

Characteristics, Causes, and Countermeasures of Bribes Offered by Multinational Corporations in China

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Abstract. The bribery behavior of multinational corporations in China is characterized by the fact that the subjects of bribery are mostly world-renowned multinational corporations, and the objects of bribery gradually penetrate government officials. The means of bribery are more covert and more difficult to be detected and handled, and bribery involves the key fields of medicine, energy equipment, telecommunication, and finance. The reasons for the occurrence of bribery by Multinational corporations in China include the imperfect legal system, the punitive measures of giving bribes lightly and receiving bribes heavily, and the cultural system differences. In order to effectively strengthen the governance of the problem of active bribery of multinational corporations, it is necessary to strengthen theoretical legal research, analyze in depth the characteristics of the law of bribery crimes, amend and improve criminal laws in a timely manner, increase the efforts to combat the crime of active bribery. And strengthen international cooperation in combating the problem of active bribery of multinational corporations. Therefore, this paper identifies common multinational corporations' behavioral tactics characteristics as well as feasible measures by examining the issue of multinational corporations' bribery.

Keywords: Multinational corporations; Bribery; China.

1. Introduction

In 2010, China officially overtook Japan as the world's second-largest economic entity and rose to become the world's largest capital-importing country. In the context of the globalization era, multinational corporations have become the core of the global economy, playing a leading role in promoting the integration of production, trade, investment, and technology development in countries around the world. According to the Ministry of Commerce, in 2021, China's actual use of foreign capital amounted to RMB 114.96 billion (US\$173.48 billion), an increase of 20.2% year-on-year [1]. However, the increasing prominence of corruption crimes in multinational corporations has sounded an alarm to people immersed in the vision of economic globalization: Multinational corporations are not only the creators of achievements but also the creators of problems. Among them, the crime of commercial bribery of multinational companies is particularly prominent. While the number of foreign companies and the amount of investment grows, the number of multinational corporations' bribery cases in China also rises sharply, while the legislation, judicial and theoretical research corresponding to this lag relatively behind, making it difficult to provide effective countermeasures for the governance of multinational corporation's commercial bribery crimes. To this end, this paper intends to analyze the characteristics and causes of bribery by multinational corporations in China and propose countermeasures to combat the crime of bribery by multinational corporations to promote the establishment of a fair and clean market economic order, maintain a fair and orderly competitive environment, and guarantee the high-quality development of the economy.

2. Characteristics of Bribes Paid by Multinational Corporations in China

In recent years, many reports have been about multinational companies offering bribes in China. Whether the IBM case, the Lucent case, the Carrefour case, the Siemens case, or the GlaxoSmithKline case, the multinational companies involved in the development in China are all suspected of taking bribes to government officials or executives of state-owned enterprises improperly obtain specific opportunities or benefits. It is evident that the phenomenon of commercial bribery by multinational

corporations is no longer an accidental event in China but a form of crime that tends to be the norm. Through the collection of domestic and foreign news reports and information from the official website of the US Department of Justice, the author summarizes the main characteristics of bribery by multinational corporations in China.

2.1 Increasing Bribery Cases

Since 2003, bribery cases by multinational corporations in China have exploded and are becoming more and more prevalent. In 2014, the Organization for Economic Cooperation and Development (“OECD”) released its first Overseas Bribery Report (“OECD Foreign Bribery Report”). (OECD Foreign Bribery Report), noting that large companies in developed economies paid the majority of overseas bribes. The organization analyzed 263 cases of individual bribery and 164 cases of corporate bribery and found that large companies made up 60% of overseas bribery cases. In contrast, only 4% of SMEs were involved in overseas bribery [2]. This is consistent with the current state of bribery of multinational companies in the Chinese market.

2.2 Changes in the Targets of Bribery

The object of bribery tends to be high-end, gradually penetrating government officials. Compared with the previous MNE bribes mainly targeting the staff or management of state-owned enterprises, the current multinational corporations tend to take the “upper route” and exchange benefits with Chinese enterprises, but also by bribing government officials to achieve the purpose of obtaining huge benefits. Several US multinationals that entered China in the early days relied heavily on bribes to employees or management of state-owned enterprises and institutions in exchange for business, such as the bribes offered by the US steel company Schnitzel to the managers of Chinese steel mills [3]. In the cases that came to light in the last two years, the bribery of multinational companies began to gradually penetrate government officials, such as the three German Siemens subsidiaries in China, Siemens China Power Transmission and Distribution Group (Siemens PTD), Siemens Transportation (Siemens TS) and Siemens Medical Group, respectively, to Chinese government officials in exchange for large contract projects. Pfizer Pharmaceuticals, Inc. paid bribes to Chinese officials to obtain drug use, Pfizer Pharmaceuticals paid bribes to Chinese officials to obtain drug approvals [4].

2.3 Changes in the Means of Bribery

The means of bribery are more covert and more challenging to be detected and handled. To avoid legal sanctions in their own countries and China, multinational companies have gradually learned to adopt more covert non-monetary methods of bribery, unlike traditional bribery methods such as direct cash bribes, gifts delivered on New Year’s Day, or the name of weddings and funerals. The new bribery methods are more subtle and sophisticated, and three main types are listed below.

Firstly, State employees obtain benefits from multinational companies in the form of real investment in shares, auctions, and other seemingly legal ways significantly higher than the standard return or market price difference. Although there is a natural capital contribution and the formalities are standardized, the benefit obtained is higher than the number of dividends that should be received in average proportion to the shares.

Secondly, national staff through the purchase of the original shares provided by multinational companies, business opportunities, etc., to obtain significant benefits in the future. This kind of “access to opportunity benefits” corruption phenomenon is compared with the previous bribe-takers directly receiving property, vehicles, cash, and other property, the subject of bribery from the fundamental interests into the expected benefits, from the certainty of benefits into the uncertainty of interests and usually manifested as the right to obtain shares before listing, after listing to obtain huge profits, essentially for power and money transactions, rather than regular market investment profits.

Thirdly, State employees accept bribes from transnational corporations through their close relatives working in transnational corporations but not doing actual work and getting paid, or working in transnational corporations but getting paid obviously higher than those at the same level. Formally,

the signing of labor contracts between multinational corporations and close relatives of state employees belongs to the employment relationship. Still, this formally legal employment relationship is, in essence, a means of transferring benefits from multinational corporations to state employees, which still belongs to the power and money transaction and is a hidden form of bribery.

2.4 Concentration of Industries Involved in bribery

The concentration of industries involved in bribery is high, with pharmaceuticals, energy equipment, telecommunications, finance, etc. becoming key areas. Counting the bribery cases of multinational companies in China exposed in recent years, from the earliest Siemens, IBM, Morgan Stanley, etc. to the most recent Pfizer, GlaxoSmithKline, etc., all involved the above industries [5]. The reason for the frequent occurrence of bribery in these industries is that they are primarily monopolistic industries. Once you successfully enter the industry, you can get a tremendous amount of revenue. Those who hold public power in the industry, such as administrative approval, resource allocation, and management, naturally become the targets of commercial bribery.

3. Causes of Bribery by Multinational Corporations in China

As incidents of commercial bribery by multinational companies in China continue to be exposed, most of their parent companies have maintained a compliant and clean image on the international stage. What has caused such a significant shift in how multinational corporations behave in the Chinese market, leading to the high incidence of bribery cases in China? Specifically, it appears to include the following.

3.1 Imperfection of the Legal System

The imperfection of the legal system provides an opportunity for multinational corporations to bribe in China. The problem of overseas bribery by multinational corporations has a long history. But in recent years, multinational corporations have gradually shifted the main battlefield of commercial bribery to developing countries. The direct reason is that developed economies have a complete anti-bribery legal system and a zero-tolerance attitude. For example, the US introduced the Anti-Foreign Bribery Act as early as 1977 and has since continued to improve and strengthen enforcement, effectively curbing the phenomenon of overseas bribery by multinational companies. The UK also enacted the UK Bribery Act 2010 in 2010, which comprehensively regulates bribery by UK-based and overseas multinational companies. Emerging economies such as China, where most do not have a comprehensive anti-bribery legal system, are a natural place for multinational corporations to operate in violation of the law. 2021 Transparency International has established a Bribery Policy Index (CPI). The CPI ranks 180 countries and territories by their perceived levels of public sector corruption on a scale of zero (highly corrupt) to 100 (very clean). The CPI ranks 180 countries and territories by their perceived levels of public sector corruption on a scale of zero (highly corrupt) to 100 (very clean), while China scores only 45 out of 100, ranking NO. 66 [6]. China's lack of legal regulation, lax restraints on public power, and the existence of business subterfuge ultimately contribute to the commission of criminal acts of bribery by multinational corporations in China. In a sense, the fact that a large number of multinational corporations are competing to join China's commercial bribery "subterfuge" camp is a reflection of the fact that China's imperfect legal system makes it impossible to combat and punish MNE bribery.

3.2 Lesser Penalties for Active Bribery

China's lighter penalties for active bribery and heavier penalties for passive bribery condone the crime of active bribery. China's criminal law provides more lenient penalties for active bribery than passive bribery. Article 383 of the Criminal Law of the People's Republic of China provides that the maximum statutory penalty for the crime of passive bribery is life imprisonment or the death penalty and confiscation of property, while Article 389 of the same law provides that the maximum statutory

penalty for the crime of active bribery is more than ten years of fixed-term imprisonment or life imprisonment and may be accompanied by confiscation of property [7]. In practice, the number of active bribery cases investigated and punished is much lower than that of passive bribery cases, with 9,083 persons prosecuted for passive bribery and 2,689 for active bribery by the national prosecutors in 2021 [8]. The expected cost of crime is reduced for multinational companies offering bribes in China. Multinational corporations are bound to analyze the economic costs and benefits before committing a bribery crime in China. The economic costs of a crime include: first, the instrumental costs, such as the bribe money; second, the probability costs, such as the degree of punishment and the likelihood of being punished. The probability cost is the focus of the offender's consideration. Thus, the rate of detection and punishment of such crimes may directly determine whether the crime is committed or not. Research by Professor Ren Jianming of Tsinghua University indicates that "the current economic penalties for commercial bribery in China are so small that they differ from those in the United States by a factor of 100; if the profit obtained through bribery is 10 cents, the economic penalty in the United States may be as high as 100 cents, while the economic penalty in China may be only 1 cent [9]."

3.3 Prisoner's Dilemma

The differences in cultural systems become a shield for multinational corporations to bribe in China and bring about adverse demonstration effects. The local culture is so strong and deep-rooted that new business rules do not achieve market discourse in the short term and are everywhere constrained by local rules. Therefore, any multinational company entering the Chinese market is first faced with the choice of how to balance business ethics and market competitiveness. In this choice, companies are often forced into a "prisoner's dilemma": if they stay away from commercial bribery, they may lose the market; if they join the stream, they will betray business ethics. In this situation, many multinational companies have lowered their business ethics standards in the Chinese market, using bribery to justify their operations and, to a certain extent, to create a demonstration effect.

4. Measures for the Governance of Multinational Corporations' Bribery in China

At present, multinational corporations' bribery in China has gradually penetrated the national and industry levels, and its negative impact not only involves the market order, industrial development, legal environment, and national image but also has a negative demonstration effect on local Chinese enterprises and Chinese multinational corporations. China must actively promote the global governance of transnational bribery by combining legal construction, market mechanism construction, risk prevention enhancement, and extensive international cooperation. Specifically, relevant governance measures could be found in the following aspects.

4.1 Improve Relevant Legislation

Restraining bribery by multinational corporations in China starts with strengthening the legal theory research, in-depth analysis of new corruption crime laws and features, and actively proposing legal responses, timely revision, and improvement of criminal laws. It is necessary to clarify the elements of bribery crimes further and include more hidden bribery acts in combating. It should be determined that bribery of national public officials, foreign public officials, or officials of international public organizations, and bribery in the private sector are all criminal acts, and expected benefits and non-material benefits should be included in the category of "property" of the bribery crime. Further, it is necessary to define the criminal liability of parent companies of multinational corporations for bribery offenses committed by their subsidiaries and branches in China. For example, the "Facilitation Payment" given by a multinational company to government officials to speed up their daily work is not an "improper benefit" under Chinese criminal law. And the act of giving Facilitation Payment by multinational companies does not constitute the crime of bribery. However,

In the UK, providing Facilitation Payments to foreign government officials, regardless of the amount, before or after the adoption of the UK Bribery Act 2010, is not legal and is considered bribery. China should take a cue from the UK legislation and do the act of giving acceleration fees an active bribe [10].

4.2 Strengthen Law Enforcement

The relevant law enforcement authorities should increase the efforts to combat the crime of bribery, increase the probability of investigation and punishment of the crime of bribery, and the cost of crime. Firstly, enhance the legal cost of bribery crimes. The majesty of the law does not lie in its severity but in its inevitability. The current anti-corruption situation is more severe, and the best prevention is still to combat it. On the one hand, China should substantially increase the probability of investigating and punishing the crime of active bribery. On the other hand, China should avoid lightening the crime of active bribery. Secondly, highlight the focus of the crime of active bribery crackdown. The regulatory authorities need to Prevent and combat significant public investment, public financial expenditure, industry and commerce, taxation, finance, land grant, government procurement, real estate, and other critical bribery crimes. Thirdly, the establishment and improvement of an industry access system and the promotion of bribery file inquiry. The procuratorial authorities may Introduce the bribery file inquiry and require market entities intending to conduct business activities to conduct a bribery file inquiry and use the file provided without a bribery record as a preparatory condition to qualify for economic activities, to establish and improve the industry access system.

4.3 Enhance Legal Awareness

Strengthen the prevention of bribery crimes of the multinational corporations' rule of law publicity. Prevention of bribery crimes in multinational companies needs to strengthen the promotion of the rule of law, enhance the awareness of legal operation, and strengthen compliance management. Through the promotion of typical judicial cases to enhance the concept of law-abiding multinational companies. The multinational corporations could also be invited to attend the trial of relevant cases in local courts to enhance the consciousness of refusing transnational bribery. Alternatively, judicial staff can be invited to conduct the rule of law classes at relevant multinational corporations to clarify the boundaries between bribery crimes and non-bribery crimes in Chinese business activities.

4.4 Enhance International Cooperation

Another effective way to combat the active bribery crimes of multinational corporations is through Strengthening international cooperation Multinational companies in China's bribery crime have transnational, complex, and other characteristics and must strengthen international cooperation to punish the occurrence of such behavior effectively. First, China should strengthen information notification and sharing. China should strengthen information notification and share with relevant countries and international organizations on the bribery of multinational corporations, jointly analyze and judge the development of the bribery of multinational corporations, and share the experience and practices of effective governance. Second, China should improve the escape prevention mechanism. A sound international anti-fleeing mechanism must be established in response to the absconding of bribe-payers outside of China. Through the sharing of bank information, entry and exit information, and other information to establish a system of information sharing of relevant personnel, thereby increasing the detection of the flow of personnel and funds, etc., and timely prevention of the flight of criminal suspects. Third, China should improve the mechanism of fugitive work. For the criminal suspects who have absconded abroad, through international judicial collaboration, extradition and repatriation should be adopted to recover the relevant bribery suspects back to the country where the crime was committed to being tried by the court.

5. Conclusion

In the historical process of economic globalization and integration, multinational corporations will certainly become the main driving force for the development of the world economy; and China, as one of the major international trading countries, its vast market space will certainly become a platform for many multinational corporations to invest and develop. However, without the supervision and restraint of laws, corporate behavior aiming at profit maximization will often become an important factor in destroying social justice and hindering social development. Looking at the investment behavior of multinational companies in China, it is found that certain multinational companies often use illegal means to implement bribery in order to obtain more corporate resources, which will disrupt the order of fair social competition, undermine the integrity of official behavior, and is not conducive to the formation of a good investment environment, bringing adverse effects to the long-term development of the national economy. Therefore, China should explore the establishment of a long-term mechanism to prevent and control the crime of bribery by multinational corporations, and should also indirectly apply the Convention through the promulgation of a separate criminal law on corruption and bribery to promote the integration of the anti-bribery criminal legal system from the substantive and procedural aspects, thus promoting the integration of criminal justice work and ultimately reshaping China's good international investment environment and market space.

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