

# ***Study on the Criminal Regulation of Foreign Commercial Bribery by Chinese MNEs***

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**Abstract:** In the process of global economic integration, Chinese multinational enterprises (MNEs) have continued to expand their overseas operations, becoming significant players on the international commercial stage. However, the acceleration of their internationalization process has been accompanied by escalating issues of foreign-related commercial bribery, which erodes MNEs' reputation and interests and poses challenges to China's international image. This paper commences by delving into the recent status of China's criminal legal framework regulating foreign-related commercial bribery committed by MNEs, highlighting specific provisions in the Criminal Law of China as well as other pertinent regulations. Subsequently, the paper proceeds to pinpoint the shortcomings and deficiencies within the existing legal regulatory system, notably including issues such as jurisdictional evasion and ambiguous definitions of specific concepts like the scope of bribe recipients. Drawing extensively from international legislative experiences, including the United States' Foreign Corrupt Practices Act, the UK's Bribery Act, and the United Nations Convention against Corruption, this paper finally distills successful practices and offers valuable recommendations for enhancing China's legal system. The proposed measures encompass clarifying the definition of bribery acts, refining the scope of bribe recipients, and enriching sentencing factors. Moreover, the paper highlights the necessity of motivating corporate compliance through legal means, thereby curbing bribery at its source. This study provides research support for refining China's anti-overseas bribery legal framework, which in turn can bolster the credibility of Chinese MNEs in the international market, foster the growth of China's transnational commerce, and elevate China's international competitiveness.

**Keywords:** foreign bribery, China's criminal law regulation, MNE's bribery.

## **1. Introduction**

Nowadays, China holds an increasingly significant position in the global market, with Chinese enterprises engaging in more frequent cross-border business activities. This has been accompanied by a series of legal issues committed by Chinese multinational enterprises (MNEs), particularly the issue of commercial bribery in host countries. According to Transparency International's overall assessment of national integrity over the past five years, China has maintained a score range of 41 to 45, ranking roughly 75th among 180 countries or regions [1]. This data underscores the complexity and severity of the anti-corruption struggle in China's foreign-related business conduct and imposes higher requirements on the compliant overseas business operations of Chinese MNEs.

The foreign-related commercial bribery discussed in this paper refers to the act of Chinese enterprises directly or indirectly offering, promising, or actually granting undue pecuniary or other benefits to public officials holding legislative, administrative, judicial, or other positions in host countries, regions, or international public organizations, with the intention of leveraging their positions to obtain improper advantages in international business activities. Such practices erode the fairness of cross-border business activities and destabilize the international business market order [2] and pose a potential threat to China's international reputation.

Currently, Chinese MNEs face practical difficulties in addressing commercial bribery, primarily due to an incomplete legal regulatory system. Specifically, the regulatory force within the criminal legal system remains inadequate, and there are numerous imperfections in the MNEs anti-bribery compliance management. These issues urgently need to be systematically identified and resolved.

In view of the above reasons, firstly, this paper comprehensively reviewed the recent criminal law provisions on commercial bribery overseas by MNEs, analyzed the application status and limitations of laws and regulations, especially the Criminal Law. After that the paper clarified the deficiencies as well as the challenges within the existing regulatory framework. Secondly, through comparative analysis, this paper examined the legislative practices and successful experiences of some countries and international organizations in regulating foreign-related commercial bribery. Thirdly, it extracted concepts and institutional designs that can be referred to in the current economic and social context of China. Finally, the paper concluded by proposing specific and feasible suggestions for improving the criminal law regulations of China on commercial bribery by MNEs, striving to enhance the development and refinement of China's regulatory framework for combating criminal bribery, enhance China's international competitiveness, elevate China's international image and influence, and safeguard the fairness and transparency of the international business environment.

## **2. Current Situation of China's Regulation on MNEs' foreign bribery**

### **2.1. Notable Cases of Foreign Bribery Involving Chinese MNEs**

#### **2.1.1. The He Zhiping Case**

He Zhiping, the leader of the China Energy Fund Committee (CEFC NGO), an organization registered in Hong Kong and the United States and established by CEFC China Energy Co. Ltd. (CEFC), was subject to investigation and indictment by the United States Department of Justice for allegedly breaching the provisions of the Foreign Corrupt Practices Act (U.S. FCPA), specifically for suspected illicit payments to public officials in Chad and Uganda[3]. He was sentenced to imprisonment and fines by a U.S. court [3]. In Chad, CEFC needed to cooperate with China National Petroleum Corporation (CNPC). Former Senegalese Foreign Minister Gadio facilitated introductions between He Zhiping and the President of Chad, in order to lift the environmental penalties imposed on CNPC. In return, He Zhiping "donated" USD 2 million to the President of Chad and transferred USD 400,000 to Gadio as a token of appreciation [3]. In Uganda, He Zhiping transferred USD 500,000 to former Ugandan Foreign Minister Sam K. Kutesa to gain a commercial advantage [3].

#### **2.1.2. The Xi Zhengbing and Zhou Zhonghe Case**

The present instance stands as a notable example within the limited pool of cases pertaining to the act of bribing foreign public officials or officials of international organizations, which have been publicly disclosed by the Supreme People's Court of China [4]. Xi Zhengbing was the former General Manager of the Singapore Branch of China Railway Tunnel Bureau Group Co., Ltd. Zhou Zhonghe was the Deputy General Manager of this enterprise. The two were convicted and sentenced to two years of

imprisonment each, along with fines of RMB 100,000, for offering bribes three times, totaling SGD 220,000 to Singaporean public officials in order to obtain improper commercial benefits.

## **2.2. Current Provisions in Chinese Criminal Law Regarding Foreign Bribery by MNEs**

### **2.2.1. The Eighth Amendment to the Criminal Law of China**

In 2011, China enacted the Eighth Amendment to the Criminal Law of China, which introduced in Article 164(2) the crime of "bribing foreign public officials or officials of international public organizations." The defining characteristics of this criminal offense entail the act of "conferring property upon foreign public officials or officials of international organizations with the aim of procuring unauthorized commercial gains", with two levels of punishment based on the "relatively large amount" and "extremely large amount" of the bribe.

### **2.2.2. Opinions on Several Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery**

Jointly issued by the Supreme People's Court and the Supreme People's Procuratorate of China in 2008, the Opinions on Several Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery (hereinafter referred to as the "Opinions") outlines certain behavioral patterns of commercial bribery crimes and the determination of the amount of bribes received under various circumstances. In the context of accepting bribes manifested as bank cards, the quantum of the bribe is ascertained by the monetary value held within the card. However, "Opinions" do not have the effect as a judicial interpretation and cannot serve as the basis of court judgement. Furthermore, owing to its issuance preceding the Eighth Amendment to the Criminal Law, the document fails to elaborate on whether, and if so, how the behavioral patterns outlined therein can be relevantly applied to the offense of "corrupting foreign public officials or officials of international organizations".

## **3. Issues with China's Current Criminal Laws and Regulations in Addressing Commercial Bribery by MNEs**

### **3.1. Conflicts in Legal Provisions Leading to Jurisdictional Evasion**

China's Criminal Law, Article 7(1), stipulates the principle of personal jurisdiction, which applies to Chinese citizens committing crimes outside China. Nonetheless, in scenarios where the statutory maximum penalty prescribed is a term of imprisonment not exceeding three years, the offender may be eligible for exemption from criminal prosecution. Overseas bribery committed by Chinese enterprises is subject to the constraint of this article. Yet, Article 164(2) of the Criminal Law sets the maximum statutory penalty for "relatively large" foreign commercial bribery at fixed-term imprisonment of not more than three years. That means that when the offense is committed outside China's territory, only acts that fall under the "extremely large" category are definitively within the jurisdiction of Chinese courts. In contrast, the U.S. Foreign Corrupt Practices Act (U.S. FCPA) has a much broader jurisdiction [5]. The conflict between these two provisions may lead to a situation - some acts that meet the criteria of "relatively large amount" but occur overseas are not subject to the jurisdiction of Chinese courts yet are subject to U.S. FCPA enforcement.

## **3.2. Lack of Clarity in China's Criminal Law Provisions**

### **3.2.1. Imprecise Definition of Conduct Patterns**

The conduct of "giving property to foreign public officials or officials of international public organizations for the purpose of seeking improper commercial benefits" is formally outlined within the provisions of China's Criminal Law. However, ambiguity persists regarding the precise delineation of the terms "seeking improper commercial benefits" and "giving property" necessitating further clarification.

With economic and social development, commercial bribery has taken on more diverse forms, and enterprises have devised various concealed bribery schemes to evade scrutiny, including offering non-material benefits such as business trips disguised as inspections, educational opportunities, job placements, and property interests without transferring ownership, such as granting dry shares or shares without actual investment, or paying salaries to third parties with specific relationships to the recipient[6].

The "Opinions" issued by the Supreme People's Court and Supreme People's Procuratorate, due to the level of socio-economic development at the time, did not provide detailed definitions of "seeking improper commercial benefits". Alternatively, judges are advised to employ discretion, taking into account the context, monetary value, motivations, timing, and methodology of the financial transactions, as well as whether the recipient leveraged their position to confer advantages upon the giver. As for the scope of "giving property", issues such as whether it includes giving property to third parties with interests, whether non-material benefits are included, and how the act of "giving" is defined, all require further clarification.

### **3.2.2. Unclear Definition of "Foreign Public Officials or Officials of International Public Organizations"**

The term "public official" is inherently vague, raising questions about which government agencies' staff members are included, whether temporary staff members are encompassed, and so on. These issues should be specifically addressed.

China's crime of "bribing foreign public officials or officials of international public organizations" is relatively new, and there are no separate interpretations for this crime in the judicial interpretation "Interpretations of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Application of Law in Handling Criminal Cases of Corruption and Bribery". Consequently, whether a bribe recipient qualifies as a "foreign public official or official of an international public organization" is entirely at the discretion of the judge.

## **4. Enhancing China's Anti-Foreign Commercial Bribery Framework: Comparative Legal Norms and Proposed Refinements**

### **4.1. Improving Legal Interpretation**

Through the above analysis, it is evident that China's criminal law provisions on foreign commercial bribery are not comprehensive. In fact, other regulations such as the "Provisional Regulations on the Prohibition of Commercial Bribery" (hereinafter referred to as the "Provisional Regulations") contain more reasonable definitions of certain concepts, such as the scope of property, specific behavior patterns, and acts that do not constitute commercial bribery. However, in the light of criminal adjudication, only the "Criminal Law" and its judicial interpretations possess the status of legal authority and can serve as a direct juridical foundation for court rulings. Other relevant norms do not have the legal effect of direct citation, but judges may incorporate them in the process of forming the

grounds for adjudication. Given the principle of "legality of crimes and punishments" in criminal law and the seriousness of criminal sanctions, it is imperative to delineate the boundaries of property and specific behavioral patterns in the judicial interpretations of the Criminal Law to avoid excessive judicial discretion.

While leveraging the sophisticated legislative precedents established in advanced nations and regions, inclusive of the United States and Europe, the enhancement of criminal law provisions pertaining to foreign commercial bribery ought to be intimately aligned with China's prevailing economic and societal progress. This is to ensure that the revised legal norms can effectively address domestic challenges and facilitate integration with the international legal system. Specifically, the core of improving China's current legal regulations lies in refining the judicial interpretations accompanying the Criminal Law.

#### 4.1.1. Definition of Behavioral Patterns

Regarding the definition of "giving": Article 1(1) of the OECD's "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" (OECD Anti-Bribery Convention), Article 6 of the "United Nations Convention Against Corruption" (UNCAC) which China has acceded to, and the U.S. FCPA[7] all characterize the conduct of commercial bribery as offering, promising, or actually giving. This definition treats the preparatory stage of bribery as part of the execution stage for punishment. This reflects an advancement in the timing of regulating commercial bribery, deeply reflecting the international community's stance of resolutely opposing and severely combating such practices. The aim is to comprehensively curb corruption, establishing a clean business environment from its very roots.

Regarding the definition of "improper commercial advantage": The U.S. FCPA introduces the "business purpose test", which requires that the briber must act to obtain or retain business for themselves or others or to secure business for another person. The U.S. FCPA exemplifies certain improper commercial advantages related to government contracts, tax treatment, and evasion of licensing or approval requirements [7].

The "Interim Provisions" issued by China's State Administration for Market Regulation have already provided specific regulations on commercial bribery, including the scope of property, specific behavioral patterns, and acts that do not constitute commercial bribery, which can serve as a reference in the judicial interpretations of the Criminal Law.

China follows a specific application model when dealing with international treaties it has acceded to: converting treaty content into domestic legislation and then enforcing the norms stipulated in the treaties according to the domestic legal system. This means that although international treaties are one of the sources of Chinese law, their provisions do not directly apply as domestic law. Therefore, China has not directly incorporated the foreign commercial bribery patterns stipulated in the UNCAC it has acceded to into its legal norms. Actually, offering and promising behaviors can still be treated as preparatory offenses of bribing foreign officials under the general provisions of the Criminal Law regarding incomplete crimes during adjudication. However, since these two behaviors are explicitly mentioned in the treaty, they should be further stipulated in legal interpretations. Some scholars further argue that various payment behaviors, such as facilitating payment, promising payment, authorizing payment, and third-party payment, should all be explicitly defined as criminal acts [8]. In defining "improper commercial advantage", China can draw on the concept of the "business purpose test" for legal interpretation and provide clearer legal guidance for enterprises or individuals engaged in foreign commercial transactions through examples.



#### 4.1.2. Definition of Sentencing Circumstances

In terms of sentencing circumstances, international advanced legislation such as the U.S. FCPA and the UK Bribery Act demonstrate a stringent regulatory stance. These laws generally do not specify a minimum threshold for criminal prosecution, prescribe an extremely broad scope of punishment, and incorporate other contextual factors in determining criminal liability. For instance, Japan's Unfair Competition Prevention Law merely distinguishes between the fines imposed on natural persons and legal entities for criminal offenses [9]. Article 1(2) of the OECD Anti-Bribery Convention explicitly criminalizes assisting behaviors such as inciting, aiding, abetting, and authorizing. Additionally, it equates the criminality of bribing foreign public officials with that of domestic public officials. In summary, these regulations generally adopt a more severe approach to combating such conduct and consider a broader range of criteria for punishment.

China's current legal framework relies solely on monetary amounts as the criterion for conviction and sentencing. To evaluate cases more comprehensively, it is suggested that factors such as motive, means, and consequences be incorporated into the consideration for conviction and sentencing. Regarding the severity of punishment, some scholars argue that bribing public officials poses a greater societal harm than bribing non-public officials [10]. However, under the current Interpretations in China, the sentencing for bribing foreign public officials is based on the standards for bribing non-state personnel, which is lighter than that for bribing state personnel, potentially leading to unduly light punishment. To address this, the provisions of the OECD Anti-Bribery Convention can be referred to in order to intensify crackdown efforts.

#### 4.1.3. Scope of "Foreign Public Officials or Officials of International Public Organizations"

The U.S. FCPA comprises primarily anti-bribery and accounting provisions, with detailed definitions of various concepts in its first part. The section titled "Who Is a Foreign Official?" specifically outlines the targets of bribery, including "any foreign official", "any foreign political party or official thereof", "any candidate for foreign political office", and anyone knowingly making payments for the purpose of bribing these three categories. While distinguishing between these three types of foreign officials, the law subsequently expands the definition to encompass anyone acting on behalf of foreign government or any department, agency, or instrumentality thereof, or of a public international organization[11].

Article 2 of the UNCAC further elaborates an exhaustive definition of "public official", encompassing individuals performing legislative, administrative, managerial, or judicial functions; individuals who exercise public duties pursuant to national legislation; as well as any individual designated as a public official in accordance with domestic law. Notably, the convention treats individuals performing public functions as a separate category, implying that even if they are not considered public officials under domestic law, they remain susceptible to the anti-corruption provisions stipulated within the treaty if they engage in the execution of public functions.

During the research process of some cases in the United States, some scholars have found that paying improper kickbacks to employees of Chinese state-owned enterprises (SOEs) and paying undue benefits to doctors working in hospitals controlled by the Chinese government have both been charged with violations of the U.S. FCPA, meaning that the above-mentioned individuals are all included in the bribery targets identified by the U.S. FCPA[12]. Similarly, under the UNCAC, Chinese SOE employees are also encompassed within the definition of "public official".

Both these laws adopt a broad interpretation of "public officials". However, in the Chinese context, there is a tendency to equate "public officials" with "state personnel", assuming that individuals engaged in public service but not belonging to administrative, legislative, or judicial institutions do not qualify as "public officials". This discrepancy could lead to situations where China deems the

application of the crime of "bribing foreign public officials or officials of international public organizations" inappropriate, while other countries initiate criminal investigations into Chinese enterprises for anti-foreign commercial bribery. Therefore, China should explicitly define the scope of "public officials" in its judicial interpretations of criminal law, adopting a broader interpretation to align with international rules and treaties China has ratified, thereby avoiding legal misunderstandings caused by Chinese MNEs and preventing violations of host country laws or international treaties.

## 4.2. Strengthening the Construction of Corporate Compliance Systems

The United Kingdom is the first country in the world to enact comprehensive anti-bribery legislation [13]. The UK's Bribery Act clarifies a legal mechanism where non-liability attaches to compliance, motivating corporations to adopt preventive measures against bribery, establish corporate compliance mechanisms, and enhance compliance awareness [14]. The crime of "Failure of Commercial Organisations to Prevent Bribery" stipulated in Article 7 of the UK Bribery Act adopts the strict liability model, where the responsible subject - the enterprise - bears a passive obligation to prevent it. The enterprise is responsible for the burden of proof regarding whether preventive measures have been taken. This, in turn, underscores the importance of strengthening corporate compliance system construction [13]. Similarly, France's Sapin II Act mandates the establishment of corporate compliance systems and delineates strict criteria for determining which enterprises must undertake such construction [15].

In the international context of increasing anti-bribery sentiment worldwide, strengthening the compliance system construction of Chinese enterprises has become particularly crucial. Scholars in China have advocated for measures such as formulating internal anti-corruption and accounting procedures, establishing comprehensive internal control measures, and conducting investment corruption risk assessments in the realm of corporate compliance [16]. These endeavors not only foster greater prudence in Chinese MNEs, effectively preventing bribery, but also erect a robust defensive barrier for them. Notably, under a policy framework that exempts compliant enterprises from punishment, corporations gain enhanced self-protection capabilities. Even when confronted with rigorous anti-bribery investigations from other countries, they can leverage their robust compliance systems to provide compelling self-justification, thereby mitigating potential legal liabilities, safeguarding corporate interests, and simultaneously reinforcing and elevating the reputable, trustworthy image of Chinese enterprises in the international community, fostering sustainable development.

## 5. Conclusion

This paper has first illuminated the prevalence of bribery among Chinese MNEs in foreign-related commercial activities. Through a in-depth analysis of China's current legal system, this paper has pinpointed the existing problems, mainly including jurisdictional evasion and the ambiguity in defining certain legal concepts. To address these issues, the paper has systematically examined international advanced legislative practices, including the U.S. FCPA, the UK's Bribery Act, Japan's Unfair Competition Prevention Law, and UNCAC, aiming to draw upon their successful experiences and provide an international perspective for the improvement of China's legal system.

Ultimately, the paper focuses on the optimization method for China's legal system, proposing a dual strategy that combines the reinforcement of legal regulations with the promotion of corporate compliance. From the perspective of legal regulations, this paper specifically proposes measures to clarify the behavioral patterns, define the targets of bribery more precisely, and enrich the sentencing circumstances in response to the identified issues. It is anticipated that these initiatives will systematically address the deficiencies of the present legal framework, furnishing China with viable

strategies to forge a more stringent and efficacious regulatory structure for foreign-related commercial bribery. The endeavor seeks to bolster China's legal system's international competitiveness and further project a favorable image within the global governance landscape, thereby advancing the establishment of a more equitable and transparent international business environment.

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