the State Parties Conference on the United Nations Convention Against Corruption (“UNCAC”) in St. Petersburg, Russia.<sup>24</sup> While the China Corruption Report chronicles China’s initiatives to suppress domestic corruption, it is silent on China’s effort to enforce its 2011 foreign bribery law.<sup>25</sup> The China Corruption Report only discusses one aspect of global corruption. The report encourages international cooperation to extradite Chinese officials who have committed corruption in China and fled the country with the proceeds of their corruption that is now hidden in foreign countries.<sup>26</sup> One of the CDIC’s significant

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Notwithstanding the above reforms, China’s ranking in the World Justice Project’s Rule of Law Index is quite low: 71 out of 102 countries with a score of .47 out of 1: [http://worldjusticeproject.org/sites/default/files/roli\\_2015\\_0.pdf](http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf).

18. Roderic Broadhurst & Peng Wang, *After the Bo Xilai Trial: Does Corruption Threaten China’s Future?*, 56 SURVIVAL 157 (2014).

19. *Id.*

20. Zheping Huang, *China’s second most powerful man warns of dissent and corruption in the Communist Party*, QUARTZ (Dec. 2, 2016), <https://qz.com/851218/wang-qishan-chinas-second-most-powerful-man-warns-of-dissent-and-systematic-corruption-inside-the-communist-party/>.

21. *Id.* at 166.

22. Lin Zhu, *Punishing Corrupt Officials in China*, 223 THE CHINA Q. 595, 596 (2015).

23. See generally James Fry, *China’s Version of the US Foreign Corrupt Practices Act and the OECD Anti-Bribery Convention: Comparing Ravens and Writing Desks?*, 24 KING’S L. J. 60, 84 (2013).

24. *China’s Fight against Corruption Underway* (Department of Publicity, Central Commission for Discipline Inspection, Beijing, China, Nov. 2016 ).”

25. See *id.*

26. See *id.*

accomplishments has been the repatriation of over 1000 economic fugitives from abroad through operations “Foxhunt” and “Skynet.”<sup>27</sup> In 2014 alone, the committee recovered nearly \$500 million in supposedly ill-gotten assets.<sup>28</sup> As roughly half of China’s economic fugitives reside in the West, the Chinese government is currently working hard to put pressure on foreign governments, including Canada and the United States, to return economic fugitives to China.<sup>29</sup> For example, in the fall of 2016, the Chinese government promised trade benefits to Canada and also released at least one Chinese-Canadian prisoner on, what looks very clearly to be, an understanding that Canada will enter into negotiations of a formal extradition treaty with China.<sup>30</sup> In addition, in an effort to force Chinese officials suspected of corruption to “voluntarily” return to China, China has allegedly sent Chinese officials to Canada on tourist visas.<sup>31</sup> These officials are apparently engaged in persuasion, threats, and harassment of these Chinese-Canadian residents with the hope of repatriating them and the illegal proceeds of their corruption.<sup>32</sup>

In the eyes of some international observers, the campaign against domestic corruption has largely succeeded in projecting China as a country that is working diligently to reduce corruption. Widespread corruption in China and the concomitant anti-corruption campaign have provided the CCP leadership with an opportunity to advance two important political objectives: (1) re-establishing public support for the CCP; and (2) allowing the leadership of the CCP to assert its internal control over the Party and regional and local governments by conducting corruption investigations on senior officials who have fallen out of favor with the CCP leadership.<sup>33</sup>

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27. *Foxhunt and Skynet are good, but not good enough for Beijing*, PRIMO NEWS (June 25, 2015), <http://news.getprimonews.com/article/da8db1e6d97b8d4cbec7342b7ae0b780>.

28. Roderick MacFarquhar, *China: The Superpower of Mr. Xi*, THE N.Y. REV. OF BOOKS (Aug. 13, 2015), <http://www.nybooks.com/articles/2015/08/13/china-superpower-mr-xi/>.

29. See, e.g., Robert Fife, *Chinese Premier Defends Country’s Justice System During Ottawa Visit*, GLOBAL AND MAIL (Sept. 23, 2016), <http://www.theglobeandmail.com/news/politics/chinese-premier-li-keqiang-kicks-off-canadian-visit-on-parliament-hill/article31998216/>.

30. See *id.*

31. E.g., Robert Fife & Nathan Vanderklippe, *Chinese Agents Enter Canada on Tourist Visas to Coerce Return of Fugitive Expats*, GLOBE AND MAIL (Sept. 21, 2016), <http://www.theglobeandmail.com/news/politics/chinese-agents-enter-canada-on-tourist-visas-to-coerce-return-of-fugitive-expats/article31981251/>.

32. *Id.*

33. MacArthur, *supra* note 17. This thesis is also more fully set out in MacArthur’s term article for Professor Pitman Potter’s Law 336 Course at University of British Columbia Faculty of Law. MacArthur notes that President Xi Jinping made anti-corruption efforts a central theme of his inaugural press conference noting that cases of corruption in the past have had a negative political impact and that the continuation of corruption threatens the continued existence of the Party. MacArthur refers to Benjamin Kang Lim and Megha Rajagopalan’s article “China’s Xi Purging Corrupt Officials to Put Own Men in Place: Sources” in Reuters, April 16, 2014, which provides evidence of the politically selective targeting of CCP, government and SOE persons for corruption investigations and prosecutions. See also Li,

### III. China's Global Corruption Ranking

It is virtually impossible to comprehensively measure the actual amount of corruption in any country. Many crimes have a distinct victim who will often report the crime to the police. In contrast, for the offence of bribery, neither the briber nor the recipient of the bribe is normally motivated to report the activity to authorities. Even where extensive law enforcement efforts are allocated toward catching incidents of bribery, the number of bribes caught will still represent only a small percentage of the number of bribes that actually occur. Because measuring levels of actual corruption is not possible, the amount of corruption in a given country can be best estimated by looking at various indicators that point to the risk of corruption occurring.

Transparency International (TI) is the largest global anti-corruption non-governmental organization (“NGO”), and its indexes, which measure the perception of corruption in each country, are the most widely cited indexes in the world.<sup>34</sup> TI’s best-known index is its annually published Corruption Perceptions Index (“CPI”), which measures the perception of public sector corruption in approximately 175 countries.<sup>35</sup> The CPI is the aggregate of a variety of different data sources, including the opinions of business persons and country experts in the country in question. Despite some limitations,<sup>36</sup> the CPI is generally acknowledged as a reliable, though not exact, indicator of the level of public sector corruption in each country that is being assessed.

So how does the perceived rate of domestic corruption in China compare to other countries? And has the aggressive “tigers and flies” campaign against corruption improved China’s ranking on the CPI? While China appears to have undertaken significant, although selective, efforts to combat domestic corruption,<sup>37</sup> its highly publicized campaign against corruption has not yet shown signs of generating a meaningful reduction in the perception of the extent of corruption and bribery in China. Perhaps that reflects the fact that corruption in China is so embedded and so extensive that the aggressive campaign in the last four years is still only uncovering a very small percentage of overall corruption.

Table 1 below gives the ranking and the score for a select number of countries from the 2014, 2015, and 2016 TI CPIs.<sup>38</sup> I have added my own description of the country scores ranging from “Excellent” to “Failing.”

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Cheng, “*Xi Jinping’s Inner Circle (Part 1: the Shaanxi Gang)*” (2014), 43 *China Leadership Monitor* 1-21.

34. TRANSPARENCY INT’L (2016), [http://www.transparency.org/news/feature/corruption\\_perceptions\\_index\\_2016](http://www.transparency.org/news/feature/corruption_perceptions_index_2016).

35. *See id.*

36. For a pertinent analysis of the limitations of Transparency International and international ranking systems generally, see Alexander Cooley & Jack Snyder, *Rank has its Privileges: How International Ratings Dumb Down Global Governance*, FOREIGN AFFAIRS, Nov.–Dec. 2015, at 101.

37. Zhu, *supra* note 22.

38. TRANSPARENCY INT’L, *Corruption Perceptions Index (2005, 2013–2015)*, <http://www.transparency.org/research/cpi/overview>.



**Table 1 Transparency International Corruption Perceptions Index**

Country	Ranking			Score out of 100		
	2016 (out of 176 countries)	2015 (out of 167 countries)	2014 (out of 175 countries)	2016	2015	2014
<b>Excellent (90% or better)</b>						
Denmark	1	1	1	90	91	92
New Zealand	1	4	2	90	88	91
<b>Very Good (80% - 89%)</b>						
Singapore	7	8	7	84	85	84
Netherlands	8	5	8	83	87	81
Canada	9	9	10	82	83	81
Germany	10	10	12	81	81	78
United Kingdom	10	10	14	81	81	78
<b>Good (70% - 79%)</b>						
Australia	13	13	11	79	79	80
Japan	20	18	15	72	75	76
Hong Kong	15	18	17	77	75	74
USA	18	16	17	74	76	74
<b>Fair (60% - 69%)</b>						
France	23	23	26	69	70	69
Portugal	29	28	31	62	63	63
<b>Poor (50% - 59%)</b>						
South Korea	52	37	45	56	56	55
Malaysia	55	54	52	49	50	50
<b>Unsatisfactory/Failing (49% and below)</b>						
South Africa	64	61	67	44	44	44
Brazil	79	76	69	38	38	43
India	79	76	85	38	38	38
China	79	83	100	37	37	36
Indonesia	90	88	107	36	36	34
Russia	131	119	136	29	29	27
Somalia & North Korea	176	167	174	8	8	8

As Table 1 shows, China's score in 2014 was 36 out of 100; in 2015 and 2016 it was to 37 out of 100. TI classifies any country with a score below 50 as a country with a "serious corruption" problem, which I consider to be an unsatisfactory, or "failing" score. In terms of global ranking, China stood 100th out of 175 countries in 2014, 83rd out of 167 countries in 2015, and 79th out of 176 countries in 2016.<sup>39</sup> Long term trends indicate that China's score and country ranking have not changed significantly in the past ten

39. TRANSPARENCY INT'L, *Corruption Perceptions Index (2005, 2013-2015)*, <http://www.transparency.org/research/cpi/overview>.

years; in 2005, China's score was 3.2 out of 10 and it ranked 78th out of 158 countries.<sup>40</sup>

In regard to bribery of foreign public officials in international business transactions, the TI Bribe Payers Index ("*BPI*") evaluates the supply side of bribery and is based on a survey of business executives in the countries that are most heavily involved in receiving imports and foreign investment.<sup>41</sup> The latest TI BPI was published in 2011.<sup>42</sup> In that report, China ranked 27 out of 28 countries, demonstrating the strong propensity of Chinese firms to bribe foreign officials while conducting business abroad.<sup>43</sup> In other words, China was the second largest supplier of bribes worldwide. Countries surveyed in the BPI are scored on a zero to ten scale where zero means a country's companies "always" bribe foreign officials and ten means a country's companies "never" bribe foreign officials.<sup>44</sup>

Table 2 shows that no country is wholly clean, nor wholly corrupt. But TI does raise a special concern about China and Russia, referring to their scores as "substantially lower" than other surveyed countries.<sup>45</sup> The results of the 2011 and 2008 BPI for a select number of countries are reproduced in Table 2 below.<sup>46</sup> As Table 2 shows, Chinese companies in both 2008 and 2011 are perceived as the second worst bribers of foreign public officials amongst the largest global trading countries.<sup>47</sup>

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40. *Id.*

41. DEBORAH HARDOON & FINN HEINRICH, TRANSPARENCY INT'L, BRIBE PAYERS INDEX 2011 2 (2011).

42. *Id.*

43. *Id.* at 5.

44. *Id.*

45. *Id.* at 4.

46. *Infra* Table 2.

47. HARDOON & HEINRICH, *supra* note 41, at 5; JUANITA RIAÑO & ROBIN HODESS, TRANSPARENCY INT'L BRIBE PAYERS INDEX 2008 5 (2008).

**Table 2 Bribe Payers Index**

	2011 Ranking of 28 Countries	2008 Ranking of 22 Countries	2011 Score out of 10	2008 Score out of 10
Netherlands	1	3	8.8	8.7
Germany	4	5	8.6	8.6
Japan	4	5	8.6	8.6
Australia	6	8	8.5	8.5
Canada	6	1	8.5	8.8
Singapore	8	9	8.3	8.1
United Kingdom	8	5	8.3	8.6
United States	10	9	8.1	8.1
Brazil	14	17	7.7	7.4
Hong Kong	15	13	7.6	7.5
South Africa	15	14	7.6	7.5
India	19	19	7.5	6.8
Indonesia	25	N/A	7.1	N/A
China	27	21	6.5	6.5
Russia	28	22	6.1	5.9

#### IV. China's Differing Approaches to Domestic and Foreign Bribery

China has adopted very different approaches to addressing domestic and foreign bribery, despite evidence that both forms of bribery are rampant. These differences are apparent in both the letter of the law and its enforcement. What explains these two different approaches? In this section, I suggest that targeting domestic bribery by government officials provides the CCP with the opportunity to promote economic growth, consolidate power, and build legitimacy. But on the other hand, ignoring the extensive bribery of foreign officials by Chinese companies preserves China's competitive advantage in the global marketplace and, therefore, aligns with China's economic self-interest. Put another way, China's inconsistent approaches to combatting domestic and foreign bribery share a common ethos: maximizing economic growth. For example, research shows that reducing domestic corruption generates foreign direct investment.<sup>48</sup> Widespread corruption in any country creates uncertainty and unfair competition for foreign companies looking to do business with that country. If China can reduce domestic corruption, it will create more economic certainty for foreign companies who want to do business in China. By adopting a tough stance against domestic bribery, China reduces externalities and minimizes risks for foreign corporations looking to conduct business in China, thereby making itself a more attractive destination for foreign investment. Whether this effect is an express goal or simply a collateral benefit of the crackdown on domestic corruption is unclear. On

48. See Julius Shi-rong Yam, *Rationalisation and Analysis of Corruption in China from the Party Perspective: A Love Hate Relationship*, 8 H.K. J. LEGAL STUD. 21 (2014).

the other hand, there are economic and political incentives for Chinese authorities to ignore the bribery of foreign officials by Chinese persons and enterprises when they conduct business abroad.

In addition to making China a more attractive site for foreign investment, combatting domestic bribery has become an effective mechanism for the leadership of the CCP to consolidate its political power. It should be noted that consolidating political power is not itself counter-productive to producing a dramatic reduction in corruption, as Singapore has demonstrated over the past thirty-five years. But if consolidating political power simply allows the official elites to continue their wide-scale corruption with impunity, then that is a problem. For the CCP, consolidating political power involves placating public discontent and sidelining political figures who belong to a competing faction and who do not subscribe to the leadership's economic or social policies.<sup>49</sup> In this regard, observers have reported that enforcement efforts aimed at stamping out domestic bribery have been selective and political; opponents have been targeted while the inner circle of the CCP has remained relatively immune.<sup>50</sup> While the administrative punishment or criminal investigation of low level bureaucrats (flies) has increased, as noted in Part Two above, it has also been suggested that recent high-profile prosecutions are less a genuine signal of changing tides than "a shot across the bow, intended to scare off any potential opposition to Xi within the [CCP] leadership."<sup>51</sup>

Available enforcement statistics corroborate political motivations behind China's selective campaign against corruption. While it is very probable that most high-ranking officials have engaged in some corruption on their rise to the top, high-ranking officials are less likely to be investigated by authorities: in 1996, only two point five percent of cases involving Party discipline concerned a high-ranking official accused of corruption, a trend that has continued under the current CCP leadership.<sup>52</sup> But when the CCP leadership does decide to prosecute high-ranking officials, it normally punishes these officials more harshly compared to low-ranking officials.<sup>53</sup> Lin Zhu suggests that senior officials are more likely to be sentenced to lengthy prison terms in an effort to exhibit "political will to clamp down on corruption by showcasing severe punishment."<sup>54</sup> Highly-publicized trials enhance the CCP's credibility in terms of routing out corruption largely because high-profile cases have a disproportionate impact on people's perceptions regarding the State's resolve to address corruption.<sup>55</sup> But it is interesting to note that, according to Jessica Shen, this severity towards

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49. *Id.*

50. Leung, *supra* note 7.

51. *Id.* at p. 36.

52. Zhu, *supra* note 22.

53. *Id.*

54. *Id.* at 596.

55. *Id.*

corrupt officials does not extend to the death penalty.<sup>56</sup> Her research has observed a judicial trend that grants legal mercy for officials who would otherwise receive the death penalty.<sup>57</sup> Instead, these officials are often given a “suspended death sentence,” which is normally commuted to life in prison.<sup>58</sup> Former Politburo Standing Committee member Zhou Yongkang’s sentence to life imprisonment, which will be discussed below, is a perfect example of this.

The case of Bo Xilai is often cited as a paradigm example of the CCP’s willingness to use the anti-corruption campaign to advance political interests.<sup>59</sup> In 2013, Chinese authorities charged Bo with various abuse of power and corruption offences.<sup>60</sup> At the time, Bo was Chongqing Party secretary, member of the CCP’s elite twenty-five-member politburo and recognized as a promising and ambitious leader.<sup>61</sup> But his theories on how best to balance economic development with the distribution of wealth contrasted with policy developed from within the CCP’s power base.<sup>62</sup> Bo’s prosecution illustrates both the prevalence of corruption among senior Party and government officials and the manner in which domestic anti-corruption initiatives can be used selectively to stifle political dissent.<sup>63</sup> As already noted, the Communist Party’s Central Commission for Discipline Inspection directs China’s corruption crackdown and it is headed by Wang Qishan, a staunch Xi Jinping supporter.

China scholar Joseph Fewsmith has observed that Chinese political leaders have tended to share the Leninist perception that political power is “monistic, unified, and indivisible.”<sup>64</sup> This identifier means that the contest over policy space is often approached from a “winner-takes-all perspective,” or as the Chinese proverb succinctly puts it, “你死我活” (You die, I live).<sup>65</sup> With (political) survival in mind, the Party leadership is riddled with factions and is dominated by patron-client ties.<sup>66</sup> As Tony Saich observes:

This system of patron-client ties lends itself easily to the formation of factions within leadership [. . .] When disputes break out among leaders of the factions and patron-client networks, this has ramifications throughout the system, often leading to large scale purges of personnel who are deemed to have supported the ‘wrong line.’ These purges are

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56. Jessica Shen, *Killing a Chicken to Scare a Monkey: The Unequal Administration of Death in China*, 23 PAC. RIM L. & POL’Y J. 869 (2014).

57. *See id.*

58. *Id.* at 870.

59. *See* Broadhurst & Wang, *supra* note 18, at 158.

60. *Id.* at 162.

61. *Id.* at 159.

62. *See id.* at 161.

63. *See generally id.*

64. JOSEPH FEWSMITH, *ELITE POLITICS IN CONTEMPORARY CHINA*, 87 (M.E. Sharpe, Inc. 2001) (1999).

65. *Id.*

66. Tony Saich, *Governance and Politics of China* (New York: Palgrave MacMillan 2004), p. 95.

accompanied by campaigns against particular individuals or groups of individuals.<sup>67</sup>

Despite the fact that Saich's observations were made long before Xi Jinping's anti-corruption campaign, they do a remarkable job of describing Xi's current power struggle.

Although the tiger hunt appears to be selective thus far, it has, nonetheless, been significant in size. In October 2015, Su Shulin, Governor of Fujian Province, became the first governor subject to a corruption investigation under the current anti-corruption campaign.<sup>68</sup> He is the twenty-third provincial or ministerial level officer placed under corruption investigation in 2015.<sup>69</sup> Between 2012 and 2015, the anti-corruption campaign has swept up seven members of the Central Committee.<sup>70</sup> In addition, at least thirty executives of SOEs, twenty of whom are CEOs, have been charged with corruption.<sup>71</sup> In recent years the People's Liberation Army has seen the largest crackdown on corrupt officers since Mao.<sup>72</sup> Over forty-four senior military officers have been arrested, including two former Central Military Commission vice-chairmen, Xu Caihou and Guo Boxiong.<sup>73</sup> These unprecedented arrests mark the first time the highest-ranking officers of the People's Liberation Army have been purged on corruption charges.<sup>74</sup> Equally notable, however, was the conviction of Zhou Yongkang on bribery, abuse of power, and "intentional disclosing of national secrets" charges in June 2015.<sup>75</sup> Zhou, who was sentenced to life in prison, is the highest ranking member of the CCP to be convicted on corruption charges to date.<sup>76</sup> He was a member of former-President Hu Jintao's Politburo Standing Committee (PSC) and a domestic security tsar with powerful interests in the oil industry—not coincidentally, the very industry Xi Jinping is working to reform.<sup>77</sup> The significance of his conviction cannot be understated, as Xi Jinping's campaign has now broken Deng Xiaoping's unwritten rule that past and present members of the elite PSC be

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67. *Id.*

68. Jianwei (Jerry) Fang, *Jerry Fang's Scoreboard: Tigers Falling Fast in Anti-Graft Campaign*, THE FCPA BLOG (Oct. 19, 2015, 10:18 AM), <http://www.fcpcbog.com/blog/2015/10/19/jerry-fangs-scoreboard-tigers-falling-fast-in-anti-graft-cam.html>.

69. *Id.*

70. For the names of all twenty officials and their government and party positions, visit Jianwei Fang's blog post. *Id.*

71. See HONGMING CHENG, FINANCIAL CRIME IN CHINA: DEVELOPMENTS, SANCTIONS, AND THE SYSTEMIC SPREAD OF CORRUPTION, 162–165 (2016).

72. See Derek Grossman & Michael Chase, *Why Xi is Purging the Chinese Military*, THE NAT'L INT., Apr. 15, 2016, <http://nationalinterest.org/feature/why-xi-purging-the-chinese-military-15795?page=show>.

73. *Id.*

74. *Id.*

75. *China Corruption: Life Term for Ex-Security Chief Zhou*, BBC, (June 11, 2015), <http://www.bbc.com/news/world-asia-china-33095453>.

76. *See id.*

77. *See id.*

immunized from prosecution. The elimination of that form of political immunity could be viewed as an encouraging step towards cracking down on high level corruption in China, but that view is tainted by the fact that Zhou was reportedly a Bo Xilai supporter, not a Xi Jinping supporter.<sup>78</sup> In July 2017, a very high-level Chinese official, Sun Zhengcai, mayor of Chongqing, was the latest to succumb to what appears to many to be a politically motivated corruption investigation. Sun had been touted by many as a possible successor to either President Xi or Premier Li Keqiang, but not a successor who was apparently supported by President Xi.

President Xi Jinping is certainly not the first Chinese leader to use an anti-corruption campaign to consolidate personal power in recent decades.<sup>79</sup> In 1995, President Jiang Zemin purged Chen Xitong, a member of the Politburo and an ally of Deng Xiaoping, on corruption charges.<sup>80</sup> Cheng had clearly opposed Jiang's policies, and his removal was essential to the consolidation of Jiang's power.<sup>81</sup> Seemingly in anticipation of Xi's campaign, a resolution of Jiang's Fourth Plenum declared, "The principle of everybody being equal before discipline should be upheld and those Party members who violate discipline should be investigated and dealt with severely."<sup>82</sup> Similarly, in 2006, President Hu Jintao ousted Party secretary and Politburo member Chen Liangyu for his involvement in a pension fund scandal. Chen, who had been a favorite of Jiang Zemin, had long been "a thorn in the side of the Hu-Wen administration," repeatedly refusing to slow investment in accordance with official directives.<sup>83</sup> Chen's ouster diminished the authority of Jiang Zemin's "Shanghai Gang" and allowed Hu to consolidate his personal power. The similarity of these examples to Xi Jinping's current anti-corruption campaign highlights the centrality of factions within the government and their uneasy existence alongside the rule of law. The fact that the criminal law can be used for political purposes demonstrates that there are "real limits on the degree of institutionalization that has taken place in China."<sup>84</sup>

It is significant that President Xi Jinping must couch his personal power struggle within a corruption campaign, rather than oust opponents via a Mao-style ideological campaign. Xi is not the "Strongman" that Mao and Deng were—he must contextualize his personal power struggle within norms and institutions, like the rule of law.<sup>85</sup> This need arguably reflects the extent to which leaders in the post-Deng era have seen their capacity to

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78. *See id.*

79. MacArthur, *supra* note 17.

80. JOSEPH FEWSMITH, CHINA SINCE TIANANMEN: FROM DENG XIAOPING TO HU JINTAO (2d ed. Cambridge University Press 2008).

81. *Id.*

82. *Id.* at 173.

83. *Id.* at 271.

84. *Id.* at 277.

85. David Lampton, *How China is Ruled: Why it's Getting Harder for Beijing to Govern*, Jan.-Feb. 2014, at 2.

single-handedly dominate policy space diminish.<sup>86</sup> As David Lampton argues, “China [. . .] has gone from being ruled by strongmen with personal credibility to leaders who are constrained by collective decision-making, term limits and other norms, public opinion, and their own technocratic characters.”<sup>87</sup>

As one senior Chinese diplomat succinctly observed in 2002, “Mao and Deng could decide; Jiang and the current leaders must consult.”<sup>88</sup> But the above analysis has potentially shifted somewhat with the announcement at the end of the Sixth Plenary Session of the CCP Central Committee in late October 2016 that President Xi Jinping has been elevated to “core leader,” which is a status that will allow him to implement reform with fewer party obstacles and challenges.

Another important objective of Xi Jinping’s anti-corruption campaign is the need to rebuild the CCP’s legitimacy.<sup>89</sup> Recognizing that negative public perceptions of the Party/State’s corruption are a threat to the CCP’s legitimacy and ultimate stability, Xi Jinping made anti-corruption a central theme in his inaugural press conference.<sup>90</sup> He told his colleagues bluntly, “There have been serious breaches of discipline in the party in recent years. Some of these cases were very bad, and they have had a terrible, appalling political impact. [Corruption in other countries] has led to popular discontent, social unrest and the *overthrow of political power*.”<sup>91</sup> Finally, to drive home the point, he added, “a large number of facts show that corruption could kill the party and ruin the party.”<sup>92</sup> It is clear that Xi’s anti-corruption campaign is largely an effort to foster Party legitimacy by appearing to adhere to Constitutional norms about the rule of law.

It is sometimes pointed out that domestic bribery in China is a reflection of collectivist culture and the historical Chinese practice of *Guanxi*.<sup>93</sup> *Guanxi*, or maintaining relationships (sometimes by gift-giving), is a traditional economic custom considered to be a fundamental social norm in Chinese culture.<sup>94</sup> The “cultural echoes of *Guanxi*” have been said to “commonly blur the line between legal and illegal activities in the eyes of Westerners.”<sup>95</sup> But even if *Guanxi* helps to explain the deep-rooted nature of some forms of “petty” bribery, these same cultural value systems cannot

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86. *Id.*

87. *Id.*

88. *Id.*

89. MacArthur, *supra* note 17.

90. Joseph Fewsmith, *Xi Jinping’s Fast Start*, CHINA LEADERSHIP MONITOR, June 6, 2013, at 4.

91. *Id.* (emphasis added).

92. *Id.*

93. Shuangge Wen, *The Achilles Heel that Hobbles the Asian Giant: The Legal and Cultural Impediments to Antibribery Initiatives in China*, 50 AM. BUS. L. J. 483, 486.

94. Alan Smart, *Gifts, Bribes and Guanxi: A Reconsideration of Bourdieu’s Social Capital* 8(3) Cultural Anthropology 388, 389 (1993).

95. Shuanage, *supra* note 93 at 489; see also Thompson, *supra* note 2 at 126-28. Thompson notes interestingly that the Western practice of extrajudicial settlement has been said to look to



adequately explain the prevalence of large-scale graft and bribes by powerful Chinese officials in carrying out their official functions. Indeed, all cultures and societies produce some form of *Guanxi*, and China's version is not distinct enough to explain the prevalence and severity of corruption that afflicts China today.<sup>96</sup> Furthermore, reliance on practices of *Guanxi* as an explanation for the offering of bribes when conducting business in foreign countries is highly suspect when the foreign country has no similar culture of *Guanxi*.

The contrast between state enforcement against domestic corruption and state enforcement against Chinese companies bribing foreign public officials is stark. In regard to foreign bribery, Chinese SOEs and private companies have rapidly become major players in the international marketplace. It is in China's overall economic interests to continue exporting capital through foreign direct investment ("FDI"). In the global marketplace, China chooses to play by its own set of norms and rules; its increasing participation in global commerce has not been accompanied by actual adherence to tenets that are expressed in various international conventions. Indeed, China's system has been criticized as "value-free profit-seeking."<sup>97</sup> Notably, emerging private corporations in China are not obligated to consider democracy, human rights, or economic inequality in their pursuit of profit.<sup>98</sup> In contrast, approaches to foreign economic relations by other Western countries are at least partially informed and sometimes constrained by policies of promoting the public good and corporate social responsibility, often at the expense of short-term corporate profit. Free of similar controls, Chinese firms stand to gain a competitive advantage in foreign business transactions against similarly situated, but more highly regulated, Western companies operating abroad.

Multiple studies have shown that U.S. foreign bribery prohibitions<sup>99</sup> impose additional costs on U.S. corporations—and non-U.S. corporations who are subject to the U.S. Foreign Corrupt Practices Act ("FCPA")—doing business in emerging economies. The prohibitions also cause reduced U.S. investment in those developing countries.<sup>100</sup> A similar study found that the ratification of the OECD anti-bribery convention, which made corruption of foreign officials a crime, caused signatory countries to invest less in countries with high-levels of domestic corruption.<sup>101</sup> Both studies concluded that the reduction of foreign investment from countries with active foreign

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non-Western eyes just like a bribe paid by large corporations to governments to avoid the stigma of a criminal conviction.

96. Leung, *supra* note 7.

97. Andrew B Spalding, *The Irony of International Business Law: US Progressivism and China's New Laissez-Faire* 29 UCLA L. REV. 354, 358 (2011).

98. *Id.*

99. FOREIGN CORRUPT PRACTICES ACT, 15 U.S.C. § 78dd-1 et seq.

100. Spalding, *supra* note 97, at 358.

101. Alvaro Cuervo-Cazurra, *Who Cares About Corruption?*, 37 J. INT'L BUS. STUD. 803, 807 (2006).

anti-bribery legislation created a need for new sources of capital in countries where corruption is perceived to be most prevalent.<sup>102</sup> Andrew Spalding suggests that the need for capital in corrupt countries is often filled by “a well-capitalized country that seeks to systematically build economic and political alliances with developing countries, but is not itself governed by liberal values.”<sup>103</sup> Countries like China, Russia, and Indonesia are uniquely positioned to fill the investment gap. It is no coincidence that business enterprises in these three countries are the most likely to offer bribes when they engage in business abroad, as shown in Table 2 of this article. Due to the rise of these so-called “black knight” countries, the broad global adoption of international anti-corruption instruments has not resulted in a net reduction of foreign investment flowing to corrupt economies.<sup>104</sup> Furthermore, this “black night” phenomenon has troubling implications for human rights because it leads to bribes across the developing world, which can compromise, among other things, “rights to medical care, to equality of access to public services, to self-determination, to political representation, and ultimately to the basic rule of law.”<sup>105</sup> Indeed, Spalding has warned “the recent rise of . . . emerging economies generally renders the OECD worldview obsolete.”<sup>106</sup>

China is perhaps the best example of a country that is well capitalized, aggressive in its foreign policy and international business conduct, and operates an alternative legal regime that is extremely tolerant of foreign corruption. Chinese corporations are able to fill the capital-need left by the withdrawal of U.S. and other Western investment, without regard for the externalities that are cast upon U.S. and other Western corporations. By not imposing similar constraints on bribery of foreign officials by Chinese corporations, China enjoys a competitive advantage in the international marketplace; China’s permissive approach to foreign bribery, thus, results in direct economic benefit to them. In other words, there is an economic incentive for China to overlook the bribery of foreign officials by Chinese enterprises doing business abroad.

## V. Limitations of China’s Approach to Foreign Bribery

In this section I provide a closer look at China’s efforts to combat foreign bribery. This assessment illustrates that the 2011 anti-corruption reforms in Chinese law were crafted to appear formidable and in compliance with the United Nations Convention Against Corruption [UNCAC] which prohibits

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102. See James Hines, *Forbidden Payment: Foreign Bribery and American Business After 1977* (Working Article 5266), NATIONAL BUREAU OF ECONOMICS, Sept. 1995, available at <http://www.nber.org/papers/w5266.pdf>.

103. Spalding, *supra* note 97, at 398.

104. *Id.* at 408.

105. Andrew B Spalding, *Corruption, Corporations, and The New Human Right* 91:6 WASH. U. L. REV. 1365, 1383 (2014).

106. *Id.* at 1421.

both domestic and foreign bribery. But in practice the 2011 reforms pose little threat to foreign bribery. As noted above, it does not necessarily follow from the adoption of an international anti-corruption instrument, such as UNCAC, that the adopting country shares the animating principles that purportedly underlie the development and implementation of that instrument. Many of these principles are based on Western notions of rule of law, democracy, human rights, and fair economic competition, and for some countries, adopting these instruments may be viewed as a perpetuation of western cultural imperialism.<sup>107</sup> Though countries such as China may be suspicious that international anti-corruption regimes are a vehicle for promoting Western notions of commerce and the rule of law, these concepts have sufficient international currency to persuade such countries that adopting international norms is in their diplomatic and economic interests if they want to be accepted as true global participants.<sup>108</sup> China's efforts in fulfilling its UNCAC obligations in respect to foreign bribery are, like many other countries, seriously wanting, and demonstrate that it is possible to play the game of global commerce by its own set of rules.

As an UNCAC signatory, China is required to develop, implement, and enforce anti-corruption laws and policies. Among its UNCAC commitments, China must enact measures to prohibit the bribery of foreign public officials as well as officials of public international organizations.<sup>109</sup> Article 16(1) of UNCAC stipulates:

Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.<sup>110</sup>

Although China ratified UNCAC in 2006, it was not until 2011 that the Eighth Amendment to Criminal Law was enacted in supposed satisfaction of its obligation to criminalize foreign bribery.<sup>111</sup> This amendment specifically included a provision that criminalizes the bribery of foreign public officials; a provision that other major economic powers had adopted with the coming

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107. RANDALL PEERENBOOM, *ASIAN DISCOURSES OF RULE OF LAW* 113 (2004).

108. Thompson, *supra* note 2, at 119.

109. G.A. Res. 58/4, iii (Oct. 31, 2003) [hereinafter UNCAC].

110. *Id.* at art. 16(1).

111. Fry, *supra* note 23. It could be argued that bribery by Chinese officials of foreign public officials was already covered by bribery offences in the Chinese Penal Code since China claims jurisdiction over crimes based on Chinese nationality, not on the basis of where the crime was committed.

into force of the OECD Convention against Foreign Bribery in 1999.<sup>112</sup> Article 164 of the Eighth Amendment states: “Whoever, for the purpose of seeking an improper commercial benefit, gives money or property to any foreign public official or official of an international public organization shall be punished in accordance with [the provision that punishes active bribery of domestic non-officials].”<sup>113</sup> On its surface, this provision appears promising. Indeed, the Eighth Amendment has generated praise from some commentators for its extraterritorial effect; but other commentators are rightfully skeptical of China’s commitment to enforcement.<sup>114</sup> Specifically, critics have noted that there is “purposeful leeway” in China’s new extraterritorial legislative initiatives.<sup>115</sup> Similarly, China’s attempt to criminalize the bribery of foreign officials has been criticized as insufficient to fulfill its UNCAC obligations and “intentionally designed to be narrowly interpreted and weakly enforced.”<sup>116</sup> China’s lack of commitment to enforcing laws against bribery of foreign officials is also apparent in its failure to ratify the 1999 *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* which has been ratified by the 35 OECD countries and by seven non-member states including Russia, Brazil, Argentina, and South Africa, but regrettably not yet by China, although some movement in that direction has been taking place.

Although some commentators have noted that there are signs that China has begun to investigate contraventions under the Eighth Amendment,<sup>117</sup> as far as the author can find, no prosecutions have been reported under China’s foreign bribery legislation in the six years since its 2011 introduction.<sup>118</sup>

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112. Amendment VIII to the Criminal Law of the People’s Republic of China (promulgated by Order No. 41 of the President of the People’s Republic of China on Feb. 25, 2011, effective May 1, 2011) §29, available at <https://www.cecc.gov/resources/legal-provisions/eighth-amendment-to-the-criminal-law-of-the-peoples-republic-of-china>.

113. Sherry Yin, et al., *Client Alert: China Outlaws Bribery Overseas* MORRISON — FOERSTER (Aug. 8, 2011), available at <http://media.mofo.com/files/uploads/Images/110808-China-Outlaws-Bribery-Overseas.pdf>

114. Fry, *supra* note 23.

115. Shuangge, *supra* note 93, at 489.

116. Samuel R. Gintel, *Fighting Transnational Bribery: China’s Gradual Approach* 31 WIS. INT’L L. J. 1 (2013).

117. Eric Carlson, *China’s Overseas Bribery Law One Year On*, FOREIGN CORRUPT PRACTICE BLOG (May 29, 2012), <http://www.fcpablog.com/blog/2012/5/29/chinas-overseas-bribery-law-one-year-on.html>.

118. I have been unable to find any English language reports, in sources such as Xinhuanet, FCPA Blog, Mondaq, Ethical Alliance, and a Google search, of a Chinese company (or an official of such company) being prosecuted by China for bribery of a foreign official while carrying on business in that foreign country. It is possible that some Chinese businessmen involved in the illegal trade of ivory may be prosecuted in China for bribing African customs officials. See Richard Cassin, “Kenya, China team up against illegal ivory trade.” FCPA BLOG, (Feb. 14, 2014), <http://www.fcpablog.com/blog/2014/2/14/kenya-china-team-up-against-illegal-ivory-trade.html>. And importantly, there appears to be no mention in the United Nations UNCAC Implementation Review Group’s evaluation of China’s compliance with UNCAC of any prosecutions of Chinese officials or enterprises for bribery of foreign officials.

This inaction is particularly concerning for two reasons. First, as mentioned above, China is the second most frequent contributor to the global supply of bribes paid to foreign officials. This presents both a problem and an opportunity for China. China is emerging as one of the world's greatest powers and many developing countries in particular are looking to China for economic and political leadership. As China consolidates its economic position, China may now be economically strong enough to maintain its economic position while complying with rules that at a different economic stage of development they may have considered to be prohibitively costly to follow. At the same time, China could take a leadership role in Asia and the global South by helping to share and follow a set of international practices acceptable in a multi-polar world.<sup>119</sup> Second, because Chinese authorities are now increasingly punishing domestic corruption by high-level officials, there does not seem to be any good moral justification for them to ignore their international obligation under UNCAC to investigate and prosecute Chinese firms that bribe foreign officials.<sup>120</sup>

In addition to a lack of political will to enforce the Eighth Amendment's foreign bribery provisions, the Eighth Amendment contains a number of textual weaknesses.<sup>121</sup> Critics have noted, for example, that the phrase "foreign public official" is left undefined,<sup>122</sup> leaving the question of who is covered by its prohibitions somewhat unclear. The scope of the Eighth Amendment is also inherently restricted because it prohibits only "giving" improper commercial benefits,<sup>123</sup> despite the fact that UNCAC requires signatories to also prohibit "promising" and "offering" such benefits. Also it

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See Implementation Review Group, Review of China's Implementation of UNCAC, Executive Summary, Eighth Session, Vienna, June 19-23, 2017 (CAC/COSP/IRG/I/4/1/Add.49).

119. See Thompson, *supra* note 2, at 129.

120. See Joseph Warin, Michael Diamant, & Jill Pfenning, *FCPA Compliance in China and the Gifts and Hospitality Challenge* 5(1) VA. L. & BUS. REV. 34, 39 (2010).

121. Some commentators have also levied similar criticisms against China's domestic bribery prohibitions. In regards to domestic bribery, Chinese law prohibits both official bribery and commercial bribery. The offence of official bribery includes the payment or acceptance of a bribe by a state official in exchange for illegitimate benefit. The offence of commercial bribery addresses the giving or receiving of compensation to bribe entities or individuals for the purpose of selling or purchasing goods. See Daniel Roules & Sijie Li, *Anti-Corruption Regulation in 51 Jurisdictions Worldwide*, GETTING THE DEAL THROUGH 58, 62 (2011), [http://www.squirepattonboggs.com/~media/files/insights/publications/2011/04/anticorruption-regulation-in-china/files/ac2011-china/fileattachment/ac2011-china.pdf](http://www.squirepattonboggs.com/~/media/files/insights/publications/2011/04/anticorruption-regulation-in-china/files/ac2011-china/fileattachment/ac2011-china.pdf); see also Interim Provisions on Prohibition of Commercial Bribery Activities (promulgated by Decree No. 60 of the State Admin. for Indus. and Commerce of the People's Republic of China on Nov. 15, 1996) art. 2-3, available at [http://www.saic.gov.cn/english/lawsregulations/Others/200603/t20060303\\_55267.html](http://www.saic.gov.cn/english/lawsregulations/Others/200603/t20060303_55267.html). But claims of selective targeting and enforcement of corruption laws have also been made in many countries including the United States. Indeed, in spite of amassing a significant record of prosecutions, critics of the U.S. system note that there remain "many questions about the effectiveness, consistency and the morality" of American anti-corruption efforts. See Thompson, *supra* note 2, at 39; see also Ferguson, *supra* note 3, at 6-58.

122. Fry, *supra* note 23.

123. *Id.*

does not prohibit paying benefits to the family or friends of foreign officials. Similarly, the Eighth Amendment only prohibits the giving of “property” to foreign public officials, while UNCAC refers more broadly to prohibiting “undue advantage” that is not limited solely to advantages of a pecuniary nature.<sup>124</sup> The CCP’s own interpretation of the Eighth Amendment<sup>125</sup> has generated further concern and suggests that there is little political appetite for enforcement. Prohibitions are most effective as a deterrent when the scope of the behavior prohibited is clearly communicated and there is a threshold degree of certainty regarding investigation and prosecution. The Eighth Amendment does not contain these most basic elements and in that respect represents a poor effort at drafting laws that fulfill China’s obligations to combat foreign bribery under UNCAC. But far more troubling than some drafting weaknesses, is China’s total disinterest in enforcing this law by investigating Chinese corruption of foreign officials.<sup>126</sup>

While China’s lack of enforcement and regulation of foreign bribery is cause for real concern, China is not the only culprit. There is also a long list of other countries that have enacted UNCAC compliant laws but have avoided implementing meaningful enforcement and monitoring mechanisms.<sup>127</sup> For example, in Canada the Corruption of Foreign Public Officials Act (“CFPOA”) was enacted in 1999 but the government allocated no new resources to the enforcement of the new offence of foreign bribery. As a result, there was only one Canadian prosecution (a very minor one at that) of foreign corruption in the first ten to twelve years following the enactment of the CFPOA. In the last five to six years, new resources have been allocated to enforcement of foreign corruption. There are now four major foreign corruption convictions, one surprising acquittal in regard to the Padma Bridge scandal and one ongoing major prosecution of SNC Lavalin. In 2015 another twenty or so investigations were underway. But in early 2016 the Commissioner of the RCMP acknowledged a shift of police investigation resources from corruption and white collar crimes to terrorist offences and terrorist financing, a move that does not bode well for aggressive enforcement of foreign corruption.

The extent of global non-enforcement of bribery of foreign officials is shocking. In its 2010 Annual Report, the OECD Working Group on Bribery<sup>128</sup> found that among fifty countries who had criminalized bribery of foreign officials, only seven countries had ever prosecuted even one

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124. *UNCAC*, *supra* note 109, at arts. 15, 21.

125. Legal Affairs Committee of the National People’s Congress Standing Committee, Interpretation of the PRC Criminal Law [Zhong hua ren min gong he guo fa lv shi yi (di 5 ban)] (2011), <<http://vip.chinalawinfo.com/newlaw2002/slc/SLC/SiyItem.asp?Db=SYItem&Gid=838870036>>. Interpretation available in: Fry, *supra* note 23.

126. *Id.* at 79-82.

127. OECD Working Group on Bribery, *2010 Data on Enforcement of the Anti-Bribery Convention*, OECD 4 (Apr. 2011), <http://www.oecd.org/dataoecd/47/39/47637707.pdf>.

128. *See id.*; *see also* OECD Working Group on Bribery, *2010 Annual Report*, OECD (2011), <http://www.oecd.org/daf/anti-bribery/45460981.pdf>.

individual under this legislation. In 2014, the OECD<sup>129</sup> published a report entitled “OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials” (“OECD Report”).<sup>130</sup> The OECD Report analyzed all foreign bribery enforcement actions (427 cases) since the OECD Anti-Bribery Convention was enacted in 1999.<sup>131</sup> Results showed that over sixty percent of all reported cases (128 out of 207) were undertaken by the United States. Germany prosecuted twenty-six cases (twelve percent) and Korea prosecuted eleven cases (five percent). Seven countries prosecuted between two and six cases, while seven other countries prosecuted one case. Significantly, twenty-four of the forty-one countries that are signatories to the OECD Foreign Bribery Convention did not prosecute a single case. So China does not stand alone in regard to its non-prosecution of foreign bribery, but as already noted China is one of the worst foreign bribers when compared to all other major exporting countries (twenty-seventh out of twenty-eight countries), and it is also an outlier among the world’s five largest economies as the only country that does not actively prosecute bribery of foreign public officials.<sup>132</sup>

One could argue that Chinese authorities have simply not had enough time to investigate, gather evidence of wrongdoing, and prosecute individuals suspected of bribing foreign officials. That is unlikely in a country like China, which has a “lightning” fast criminal justice system compared to other Western countries. It is more likely that lack of enforcement is part of the Chinese leadership’s policy of aggressive investment in foreign countries, including developing countries with a record of significant corruption. Even in respect to domestic bribery cases, Chinese authorities generally target only government officials who accept

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129. China is not a member of the OECD nor a signatory to the OECD Anti-Bribery Convention. OECD, *Members and Partners*, OECD, <http://www.oecd.org/about/membersandpartners/>; OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

130. OECD, *An Analysis of the Crime of Bribery of Foreign Public Officials*, OECD (2014), <http://www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm>.

131. The OECD Anti-Bribery Convention is open to accession by any country which is a member of the OECD or has become a full participant in the OECD Working Group on Bribery in International Business Transactions. As of 2015, forty-one countries had ratified or acceded to the OECD Anti-Bribery Convention. The eight countries in italics below are not OECD members, but they are state parties to the OECD Anti-Bribery Convention: *Argentina*, Australia, Austria, Belgium, *Brazil*, *Bulgaria*, Canada, Chile, Colombia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, *Ireland*, Israel, Italy, Japan, *Latvia*, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, *Russia*, Slovakia, Slovenia, *South Africa*, *South Korea*, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States. OECD, *Members and Partners*, OECD, <http://www.oecd.org/about/membersandpartners/>; OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>.

132. Gintel, *supra* note 116, at 10-11.

bribes<sup>133</sup> while, at least until very recently, they do not generally charge or prosecute those individuals and firms who give or offer large bribes to public officials. Perhaps the explanation of this one-sided enforcement approach is the fact that punishing those entrepreneurs who offer bribes does little to advance China's economic interests because the private companies are key drivers of China's economic growth.<sup>134</sup> With no history of pursuing the suppliers of domestic bribery, it is perhaps not surprising that China is not pursuing Chinese individuals and enterprises that offer bribes abroad.

In respect to foreign bribery, UNCAC only requires signatories to prohibit active foreign bribery (i.e. persons who supply bribes); prohibiting passive foreign bribery (i.e. requesting or accepting bribes) is recommended, but not mandatory.<sup>135</sup> The non-mandatory nature of passive bribery provisions reflects broader global concerns about jurisdictional sovereignty: countries would be hesitant to support measures that enable domestic states to prosecute foreign officials for accepting bribes in a foreign country. But none of that explains or relieves China from its UNCAC obligation of pursuing Chinese individuals and enterprises that offer or give bribes to foreign officials.

## VI. The Way Forward

At present, widespread institutional corruption in China is still a threat to the legitimacy of the current Chinese government and the future of China's political stability and economic development.<sup>136</sup> The economic costs and adverse consequences of corruption exacerbate rising social inequality and further erode public confidence in government. Whether the current "tigers and flies" anti-corruption campaign will succeed in convincing the Chinese people that the CCP leadership is sincere in its efforts to reduce corruption remains an open question.

Signs of a faltering domestic economy, together with reforms designed to encourage investment in foreign countries, have led to an increase in the outflow of capital from China. China's recent stock-market crash and continued devaluation of the *renminbi* (yuan) have decreased buying power

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133. *Over 660,000 Officials Punished in Five Years*, CHINA INTERNET INFORMATION CENTER (8 Oct. 2012), [www.china.org.cn/china/2012-10/08/content\\_26726408.htm](http://www.china.org.cn/china/2012-10/08/content_26726408.htm). *But see* Nikkei staff writers, *Beijing takes its corruption crackdown into new territory*, NIKKEI ASIAN REVIEW (Feb. 26, 2016), <http://asia.nikkei.com/magazine/20160225-IS-CHINA-S-LUCK-RUNNING-OUT/On-the-Cover/Beijing-takes-its-corruption-crackdown-into-new-territory> (referring to a small but growing list of Chinese entrepreneurs who are under investigation for bribery).

134. Gintel, *supra* note 116, at 6.

135. Active bribery refers to donation of bribes while passive bribery refers to receipt of bribes. *See generally* Amy L Sommers & David D Zhang, *Anti-bribery Enforcement with Chinese Characteristics: Not All Official*, K & L GATES GLOBAL GOVERNMENT SOLUTION 2012: ANNUAL OUTLOOK 44 (2012), [http://www.klgates.com/files/upload/GGS\\_2012\\_Year Ahead.pdf](http://www.klgates.com/files/upload/GGS_2012_Year Ahead.pdf).

136. Minxin Pei, *Corruption Threatens China's Future*, CARNEGIE ENDOWMENT FOR INT'L PEACE 5 (2007), [http://carnegieendowment.org/files/pb55\\_pei\\_china\\_corruption\\_final.pdf](http://carnegieendowment.org/files/pb55_pei_china_corruption_final.pdf).



abroad, but also caused some uncertainty about the stability of the Chinese economy.<sup>137</sup> As a result, Chinese individuals and companies are increasingly investing elsewhere, notably in real estate, despite the prospect of lower returns. To the extent that corrupt officials invest their illicit proceeds outside of China, these developments send a significant sum of money beyond the reach of Chinese authorities, and may ultimately encourage the CCP leadership to reconsider the wisdom of passive scrutiny over foreign business practices. Nevertheless, increased enforcement against bribery by Chinese SOEs and private enterprises in foreign countries seems a distant prospect. Instead, the formal adoption of international anti-corruption instruments like UNCAC provides the CCP with continued political cover to pursue policies that perpetuate existing practices rather than combat foreign bribery. The recent crackdown on freedom of the press in China reduces the likelihood that the Chinese press will openly criticize China's inaction in enforcing bribery of foreign officials. Pressure on China to begin fulfilling its obligations to enforce bribery of foreign officials needs to come from the international community and from major economic powers like USA and Germany who are at a competitive disadvantage due to China's inaction.

As discussed, some observers note that corruption charges have long been used as a method to "discredit rivals rather than as an effort to clean up politics."<sup>138</sup> As previously suggested in this article, it seems clear that in China, the anti-corruption campaign has been used at least to a significant degree to settle political scores, suppress dissent, and consolidate the power of the CCP.<sup>139</sup> While it may be unrealistic to expect the CCP to implement reforms that will fundamentally undermine its powerbase, Jon Quan has proposed a number of measures that may "reduce the incentive for corrupt behavior and increase the incentive for officials in China to remain honest."<sup>140</sup> First, he suggests that the CCP should delegate investigative authority to an independent body that would reduce the opportunity for party members to interfere with investigations; Hong Kong's Independent Anti-Corruption Agency would be an exemplary model for the rest of China to follow. But as McGregor suggests, such a reform is unlikely because "exposing its members to investigation by outside bodies would be intolerable, as it would be akin to ceding the [CCP's] monopoly on power."<sup>141</sup> Second, Quan suggests that investigative and prosecutorial

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137. Dionne Searcey & Keith Bradahser, *Chinese Cash Floods US Real Estate Market*, NEW YORK TIMES (Nov. 28, 2015), [http://www.nytimes.com/2015/11/29/business/international/chinese-cash-floods-us-real-estate-market.html?\\_r=0](http://www.nytimes.com/2015/11/29/business/international/chinese-cash-floods-us-real-estate-market.html?_r=0).

138. Dini Djalala, *Southeast Asia*, in GLOBAL CORRUPTION REPORT 2001: TRANSPARENCY INTERNATIONAL 32 (2001), [https://www.transparency.org/whatwedo/publication/global\\_corruption\\_report\\_2001](https://www.transparency.org/whatwedo/publication/global_corruption_report_2001).

139. See, e.g., Jon Quan, *Minimizing Corruption in China: Is This An Impossible Dream?*, MD. SER. CONTEMP. ASIAN STUD. 1, 79 (2013).

140. *Id.* at 82.

141. RICHARD MCGREGOR, *THE PARTY: THE SECRET WORLD OF CHINA'S COMMUNIST RULERS* 168 (2012).

discretion should be fettered in such a way that increases the probability of detecting and punishing corrupt officials regardless of their political connections and therefore operates as an effective deterrent. Third, Quan suggests that systematic reforms that improve working conditions and salaries, streamline bureaucracy, and minimize red tape will improve regulatory clarity and ultimately reduce incentives for corruption.

On a different point, Randall Peerenboom has noted that China's tendency to discipline corrupt officials using internal Party mechanisms, rather than external public processes, undermines transparency and threatens the legitimacy of China's anti-corruption campaign. Indeed, corruption investigations are led by the Party's Central Commission for Discipline Inspection (CCDI), which enjoys unlimited power to investigate, detain, and interrogate.<sup>142</sup> Internal investigation and sanctioning of improper or corrupt behavior remains private unless the CCDI decides that a suspect should be expelled from the Party and sent to face criminal prosecution and public scrutiny.<sup>143</sup> Echoing Peerenboom's concerns, Stanley Lubman notes: "Primary responsibility for investigating and punishing corruption should be transferred to legal institutions—the Procuracy and the courts—with instructions to those organizations and the Party alike to strictly implement the rule of law."<sup>144</sup> Despite these suggestions for reform, it seems unlikely that CCP leadership will soon relinquish control over Party discipline in a way that empowers Chinese prosecutors and courts to address corruption impartially and independent of political influence.

In terms of independence, transparency, and the rule of law, China's current legal system is embryonic relative to many other countries. This embryonic phase has been complicated by China's rapid economic growth. In contrast to the legal systems of other major economies, China's domestic anti-bribery provisions are the product of legal efforts undertaken since the 1980s and primarily in the past ten to fifteen years.<sup>145</sup> Specifically, provisions addressing the bribery of foreign officials were only enacted in 2011. The rapid pace of change during this brief developmental period has likely contributed to inadequacies in legislative drafting and incongruent approaches to the control of bribery. With time, China may adopt emerging best practices that better align with international standards. It is possible that, for the moment, China is picking its battles and is content to address one problem at a time. In the long term, however, China's reluctance to

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142. James Leung, *supra* note 7.

143. Randall Peerenboom, *The Future of Legal Reforms in China: A Critical Appraisal of the Decision on Comprehensively Deepening Reform*, WORKING PAPER SERIES 8 (Jan. 16, 2014).

144. Stanley Lubman, *A Blueprint for Genuinely Fighting Corruption in China*, THE WALL STREET J. (Apr. 25, 2014), <http://blogs.wsj.com/chinarealtime/2014/04/25/a-blueprint-for-genuinely-fighting-corruption-in-china/>; Stanley Lubman, *Why China Can't Clean up Corruption*, THE WALL STREET JOURNAL (Apr. 9, 2014), <http://blogs.wsj.com/chinarealtime/2014/04/09/why-china-cant-clean-up-corruption/>.

145. Shuangge, *supra* note 93, at 496.

investigate and prosecute under its foreign bribery legislation disqualifies it as an international leader in the fight against global corruption. Ignoring the rampant bribery of foreign officials runs contrary to the spirit of the CCP's broader anti-corruption campaign. Calibrating the scope and intensity of enforcement will prevent the campaign from becoming disconnected from its mandate and devolving into little more than a tool to advance political self-interest. It is clear that the existence of provisions that prohibit domestic and foreign bribery is not enough: meaningful, apolitical enforcement is the way forward.