

Working Paper

Doing Business in a Connected Society: The GSK Bribery Scandal in China

Cindy A. Schipani
Stephen M. Ross School of Business
University of Michigan

Junhai Liu
Business Law Center
Remnin University of China

Haiyan Xu
University of International Business and Economics
Beijing, China

Ross School of Business Working Paper
Working Paper No. 1268
March 2015

This work cannot be used without the author's permission.
This paper can be downloaded without charge from the
Social Sciences Research Network Electronic Paper Collection:
<http://ssrn.com/abstract=2579040>

**Doing Business in a Connected Society:
The GSK Bribery Scandal in China⁺**

by

Cindy A. Schipani,* Junhai Liu,** and Haiyan Xu***

Almost every society could be considered a society based on connections. As Lawrence M. Friedman said, “in this society, as in every society, who you know and what your connections are, whether you are rich or poor, educated or uneducated, articulate or inarticulate, has always mattered greatly—one way or the other.”¹ The logic is very simple. No one will feel safe and secure when entering into a significant transaction with a stranger. The same notion of a “connection,” however, might mean more in the context of the Chinese society than in the context of society in the US. In China, connections, or *guanxi*, are important, not only in a business context, but also at the personal level.² Compared to US “connections,” which tend to rely primarily on a *quid pro quo* dynamic, *guanxi* are typically understood as being primarily socio-emotional relations.³ “Intimately related to family, kinship, ethnic and other personalistic relations,” *guanxi* thus constitute more meaningful, as well as powerful connections, connections who are frequently relied upon in both business and personal contexts.⁴

A connection *per se* is neither the angel nor the devil. To the contrary, it is a neutral term. A connection could be used for different, or even opposite, purposes. In some circumstances, a connection could be an angel, as healthy, moral, and lawful connections will benefit both businesses and their stakeholders in the local market.⁵ In other circumstances, connections are abused to advance the interests of firms and their corrupted partners at the

⁺ Copyright 2015. Cindy A. Schipani, Junhai Liu, Haiyan Xu. All rights reserved. The authors wish to thank the participants of the Big 10 and Friends Seminar (Angie Raymond, Gwendolyn Gordon, Todd Haugh, David Zaring, Dan Cahoy, Jamie Prenkert, Leigh Anenson, and David Hess) held at the University of Michigan for helpful comments and to thank Alina Charniauskaia, Zachary Fichtenbaum, and Jacob Styburski, J.D. Candidates, University of Michigan Law School for valuable research assistance.

* Merwin H. Waterman Collegiate Professor of Business Administration and Professor of Business Law, Ross School of Business, University of Michigan.

** Professor and Director, Business Law Center, Law School, Renmin University of China.

*** Professor, School of Law, University of International Business and Economics, Beijing, China.

¹ LAWRENCE M. FRIEDMAN, *LAW IN AMERICA: A SHORT HISTORY* 32 (2002).

² Bingyuan Hsiung, *Guanxi: Personal Connections in Chinese Society*, 15 *J. BIOECON.* 17, 17 (2011).

³ Roy Y.J. Chua, Michael W. Morris, & Paul Ingram, *Guanxi vs Networking: Distinctive Configurations of Affect- and Cognition-Based Trust in the Networks of Chinese vs American Managers*, 40 *J. INT’L. BUS. STUD.* 490, 490-91 (2009).

⁴ Hsiung, *supra* note 2, at 17 (“One important feature of *guanxi* is that it is closely related to family. A popular Chinese idiom captures its spirit vividly: ‘Count on your parents while at home, and count on your friends while away from home.’”). This heightened conception of connections has even been linked to the family/clan-based origins of Chinese thinking on the makeup and proper . . . function of corporations, Teemu Ruskila, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 *STANFORD L. REV.* 1599, 1616-17 (1999-2000) (citing HILL GATES, *CHINA’S MOTOR: A THOUSAND YEARS OF PETTY CAPITALISM* 84-120 (1996) (discussing commercially-oriented Chinese clans, which she calls “patricorporations”).

⁵ See generally HUBERT OESTERLE, ELGAR FLEISCH, & RAINER, *BUSINESS NETWORKING: SHAPING COLLABORATION BETWEEN ENTERPRISES* (2001).

price of defrauding consumers, bullying small competitors, and polluting the commercial culture.⁶

More importantly, connection-based bribery has been a special target in contemporary Chinese society.⁷ Anti-corruption efforts and reforms toward a transparent and competitive market are key elements of the contemporary Chinese culture.⁸ A misinterpretation of contemporary Chinese culture may have created, and may continue to create, more bribery scandals on the part of multinational corporations (MNCS).⁹

To analyze this point, this paper focuses on the scandal plaguing global healthcare giant, GlaxoSmithKline LLC (GSK). On July 2, 2012, GSK agreed to plead guilty and pay \$3 billion to resolve its criminal and civil liability arising from the company's unlawful promotion of certain prescription drugs, its failure to report certain safety data, and for alleged false price reporting practices in the US.¹⁰ The allegations include two counts of introducing misbranded drugs, Paxil and Wellbutrin, into interstate commerce and one count of failing to report safety data about the drug, Avandia, to the Food and Drug Administration (FDA).¹¹ Furthermore, GSK was accused of paying for publication of articles about their drugs in medical journals.¹² The fine was the largest combined federal and state healthcare fraud recovery in a single case in the history of the United States.¹³

Before GSK had the chance to rebuild its image, the company was embroiled in another bribery scandal in China. In June 2013, a criminal investigation of GSK began in China. GSK allegedly bribed government officials, medical associations, hospitals, and individual doctors, to open more distribution channels and raise product prices.¹⁴ The Chinese police claimed GSK funneled up to three billion yuan (\$490 million) to travel agencies in order to facilitate bribes to doctors and other officials.¹⁵ More than 700 middlemen and travel agencies were alleged to have helped channel nearly \$500 million in kickbacks to those who prescribed pills from the UK pharmaceutical since 2007.¹⁶ The Ministry of Public Security detained four

⁶ SUSAN ROSE-ACKERMAN, CORRUPTION AND THE GLOBAL ECONOMY 43 (1997); see Jessica Silver-Greenberg & Ben Protess, *JP Morgan Hiring Put China's Elite on an Easy Track*, N.Y. TIMES, Aug. 29, 2013; see generally Cindy A. Schipani, *Falling Off the Corporate Ladder: Prosecution for Financial Fraud in the United States*, 32 COMPANY LAWYER 336 (2011).

⁷ Dingding Chen, *4 Misconceptions About China's Anti-Corruption Campaign*, THE DIPLOMAT, Aug. 6, 2014, <http://thediplomat.com/2014/08/4-misconceptions-about-chinas-anti-corruption-campaign/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Press Release, U.S. Dep't of Justice, *GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data* (July 2, 2012), <http://www.justice.gov/opa/pr/2012/July/12-civ-842.html> [hereinafter Press Release].

¹¹ *Id.*

¹² Simon Neville, *GlaxoSmithKline Fined \$3bn After Bribing Doctors to Increase Drugs Sales*, THE GUARDIAN, July 3, 2012, <http://www.theguardian.com/business/2012/jul/03/glaxosmithkline-fined-bribing-doctors-pharmaceuticals>.

¹³ Press Release, *supra* note 10.

¹⁴ *Top Ten White-collar Crimes in 2013*, China Daily, http://www.chinadaily.com.cn/business/2014-02/17/content_17287131.htm (last updated Feb. 17, 2014).

¹⁵ Ben Hirschler, *Bribery Scandal Slashes GlaxoSmithKline's Chinese Drug Sales*, REUTERS, Oct. 23, 2013, <http://www.reuters.com/article/2013/10/23/us-gsk-earnings-idUSBRE99M0DB20131023>.

¹⁶ *Id.*

upper-level executives of GSK China, and at least eighteen other employees were arrested.¹⁷ The GSK scandal quickly became one of the “Top 10 White-collar Crimes” in 2013.¹⁸

On September 19, 2014, The Changsha Intermediate People’s Court found the company guilty of bribing nongovernmental personnel and imposed on GSK a fine of nearly \$500 million, the amount of the company’s bribes¹⁹ and the largest corporate fine ever imposed in China.²⁰ The court also sentenced GSK’s former country manager for Britain, Mark Reilly, along with four other company managers, to prison sentences that could have lasted up to four years (the court has agreed to suspend the sentences so long as the convicted commit no further offenses in China).²¹ In a statement released just hours after the verdict, GSK stated that it “fully accepts the facts and evidence of the investigation, and the verdict of the Chinese judicial authorities... GSK P.L.C. sincerely apologizes to the Chinese patients, doctors and hospitals, and to the Chinese government and the Chinese people.”²²

Although GSK has very specific internal rules against commercial bribery, these rules appear to have been easily circumvented through the use of third parties, such as travel agencies.²³ The major function of the travel agency was to invent corporate meetings that would have required staff travel.²⁴ The budget for these fictitious meetings would then be used to bribe doctors to prescribe certain drugs.²⁵ The doctors involved were issued a credit card from the company and the kickbacks they received were transferred to the cards the day after drugs were prescribed.²⁶

It has been further alleged that GSK offered bribes to doctors not only in China, but also to doctors in other countries, including Iraq, Lebanon, Jordan, Syria, and Poland.²⁷ According to an April 15, 2014 report, GSK was fully cooperating with the Polish government’s investigation after the British media accused it of paying bribes to Polish doctors.²⁸ Between 2010 and 2012, under the facade of “educational services,” GSK representatives allegedly paid Polish doctors to promote GSK’s asthma drug, Seretide.²⁹ The local prosecutor has charged eleven doctors and a GSK regional manager over the alleged corruption. The prosecutor of the Polish region of Lodz found evidence in documents given to doctors by

¹⁷ Emma Dai & Yao Jing, *Overseas Firms Making Sure They Keep Their Hands Clean*, CHINA DAILY, Mar. 13, 2014, http://www.chinadaily.com.cn/business/2014-03/13/content_17343519.htm.

¹⁸ *Top 10 White-collar Crimes in 2013*, *supra* note 14.

¹⁹ Keith Bradsher & Chris Buckley, *China Fines GlaxoSmithKline Nearly \$500 Million in Bribery Case*, N.Y. TIMES, Sept. 19, 2014.

²⁰ Hester Plumridge & Laurie Burkitt, *GlaxoSmithKline Found Guilty of Bribery in China*, WALL ST. J., <http://online.wsj.com/articles/glaxosmithkline-found-guilty-of-bribery-in-china-1411114817> (last updated Sept. 19, 2014).

²¹ Bradsher & Buckley, *supra* note 19.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Hirschler, *supra* note 15.

²⁷ *GSK Admits Under Bribery Investigation in Poland*, XINHUA, Apr. 15, 2014, http://news.xinhuanet.com/english/world/2014-04/15/c_133261867.htm; Ben Hirschler, *Exclusive: GlaxoSmithKline faces fresh drug bribery claims in Syria*, REUTERS, Aug. 11, 2014, <http://www.reuters.com/article/2014/08/11/us-gsk-corruption-syria-idUSKBN0GB1PR20140811>; *UPDATE 4-UK fraud office probes GSK after claims of foreign bribery*, REUTERS, May 28, 2014, <http://www.reuters.com/article/2014/05/28/gsk-sfo-idUSL6N0OD5E020140528>.

²⁸ *GSK Admits Under Bribery Investigation in Poland*, *supra* note 27.

²⁹ *Id.*

GSK to support claims of corrupt payments in more than a dozen different health centers, where there was no evidence that "patient education" had taken place.³⁰ Furthermore, GSK has said that it was "looking into accusations" that its Iraqi business had hired government-employed doctors and pharmacists to act as paid sales representatives for the company.³¹ In April 2014, GSK announced that it is investigating similar bribery allegations in Jordan and Lebanon.³²

In addition, the US Department of Justice (DOJ) has started its own investigation. The US is investigating whether GSK violated US anti-bribery laws, specifically the US Foreign Corrupt Practices Act (FCPA), in China.³³ Additionally, Britain's Serious Fraud Office (SFO) is taking steps to prosecute or fine companies that commit bribery overseas, which would likely implicate GSK.³⁴ No charges by either the DOJ or SFO have yet been announced. Furthermore, the GSK bribery scandal is not a singular event in China. Just one month after the investigation of GSK began, Beijing municipal authorities set up a joint investigation team to investigate the French pharmaceutical company Sanofi after a Chinese newspaper published bribery allegations against that company.³⁵

Although GSK is not the only multinational pharmaceutical company to be investigated for its business in China, it has suffered the most damage to date as many Chinese doctors have shunned its drugs and sales representatives.³⁶ While rivals of GSK (such as Roche and Novartis) have experienced continued growth, GSK's drug sales slumped 61 percent in the third quarter in China following the announcement of the investigation.³⁷ This dip in sales is greater than investors were predicting³⁸ and was caused in part by the considerable uncertainty in China concerning the extent of GSK's continued drug sales, which has led hospitals to turn to more reliable alternatives.³⁹ Additionally, consumer discontent has likely played a strong role in decreasing GSK's China sales.⁴⁰ There is a common perception in China that foreign medicines are overpriced due to the costs of corruption associated with their marketing.⁴¹ Given the GSK scandal's considerable publicity, it appears that Chinese patients have directed their resentment of over-priced, foreign medications at GSK, putting pressure on Chinese doctors to avoid prescribing GSK products when possible.⁴² The sales hit the hardest were those of drugs with easily accessible substitutes.⁴³

³⁰ *Id.*

³¹ *Id.*

³² Scott Campbell, *Glaxo China Bribery Allegations-Timeline*, THE TELEGRAPH, May 14, 2014, <http://www.telegraph.co.uk/finance/newsbysector/pharmaceuticalsandchemicals/10828571/Glaxo-China-bribery-allegations-timeline.html>.

³³ *US Prosecutors Add China Bribery Allegations to GSK Probe*, REUTERS Sept. 6, 2013, <http://www.cnn.com/id/101015570>.

³⁴ Carly Helfand, *British Penalties for China Bribery May be on the Way for GSK*, FIERCE PHARMA Feb. 21, 2014, <http://www.fiercepharma.com/story/british-penalties-china-bribery-may-be-way-gsk/2014-02-21>.

³⁵ *Pharmaceutical Giants Rethink Rebate Marketing*, XINHUA, Apr. 12, 2014, http://www.chinadaily.com.cn/business/2014-04/12/content_17429361.htm.

³⁶ Hirschler, *supra* note 15.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *A Brand that Needs a Makeover: GlaxoSmithKline China*, SCIENCE, MEET LAW, Feb. 13, 2014, http://www.sciencemeetlaw.com/2014_02_01_archive.html.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Hirschler, *supra* note 15.

In light of these scandals, we seek to analyze the complicated harms triggered by the alleged corrupt practices of GSK and other multinational corporations (MNCs) in connected societies in order to identify the causes of these scandals and to provide suggestions for reform. Part I provides an overview of Chinese culture followed by identification of some of the harms that may be triggered by corrupt practices of businesses in Part II. Part III examines the international anticorruption framework while Part IV considers why the alleged GSK bribery scandal was possible in China. We then analyze the need for improvement of the evaluation and incentive system for professional sales representatives in Part V, leading to suggestions for reform in Part VI. Concluding remarks then follow.

I. Understanding Chinese Culture and Society

It is difficult to have a deep understanding of China. Historically speaking, China has been a connection-based, agricultural society, with a brief exposure to rule of law (in the modern sense) in comparison with its five thousand years of civilization.⁴⁴ Yet, a close examination of Chinese culture reveals that commercial corruption is neither encouraged nor tolerated.⁴⁵

First, Chinese culture, especially the mainstream philosophy, is against any form of corruption.⁴⁶ As President Xi Jinping outlined in his speech at the College of Europe on April 1, 2014, China has a civilization of over 5,000 years.⁴⁷ Over 2,000 years ago, there was “the period of one hundred masters and schools of thought.”⁴⁸ Great thinkers, such as Laozi, Confucius, and Mozi, explored a wide range of topics from the universe to the Earth, from men’s relationship with nature to relations among people, and between the individual and society.⁴⁹ The extensive and profound schools of thought they established covered many important ideas, such as the moral injunction of fidelity to one’s parents and brothers and to the monarch and friends, a sense of propriety, justice, integrity and honor, emphasis on benevolence and kindness towards fellow people, and the belief that man should be in harmony with nature, follow nature’s course, and constantly pursue self-perfection.⁵⁰ These values and teachings still carry a profound impact on the Chinese people’s way of life today, underpinning the unique value system in the Chinese outlook of the world.⁵¹ Chinese culture pays close attention to the integrity and morality of people and commercial corruption would thus be contrary to these basic tenets

⁴⁴ See generally RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW (2002).

⁴⁵ See H. E. Xi Jinping, Pres. of P.R.C., Speech at the College of Europe, Bruges, (Apr. 1, 2014), <http://www.chinamission.be/eng/jd/t1143591.htm>; Jinxuan Zhang, *Moutai, the FCPA and Doing Business with China*, 2012 WL 3069984 (WJCODL) (noting the current trend in China toward both increased regulation and prosecution of commercial corruption, including bribery). Many of China’s problems with corruption are relatively recent phenomena, e.g., the abuses caused by the initial grant of too much power to the executives of state-owned corporations, prior to the 1999 reforms. Cindy A. Schipani & Junhai Liu, *Corporate Governance in China: Then and Now*, 2002 COLUM. BUS. L. REV. 1, 17-18

⁴⁶ Jinpin, *supra* note 45.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

Second, the Chinese market economy operates based on the rule of law,⁵² and could be called a legal economy or an economy ruled by law.⁵³ China introduced the state policy of the rule of law into the Chinese Constitution as late as 1999 and there are legal rules for combatting corrupt practices.⁵⁴ Both the Anti-Unfair Competition Law and the Criminal Law, discussed below, prohibit commercial bribery and other corrupt practices.⁵⁵ According to the white paper on the Socialist System of Laws with Chinese Characteristics, published by the Information Office of the State Council, by the end of August 2011, the Chinese legislature had enacted 240 laws including the current Constitution, 706 administrative regulations, and over 8,600 local regulations.⁵⁶ As a result, all legal branches have been instituted; basic and major laws of each branch have been established; and related administrative regulations and local regulations have been adopted. A socialist system of laws with Chinese characteristics has been solidly put into place.⁵⁷ There is no legislation that legalizes corrupt practices.

Third, corrupt practices are contrary to ongoing reforms in China.⁵⁸ Although there are unalienable links between the past, the present, and the future, China has undergone and continues to undergo a great number of unprecedented reforms since the late 1970s, especially from November of 2012, when new Chinese leaders came to power. As President Xi Jinping said in the abovementioned speech at the College of Europe, “China is a country undergoing profound changes. Reform, which was first forced upon us by problems, goes deeper in addressing the problems. We know keenly that reform and opening-up is an ongoing process that will never stop. China’s reform has entered a deep-water zone, where problems crying to be resolved are all difficult ones. What we need is the courage to move the reform forward.”⁵⁹ In addition to ambitious and comprehensive reform policies concerning the market economy and the rule of law declared by the Chinese Communist Party, China has been vigorously fighting corruption. For instance, the Chinese courts have convicted and punished 31,000 criminals in 29,000 cases of embezzlement, bribery and breach of duty, including several serious cases involving Bo Xilai, the former party chief of Chongqing Municipality, and Liu Zhijun, former minister of railways.⁶⁰

II. Harms Triggered by Corruption

This part turns to an examination of the various harms, which may be triggered by corrupt practices of firms. These include damage to fair and transparent competition, harm to consumer welfare, and harm to commercial culture.

A. Damage to Fair and Transparent Competition

⁵² Chul-kyu Kang, *Market Economy and Corporate Governance - Fairness and Transparency for Sustainable Growth*, 6th Global Forum on Reinventing Government (2005), <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan020075.pdf> (3).

⁵³ *Id.*

⁵⁴ Ed Silverman, *Did Glaxo Violate Its Corporate Integrity Agreement?*, FORBES, July 24, 2013.

⁵⁵ Law of P.R.C. Against Unfair Competition (promulgated by the Standing Comm. Nat’l People’s Cong. Gaz., Sept 2, 1993, effective Dec. 1, 1993), http://www.wipo.int/wipolex/en/text.jsp?file_id=125970.

⁵⁶ *The Socialist System of Laws with Chinese Characteristics*, XINHUA, Oct. 27, 2011, http://news.xinhuanet.com/english2010/china/2011-10/27/c_131215899_6.htm.

⁵⁷ *Id.*

⁵⁸ *Comprehensively Deepening Reform (Quan mian shen hua gai ge)*, CHINA DAILY, Nov. 18, 2013, http://www.ce.cn/xwzx/gnsz/szyw/201311/18/t20131118_1767104.shtml.

⁵⁹ Jinping, *supra* note 45.

⁶⁰ *Highlights of work report of China's Supreme People's Court*, XINHUA NEWS AGENCY, Mar. 10, 2014, http://news.xinhuanet.com/english/special/2014-03/10/c_133174809.htm.

Although it is difficult to quantify the exact value of the competitive advantage resulting from bribery, it has been estimated that GSK derived substantial benefits from its bribes in the Chinese market of more than \$150 million, including revenue from higher drug prices.⁶¹ Because GSK is in direct competition with domestic Chinese firms, as well as other MNCs, the gains of GSK also reflect the losses sustained by competitors who were unwilling to deviate from free-market competition.

Moreover, in addition to putting GSK's competitors at an unfair competitive disadvantage, GSK's bribes (and those of other firms)⁶² have undermined the Chinese government's efforts to promote a fair and transparent market economy.⁶³ China passed the Anti-Unfair Competition Law of the People's Republic of China on September 2, 1993 to fight commercial bribery and to promote fair competition in the market.⁶⁴ Article 8 of this Law specifically targets commercial bribery.⁶⁵ To strengthen the enforcement of anti-corruption laws, the State Authority of Industry and Commerce (SAIC) issued the Interim Provisions on Banning Commercial Bribery on November 15, 1996.⁶⁶ Serious commercial bribery is also banned by Chinese Criminal Law.⁶⁷ According to Zhou Qiang, president of China's Supreme People's Court (SPC), Chinese courts have convicted and punished 31,000 criminals in 29,000 cases of embezzlement, bribery and breach of duty in 2013.⁶⁸ The SPC plans to step up efforts against corruption including cases of embezzlement, bribery and breach of duty.⁶⁹

By offering bribes, GSK challenged the sincerity of the Chinese government's extensive legislation on private sector bribery, suggesting that bribery is an unofficial norm within the Chinese market—the law notwithstanding.⁷⁰ With its record-breaking fine against GSK,⁷¹ China has signaled the contrary to the international community, a message that will hopefully

⁶¹ Bradsher & Buckley, *supra* note 19.

⁶² See, *Pharmaceutical Giants Rethink Rebate Marketing*, *supra* note 35.

⁶³ See Jinping, *supra* note 45.

⁶⁴ Zhonghua Renmin Gongheguo Fan bu zheng dang jing zheng fa (中华人民共和国反不正当竞争法) [Anti-Unfair Competition Law of the Peoples Republic of China] (promulgated by Order No. 10 of the President of the People's Republic of China on Sept. 2, 1993, effective Dec. 1, 1993), art. 8 (LawInfoChina) (China), translated in <http://lawinfochina.com/display.aspx?id=648&lib=law>.

⁶⁵ *Id.*

⁶⁶ Criminal Law, arts. 163–164; Guan yu jin zhi shang ye hui lu xing wei de zan xing gui ding (关于禁止商业贿赂行为的暂行规定) [Interim Provisions on Banning Commercial Bribery]

(promulgated by Order No. 60 of the Dir. General of the State Admin. for Indus. and Commerce on Nov. 15, 1996, effective Nov. 15, 1996), art. 5 (China), translated in <http://cclp.sjtu.edu.cn/article/?NewsID=3027>.

⁶⁷ Criminal Law of the P.R.C. (promulgated by Standing Comm., effective Oct. 1, 1997) (amended Mar. 14, 1997), <http://www.fmprc.gov.cn/ce/cgvienna/eng/dbtyw/jdwt/crimelaw/t209043.htm>.

⁶⁸ The report on the SPC's work at the third plenary meeting of the second session of China's 12th National People's Congress (NPC) at the Great Hall of the People in Beijing, capital of China, March 10, 2014 [hereinafter SPC Report], available at http://www.chinadaily.com.cn/china/2014npcandcpcpc/2014-03/10/content_17336143.htm.

⁶⁹ *Id.*

⁷⁰ See Karl M. Meessen, *Fighting Corruption Across the Border*, 18 FORDHAM INT'L L.J. 1647, 1647 (1995) (“Corruption [in] private business has no little role in discrediting...freshly installed free market systems.”).

⁷¹ Plumridge & Burkitt, *supra* note 20.

diminish the negative effects that the bribes of GSK and other MNCs have had on the integrity of fair play among firms in China. Of course, this may take some time.⁷²

B. Harm to Consumer Welfare

According to an old Chinese proverb, “When the snipe and the clam grapple, the fisherman profits.”⁷³ Consumers will be some of the most important beneficiaries of fair competition among pharmaceutical companies.⁷⁴ The fiercer the competition, the more benefits the consumers will acquire in terms of better quality and lower prices.⁷⁵ If, however, competitors are interested in building their competitiveness by bribery, instead of better products or services, the quality of the goods or services will not be improved and the price will not be lowered.⁷⁶ Thus, consumers will suffer double damages from bribery—higher prices and poorer quality of the goods or services.⁷⁷

Through its bribes in China, GSK inflated its medicine prices and passed on the cost of hundreds of millions of dollars in bribes directly to patients. If patients pay medical bills themselves, they are directly hurt by the increased costs. Even if the medical bills are paid by commercial insurance companies or the social security system, patients are still victims, because patients or their employers will pay increased insurance premiums or taxes.⁷⁸ A GSK senior executive held in detention admitted that the bribes would be reflected in higher medicine prices;⁷⁹ thus, a product that cost only 30 yuan (\$4.89) to make could end up costing patients 300 yuan (\$48.94).⁸⁰ A significant portion of this differential may constitute a direct imposition of the costs of bribery passed onto consumers.⁸¹

C. Harm to the Commercial Culture

In addition to damaging its own image, GSK has also compromised the integrity of the commercial culture.⁸² The Chinese government has been actively welcoming MNCs to do

⁷² See Kang, *supra* note 52, at 8 (“When companies lose consumer confidence, it will directly affect share prices, aggravating profits and threatening long-term existence of companies.”).

⁷³ *Learning Chinese*, CHINA CULTURE, http://www.chinaculture.org/gb/en_learning/2003-09/24/content_20580.htm.

⁷⁴ See Marie M. Dalton, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 N.Y.U. J. L. & Bus. 583, 585-89 (2006).

⁷⁵ See generally Kevin D. Dayaratna, *Competitive Markets in Health Care: The Next Revolution*, THE HERITAGE FOUNDATION (2013), <http://www.heritage.org/research/reports/2013/08/competitive-markets-in-health-care-the-next-revolution>.

⁷⁶ Cf. Charles Kenny, *Construction, Corruption, and Developing Countries*, World Bank Policy Research Working Paper 4271 (2007), <https://openknowledge.worldbank.org/handle/10986/7451>.

⁷⁷ *Id.*

⁷⁸ See Sarah L. Barber & Lan Yao, *Health insurance systems in China: A briefing note*, World Health Report Background Paper 37, 4.1-4.4 (2010), available at http://www.who.int/healthsystems/topics/financing/healthreport/37ChinaB_YFINAL.pdf.

⁷⁹ Yin Pumin, *Clamping Down on Corporate Bribery*, BEIJING REVIEW, Aug. 1, 2013, http://www.bjreview.com.cn/business/txt/2013-07/29/content_557941_2.htm.

⁸⁰ *Id.*

⁸¹ Cf. Kenny, *supra* note 76.

⁸² Kevin Done, *High Levels of Bribes Harm Rate of Growth*, FIN. TIMES, June 28, 1996, at 4 (citing a report by the World Bank that finds corruption to be among the most important factors creating popular resistance to market reform); see Neelima Mahajan & Major Tian, *The Going Gets Tough for MNCs in China*, CKGSB Knowledge, Aug. 20, 2014, <http://knowledge.ckgsb.edu.cn/2014/08/20/china/the-going-gets-tough-for-mncs-in-china/>.

business in China for the past three decades.⁸³ Moreover, Chinese consumers and the public in general have considerable expectations of foreign brands, as foreign brands not only mean new products supporting advanced technology, new management skills, and new capital,⁸⁴ but also new ideas and a new commercial culture.⁸⁵

Undoubtedly, Chinese businesses and consumers are disappointed with the alleged misbehaviors at GSK and other MNCs.⁸⁶ Of course, the laws that forbid MNC bribery apply with equal force to domestic firms.⁸⁷ Unfortunately, unspoken bribery is also thought to exist in some domestic firms in China.⁸⁸ The public, however, hopes and believes that MNCs will provide good examples for Chinese domestic firms, as the MNCs create a new business culture helping to eradicate local unspoken corruption.⁸⁹ It also seems that a consensus has been reached to step up enforcement of China's anti-corruption laws,⁹⁰ which have already been applied to domestic firms, on MNCs.⁹¹

III. The International Anticorruption Framework

Many countries, including China, have recently enacted statutes to combat foreign corruption and bribery practices.⁹² These efforts have taken on two primary paths: public and private. In the United States, the FCPA is a significant example of a dominant public enforcement mechanism. As the first domestic law to criminalize foreign bribery, it inspired the OECD to draft a major treaty on anti-bribery.⁹³ In the private realm, international arbitration tribunals hold contracts obtained through bribes unenforceable.⁹⁴ These arbitration tribunals penalize companies and individuals who pay bribes, not foreign officials.⁹⁵ This Part begins with a description of China's anticorruption laws, continues with an overview of

⁸³ Yigang Pan & Peter S. K. Chi, *Financial Performance and Survival of Multinational Corporations in China*, 20 STRATEGIC MANAGEMENT J. 359, 360 (1999).

⁸⁴ Indeed, MNC goods and services often demand a premium in Chinese markets, where (regardless of actual quality) consumers tend to believe that MNC goods and services are more reliable than domestic alternatives, due, for example, to better technology and consumer-friendly policies; Benjamin Shobert, *The Ethical Challenges of Doing Business in China's Healthcare Economy*, HEALTH INTEL ASIA, Feb. 5, 2014, <http://www.healthintelasia.com/ethical-challenges-business-chinas-healthcare-economy/>; Jill Gabrielle Klein, Richard Ettenson & Marlene D. Morris, *The Animosity Model of Foreign Product Purchase: An Empirical Test in the People's Republic of China*, 62 J. MARKETING 89 (1998); see also Mahajan & Tian, *supra* note 82.

⁸⁵ See generally Chung Chen, Lawrence Chang & Yimin Zhang, *The Role of Foreign Direct Investment in China's post-1978 Economic Development*, 23 WORLD DEVELOPMENT (1995).

⁸⁶ See Hirschler, *supra* note 15 (explaining how a slump in sales indicates market disapproval).

⁸⁷ See, e.g., Interim Provisions on Banning Commercial Bribery, *supra* note 66.

⁸⁸ Shobert, *supra* note 84; see SPC Report, *supra* note 68.

⁸⁹ *Id.*

⁹⁰ Bradsher & Buckley, *supra* note 19.

⁹¹ David W. Simon & Robert H. Iseman, *Domestic Anti-Bribery Enforcement May be on the Rise in China: Multinationals Must Focus on Anti-Corruption Compliance*, LEGAL NEWS: EYE ON CHINA QUARTERLY NEWSLETTER, <http://www.foley.com/spring-2013-eye-on-china-newsletter-04-29-2013/> (2013) (noting the relatively large number of corruption investigations that have taken place between 2000 and 2009, many of which involved domestic companies).

⁹² David Kennedy & Dan Danielsen, *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act*, OPEN SOCIETY FOUNDATIONS, 17-26.

⁹³ See Evan P. Lestelle, Comment, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527, 530-43 (2008).

⁹⁴ See *id.*, at 545-46.

⁹⁵ Rashna Bhojwani, *Student Note, Deterring Global Bribery*, 112 COLUM. L. REV. 66, 67 (2012) (citing *World Duty Free*, ICSID Case No. ARB/00/7, ¶ 181, 46 I.L.M. at 369-70).

the FCPA in the United States, and concludes with a brief comparison of the sanctions of the two regimes.

A. China's Anticorruption Laws

Two statutes are of particular importance to China's anticorruption efforts: the Criminal Law of the People's Republic of China (Criminal Law)⁹⁶ and the Anti-Unfair Competition Law of the People's Republic of China (AUCL).⁹⁷ Commercial bribery is considered an unfair competition practice under Chinese law.⁹⁸ To restrict unfair competition among firms, China passed the AUCL in 1993. Article 8 of the law states,

[a] business operator shall not resort to bribery, by offering money or goods or by any other means, in selling or purchasing commodities. A business operator who offers off-the-book rebate in secret to the other party, a unit or an individual, shall be deemed and punished as offering bribes; and any unit or individual that accepts off-the-book rebate in secret shall be deemed and punished as taking bribes.⁹⁹

China's Criminal Law also bans commercial bribery. Article 164 penalizes offering bribes to non-public employees in business companies or enterprises.¹⁰⁰ Article 389 penalizes offering bribes to public employees of state-owned companies or non-profit organizations.¹⁰¹ Article 391 penalizes offering bribes to government agents, state-owned companies or non-profit organizations. Article 393 penalizes corporations offering bribes to public employees.¹⁰² The Chinese Criminal Law is not confined to domestic bribery. As more Chinese firms pursue overseas markets, Paragraph 2 of Article 164 of Chinese Criminal Law punishes Chinese firms offering bribes to public employees in foreign countries or international public organizations, for the purpose of acquiring an unfair commercial interest.¹⁰³ GSK has broken both the Chinese Anti-Unfair Competition Law and the Criminal Law.¹⁰⁴

⁹⁶ Zhonghua Renmin Gongheguo Xing fa (97 xiu ding) (中华人民共和国刑法(97修订)) [Criminal Law of the People's Republic of China (1997 Revision)] (promulgated by Order No. 5 of the Chairman of the Standing Comm. of the Nat'l People's Cong. on July 6, 1979, effective Jan. 1, 1980 and amended by the Fifth Session of the Eighth Nat'l People's Cong. on March 14, 1997) (LawInfoChina) (China) [hereinafter Criminal Law], translated in <http://lawinfochina.com/display.aspx?id=354&lib=law>.

⁹⁷ Zhonghua Renmin Gongheguo Fan bu zheng dang jing zheng fa (中华人民共和国反不正当竞争法) [Anti-Unfair Competition Law of the Peoples Republic of China] (promulgated by Order No. 10 of the President of the People's Republic of China on Sept. 2, 1993, effective Dec. 1, 1993), art. 8 (LawInfoChina) (China), translated in <http://lawinfochina.com/display.aspx?id=648&lib=law>.

⁹⁸ See Zhang, *supra* note 45 (noting the current trend in China toward both increased regulation and prosecution of commercial corruption, including bribery).

⁹⁹ Law of P.R.C. Against Unfair Competition, *supra* note 55.

¹⁰⁰ Criminal Law of the P.R.C., *supra* note 67..

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See Law of P.R.C. Against Unfair Competition, *supra* note 55; Criminal Law of the P.R.C., *supra* note 67; Bradsher & Buckley, *supra* note 19.

The penalties under the Criminal Law depend on the identity of the party offering the bribe.¹⁰⁵ Acts involving official bribery may include penalties anywhere from criminal detention to life imprisonment and/or confiscation of property.¹⁰⁶ Commercial bribery may be penalized anywhere from criminal detention to 10 years' imprisonment and/or criminal fines.¹⁰⁷ Those involved in the management of the company directly responsible for the issue may be punished as individual bribers.¹⁰⁸ The AUCL provides for penalties including a fine up to approximately \$32,000 and disgorgement of illegal income for violations that do not amount to a criminal act.¹⁰⁹ Under the AUCL, the competitors may allege harm by commercial bribery and bring a civil claim for damages before the People's Court.¹¹⁰ Although the AUCL and Criminal Law have not always been applied impartially,¹¹¹ it is anticipated that foreign and domestic firms, as well as public and private firms, will soon be regulated and protected on an equal basis under the rule of law.¹¹²

Since the meeting of the 18th National Congress of the Communist Party of China in 2012, President Xi Jinping has reiterated the significance of "rule of law" in the country's anti-graft efforts. The Fourth Plenum of the 18th CPC Central Committee also set a goal of "governance according to the law" in its detailed Decision on Some Major Questions in Comprehensively Promoting Governing the Country According to Law.¹¹³ Thus, governance based on the rule of law is the guideline in the nation's massive anticorruption campaign which has become even more powerful and widespread since the 18th Party Congress.¹¹⁴

While the law has teeth, the market has eyes. The Chinese Supreme Procuratorate has set up a special data base of commercial bribery cases, which is available to the public for inspection.¹¹⁵ Once publicly disclosed, a firm's bribery record will likely have a negative impact on future business. For instance, firms that have engaged in bribery will likely be put at disadvantage when they bid for the government procurement contracts or governmental funds.

B. The Foreign Corrupt Practices Act of 1977 (FCPA)

¹⁰⁵ Wantao Yang, Emilia Shi, Timothy P. Peterson, & Robertson Pak, *Understanding China's Approach to Anticorruption*, Jan. 28, 2014, at 2, <http://www.mmlawus.com/Data/Files/Articles/Corporate%20Counsel%20China%20article.pdf>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See *Strong arm of the law*, CHINA ECON. REV., Jul. 13, 2012, <http://www.chinaeconomicreview.com/strong-arm-law> ("Of the 500,000 corruption investigations undertaken in China between 2000 and 2009, 64% involved foreign companies, according to a 2010 study by Anbound Group, a Beijing-based consulting company.")

¹¹² See Jaime A. FlorCruz, *Opinion: Corruption as China's top priority*, CNN, Jan. 6, 2013, <http://www.cnn.com/2013/01/06/world/asia/florcruz-china-corruption>.

¹¹³ Donald Clark, *Decision of the Fourth Plenum of the 18th CCP Central Committee (English)*, GENIUS, <http://genius.com/Central-committee-of-the-chinese-communist-party-decision-of-the-fourth-plenum-of-the-18th-ccp-central-committee-english-annotated>.

¹¹⁴ Wu Jianxiong, *Lawbreaking graft should be unexceptionally punished*, CHINA DAILY, http://europe.chinadaily.com.cn/opinion/2015-01/12/content_19296257.htm.

¹¹⁵ *The Supreme People's Procurate on Bribery files provisional regulations*, <http://www.yfw.com.cn/xhfdacx/>.

As mentioned above, in addition to China's investigation of GSK and its corrupt practices, the US Department of Justice has started an investigation. The US is investigating whether GSK violated US anti-bribery laws, specifically the FCPA, in China.¹¹⁶

Through the FCPA, the US criminalized payment of bribes by domestic companies, as well as foreign companies listed on the US stock exchanges, to foreign officials.¹¹⁷ The US has encouraged other countries to follow suit.¹¹⁸ The OECD, the Organization of American States, the Council of Europe, the United Nations, and the African Union have all adopted anticorruption provisions similar to the FCPA.¹¹⁹

The FCPA was passed as an amendment to the Securities and Exchange Act of 1934 in an effort to eliminate foreign corruption by US firms overseas.¹²⁰ The anti-bribery provisions ban US companies, US citizens, foreign companies listed on a US stock exchange, as well as a "person" acting within US territory, from paying or offering to pay directly or indirectly, money or anything else of value to a foreign official to obtain or retain their business.¹²¹ These provisions range from prohibiting cash payments to foreign officials to more nuanced prohibitions against indirect gifts with intangible benefits.¹²² Although anyone committing bribery within the US jurisdiction can be found to be violating the FCPA anti-bribery provisions, foreign officials who receive the bribe cannot be prosecuted under these provisions.¹²³ The FCPA applies to all US businesses and persons, regardless of whether the bribery occurs within the US or abroad and to foreign companies or persons utilizing interstate commerce. To constitute a violation of the FCPA, the foreign official must be aware that the payment received is payment for some illegal action.¹²⁴

¹¹⁶ *US Prosecutors Add China Bribery Allegations to GSK Probe*, *supra* note 33.

¹¹⁷ Steven, R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH & LEE L. REV. 229 (1997).

¹¹⁸ At the 1997 OECD Convention signatory countries agreed to enact measures that were similar to the FCPA. In 2009, the OECD Council adopted two more recommendations relating to tax measures and reporting foreign bribery. Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Expansion of the Foreign Corrupt Practices Act*, GA. L. REV. 489, 511 (2011).

¹¹⁹ *Id.* at 512.

¹²⁰ Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C.J. INT'L & COM. REG. 83, 84 (2007). Beyond criminalizing the payment of bribes to foreign officials, the FCPA requires public companies meet certain standards with respect to their books, records, and accounting practices. The FCPA was passed in response to the Watergate scandal and the US Securities and Exchange Commission's (SEC) investigation that discovered over \$300 million in payments by US firms to foreign officials. The report included major US MNCs such as Boeing, Gulf Oil, and Exxon Mobil. The FCPA was amended in 1988 and 1998. Foreign Corrupt Practices Act (amendments), Pub. L. 100-418, 102 Stat. 1415 (1988); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366; McSorley, *Foreign Corrupt Practices Act*, 48 AM. CRIM. L. REV. 749, 750-51 (2011). The provision also applies to entities that are required to file periodic reports routine with the SEC, regardless of which stock exchange the company's shares are traded. *Id.* at 765.

¹²¹ *Id.* at 750-51.

¹²² *Id.* at 757.

¹²³ *Id.*

¹²⁴ This is done partly in an attempt to make sure the government contracts are not inhibited by the FCPA. One exception and two affirmative defenses exist for the anti-bribery provisions of the FCPA. "Grease payments" to foreign officials in order to "expedite or secure the performance of routine government actions" are permissible under the statute. Payments fit this exception when they are routine and occur within the ordinary business of the foreign official. Courts focus on the intent of the individual making the payment and what the true purpose of the payment is. *U.S. v. Kay*, 359 F.2d 738, 740 (5th Cir. 2004). The affirmative defenses to the FCPA anti-bribery provisions are: (1) a payment, gift or promise of "anything of value" to a foreign official . . . if that type of payment is legally allowed under the country's laws, and (2) the payment for a bona fide expenditure, which

The FCPA imposes both criminal and civil penalties on those acting on behalf of US companies.¹²⁵ Under §2B4.1 of the Sentencing Guidelines, any individual found in violation of the anti-bribery provisions can be fined up to \$100,000 and five years in prison per violation.¹²⁶ If a corporation is found to have violated the anti-bribery provisions, the maximum criminal penalty per violation is \$2 million.¹²⁷ The DOJ and the SEC may increase the fine by combining both civil and criminal penalties. Penalties vary depending on the level of due diligence and the effectiveness of compliance.¹²⁸ Civil penalties of up to \$10,000 may also be added for anti-bribery provision violations.¹²⁹ In addition, if a corporation or individual violates the FCPA, they may be subject to suspension from contracts with government agencies.¹³⁰

Recently, there has been a surge in the enforcement of the FCPA's anti-bribery provisions.¹³¹ Corporations are under greater scrutiny by the SEC and the DOJ. Both agencies, along with the federal courts, are interpreting the FCPA more broadly,¹³² increasing not just their enforcement actions, but the penalties imposed on the parties as well.¹³³

Because every instance of bribery or record-keeping violations can count as a separate act for penalty purposes, considerable fines and penalties may be imposed in cases involving longstanding patterns of corruption.¹³⁴ Over the past decade, the DOJ and SEC have made their willingness to take advantage of this provision abundantly clear. In 2008, for instance,

lacks a corrupt purpose. McSorsley, *supra* note 120, at 765. The courts have not yet interpreted the second defense. An expenditure will likely be considered reasonable and bona fide by the DOJ when (1) it is made directly to the service provider as opposed to the government official, and (2) where the company making the payments does not have pending business with the government agency whose employee is receiving the benefits of the payment. *Id.* at 765-66. See FCPA Op. Proc. Rel. 2004-01 (2004); FCPA Op. Proc. Rel. 2004-03 (2004). The DOJ and the SEC are both responsible for enforcement of the anti-bribery provisions of the FCPA. The DOJ is solely responsible for any criminal investigation and enforcement. The SEC is primarily responsible for any civil investigation; however, the DOJ may conduct a parallel investigation. McSorley, *supra* note 120, at 767. To provide guidance to issuers and businesses, the DOJ uses advisory opinion letters and the SEC may write no-action letters. *Id.* at 768.

¹²⁵ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-123, 91 Stat. 1494; McSorsley, *supra* note 120, at 771. Prior to the 1998 amendments, the penalties were only civil.

¹²⁶ *Id.* at 770. The US Sentencing Guidelines are effective advisory in determining how court will react. *Id.* at 771. In contrast, individuals violating the accounting provisions, may be fined up to \$5 million and imprisoned for up to 20 years under § 2B1.1 of the Guidelines. *Id.* at 769. Sarbanes-Oxley increased the maximum penalties to their current levels. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 810 (2002) (enacting § 1106).

¹²⁷ McSorsley, *supra*, note 120 (in contrast, the maximum penalty for the violation of the accounting provisions by a corporation is \$25 million).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 771.

¹³¹ Benjamin Gruenstein, *Upswing in FCPA Cases Results in Increased Judicial Oversight*, NEW YORK L. J. SPECIAL SELECTION, Jul. 8, 2013 (“From 2008 through May 2013, the Department of Justice (DOJ) charged over 80 individuals with violating the FCPA, over twice the number that was prosecuted in the 10 preceding years.”).

¹³² Krever, *supra* note 120, at 94.

¹³³ See Dan Slater, *Halliburton Breaks FCPA Settlement Record for U.S. Companies*, WALL ST. J. JAN. 26, 2009, <http://blogs.wsj.com/law/2009/01/26/halliburton-breaks-fcpa-settlement-record-for-us-companies/>.

¹³⁴ Aaron G. Murphy, *Foreign Corrupt Practices Act: A Practical Resource for Managers and Executives* 23-24 (2010).

Siemens agreed to an FCPA settlement of \$800 million with the DOJ and SEC (\$450 million in criminal fines to the DOJ and \$350 million in civil damages to the SEC).¹³⁵ Due to Siemens extensive cooperation with their investigations, the DOJ and SEC agreed to lower criminal fine and penalties;¹³⁶ additionally, the DOJ and SEC did not require Siemens to formally plead guilty to bribery charges, allowing the company to continue bidding for public-sector projects in the US. In the years following the Siemens case, other notable fines and penalties imposed under the FCPA's anti-bribery provisions have included (among many others) \$559 million paid by Halliburton to settle charges that it bribed officials in Nigeria while constructing a gas plant,¹³⁷ \$400 million in fines paid by the British weapons maker BAE Systems, \$137 million by the French telecom company Alcatel-Lucent, and \$200 million by the German auto manufacturer Daimler.¹³⁸

Today, the US regulatory agencies appear focused on oil and gas, technology, pharmaceuticals and medical supplies industries.¹³⁹ In 2012, the SEC charged Eli Lilly and Co. for improper payments made by its subsidiaries to foreign government officials to win business in Russia, Brazil, China, and Poland.¹⁴⁰ Lilly eventually agreed to pay \$29 million to settle the charges without admitting or denying any of the allegations.¹⁴¹ In the same year, the SEC charged Pfizer with making illegal payments to foreign officials through its subsidiaries in Bulgaria, China, Croatia, and Italy (among others) in order to secure regulatory approvals and increased prescriptions for Pfizer products. Pfizer agreed to pay \$45 million in its settlements.¹⁴²

The largest fine administered in a single FCPA case thus far was the \$800 million penalty imposed on Siemens in 2008.¹⁴³ In total, the company paid \$1.6 billion in fines and costs in Germany and the US and more than \$1 billion for internal reforms and investigations.¹⁴⁴ The combined \$1.6 billion US-German fine was the largest imposed for bribery in modern corporate history. Siemens was allowed to plead guilty to violating accounting provisions of the FCPA rather than bribery because of its cooperation with SEC and DOJ investigations.¹⁴⁵

The Siemens case is significant due to the sheer breadth and amount of money involved.¹⁴⁶ The annual bribery budget of the corporation between 2002 and 2006 was approximately \$40 to \$50 million.¹⁴⁷ Various Siemens executives and employees arranged payments that eventually were pocketed by officials all around the globe.¹⁴⁸ The company

¹³⁵ Dan Slater, *Siemens Settles in U.S. for \$800 Mil, Leaving \$\$ for German Authorities*, WALL ST. J., Dec. 15, 2008, <http://blogs.wsj.com/law/2008/12/15/siemens-settles-in-us-for-800-mil-leaving-for-german-authorities/>.

¹³⁶ Murphy, *supra* note 134, at 24.

¹³⁷ Slater, *supra* note 135.

¹³⁸ Murphy, *supra* note 134, at 24.

¹³⁹ Westbrook, *supra* note 118.

¹⁴⁰ SEC Enforcement Actions: FCPA Cases, <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml>.

¹⁴¹ Sharon Blinkoff & Valerie Charles, *Greatest Pharmaceutical Executive Risk: DOJ and the Foreign Corrupt Practices Act*, <http://www.pharmacompliance.com/greatest-pharmaceutical-executive-risk-doj-and-the-foreign-corrupt-practices-act/5053/>.

¹⁴² *Id.*

¹⁴³ Richard L. Cassin, *Alcoa lands 5th on our Top Ten list*, THE FCPA BLOG, Jan. 10, 2014, <http://www.fcpablog.com/blog/2014/1/10/alcoa-lands-5th-on-our-top-ten-list.html>.

¹⁴⁴ Siri Schubert & T. Christian Miller, *At Siemens, Bribery Was Just a Line Item*, N.Y. TIMES, Dec. 20, 2008.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

paid its largest bribes in China, Russia, Argentina, Israel, and Venezuela.¹⁴⁹

The executives interviewed believed that they had to bribe officials in order to receive the contracts and retain all of their employees. As Mr. Siekaczek, a midlevel executive who was convicted during the scandal, stated, “[w]e thought we had to do it,” or “we’d ruin the company.”¹⁵⁰ Once various countries began to investigate the company’s suspicious account activities, however, Siemens quickly changed its direction. The corporation hired an American law firm, Debevoise & Plimpton, to conduct an internal investigation and to work with the federal investigators. A number of senior managers were arrested and the CEO resigned.¹⁵¹ Almost immediately, the board recruited Peter Löscher to become the first outsider to lead the company as the CEO since Siemens’ founding.¹⁵² Within months, the company replaced over 80 percent of its top executives.¹⁵³ Ultimately, 80 percent of the managing board members left the company as well.¹⁵⁴

Despite the scandal, Siemens was able to revive its reputation and has continuously increased its revenue since the scandal.¹⁵⁵ Surprisingly, some of its largest contracts in the US in the recent years have come from the US federal government.¹⁵⁶ Since the scandal, Siemens has hired hundreds of compliance officers and is considered to be “a corporate standard-bearer in its anticorruption efforts.”¹⁵⁷ Moreover, although some predicted revenues would decrease when bribes were no longer offered to secure contracts, revenues increased.¹⁵⁸ Bribery is an expensive proposition and the gains in obtaining the contracts were more than offset by the costs incurred in paying bribes.¹⁵⁹

The FCPA is not without its critics, however. Most frequently, the Act’s detractors contend that the FCPA is over-enforced and that the statute is vague and overly broad. All this causes the confusion concerning which actions are illegal.¹⁶⁰ The problem of ambiguity (the argument goes) is “compounded by the fact that fears of the negative consequences of indictment or conviction” make challenging aggressive theories of liability nearly impossible for private firms, whose (financial) success typically depends upon maintaining a positive

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Peter Loscher, *The CEO of Siemens on Using a Scandal to Drive Change*, HARVARD BUS. REV. 39 (Nov. 2012).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*; Graham Dietz & Nicole Gillespie, *Rebuilding trust: How Siemens atoned for its sins*, THE GUARDIAN, Mar. 26, 2012, <http://www.theguardian.com/sustainable-business/recovering-business-trust-siemens>.

¹⁵⁶ See, e.g., *NNSA Awards Contract for Largest Federal Wind Farm to Siemens Government Technologies, Inc.*, Press Release, NNSA, Jan. 15, 2013, <http://nnsa.energy.gov/mediaroom/pressreleases/windfarm011513>; *Company Overview of Siemens Government Technologies, Inc.*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=46571723>.

¹⁵⁷ Vanessa Fuhrmans, *Shrugging off Bribery Case, Siemens Gains Favor in U.S.*, Dec. 15, 2011, <http://www.wsj.com/articles/SB10001424052970203893404577098632947522176>.

¹⁵⁸ *A giant awakens*, THE ECONOMIST, Sept. 9, 2010.

¹⁵⁹ See *id.*

¹⁶⁰ Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. CORP. L. 325, 332 (2013) (“To take one example, critics make much of the fact that the FCPA’s definition of ‘foreign official’ includes ‘any officer or employee of a foreign government or and...instrumentality thereof.’ Concerns arise because the statute does not define the term ‘instrumentality,’ and some experienced attorneys and managers claim that they have a hard time figuring out who or what comes within its scope.” (citation omitted)).

reputation in the marketplace.¹⁶¹ Additionally, the FCPA may diminish the ability of US-based firms to compete overseas with corporations who are not within the jurisdiction of the FCPA. These companies do not have the same incentives to avoid the bribing of foreign officials and may benefit unfairly.¹⁶² Finally, the FCPA does not necessarily cause US firms to act more ethically. It may simply induce companies to resort to more sophisticated measures of hiding payments, and push bribery further under the radar.¹⁶³ Yet, the Siemens case, discussed above, provides a counter-example to these fears.

C. Comparing FCPA Sanctions to Chinese Sanctions

The potential sanctions against violators available to the governments of the US and China differ notably. Under the FCPA, corporations may face up to a \$2 million fine per violation and individuals may face up to a \$100,000 fine per violation.¹⁶⁴ Furthermore, for each count of bribery, an individual may face up to five years in prison.¹⁶⁵ The SEC has the ability to pursue the equitable remedy of disgorgement of all profits due to the corrupt activity.¹⁶⁶

Under China's Criminal Law, there are also criminal fines and potential confiscation of property.¹⁶⁷ In practice, however, the fines have been modest under both the Criminal Law and the AUCL in comparison to the large settlements seen under the FCPA.¹⁶⁸ Yet, although the fines may have been smaller, there is a potential for life imprisonment in China, something that ought to be a substantial concern for those operating in China, especially corporate executives.¹⁶⁹

GSK was fined three billion yuan (\$489 million) for paying bribes and five senior executives were sentenced to two to four years in prison. Partial to full reprieves were granted for all five by the Changsha Intermediate People's Court in central China's Hunan Province in September 2014.¹⁷⁰ Compared with previous criminal penalties imposed in similar commercial bribery cases, three billion yuan is the largest fine imposed thus far.¹⁷¹ Yet, it is expected that other foreign firms and domestic firms will be subject to the same or even higher penalties for corruption in the future.¹⁷² Otherwise, there is a risk that GSK will be perceived as a case of selective legal enforcement targeting foreign firms. Enforcement of the laws across all firms may be necessary to demonstrate China's commitment to the rule of law in the Chinese market economy.

¹⁶¹ *Id.*, at 332.

¹⁶² Krever, *supra* note 120, at 94.

¹⁶³ *Id.*, at 101.

¹⁶⁴ Foreign Corrupt Practices Act of 1977, *supra* note 128; McSorsley, *supra* 120, at 771. Prior to the 1998 amendments, the penalties were only civil.

¹⁶⁵ *Id.*

¹⁶⁶ Krever, *supra* note 120, at 94.

¹⁶⁷ See Criminal Law of the P.R.C., *supra*, note 67.

¹⁶⁸ Martin Rogers, *GSK: A Case Study*, CHINA LAW & PRACTICE, July/August, 2014, <http://www.chinalawandpractice.com/Article/3358958/Channel/9928/GSK-A-case-study.html>, also available at, http://www.davispolk.com/sites/default/files/52399256_1_0.pdf.

¹⁶⁹ See Criminal Law of the P.R.C., *supra* note 67.

¹⁷⁰ See *GSK China hit with record fine, says sorry*, CHINA DAILY, http://usa.chinadaily.com.cn/china/2014-09/19/content_18630605.htm

¹⁷¹ *GSK: A case study*, Davis Polk, http://www.davispolk.com/sites/default/files/52399256_1_0.pdf (2014).

¹⁷² *Id.*

IV. Why the GSK Bribery was Possible in China

It is not enough to point out the seriousness and illegality of GSK's behavior. It is also important to identify the possible underlying causes of the alleged bribery in order to restructure the institutions that allow for commercial bribery. Without a deep understanding of the causes of commercial bribery, it is difficult to prevent other MNCs from engaging in bribery. This Part examines several distinct features of doing business in China that MNCs should consider when designing corporate governance structures to guard against the temptation to offer bribes.

A. Misinterpretation of Contemporary Chinese Culture

MNCs may misinterpret China's connection-based society and conclude that it is appropriate to bribe potential institutional buyers, especially public hospitals in China.¹⁷³ But this ignores China's contemporary efforts at reform. It is true that the Chinese market economy is not yet well-developed.¹⁷⁴ It took China three decades to transform from a centrally planned economy to a free market economy since the late 1970s when Deng Xiaoping, the late paramount leader, came to power in China.¹⁷⁵ Usually, there is no foreign capital in a planned economy, while there is no legitimacy of bribery in a market economy.¹⁷⁶ Unspoken, hidden rules prevailed in the planned economy, while open, transparent legal rules should prevail in a market economy.¹⁷⁷ In a free market, consumers choose which goods and services they will purchase on the basis of price and quality.¹⁷⁸ Thus, in such a system, consumer access to information concerning the price and quality of goods and services (market transparency) is paramount.¹⁷⁹

Unspoken rules might not have completely disappeared in the process of transition from a planned economy to a market economy, as the emerging twins, the rule of law and the market economy, have not been fully-fledged.¹⁸⁰ The National People's Congress, however, inserted the rule of law into the first paragraph of Article 5 of the Constitution on March 15, 1999, declaring, "the People's Republic of China shall govern the country with the rule of law, and shall build the socialist country with rule of law."¹⁸¹ One of the latest comprehensive reform policies made by the ruling party, the Chinese Communist Party, on November 12, 2013, endorsed the rule of law. Keeping in mind the bitter lessons of the ten years of the Cultural Revolution, the rule of law has become the social consensus in contemporary

¹⁷³ Shobert, *supra* note 84.

¹⁷⁴ Veasna Kong, Adam McKissack & Dong Zhang, *China in a New Period of Transition*, 4 ECON. ROUNDUP (2012), <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2012/Economic-Roundup-Issue-4/HTML/article2>.

¹⁷⁵ *Id.*

¹⁷⁶ See Dalton, *supra* note 74, at 585. An exception to this general rule is Cuba, a planned economy that accepts foreign direct investment, particularly within its tourism industry. See generally Françoise L. Simon, *Tourism Development in Transition Economies: The Cuba Case*, 30 COLUM. J. WORLD BUS. (1995).

¹⁷⁷ Yingyi Qian & Jinglian Wu, *China's Transition to a Market Economy: How Far Across the River?*, Stanford Institute for Economic Policy Research SCID Working Paper 69 at 33 (2003).

¹⁷⁸ See Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. U. INT'L L. REV. 1307, 1318.

¹⁷⁹ *Id.*

¹⁸⁰ In the context of healthcare, the prevalence of bribery resulted from the Chinese privatization of the industry. When China privatized healthcare, needs that had historically been addressed by the government became underfunded, and remained so for decades, leading the people tasked with healthcare delivery to seek additional sources of funding. Shobert, *supra* note 84.

¹⁸¹ Xian Fa art. 5 (1999) (R.P.C.), http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm.

China.¹⁸² In addition, to further detailed reform plans, China published twelve core values including national goals of prosperity, democracy, civility, and harmony; social goals of freedom, equality, justice and the rule of law; and individual values of patriotism, dedication, integrity and friendship.¹⁸³

Ignoring Chinese contemporary efforts and commitments to a free and open market, the rule of law, and modernization of state governance, some MNCs seek to hire so-called “elites” with good connections in China to join their subsidiaries in China.¹⁸⁴ Retired officers, or relatives or close friends of current officers, are favorite candidates for the positions of senior executives in China subsidiaries.¹⁸⁵ Of course, some of Chinese domestic corporations have been also behaving this way. But in the past few years, China has begun to investigate and punish commercial bribery and the related corrupt activities committed by retired officers, or relatives or close friends of current officers. So far, over 60 government officials at the provincial and ministerial levels, or above, are under investigation.¹⁸⁶

More importantly, connection-based bribery has been a special target in contemporary Chinese society.¹⁸⁷ Anti-corruption efforts and reforms toward a transparent and competitive market are key elements of the contemporary Chinese culture.¹⁸⁸ A misunderstanding of contemporary Chinese culture may have created, and may continue to create, more bribery scandals on the part of the MNCs.¹⁸⁹ It is important for MNCs to recognize that contemporary Chinese culture does not tolerate bribery.

B. Optimization of Profits

Many MNCs, including GSK, may see maximization of profits as their sole goal.¹⁹⁰ In fact, exploring and expanding their market shares may be the first priority of MNCs entering the Chinese market. Yet, in the age of globalization and the Internet, emerging theories promoting the significance of non-shareholder stakeholders and corporate social responsibility are challenging the conservative notion of maximization of profits at all costs.¹⁹¹

As early as October 27, 2005, the Chinese legislature inserted a corporate social responsibility clause into the first paragraph of Article 5 of the Corporate Law stating: “In its operational activities, a company shall abide by laws and administrative regulations, observe social morals and commercial ethics, persist in honesty and good faith, accept supervision by

¹⁸² The Third Plenary Session of the 18th Communist Party of China Central Committee, which concluded on Nov 12, 2013 issued a Communiqué and a Decision, laying down broad policy directions for comprehensively deepening reform and further opening-up. The Decision is widely regarded as being the blueprint for China's future development. *Comprehensively Deepening Reform*, *supra* note 58.

¹⁸³ *China promotes core socialist values*, XINHUA, Dec. 12, 2014, http://usa.chinadaily.com.cn/china/2013-12/24/content_17192145.htm.

¹⁸⁴ *Id.*

¹⁸⁵ See Silver-Greenberg & Protess, *supra* note 6.

¹⁸⁶ Jianxiong, *supra* note 114.

¹⁸⁷ Chen, *supra* note 7.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Waheed Hussain, *Corporations, Profit Maximization and the Personal Sphere*, 28 *ECON. & PHIL.* 313 (2012).

¹⁹¹ See LIU JUNHAI, *CORPORATE SOCIAL RESPONSIBILITY* (1999) for further details regarding corporate social responsibility.

the government and the public, and assume social responsibility.”¹⁹²

Similarly, as the result of five years of negotiation and bargaining among many different stakeholders across the world, the International Standard Organization issued ISO 26000:2010, *Guidance on Social Responsibility* on November 1, 2010.¹⁹³ The Guidance provides harmonized, globally relevant guidelines for private and public sector organizations of all types, based on an international consensus among expert representatives of the main stakeholder groups, and encourages the implementation of best practices in social responsibility worldwide.¹⁹⁴

ISO 26000:2010 represents an international consensus to some extent, as more than 600 representatives from 99 governments and 42 international organizations¹⁹⁵—including representatives from non-governmental organizations (NGOs), industry, consumer groups, and labor organizations—were involved in its development.¹⁹⁶ The text is currently available in 22 languages, and a recent survey performed by the ISO 26000 Post Publication Organization found that “at least 60 countries have adopted the standard,” with 20 other countries actively pursuing adoption.¹⁹⁷ Notable applications of the ISO 26000 guidelines have included a project in the Middle East/North Africa to create a pool of national social responsibility experts in eight pilot countries, the use of the guidelines by Germany’s Federal Ministry for Economic Cooperation and Development, and the implementation of the guidelines by many well-known companies.¹⁹⁸ Although ISO 26000:2010 is a voluntary standard, it helps clarify social responsibility by translating principles into effective actions, and sharing global best practices.¹⁹⁹

Optimization of profits, instead of maximization of profits, is the logical reflection of corporate responsibility and business ethics in the corporate core value framework. Profit optimization represents a certain degree of restraint, requiring reasonable profits to be made

¹⁹² The Company Law of P.R.C. (2005), <http://english.wzj.saic.gov.cn/laws/061027085055-0.htm>.

¹⁹³ ISO 26000:2010, *Guidance on Social Responsibility*, ISO, http://www.iso.org/iso/catalogue_detail?csnumber=42546.

¹⁹⁴ *Id.* ISO 26000 contains voluntary guidance, not requirements, and therefore is not used as a certification standard like ISO 9001:2008 and ISO 14001:2004. .

¹⁹⁵ http://www.iso.org/iso/home/news_index/news_archive/news.htm?refid=Ref1691.

¹⁹⁶ Rudiger Hahn & Christian Weidtmann, *Transnational Governance, Deliberative Democracy, and the Legitimacy of ISO 26000: Analyzing the Case of a Global Multistakeholder Process*, SAGE PUBLICATIONS (2012), <http://bas.sagepub.com/content/early/2012/10/24/0007650312462666.full.pdf>, at 15 (“Members of the ISO Working Group (WG) were subdivided in six stakeholder categories (‘Consumers,’ ‘Government,’ ‘Industry,’ ‘Labor,’ ‘NGO,’ and ‘Service, support, research and others [SSRO]’) to support a balanced representation of the different stakeholders that meets the various interests of the addressees of the guideline. ISO member bodies (i.e., those national bodies that represent their country within the ISO) were allowed to nominate up to six persons (one for each of the six stakeholder categories). These nominees held an ‘expert status’ that included the right to participate actively at the different drafting stages.” (internal citations omitted)).

¹⁹⁷ http://www.iso.org/iso/home/news_index/news_archive/news.htm?refid=Ref1691.

¹⁹⁸ *Id.* (“Various companies have already implemented the standard such as Maersk, NovoNordisk, TeliaSonera, HSB, HM, Suzano, Petrobras, Veolia, Air France, Toshiba, AB Volvo, Takeda, Panasonic, British Telecom, TRS, and Toyota.”).

¹⁹⁹ Int’l Org. for Standardization, *ISO 26000-Social Responsibility*, <http://www.iso.org/iso/home/standards/iso26000.htm>; Larry Catá Backer, *Transparency Between Norm, Technique and Property in International Law and Governance: The Example of Corporate Disclosure Regimes and Environmental Impacts*, 22 MINN. J. INT’L L. 1, 33-34 (2013) (“the application of the ISO 26000 has [occurred] through its recent incorporation as advisory guidance in the predominant corporate social responsibility initiatives of the present day.”).

in legal, ethical, and respected ways.

This conclusion finds ample support in the literature surrounding the recent corporate social responsibility movement, which seeks to augment the factors that motivate corporate decision-making.²⁰⁰ Proponents of the movement, for instance argue that the myriad interests relate to and should play a direct role in deciding corporate affairs, including (but not limited to) the concerns of environmentalists, creditors, consumers, and employees.²⁰¹ According to this theory the possessors of these interests, “stakeholders,” have a right to participate in corporate decision-making.²⁰²

In contrast, under the more recently proposed Team Production Theory, the actors involved in and affected by corporate affairs are all part of a team.²⁰³ The team comes about because the participants all believe they will gain more from acting in concert than they would through individual action.²⁰⁴ Because all have participated in bringing about the team production, the (corporate) profits of that production must be allocated accordingly.²⁰⁵ Under the theory, because the effects of an individual team member’s participation are difficult to isolate, profits must be allocated by the board of directors via a political process.²⁰⁶

In recent years, these theories have done much to promote widespread awareness of the corporate social responsibility movement. Yet neither theory is completely satisfactory. While the team production theory conceptualizes corporate work product and decision making as collaborative enterprises dependent upon a panoply of stakeholders, by leaving the allocation of rents up to the discretion of corporate board members, the theory is descriptive rather than normative.²⁰⁷ Critics claim that in reality, under this theory, the allocation of profit is “a matter of power rather than principle.”²⁰⁸ Stakeholder theory, by contrast departs from the underlying ideals of the corporate social responsibility movement in the opposite fashion. Rather than live up to the movement’s goals of spurring more sustainable and inclusive business practices, stakeholder theory, taken to its logical extremes, may provide boards with so much discretion in decision-making that being accountable to everyone could result in being accountable to no one.²⁰⁹

As reflected in the recent backlash to the GSK scandal, and as embodied by the Chinese Corporate Law mandate that companies “observe social morals and commercial ethics...and

²⁰⁰ Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227, 1229 (2002).

²⁰¹ *Id.* at 1237.

²⁰² *Id.*

²⁰³ Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 265-76 (1999) (“[A] public corporation is a team of people who enter into a complex agreement to work together for their mutual gain. Participants—including shareholders, employees, and perhaps other stakeholders such as creditors or the local community—enter into a ‘pactum subjectionis’ under which they yield control over outputs and key inputs (time, intellectual skills, or financial capital) to the hierarchy.”(citation omitted)).

²⁰⁴ Testy, *supra* note 200, at 1233.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *See id.* at 1234.

²⁰⁸ David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV. 1001, 1004-06, 1026, 1030-37 (2000).

²⁰⁹ Michael Bradley, et al., *The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads*, 62 LAW & CONTEMP. PROBS. 1, 45-47 (1999) (offering a critique of communitarianism, a theory similar to stakeholder theory).

assume social responsibility,”²¹⁰ the goal of the corporate responsibility movement is not to hijack the corporate form. To the contrary, its purpose is to impress upon corporations, and especially upon MNCs like GSK, the necessity of subjecting their pursuit of profits to ethical and legal limitations. For this reason, it is the concept of optimizing profits—of maximizing profits within the boundaries set by legal, moral, and cultural standards—that best encapsulates the global movement that continues to call for more sustainable and inclusive business practices.

Moreover, in addition to providing a framework in which firms will be encouraged to protect the interests of their stakeholders, embracing profit optimization will typically be in the companies’ long-term profit-maximizing interests. This is especially true in emerging markets like China, where decreases in corruption have been linked to significant growth in gross domestic product per capita, which should in turn mean increased demand for MNC products in these markets.²¹¹ Additionally, by refusing to engage in corrupt practices, MNCs would avoid paying the heavy transaction costs associated with commercial bribery.²¹² Hence, it is important for companies like GSK, which has invested heavily in China, to recognize that there is a great deal to be gained (both for themselves and their stakeholders) through playing by the rule of law. Without such a fundamental change in corporate thinking about maximization of profits, scandals such as the one embroiling GSK are likely to repeat themselves on the global stage.²¹³

C. Strengthening Corporate Governance to Address Corruption

Many MNCs, including GSK, oppose corruption in their corporate policies or internal rules.²¹⁴ It would be both unwise and almost unheard of for an MNC to be silent on the anti-corruption issue.²¹⁵ Therefore, the core issue is not whether the MNC has a corporate anti-corruption policy, but instead, whether the corporate governance policy regarding anti-corruption translates well into commercial practice.²¹⁶

When the Chinese authorities began investigating GSK’s China operations, GSK China issued a statement regarding the ongoing investigation on July 15, 2013, saying:

[w]e are deeply concerned and disappointed by these serious allegations of fraudulent behavior and ethical misconduct by certain individuals at the company and third-party agencies. Such behavior would be a clear breach of GSK's systems, governance procedures, values and standards. GSK has zero tolerance for any behavior of this nature. GSK shares the desire of the Chinese authorities to

²¹⁰ The Company Law of P.R.C. (2005), <http://english.wzj.saic.gov.cn/laws/061027085055-0.htm>.

²¹¹ Paolo Mauro, *Corruption and Growth*, 110 Q. J. ECON. 6 (1995).

²¹² See Bryan w. Husted, *Honor Among Thieves: A Transaction-Cost Interpretation of Corruption in Third World Countries*, 4 BUS. ETHICS Q. 17, 18-19 (1994).

²¹³ Cf. Daphne Athanasouli, Antoine Goujard & Pantelis Sklias, *Corruption and firm performance: Evidence from the Greek firms*, 5 INT’L J. ECON. SCIENCES & APPLIED RESEARCH 44 (2012).

²¹⁴ Greg Hills, Leigh Fiske & Adeep Mahmud, *Anti-corruption as Strategic CSR: A call to action for corporations*, FSG SOCIAL IMPACT ADVISORS 24 (2009),

http://www.karmayog.org/relateddocumentsoncsr/upload/26538/Anti_Corruption_as_Strategic_CSR.pdf.

²¹⁵ See generally Jennifer L. McCoy, *The Emergence of a Global Anti-corruption Norm*, 38 INT. POL. (2001).

²¹⁶ *Id.*

root out corruption. These allegations are shameful and we regret this has occurred.²¹⁷

This statement demonstrates that GSK has specific systems, governance procedures, values, and standards designed to address the bribery scandal and other corrupt practices.

The Chinese government spokesperson alleged in September 2013 that the wrongdoing was organized by GSK China.²¹⁸ Furthermore, he claimed “the company passed the buck to the salesforce, but the police investigation has found that GSK China went through the motions in internal auditing so as not to discover these violations.”²¹⁹ GSK has continuously stated that the head office of GSK had no prior knowledge about the wrongdoing of the Chinese salesforce while fully cooperating with Chinese authorities.²²⁰

Despite these claims, five senior executives of GSK were found in violation of the anti-corruption laws.²²¹ In order to prove criminal and civil liability of the top executives in GSK, the Chinese authorities had to prove breach of fiduciary duties.²²² This required proof that the executives had knowledge of the bribery or should have reasonably known about it.

Considering GSK’s long-standing position against corruption, the question becomes why is it embroiled in a bribery scandal.²²³ There must have been a problem with execution of corporate governance policies and translation of formal anticorruption policies and norms into practical reality. After meeting with the officials of the Chinese Ministry of Public Security, Abbas Hussain, the GSK President International – Europe, Japan, Emerging Markets & Asia Pacific, said on July 22, 2013, “certain senior executives of GSK China, who know our systems well, appear to have acted outside of our processes and controls which breaches Chinese law. We have zero tolerance for any behavior of this nature.”²²⁴

Hussain’s comment worked to insulate GSK’s head office from the accusation of the corporate wrongdoing at the level of corporate values and policies, and to separate the wrongdoings of senior executives from GSK China and the global GSK group. GSK Chief Executive, Sir Andrew Witty, also admitted that the four executives appeared to have worked around the corporate control processes to commit the alleged crimes.²²⁵ No charges have been filed against the global GSK groups to date.

Yet, there were apparently at least two serious failures of the corporate governance policies of GSK. First, certain senior executives of GSK China have breached Chinese law. Five senior executives of GSK were found to have actively organized, pushed forward and

²¹⁷ *GSK Statement Regarding Ongoing Investigation by Chinese Authorities*, GlaxoSmithKline-China, Jul. 15, 2013, <http://www.gsk-china.com/asp/News/client/newconten/7152013120142.htm>.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Lianna Brinded, *GlaxoSmithKline Shaves Bonuses on China Bribery Scandal*, INT. BUS. TIMES, Feb. 28, 2014, <http://www.ibtimes.co.uk/glaxosmithkline-shaves-bonuses-china-bribery-scandal-1438271>.

²²¹ See *GSK China hit with record fine, says sorry*, *supra* note 170.

²²² *Id.*

²²³ See *Living Our Values: The GSK Anti-Bribery and Corruption (ABAC) Programme*, GlaxoSmithKline (2010), <http://www.gsk.com/media/280711/anti-bribery-corruption.pdf>.

²²⁴ *GSK Response to China Investigation*, GlaxoSmithKline-China, Jul. 22, 2013, <http://www.gsk-china.com/asp/News/client/newconten/7222013104231.htm>.

²²⁵ Campbell, *supra* note 32.

implemented a sales force involved with bribery. Second, the internal systems of GSK were unable to prevent GSK employees from engaging in corrupt behaviors. Even before the GSK conviction for commercial bribery, GSK's stated policies were to promote corporate social responsibility and ensure accountability. For instance, its mission is "to improve the quality of human life by enabling people to do more, feel better, [and] live longer," and it claimed, "we have a robust structure in place to ensure the approach we take on corporate responsibility is appropriate. Our board-level Corporate Responsibility Committee (CRC) has overall oversight and sits within a clear organizational structure that ensures accountability."²²⁶

If the corporate governance policies of GSK had functioned effectively, no crimes should have been committed. It is easy to adopt corporate governance provisions and anticorruption rules. It is also easy to organize a committee to address the issue of corruption within a corporation. What is difficult—and even more important—is ensuring that such measures are effective. GSK's failure lies not in the lack of corporate social responsibility measures, but instead in the functional (in)effectiveness of these governance norms.

GSK acknowledged this failure following the criminal verdict. The company posted an apology on its Chinese website, saying that it "fully accepts the facts and evidence of the investigation, and the verdict of the Chinese judicial authorities." GSK "sincerely apologizes to the Chinese patients, doctors and hospitals, and to the Chinese Government and the Chinese people" and "deeply regrets the damage caused." It also apologized for harm caused by its illegal private investigation. The apology described the events as a clear breach of GSK's governance and "wholly contrary to the values and standards we expect from our employees."²²⁷

As the GSK scandal illustrates, it is insufficient, or even meaningless, to discuss the institutional innovations of corporate governance on the books without noting the significance of exploring mechanisms for converting good norms into formal and effective practices. Of course, formalization of corporate governance does not mean that all corporate rules are compatible with anticorruption policies. To the contrary, some of GSK's rules, especially the evaluation and incentive system for professional sales representatives, may have been key factors in triggering the bribery scandal.²²⁸

V. The Need for Reform of the Evaluation and Incentive System for Professional Sales Representatives

GSK's evaluation and incentive systems for professional sales representatives may help explain why senior executives and professional sales representatives of GSK were engaging in corrupt practices. Under the traditional compensation system of GSK, bonuses for sales professionals were based on individual achievement of sales targets.²²⁹ Simply put, the more drugs sold, the more bonuses received.

²²⁶ <http://www.gsk.com/en-gb/responsibility/>

²²⁷ See *GSK China hit with record fine, says sorry*, *supra* note 170.

²²⁸ Jose Sierra, *Will GSK's Incentive Compensation and Speaker Program Initiatives Set the Tone for 2014?*, PHARMARISC, Jan. 8, 2014, <http://pharmarisc.com/2014/01/will-gsks-incentive-compensation-and-speaker-program-initiatives-set-the-tone-for-2014/>.

²²⁹ *Id.*

On its face, this compensation system sounds reasonable and fair. Yet, professional sales representatives may have been incentivized to offer bribes to gain a competitive advantage. When GSK evaluated its senior executives and professional sales representatives based only on the sales of market shares, employees may have considered offering bribes, regardless of illegality. Great bonuses arising from bribery may have been expected, while legal prosecution was uncertain. From the perspective of GSK employees, bribery may have been a great game of small input and large return. Motivated by the maximization of profits for GSK and the maximization of compensation for the professional sales representatives, it may have been very difficult for the management of GSK to stop or even slow down perceived profitable bribery practices.

In fact, the sales targets-orientated compensation policy may have been the primary cause, not just of bribes to doctors, but also of fraud to consumers. It is likely not a coincidence that GSK was required to execute a five-year Corporate Integrity Agreement (CIA) with the US Department of Health and Human Services, Office of Inspector General (HHS-OIG) in 2012 in the US.²³⁰ The plea agreement and the CIA included novel provisions requiring GSK to implement and/or maintain major changes to the way it does business. These changes include changing the way its sales force is compensated to remove compensation based on sales goals for territories, one of the driving forces behind much of the conduct at issue.²³¹ Under the CIA, GSK is required to change its executive compensation program to permit the company to recoup annual bonuses and long-term incentives from covered executives if they, or their subordinates, engage in significant misconduct.²³² GSK may recoup monies from executives who are current employees and those who have left the company. Among other things, the CIA also requires GSK to implement and maintain transparency in its research practices and publication policies and to follow specified policies in its contracts with various health care payers.²³³ To some extent, the CIA paved the way for GSK to change its traditional compensation system in China in 2014.

A. Fundamental Change in Compensation: From Unitary Sales Target Orientation to Diversified Evaluation Indicators

After recognizing the relationship between its sales target-oriented evaluation and incentive system and the ever increasing amount of bribery, beginning in January 2014, GSK began to implement fundamental changes to its evaluation and incentive system.²³⁴ Under the new system, employees who interact with customers will be evaluated according to their technical knowledge, quality of service, and adherence to the company values of transparency, integrity, respect, and patient-focus.²³⁵ The new system will apply to all GSK sales employees who interact with prescribing healthcare professionals including sales representatives and sales managers.²³⁶ In addition to its implementation in China, the new

²³⁰ *Corporate Integrity Agreement Between the Office of Inspector General of the Dep't of Health and Human Services and GlaxoSmithKline LLC, (CIA)*, <http://www.justice.gov/opa/documents/gsk/hhs-oig-corp-integrity-agreement.pdf>.

²³¹ *Id.*

²³² *Id.*

²³³ Press Release, *supra* note 10.

²³⁴ *GSK China to Implement New Compensation Programme for Sales Force in 2014, GlaxoSmithKline-China*, Dec. 18, 2013, <http://www.gsk-china.com/asp/News/client/newconten/12182013125800.htm>.

²³⁵ *Id.*

²³⁶ *Id.*

system will be implemented in other markets around the world. GSK promised that the new system would be fully implemented in all of the countries in which it operates by early 2015.²³⁷

Regarding the rationale behind the change of the compensation system, Hervé Gisserot, Senior Vice President and General Manager of GSK Pharmaceuticals and Vaccines China, explained: “The new sales compensation system will enable us to put patients’ needs at the heart of everything that we do. Our medical representatives are the gateway to our customers and it is important we inspire, coach and ultimately reward people working within the organization to focus on behaviors, which reflect our values. I am confident that this industry-leading initiative will help GSK to continue to build a sustainable business in China and make a strong contribution to the development of the Chinese healthcare system.”²³⁸ Further, according to Gisserot, GSK has demonstrated its determination to pursue a patient friendly business model—to find a means of linking the company’s core values and its sustainable development, the welfare of the patients and the incentives of its medical representatives.²³⁹ The rationale behind the new system should be welcome to both medical representatives and patients alike.

Gisserot’s comments suggest the three failures of corporate governance described above: sole reliance on a maximization of profits-oriented philosophy, misunderstanding of Chinese contemporary culture, and the failure of corporate governance policies to combat corruption.²⁴⁰ Identifying the corporate governance failures, however, is only the first step toward stakeholder-friendly governance. The effectiveness of the new compensation system remains to be tested by all stakeholders.

B. Shortcomings of the New Compensation System

The criminal investigation of GSK appears to have prompted the introduction of its new compensation system. Under pressure from the public and the media, GSK changed the visible rules directly contributing to corrupt practices. In addition to developing the strategy with regard to public relations, GSK has weighed the potential benefits and costs associated with the new compensation system.²⁴¹

As announced by GSK on December 18, 2013, “these changes build on the successful introduction of GSK’s ‘Patient First’ program in the United States in 2011. Experiences from the U.S. have shown this more patient-focused approach has significantly improved customer interactions. It has also coincided with a period of growth for GSK’s U.S. business.”²⁴² This implies that GSK sees positive effects from the CIA. The effects are in the best interests of GSK and the public, especially the patients. Furthermore, it seems that the new compensation system successfully implemented in the US could be applicable to the Chinese market.²⁴³ GSK’s new compensation system in China, however, has several shortcomings, compared with the promises made in its US CIA.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Silverman, *supra* note 54.

First, the new compensation system introduced in China is less detailed than its CIA Patient First program. Pursuant to the CIA, GSK agrees that it will not provide a financial reward (through compensation, including incentive compensation or otherwise) or discipline (through tangible employment action) to its prescribing field sales professionals (pharmaceutical sales representatives) or their direct managers based on the volume of GSK product sales within an employee's territory, or within the manager's district.²⁴⁴ The Patient First program includes evaluations for sales representatives based on business acumen, customer engagement, and scientific knowledge about GSK's products.²⁴⁵ GSK agreed to maintain its Patient First Program, or a substantially equivalent program, for at least the duration of the CIA, absent agreement otherwise. The restrictions on such tangible employment decisions are set forth in its Use of Territory/Individual Sales Data policy.²⁴⁶ In contrast, the information released on GSK's website about the new compensation system in China is very general and ambiguous.²⁴⁷ This may be because GSK considers the details of the new compensation system in China confidential, but transparency of the new compensation system could win the trust of the public.

Second, there is no financial recoupment program in China. In the CIA, GSK promised to establish and maintain, throughout the term of the CIA, a financial recoupment program that puts at risk of forfeiture and recoupment an amount equivalent to up to three years of annual performance pay (i.e., annual bonuses, plus long term incentives) for an executive who is discovered to have been involved in any significant misconduct.²⁴⁸ This financial recoupment program applies to executives who are either current GSK employees or who were former GSK employees.²⁴⁹ GSK also committed to maintaining an Executive Financial Recoupment Program for at least the duration of the CIA, absent agreement otherwise.²⁵⁰ Both the incentive and the restraint mechanisms are essential to preventing excessive emphasis on sales targets. Although GSK promised a new compensation system in China, it has not yet announced an Executive Financial Recoupment Program in China.

Third, there is no independent review mechanism in China from a third party equivalent to the Independent Review Organization (IRO) as defined in the CIA. In the CIA, within 120 days after the effective date, GSK is required to engage an entity (or entities), such as an accounting, auditing, or consulting firm, to perform reviews to assist it in assessing and evaluating its systems, processes, policies, procedures, and practices.²⁵¹ Without independent verification and oversight, it would be difficult to convince the public of the effectiveness of the new Chinese compensation program. Theoretically speaking, GSK would benefit from the independent review mechanism in terms of better corporate image and long-term development.

Fourth, there is no mechanism for the Chinese government to punish GSK for failure to comply with its promises. In the US, the 2012 CIA has a section on dealing with "breach and

²⁴⁴ CIA, *supra* note 170.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *GSK China to Implement New Compensation Program for Sales Force in 2014*, *supra* note 122.

²⁴⁸ *See* CIA, *supra* note 170.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *See id. supra* note 170, at 35.

default.”²⁵² GSK agreed that failure to comply with the obligations to establish and implement the employee and executive incentive compensation and recoupment may lead to the imposition of stipulated penalty of \$2,500 for each day.²⁵³ As the new compensation system in China is the unilateral policy declared by GSK, it is up to GSK to discipline the breach of the system in the framework of internal controls. The public, however, might not trust the effectiveness of the internal controls of GSK, as they have witnessed the failure of the internal controls in the bribery scandal in 2013.

Fifth, no comprehensive corporate integrity obligation was imposed on GSK in the new compensation system in China. In the 2012 CIA, GSK promised to establish and maintain a compliance program in the US, and especially to add compliance responsibilities for certain GSK employees and the board of directors. This program includes appointing a Compliance Officer, a Compliance Committee, and assigning the Board compliance obligations. The Board is further required to adopt a written Code of Conduct and written policies and procedures relating to the training of management and relevant employees.²⁵⁴

Despite the shortcomings of the new compensation system of GSK in China, many pharmaceutical MNCs are eager to know its fate. Although other pharmaceuticals have not yet followed GSK’s new compensation model, some MNCs may be willing to follow it to avoid regulatory risks. On the other hand, some MNCs may be reluctant to follow GSK’s new model before the model proves successful.²⁵⁵

VI. Suggested Corporate Governance Reforms

This Part offers our proposals for governance reforms, in an attempt to reduce the incentives for corporate executives to engage in acts of bribery when doing business in China. Our proposals include a reorientation of the corporate purpose from profit maximization to profit optimization, the need to understand Chinese culture and society, and the execution of corporate governance practices that directly address corruption.

A. Reorientation of Corporate Purpose to Optimization of Profits

An ancient Chinese proverb deeply describes the profit driven world: “Jostling and joyous, the whole world comes after profit; racing and rioting, after profit the whole world goes.”²⁵⁶ Maximization of profits has been one of the most powerful driving forces for entrepreneurship, innovation and progress in the human history, especially in the corporate age.²⁵⁷ Maximization of profits, however, may incentivize some corporations desperate for profits and ignorant of the interests of other stakeholders.²⁵⁸

²⁵² *Id.*

²⁵³ *See id.* at 32.

²⁵⁴ *See id.* at 5-25.

²⁵⁵ He Fenglun & Zhong Qun, *The Efforts of Fighting Against the Commercial Bribery in Chinese Medical Industry Are Bring Out Changes* (ZHONG GUO YI YAO HANG YE FAN SHANG YE HUI) LU ZHENG ZAI DAI LAI BIAN HUA), XINHUA, Apr. 11, 2014, http://news.xinhuanet.com/fortune/2014-04/11/c_1110208587.htm.

²⁵⁶ Sima Qian & Shi Ji, *Biographies of Merchants* (SHI JI, SHI HUO ZHI LIE ZHUAN).

²⁵⁷ *See* Kang, *supra* note 52, at 5.

²⁵⁸ Hussain, *supra* note 190, at 313.

The tricky issue is that although many corporate citizens condemn corrupt practices as unethical and illegal, or even crimes, and business leaders declare zero tolerance for corrupt practices in their corporate policies,²⁵⁹ such promises and policies tend to be subordinate to the purpose of maximizing profits for the corporation and its shareholders.²⁶⁰ The reason some anticorruption policies fail is that corruption is sometimes considered the price the corporation has to pay in certain circumstances.²⁶¹ Yet, maximization of profits *per se* does not justify engaging in corrupt activities.

Because corporations are important members of society, we argue that it is imperative that they revise their mission of profit maximization by replacing “maximization” with “optimization.” First, optimization of profits implies a broader inclusion of stakeholders. Traditionally, the shareholder has been considered the primary corporate stakeholder.²⁶² The purpose of the modern corporation, however, should be to create wealth for its shareholders and other stakeholders harmoniously, but not necessarily in the same ways. In addition to advancing investment returns for shareholders and compensating directors and executives, the creation and growth of the corporation should also benefit other stakeholders or constituencies.²⁶³ Profit is not adequate to describe the purpose of a corporation, as the interests or stakes owned by the non-shareholder constituencies do not necessarily take the form of profit.²⁶⁴ It is unnecessary to narrowly interpret corporate interest solely in terms of shareholder interest.²⁶⁵

Second, optimization of profits implies legal and ethical profit making. It demands that profits be acquired for various stakeholders—including shareholders, employees, consumers, creditors, competitors, suppliers, retailers, the community, future generations of people, the natural environment, and other stakeholders—in lawful, ethical, and respectful ways. In the pursuit of this ideal balance of interests, we argue for compromise, tolerance, and inclusiveness. Corruption has seriously eroded cooperation among corporations and their stakeholders, infringed upon the rights of consumers and competitors, and thereby destroyed the confidence of both the business community and the public in fair competition in a free market.²⁶⁶ Optimization of profits does not prohibit corporations from being profitable. Being profitable is not the problem. The problem arises when firms seek to profit in an illegal or unethical way.

Third, optimization of profits implies the sustainable development of the corporation. Indeed, there are tensions between short-term interests and long-term interests, between the shareholder’s interest and non-shareholder constituencies’ interests, between the visible financial interest and invisible public reputation, between short-term tactics and long-term strategy, and between short-term revenue generation and long-term competitiveness.²⁶⁷ Optimization of profits, however, guides the corporation with a long-term vision of sustainable development and helps to pave the way to sustainable business success. MNCs need to consider their long-term interests, public reputations, long-term strategies, long-term

²⁵⁹ Hills, Fiske, & Mahmud, *supra* note 214, at 24.

²⁶⁰ See Silver-Greenberg & Protes, *supra* note 6.

²⁶¹ *Id.*

²⁶² Kang, *supra* note 52, at 13.

²⁶³ *Id.* at 14.

²⁶⁴ *Id.* at 15-16.

²⁶⁵ *Id.*

²⁶⁶ *Id.*, at 8; see generally Kenny, *supra* note 76.

²⁶⁷ See Kang, *supra* note 52, at 13-21.

competitiveness, and the core interests of their non-shareholder constituencies when optimizing profits.

It is a longstanding maxim in corporate law that business corporations are “organized and carried on primarily for the profit of the stockholders”²⁶⁸ and that, accordingly, corporate board members and officers owe a fiduciary duty to maximize shareholder profits.²⁶⁹ Yet such a duty, if it exists at all,²⁷⁰ can easily coexist with profit optimization. Because a firm’s market reputation plays a considerable role in determining its valuation and profits, it will almost always be in the firm’s best (long-term profit maximizing) interest to pay close attention to the stakeholder concerns noted above. This is particularly true of MNCs. As our GSK case study exemplifies, when such companies fail to live up to stakeholder standards, the news is unlikely to fall on deaf ears. Hence, profit optimization stands, not only to promote a broader array of stakeholder interests, but also to prevent corporate fiduciaries from sacrificing their firms’ long-term financial welfare in the pursuit of short-term profits.

B. The Need for Understanding Chinese Culture

Firms need to bear in mind both China’s past and present and draw conclusions from both China’s accomplishments and the Chinese way of thinking. One can hardly understand China well without a proper understanding of China’s history, culture, the Chinese people’s way of thinking, and the profound changes taking place in China today.²⁷¹ It would be unwise for MNCs to follow the so-called “unspoken rules” of corruption. The better choice for MNCs is to conduct their business in lawful and ethical ways, and to adopt a policy of zero tolerance for corruption, despite heavy pressure from the competition. By doing so, MNCs will lower their own transaction costs in China, as well as spur more demand for their products.²⁷² In promoting these ends, the most important step is to gain a deeper understanding of Chinese culture and rule of law.

C. Corporate Governance Practices Must Address Corruption

As mentioned above, many MNCs, including GSK, have anti-corruption policies. Unfortunately, the policies and the norms of good corporate governance have not always translated into practice. Thus, the key issue is how to implement good corporate governance policies regarding anti-corruption. To achieve this, three factors would be equally important: good people, good norms, and good culture. Furthermore, we suggest that MNCs implement the following practices.

First, a consumer friendly compensation system should be implemented by MNCs to better reflect the competence and performance of the marketing employees or representatives based on consumer primacy. Although it was encouraging for GSK to announce a new compensation system in late 2013, as noted above, its system still has shortcomings and weaknesses. We have several suggestions for reform for GSK and other MNCs facing the

²⁶⁸ Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

²⁶⁹ Robert Ashford, *Binary Economics, Fiduciary Duties, and Corporate Social Responsibility: Comprehending Corporate Wealth Maximization and Distribution for Stockholders, Stakeholders, and Society*, 76 TUL. L. REV. 1531, 1558 (2002).

²⁷⁰ See *id.* (discussing reasons to doubt the existence of a specific fiduciary duty to maximize profits).

²⁷¹ Jinping, *supra* note 45.

²⁷² *Id.*

same challenges.

The most important suggestion is to hear the opinions of the consumers, including the patients. It is unlikely that a compensation system will be truly consumer friendly if the system has not been heard, debated, and discussed by the public consumers. Another important requirement of a revised compensation system is that it must accommodate the core interest of the employees or representatives. Without the support of the marketing employees or representatives, it would be unlikely that a consumer friendly compensation system would succeed. In addition, a consumer friendly compensation system should be made transparent in order to enable and facilitate public supervision. Finally, both corporate employees and independent sales representatives or agents should be evaluated by the consumer friendly compensation system. To control the legal risk of corruption, some MNCs might attempt to outsource marketing to independent agents, representatives, or intermediaries reasoning that this strategy may insulate the firm from corruption. We argue that MNCs should also be held accountable for the selection and oversight of the independent intermediaries. Independent intermediaries must also be prohibited from engaging in bribery.

Second, internal punishments, including financial recoupment, should be adopted to improve governance on anti-corruption. In the 2012 US CIA, GSK promised to establish and maintain a financial recoupment program that puts at risk of forfeiture and recoupment an amount equivalent to up to three years of annual performance pay for an executive who is discovered to have been involved in any significant misconduct.²⁷³ GSK, however, has not announced a similar program in China. A recoupment program could help deter and prevent executives of MNCs from engaging in misconduct, including consumer fraud and bribery. In addition to the executives, the directors and marketing employees should be subject to the recoupment program. To increase the cost of corruption, firms could seek to impose penalties in the case of intentional misconduct or gross negligence resulting in corruption.

Third, an independent third party review mechanism should be established to fight against corruption. An MNC's internal review of the effectiveness and weakness of anti-corruption practices is unreliable from the perspective of the public, including the competitors and the consumers. Furthermore, if the independent review organization is selected and paid by the corporation, there is a possibility that the corporation will in effect control the review organization. Some review organizations might thus close their eyes to the ongoing corrupt practices. Therefore, corporations should not nominate the members of the organizations. We recommend that the independent review organizations be selected by a government agency based on open, fair, transparent, and competitive procurement procedures. The public should be entitled to inspect the review documents and raise questions before the independent review organizations, either individually or at a hearing procedure organized by the government agency. The review organization could be funded through a fee imposed on corporations.

Fourth, penalties should be imposed on corrupt practices of multinational corporations. The market has eyes, the law has teeth. Civil liabilities, administrative liabilities, and criminal liabilities are different, but interconnected. In the case of massive infringement of consumer rights, the China Consumers' Association or the consumers associations at the provincial

²⁷³ CIA, *supra* note 230, at 32.

level may take up public interest lawsuits on the behalf of consumers.²⁷⁴ In the case of administrative or criminal penalties imposed on a wrongdoing corporation, the fine should not exclude a consumer's claim to damages. In addition to consumer litigation, the competitors should be permitted to file lawsuits against a wrongdoing corporation for compensation and injunctions. In China, penalties imposed on those offering bribes are usually less harsh than those imposed on bribe recipients, in order to encourage the bribing firms to report to the government or the judicial system.²⁷⁵ Both sides of the transaction, however, benefit from bribes. As a result, MNCs, as the providers and beneficiaries of bribes, are not motivated to act as whistleblowers with respect to corrupt practices. The administrative penalties prescribed by Article 22 of the Unfair Competition Law of 1993 are minimal with regard to bribes not serious enough to amount to crimes; the regulator may fine from RMB 10,000 (equivalent to USD 1,600) up to RMB 200,000 (equivalent to USD 32,000) depending on the circumstances and the illegal income.²⁷⁶ Administrative penalties need to be made harsher in order to deter and punish corporate corruption. Although plea-bargaining is unfamiliar to Chinese law, it is highly recommended that China introduce it to decrease the costs of investigation and improve the efficiency of legal enforcement, given the limited resources of regulators and the judicial system.

Fifth, anti-corruption practices should be added to the corporate governance structures of MNCs. Based on the successful experience of the corporate integrity obligation imposed by the 2012 CIA, corporations should be encouraged to establish an anticorruption committee under the board of directors, and to create the position of Chief Anticorruption Officer (CAO) at the management level. The board of directors should be responsible for the CAO's nomination and removal and the CAO should report on a timely basis. The board of directors should have a duty to monitor and evaluate whether corruption exists within the corporation. A practical code of conduct of anticorruption should be learned and followed by the employees, especially those engaged in marketing. Needless to say, as MNCs and their directors, executives, and employees are sensitive to negative impacts on their reputations, corruption records of directors, executives and employees should be made available to the public.²⁷⁷

In keeping with this approach, it would be helpful for China and other nations hosting MNCs to adopt sentencing policies similar to those found in the US federal Organizational Sentencing Guidelines (OSGs)²⁷⁸ and in the US prosecutorial practice of encouraging organizational cooperation through deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). The OSGs allow leniency if the organization reports an offense to the government, cooperates fully in the investigation, and demonstrates its

²⁷⁴ Article 47, Chinese Consumer Protection Law (2013).

²⁷⁵ Under Article 163 of the Chinese Criminal Law, the bribery recipients in a corporation shall be sentenced to a maximum of 5 years of imprisonment for a bribery crime of a significant amount. For a bribery crime of a large amount, the recipient can be sentenced between 5 and 20 years of imprisonment. However, under Article 164 of Chinese Criminal Law, the bribery providers in the corporations shall be sentenced to the maximum of 3 years of imprisonment for the bribery crime of significant amount, or sentenced to 3 to 10 years of imprisonment for the bribery crime of a large amount. Furthermore, the bribery providers, who have voluntarily confessed the bribery prior to the initiation of prosecution procedure, shall be entitled to mitigated punishment or exemption from punishment. Criminal Law of the P.R.C., *supra* note 67.

²⁷⁶ Article 22, Chinese Unfair Competition Law (1993).

²⁷⁷ On March 1, 2013, the State Authority of Industry and Commerce launched a website with the credit information of every firm in China: <http://gsxt.saic.gov.cn>.

²⁷⁸ U.S. Sentencing Guidelines Manual § 8C2.5(g) (2008).

recognition and affirmative acceptance of responsibility.²⁷⁹

Similarly, by offering NPAs and DPAs, prosecutors create serious incentives for corporate cooperation with criminal investigations. Based on a recent Government Accountability Office report, NPAs and DPAs have significantly reduced the use of court resources in dealing with FCPA violations.²⁸⁰ Moreover, the NPA/DPA process typically allows the DOJ to engage in more active communication with FCPA violators, with favorable settlements often being dependent on the MNC's adoption of company-specific policies for combatting corruption.²⁸¹ Such agreements frequently include "monitorship provisions," which require companies to hire an independent corporate monitor to oversee their compliance efforts throughout the period of the agreement.²⁸² This has been particularly common in cases involving FCPA violations.²⁸³ Companies have also been required to employ independent ethics and compliance consultants to examine their ethics and compliance programs.²⁸⁴ Moreover, in addition to stiff fines,²⁸⁵ NPAs and DPAs typically include non-contradiction clauses, which prevent companies from subsequently denying any admissions of guilt made in an agreement.²⁸⁶ In return for paying penalties and complying with the agreements' other provisions, companies typically avoid indictment and conviction, along with suspension and debarment from government, a considerable carrot for most MNCs.²⁸⁷

By relying on such strategies, countries hosting MNCs will likely establish an atmosphere much more conducive to the cooperative policing and prevention of corporate corruption. In such an environment, MNCs would have even less reason to avoid seriously engaging in corporate governance measures to prevent crimes like bribery.

Conclusion

GSK acquired significant competitive advantages by bribing hospitals, doctors, officials, and professional medical organizations. It is true that in general, firms seek to be competitive and strong in the market. To this end, however, firms operating in a free market should focus on improving their competitiveness through, for example, diversity and quality of goods or

²⁷⁹ Cindy A. Schipani, *The Future of the Attorney-Client Privilege in Corporate Criminal Investigations*, 34 Del. J. Corp. L. 921, 925 n. 12 (2009).

²⁸⁰ *Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution*, GAO Report to Congressional Requesters, available at, <http://www.gao.gov/new.items/d10110.pdf>.

²⁸¹ Thomas R. Fox, *DPAs and NPAs – Powerful Tools in the Fight Against Corruption*, FCPA COMPLIANCE & ETHICS BLOG, Dec. 8, 2014, <https://tfoxlaw.wordpress.com/tag/dpa/>.

²⁸² *2013 Year-End Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, Gibson Dunn, Jan. 7, 2014, <http://www.gibsondunn.com/publications/Documents/2013-Year-End-Update-Corporate-Non-Prosecution-Agreements-and-Deferred-Prosecution-Agreements.pdf>, at 4-5.

²⁸³ *Id.*

²⁸⁴ *See id.* at 5.

²⁸⁵ *See id.* at 13 (highlighting a 2014 DPA in which JPMorgan Chase agreed to forfeit \$1.7 billion "to resolve Bank Secrecy Act violations in connection with the Bernard L. Madoff Ponzi scheme").

²⁸⁶ *Id.* at 9 (discussing the 2013 Standard Chartered Bank agreement with the DOJ, which the DOJ threatened to revoke upon discovering that a bank official had contradicted (in a press release) the admission in its agreement that the company had willfully violated U.S. sanctions laws).

²⁸⁷ *Id.* at 11-12.

services, marketing strategies, post-sale services, internal controls, and public relations.²⁸⁸ Moreover, firms should acquire or consolidate competitive advantages in a fair, ethical, and lawful manner. Bribery, however, is none of these and is an illegal, inefficient, and immoral trade practice.²⁸⁹

Although it is impossible to eliminate all corruption in the global market, a policy of zero tolerance for corruption should acquire global consensus. In addition to tougher punishments of corrupt practices and a more liberal, transparent and competitive market based on the rule of law in the host countries of MNCs, more efficient international coordination mechanisms based on shared information and mutual assistance should be expected. The reason for this is simple. Corrupt practices are the common enemy in the global economy. MNCs should play the leading role in changing traditional corporate governance by reorienting corporate purpose, gaining a deeper understanding of host country culture, and adopting and employing serious corporate governance policies against corruption.

²⁸⁸ See Nichols, *supra* note 178, at 1318 (citing Mark B. Bader & Bill Shaw, *Amendment of the Foreign Corrupt Practices Act*, 15 N.Y.U. J. INT'L L. & POL. 627, 627-29 (1983)) (explaining that, in free market systems, economic transactions should be based exclusively on the price and quality of a given product or service).

²⁸⁹ See Dalton, *supra* note 74, at 585 (“[B]ribery distort[s] economic judgments, impede[s] the development of cross-border commercial relationships, debase[s] governmental and bureaucratic systems, and erode[s] the foundations of social structures.”); Ibrahim F.I. Shihata, *Corruption—A General Review With an Emphasis on the Role of the World Bank*, 15 DICK. J. INT'L L. 451, 453 (1997).