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September 2012 ■ Vol. 4, No. 2

Spotlight on the Asia-Pacific Region (Part II)

This issue represents the second installment of a new feature of FCPA Update: our "regional spotlight" series. In Part I (August 2012), we provided an overview of FCPA enforcement and general background pertaining to other anti-corruption legal regimes in the Asia-Pacific region, as well as articles specifically dealing with recent developments in Australia and Hong Kong. In Part II, we address the legal framework for anti-corruption enforcement in China, and recent developments in anti-bribery enforcement in South Korea, comparing those developments to the handling of similar issues under the FCPA.

Anti-corruption Authorities in China

As noted in the Asia Pacific "Overview" published in the August issue of *FCPA Update* in recent years FCPA investigations by the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC") relating to China are more numerous than those relating to any other country. Domestically, China as well has been pursuing a number of high profile corruption cases, including against high level officials. China prohibits both public and commercial bribery and has been active in prosecuting domestic bribery, usually targeting the officials who receive bribes. In 2010 alone, the Chinese authorities reportedly conducted more than 119,000 corruption-related investigations.[1] China also recently amended the anti-bribery sections of its criminal law to prohibit bribery of foreign officials, although some key terms remain undefined and there have yet to be any disclosed prosecutions.[2]

The manner in which corruption cases are investigated within China is often opaque, involving no fewer than five separate state and party bodies: (1) the People's Procuratorate, (2) the Public Security Bureau, (3) the Commission of Discipline Inspection of the

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1. "Why multinationals must be wary of China's anti-corruption authorities," *International Financial Law Review* (Jan. 30, 2012), http://www.iflr.com/Article/2969798/Why-multinationals-must-be-wary-of-Chinas-anti-corruption-authorities.html.

2. Paul R. Berger, Bruce E. Yannett, Niping Wu, Tingting Wu & Noelle Duarte Grohmann, "China's New Push to Combat Foreign Bribery," *FCPA Update* Vol. 2, No. 8 (Mar. 2011), http://www.debevoise.com/files/Publication/d263dadf-70e8-4bbd-b543-00fafbae8044/Presentation/PublicationAttachment/d375ac45-c0ac-461e-b512-30828ec23109/FCPAUpdateMarch2011.pdf.

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Communist Party of China, (4) the Administrative Supervision Authority and (5) the Administration of Industry and Commerce. Though much of the state apparatus devoted to prosecuting corruption is focused on the rules that apply to Chinese officials, resources in recent years have also been devoted to investigating private sector actors, including employees and managers at multinational corporations.[3] State investigations in China are also of relevance to multinational firms insofar as western and Chinese anti-corruption authorities have in recent years slowly begun the process of cross-border cooperation. To enable our readers to understand the regulatory landscape, we provide here an overview of the various state and party institutions involved in investigating bribery in China.

People's Procuratorate

The People's Procuratorate is the body with primary responsibility for the prosecution of all criminal cases in China.[4] It is also the primary body charged with investigating potential breaches of China's criminal law relating to bribery of public officials.[5] The Supreme People's Procuratorate is the highest prosecution authority in China and has local counterparts at the provincial, municipal and county levels. The People's Procuratorate at each level reports to the People's Congress (according to the P.R.C. Constitution, the highest authority in the state and the legislative body) and, in the case of subordinate levels of the People's Procuratorate, to the People's Procuratorate at the next higher level.

Within each People's Procuratorate at the county level or above, there is a division called "Bureau of Anti-corruption and Bribery" responsible for investigating bribery cases involving state employees or entities. Although each People's Procuratorate can initiate its own bribery investigation, in practice cases are often referred by other state or party bodies (described below) which have already conducted a significant investigation of the facts.

The People's Procuratorate has the power to compel the production of evidence and the power to interrogate suspects. It can also call on the Public Security Bureau for assistance. For example, residential surveillance and similar law enforcement tactics would be conducted by the Public Security Bureau (or "People's Police") at the request of the People's Procuratorate.[6]

During an investigation, suspects have limited rights. The right to an attorney attaches after the procurators interrogate the suspect for the first time.[7] If an attorney wishes to meet a detained suspect, the attorney must notify the People's Procuratorate in advance, and the staff will arrange an attorney-client visit within 48 hours upon receiving the

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3. A number of western companies, including the multinational giants Coca Cola, Pepsi, Rio Tinto and Carrefour, have reportedly been investigated and/or prosecuted in China for corruption related offenses. *See, e.g.*, Why Foreign Companies Frequently Offer Bribery in China? People's Daily Online (2009), http://mnc.people.com.cn/GB/54849/69891/170513/index.html [Chinese]; and PepsiCo Under Commercial Bribery Investigation, *People's Daily Online* (Sept. 25, 2009), http://english.people.com.cn/90001/90778/90857/90860/6767606.html.

4. Article 5 of the Organic Law of the People's Procuratorate (promulgated by the National People's Congress in 1983).

5. Article 18 of the P.R.C. Criminal Procedure Law (promulgated by the P.R.C. National People's Congress in 1979 and last amended in 2012).

6. *Id.* at Art. 72.

7. Article 145 of the Criminal Procedure Rules for the People's Procuratorates (issued by the P.R.C. Supreme People's Procuratorate in 1999).

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application and during which time the People's Procuratorate is free to continue to interrogate the suspect.[8] There is no attorney-client privilege in this context and the People's Procuratorate has the power to require that a procurator be present at the meeting between the suspect and his attorney.[9] After completing the investigation, if criminal sanction is deemed appropriate the Bureau of Anti-corruption and Bribery refers the case to the Division of Public Prosecution for prosecution.

In addition to conducting investigations and prosecuting cases, the Supreme People's Procuratorate also issues detailed prosecution thresholds, often in coordination with other ministries. With regard to bribery, the Supreme People's Procuratorate has issued guidance providing that, absent aggravating circumstances, an individual will be prosecuted if he/she offers a bribe of more than RMB10,000 to state employees and an entity will be prosecuted for bribery if the bribe exceeds RMB200,000.[10]

Public Security Bureau

Commercial bribery (*i.e.*, cases not involving a state employee) is investigated by the Division of Economic Crimes Investigation of the Public Security Bureau. The Public Security Bureau is an administrative organ responsible for preventing, curbing, investigating, and punishing illegal and criminal activities. Within the Public Security Bureau system, the Ministry of Public Security is the highest authority and it has local counterparts at each provincial, municipal and county level. The Public Security Bureau at each level reports to the People's Government at the same level and the Public Security Bureau at the higher level. After an investigation is complete, if the staff of the Public Security Bureau believes that the case may involve criminal conduct meriting sanctions, it will refer the case to the People's Procuratorate for prosecution.[11]

"[A]bsent aggravating circumstances, an individual will be prosecuted if he/she offers a bribe of more than RMB10,000 to state employees and an entity will be prosecuted for bribery if the bribe exceeds RMB200,000."

Some complex criminal bribery cases may involve both state employees and non-state employees, which means both the People's Procuratorate and the Public Security Bureau will have jurisdiction. In 1998, six ministries issued a guidance document regarding this overlapping jurisdiction.[12] The general rule is that, in cases of overlapping jurisdiction, the investigation will be handled by the organ with authority to investigate the "main crime" under investigation. If the main crime would be investigated by the People's Procuratorate (*e.g.*, bribery of public officials), then the whole case will be handled by the People's Procuratorate with the cooperation of the Public Security Bureau. If the main crime is to be investigated by the Public Security Bureau, the case will be investigated by the Public Security Bureau with the cooperation of the People's Procuratorate, which would still ultimately be responsible for prosecution.[13] There is no clear guidance as to what is the "main crime" in complex cases and at the outset of a case the People's Procuratorate will usually confer with the Public Security Bureau on a case by case basis and the agencies will determine which one is in a better position to investigate.

The Ministry of Public Security also has the power to promulgate detailed prosecution standards jointly with the Supreme People's Procuratorate. For example, a prosecution standard jointly issued by the Ministry of Public Security and the Supreme People's Procuratorate in 2010 provides that in a commercial bribery case that is investigated by the Public Security Bureau, an individual will be prosecuted for commercial bribery (absent

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8. *Id.* at Arts. 150, 151.
9. *Id.* at Art. 151.
10. Provisions of the Supreme People's Procuratorate on the Case-filing Criteria for Crimes of Offering Bribes (issued by the P.R.C. Supreme People's Procuratorate in 2000).
11. Questions and Answers (Part 2) regarding Certain Issues Concerning the Application of Law in Handling Criminal Cases of Commercial Bribery (jointly issued by the P.R.C. Supreme People's Court and the P.R.C. Supreme People's Procuratorate in 2008).
12. Article 1 of Regulations of Certain Issues in Implementation of the P.R.C. Criminal Procedure law (jointly issued by Supreme People's Court, Supreme People's Procuratorate, Ministry of Public Security, Ministry of National Security, Ministry of Justice and Legal Committee of the Standing Committee of the National People's Congress in 1998).
13. *Id.*

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aggravating circumstances) if he/she offers a bribe of more than RMB10,000; entities may be prosecuted if the offer exceeds RMB200,000.[14]

Commission of Discipline Inspection of CPC

The Communist Party of China ("CPC") is the country's sole ruling party. As such, the CPC's internal rules effectively have the force of law affecting party cadres, which make up the overwhelming majority of government officials and executives at state-owned and other large corporations in China. These cadres are subject to internal party discipline, meaning that corruption cases are often dealt with as an internal party matter at first. When the internal party investigation ends, if the conduct of the suspected party cadre is sufficient to implicate potential criminal liability the case will be handed to judicial authorities for further investigation, prosecution and, ultimately, trial.

The Commission of Discipline Inspection of CPC ("Discipline Inspection Commission") is an internal CPC organization charged with rooting out corruption and malfeasance among CPC members. The Central Discipline Inspection Commission, based in Beijing, oversees CPC discipline throughout China and reports to the Central CPC Committee. Each administrative level of the state (provincial, municipal and county) has a Discipline Inspection Commission reporting to both the Discipline Inspection Commission at the next higher level and the CPC committee for its administrative unit.

The Discipline Inspection Commission has broad powers to investigate allegations of corruption against CPC members (*i.e.*, whenever a CPC member is accused of giving or receiving a bribe).[15] Although it is possible for there to be parallel Discipline Inspection Commission and People's Procuratorate investigations, the People's Procuratorate will usually defer to the Discipline Inspection Commission. The Discipline Inspection Commission has its own investigative staff and the authority to collect and compel the production of evidence.[16] The Discipline Inspection Commission also has a quasi-judicial power, allowing it to freeze bank accounts to maintain the status quo.[17]

One of the most common investigative measures used by the Discipline Inspection Commission is known as "*Shuangui*" (or "double-designation"). *Shuangui* is a process by which a CPC member suspected of bribery or corruption can be compelled to submit to interrogation at a designated time and a designated place (hence "double-designation").[18] *Shuangui* is a confidential investigative procedure conducted by members of the Discipline Inspection Commission without the involvement of ordinary Chinese law enforcement authorities. Suspected party members may be deprived of the freedom of movement and the right to contact with the outside world. As *Shuangui* is not a criminal proceeding, the suspected CPC members have no right to an attorney during this process,[19] although the right to an attorney usually would attach after the Discipline Inspection Commission investigation is complete and the case is referred for prosecution.[20] A suspect can normally be called for *Shuangui* for a maximum of three months, but this period can be extended for one additional month by the Discipline Inspection Commission if it deems it necessary for the investigation.[21]

If the case is complex or severe, upon the approval of the competent Discipline Inspection Commission or relevant CPC Committee the investigation deadline can be extended for another period, the maximum length of which is not provided by any specific rule.[22] *Shuangui* has led to

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14. Criteria for Accepting Cases for Prosecution in respect of Criminal Cases within the Jurisdiction of Public Security Bureau (jointly issued by the P.R.C. Supreme People's Procuratorate and Ministry of Public Security in 2010).
15. Regulations on Case Inspection of Discipline Inspection Commission of the Communist Party of China (promulgated by the Central Discipline Inspection Commission of the Communist Party of China in1994), http://cpc.people.com.cn/GB/33838/2539632.html [Chinese].
16. *Id.* at Art. 28.
17. *Id.* at Art. 28(7).
18. *Id.* at Art. 28(3).
19. Jerome A. Cohen, "The Big Squeeze," *South China Morning Post* (Apr. 18, 2012), http://www.usasialaw.org/wp-content/uploads/2012/04/2012.04.18-SCMP-Cohen-The-Big-Squeeze.pdf.
20. Article 36 of the P.R.C. Criminal Procedural Law.
21. Article 39 of the Regulations on Case Inspection of Discipline Inspection Commission of the Communist Party of China.
22. *Id.*

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successful investigation and prosecution of a number of high-profile party officials. Because the procedure is confidential, there are no published guidelines as to how *Shuangui* interrogation is to be conducted, and outsiders have only media reports as evidence of how the interrogations are conducted in fact.[23]

At the close of an investigation, an investigation report is prepared, which will identify the facts of the case, evidence collected, recorded "attitudes" of the suspected party cadre during the investigation, and a proposed resolution (*i.e.*, recommended punishment).[24] The investigation report is then forwarded to the relevant Discipline Inspection Commission for a final decision regarding the misconduct of the suspected party cadre. At this point, the suspected party cadre will have the opportunity to address the decision maker.[25] The Discipline Inspection Commission may impose only internal sanctions, such as a warning, suspension or dismissal from a party position, or expulsion from the party.[26] If the Discipline Inspection Commission believes the suspected party cadre's misconduct is not severe enough to trigger criminal sanction, it may impose such non-criminal sanctions. If the case implicates criminal wrong-doing (and meets the thresholds for prosecution issued by the Supreme People's Procuratorate), the party member will usually be dismissed from his role in the CPC and, most likely, expelled from the CPC. At the same time, the Discipline Inspection Commission will refer the case to the People's Procuratorate for further investigation and prosecution.

> "[T]here are no published guidelines as to how *Shuangui* interrogation is to be conducted, and outsiders have only media reports as evidence of how the interrogations are conducted in fact."

Administrative Supervision Authority

The Ministry of Supervision and its local branches (collectively known as the "Administrative Supervision Authority") is an internal organ of the People's Government responsible for supervising civil servants and ensuring that they comply with laws and regulations in the exercise of their public functions. The Ministry of Supervision is the highest authority within this system, with local counterparts at the provincial, municipal and county levels. At each level of government, the Administrative Supervision Authority reports to the People's Government at the same level and the Administrative Supervision Authority at the next higher level.

The Administrative Supervision Authority is responsible for investigating all types of misconduct or dereliction of duty among civil servants, including corruption related offenses. It is an administrative organ that supervises civil servants, while the Discipline Inspection Commission is an internal body of the CPC which supervises party members. In practice, most civil servants are also CPC members, giving rise to overlapping jurisdiction between the two bodies. Because of this fact, the Administrative Supervision Authority and the Discipline Inspection Commission functionally merged in 1993. Although each maintains its own name and is governed by its own set of regulations, the two organs share the same staff and facilities. While formally separate, an Administrative Supervision Authority investigation and a Discipline Inspection Commission investigation of the same facts are usually conducted at the same time by the same staff.

The Administrative Supervision Authority has the power to conduct investigations regarding the violation of civil service rules,[27] although such investigations are usually conducted in conjunction with the Discipline Inspection Commission's process. Like the Discipline Inspection Commission, it has the power to collect and compel the production of evidence[28] and the power to freeze bank accounts.[29] It may also compel the suspects to explain

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23. Andrew Jacobs, "Accused Chinese Party Members Face Harsh Discipline," *The New York Times* (June 14, 2012), http://www.nytimes.com/2012/06/15/world/asia/accused-chinese-party-members-face-harsh-discipline.html?pagewanted=1&_r=1.
24. Article 34 of the Regulations on Case Inspection of Discipline Inspection Commission of the Communist Party of China.
25. Article 14 of the Regulations of Judgment of Party Members' Violation of the Party's Disciplines (promulgated by the Central Commission for Discipline Inspection of the Communist Party of China in 1991).
26. Article 10 of the Regulations of Disciplinary Sanctions of the Communist Party of China.
27. Article 2 and 3 of the P.R.C. Administrative Supervision Law (promulgated by the Standing Committee of the National People's Congress and last amended in 2010).
28. *Id.* at Art. 20 (1).
29. *Id.* at Art. 21.

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and clarify issues relevant to the matters during the investigation at a designated time and place. Unlike the Discipline Inspection Commission's *Shaungui* procedure, the Administration Supervision Authority does not have the power to officially or unofficially detain suspects or witnesses.[30] During the investigation, the suspected civil servant has no right to engage an attorney as his or her representative. The Administrative Supervision Authority must conclude its investigation within six months of an investigation's commencement,[31] unless there are "special reasons" in which case the investigative period can be extended to up to one year. "Special reasons" would be present, for example, if the case involves numerous people or if there are obstacles to collecting evidence.[32] If any violation of civil service regulations or other relevant law is detected, the Administrative Supervision Authority can impose penalties ranging from a warning to dismissal from the civil service. As with the Discipline Inspection Commission, when the investigation conducted by the Administrative Supervision Authority closes and the misconduct of the civil servant is of a nature which could trigger criminal sanction, the Administrative Supervision Authority will refer the case to the People's Procuratorate for further investigation and prosecution.

Administration of Industry and Commerce

Administrations of Industry and Commerce ("AIC") are administrative organs mainly in charge of market regulation and supervision. In addition, as provided by the P.R.C. Anti-Unfair Competition Law, the AICs at county level or above are also the competent authority in charge of investigating and punishing commercial bribery which falls below the criminal prosecution thresholds. Within the AIC system, the State Administration of Industry and Commerce ("SAIC") is the highest authority and it has local counterparts at each provincial, municipal and county level. Municipal and county AICs report to the Provincial AIC, which in turn reports to the SAIC.

AICs are authorized to carry out on-site anti-commercial bribery investigations and collect evidence during the investigation process. Depending on the results of the investigation, the AIC may refer the case to the Public Security Bureau for further investigation or to the People's Procuratorate for prosecution. Otherwise, the AIC may impose an administrative fine ranging from RMB10,000 to 200,000 and/or confiscation from the violator of illegal income generated from bribery.[33] The risk of such a confiscation is perhaps one of the most important risks facing multinational firms in China

The SAIC also has promulgated detailed anti-commercial bribery implementation rules, the most important of which is the Tentative Provisions on Prohibition of Commercial Bribery, issued in 1996. These SAIC rules contain non-exhaustive examples of transactions that can constitute commercial bribery and definitions for some key terms such as what is a lawful discount. According to the data disclosed recently by an SAIC official, AICs across the country have conducted more than 28,000 commercial bribery-related investigations over the past five years.[34]

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30. *Id.* at Art. 20 (3).
31. *Id.* at Art. 33.
32. *Id.*; Article 36 of the Implementation Rules of the P.R.C. Administrative Supervision Law (issued by the State Council in 2004).
33. Article 9 of the Tentative Provisions on Prohibition of Commercial Bribery (issued by the State Administration of Industry and Commerce in 1996).
34. Disclosed by Ren Airong, the director of Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of the SAIC during an interview in July 2012, http://cpc.people.com.cn/n/2012/0711/c77791-18495680.html [Chinese].

Korea's *China Eastern Airlines* Case: A Comparative Perspective on the "Foreign Official" Debate

In February of this year, the District Court of Incheon, Korea, found two individuals not guilty of violating the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions (the "Act")[1] in connection with alleged payments made to the president of the Korean subsidiary of China Eastern Airlines.[2] The case attracted significant media attention when it was commenced in May 2011. At the time, the prosecution erroneously announced it to be the first instance of charges under the Act – while the Act has not been aggressively enforced since its adoption in 1999, 19 individuals have been prosecuted under it, beginning in 2002.[3] The China Eastern Airlines case, however, was the first time charges were brought against parties engaged in commercial transactions rather than military procurement or customs importation.[4]

In its not-guilty ruling, the trial court held that the prosecution failed to prove beyond reasonable doubt an essential element, namely, that the airline (in which the Chinese government holds a controlling stake) was a foreign "enterprise" under the Act.[5] The prosecution appealed this ruling even though the defendants were convicted on other charges. Depending on the outcome of the appeal, the case could signal the expanding reach and applicability of the Korean law. The case also provides an interesting comparison to recent U.S. cases dealing with regard to who is a "foreign public official" under anti-bribery statutes like the FCPA.[6]

Korean Anti-Corruption Legislation and Enforcement

Korea passed the Act on February 15, 1999 to implement the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"), to which it became a signatory earlier that year.[7] The Act outlaws bribery of "foreign public officials," defined as elected or appointed non-Korean officials at any level or branch of government, individuals exercising "public function for a foreign government," as well as those who work for a public international organization.[8]

The Act contains two exceptions: (1) payments permitted by law;[9] and (2) as in the case of the FCPA, facilitating payments, defined as "small pecuniary or other advantage[s]" provided that they are made "to facilitate the legitimate performance of the official's business."[10]

Natural persons who violate the law are subject to up to five years' imprisonment and criminal fines.[11] Legal persons are concurrently liable for the violations of their employees and agents and may be subject to fines up to twice the amount of their profits

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1. An English translation of the Act is available at the Organization for Economic Co-operation and Development ("OECD") Anti-Bribery Convention: National Implementing Legislation website, http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/2378002.pdf.
2. Incheon Prosecutor's Office Press Rel. (May 18, 2011), http://www.spo.go.kr/incheon/notice/notice/notice01.jsp?mode=view&article_no=508687&pager.offset=30&board_no=99&stype= [Korean].
3. Not all of these cases led to convictions and the vast majority of them dealt with bribes paid to foreign military officials stationed in the country. *See* Bumjoon Park, "Incheon Prosecutor's Office Reversed its Earlier Announcement," *Incheon Ilbo* (May 23, 2011), http://news.itimes.co.kr/news/articleView.html?idxno=420282 [Korean].
4. Bribery cases involving foreign business officials are prosecuted principally via charges under Korea's domestic misappropriation and embezzlement laws. *See* Yongtae Jin, "Exporters Brace for Anti-Bribery Law," *Seoul Economy* (Oct. 23, 2011), http://economy.hankooki.com/lpage/society/201110/e2011102316471193800.htm. [Korean].
5. Decision of the Court, District Court of Incheon, 2011 gohap 277, 294, 757 at 31-32 (12th Crim. Dep't Feb. 14, 2012) [hereinafter "February 2012 Decision"].
6. *See* Sean Hecker, Philip Rohlik & Michael A. Janson, "Carson Ruling on Defendants' Challenge to the DOJ's Definition of 'Foreign Official': A Fact-Based Approach," *FCPA Update* Vol. 2, No. 10 (May 2011), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=064c31c9-70b6-4a0a-b4e1-370afcc230a3.
7. OECD, "Korea—OECD Anti-Bribery Convention" (last visited Sept. 7, 2012), http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/korea-oecdanti-briberyconvention.htm.
8. OECD Translation of Act, *supra* note 1, Art. 2.
9. *Id.* at Art. 3(2)(a).
10. *Id.* at Art. 3(2)(b).
11. *Id.* at Art. 3(1).

Korea's *China Eastern Airlines* Case ■ Continued from page 7

from the offense. Legal persons enjoy a defense if they have "paid due attention or exercised proper supervision to prevent the offen[s]e against this Act."[12]

Between the Act's passage in 1999 and the October 2011 publication of the OECD's Phase 3 Report on implementation of the OECD Convention in Korea, there had been nine convictions under the Act, including three against legal persons. The Act has largely been used to prosecute activities occurring on Korean soil, primarily with respect to bribery of U.S. Army procurement personnel based in Korea.[13] In 2008, three individuals were convicted under the Act and were sentenced to pay modest fines for providing approximately US $5,000 worth of cosmetics and offering an additional US $20,000 in cash bribes to Chinese customs and immigration officials.[14]

The China Eastern Airlines Case

In May 2011, two individuals, the CEOs of a logistics company and a travel agency, were charged by the Incheon district prosecutor with violating the Act. The individuals allegedly bribed the president of the Korean subsidiary of China Eastern Airlines to obtain a decrease in freight fees and more flight tickets for sale, respectively.[15] Although the Act allows for corporate responsibility, only the CEOs were charged. In addition to being charged under the Act, the CEOs were charged with misappropriation and embezzlement, the principal criminal charges traditionally used to prosecute corporate bribery in Korea.[16] That the recipient of the bribes was a Chinese national might have persuaded the prosecution to invoke the Act.[17]

> "The Act has largely been used to prosecute activities occurring on Korean soil, primarily with respect to bribery of U.S. Army procurement personnel based in Korea."

An essential element of the charges under the Act was that the president of a China Eastern subsidiary was a "foreign public official." Article 2(2) of the Act defines a foreign public official to include some employees of state-owned enterprises when such employees exercise a "public function for a foreign government." The definition includes:

> c. an executive or employee of any enterprise over which a foreign government holds over 50 percent of its subscribed capital or exercises substantial controlling power over its overall management including the decision of major business and the appointment or dismissal of its executives. This sub-paragraph shall not be applicable to an executive or employee of those enterprises operating on a competitive basis equivalent to entities of ordinary private economy, without preferential subsidies or privileges.

With regard to state-owned enterprises, therefore, the prosecution had to prove two elements to demonstrate that payments to employees of the relevant "enterprise" are subject to the Act: (1) "substantial controlling power" (including ownership) by a non-Korean government and (2) that the enterprise does not operate on a "competitive basis."[18] In this

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12. *Id.* at Art. 4.
13. OECD Working Group on Bribery, "Phase 3 Report on Implementation of the OECD Anti-Bribery Convention in Korea" at 47-51 (Oct. 14, 2011), http://www.oecd.org/daf/briberyininternationalbusiness/anti-briberyconvention/48897608.pdf.
14. *Id.* at 50-51.
15. *See* February 2012 Decision, note 5, *supra* at 7-8, 11-13. The Korean media covered the case extensively when it was brought to the court in May of 2011. *See, e.g.,* Junho Cha, "President of Chinese Company Lived like an Emperor," *DongA Ilbo* (May 19, 2011), http://news.donga.com/Society/New/3/03/20110519/37357351/1 [Korean]; Yonghwan Kim, "Chinese Public Airlines Bribed for More Freights," *HanKerye* (May 18, 2011), http://www.hani.co.kr/arti/society/area/478659.html [Korean]; Yongchul Lee, "Prosecutor's Bring Case against Local Head of Chinese Company for Bribery," *JoongAng Ilbo* (May 18, 2011), http://article.joinsmsn.com/news/article/article.asp?total_id=5507996&ctg=1203 [Korean].
16. Yongtae Kwon, "Local Firms Show Significant Interest in OECD's Anti-Bribery Law," *The Law Times* (Sept. 7, 2011), http://www.lawtimes.co.kr/LawNews/News/NewsContents.aspx?serial=59110&kind= [Korean].
17. Chinese publications expressed dismay at the news of a Chinese official taking bribes abroad, with some commenting that had the official been convicted of the same charges in China, he likely would have received a death sentence. *See, e.g.,* Feng Qing, "Major Corruption Investigation of [China] Eastern," *Securities Market Weekly* (May 7, 2011), http://news.hexun.com/2011-05-07/129383736.html [Chinese].
18. OECD Translation of Act, *supra* note 1.

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regard, the Act is not unique. The Commentaries to the OECD Convention (the "Commentaries"), adopted in 1997,[19] follow a similar approach. Paragraph 14 of the Commentaries defines "public enterprise" in terms of control (any enterprise over which a government or governments "exercise a dominant influence" including "when the government or governments hold the majority of the enterprises subscribed capital"). Paragraph 15 provides an exception:

> An official of a public enterprise shall be deemed to perform a public function[20] unless the enterprise operates on a normal commercial basis in the relevant market, *i.e.*, on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

The Korean district court found that the prosecution had not met its evidentiary burden of showing that China Eastern Airlines was an "enterprise." The prosecution had presented information on the airline's corporate structure, as submitted by two employees of the company. The court found that their testimony was deficient in that neither witness easily explained or verified the data they presented nor were they certain of its truthfulness. While noting that "more than a small amount of evidence" was presented on this point, the court held that not enough credible evidence was presented to satisfy the prosecution's burden of proof.[21] The judgment is not clear on whether the acquittal rests on a simple evidentiary failure regarding "substantial control" by a government or whether the issue decided related to the "operating on a competitive basis" provision of Article 2(2)(c) of the Act.

Although its shares are traded in Shanghai, Hong Kong and New York, China Eastern Airlines appears to acknowledge that it is a company ultimately owned and controlled by the Chinese government.[22] Given this fact, it would be surprising if the prosecution in a high-profile case failed due to a simple lack of evidence relating to ownership and control. Even if the acquittal was based on insufficiency of evidence, it will be instructive to see how the Korean court of appeals will react regarding the competitive basis prong of the Act when it is presented in other cases with credible evidence establishing a company's ultimate ownership or control by the Chinese state.

Who Is a "Foreign Official": Comparison of U.S. and Korean Enforcement

The question presented by the China Eastern Airlines case regarding when payments to an employee of a state-owned enterprise can generate liability under the Act provides an interesting comparison to recent U.S. case law. The issue of who is a "foreign official" under the FCPA is highly contentious. Although the United States is a party to the OECD Convention, the FCPA pre-dates the Convention by 20+ years and the language of the FCPA does not track that of the Convention. The FCPA's anti-bribery provisions apply mainly to payments or promises to a "foreign official," defined as:

> any officer or employee of a foreign government or any department or agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government department, agency or instrumentality, or for or on behalf of any such public international organization.[23]

The FCPA does not mention state-owned enterprises, nor does it include an exception for enterprises operating on a competitive basis as found in paragraph 15 of the Commentaries. Enforcement agencies and a number of U.S. courts have expressed the view that state-owned enterprises can be "instrumentalities" under the FCPA.

Prior to 2011, there was little guidance relating to when a state-owned enterprise could be considered an "instrumentality." In April and May 2011, two U.S. district courts articulated non-exclusive multi-factor tests for determining when a state-owned enterprise is a state instrumentality. Although the United States is also a party to the OECD Convention, whether the

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19. OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents, 14-19 (1997), http://www.oecd.org/dataoecd/4/18/38028044.pdf.

20. A "public function" is "any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement." *See id.*, Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions at ¶ 12 (Nov. 21, 1997).

21. February 2012 Decision, note 5, *supra*.

22. China Eastern Airlines describes its ultimate parent as CEA Holdings, which is "a state-owned enterprise established in the PRC [People's Republic of China]." China Eastern Airlines, "Annual Report" at 31 (2011) ("CEA Holding is the parent company of the Company…"); *id.* at 87 ("The Company is majority owned by China Eastern Air Holding Company ("CEA Holding"), a state-owned enterprise incorporated in the PRC."); *id.* at 197 ("The Directors regard CEA Holding, a state-owned enterprise established in the PRC, as being the ultimate holding company."), http://en.ceair.com/mu/en/gydh/tzzgx/sy/index.html.

23. 15 U.S.C. §§ 78dd-1(f)(1)(A), 78dd-2(h)(2)(A), 78dd-3(f)(2)(A).

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enterprise operates on a competitive basis was not a listed factor in either case. In *United States v. Aguilar* (known as the *Lindsey* case), the district court set forth the following non-exclusive list of factors:

- The entity provides a service to the citizens – indeed, in many cases to all the inhabitants – of the jurisdiction;
- The key officers and directors of the entity are, or are appointed by, government officials;
- The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park;
- The entity is vested with and exercises exclusive or controlling power to administer its designated functions; and
- The entity is widely perceived and understood to be performing official (*i.e.*, governmental) functions.[24]

A slightly more developed non-exclusive list was set forth in *United States v. Carson*:

- The foreign state's characterization of the entity and its employees;
- The foreign state's degree of control over the entity;
- The purpose of the entity's activities;
- The entity's obligations and privileges under the foreign state's law, including whether the entity exercises exclusive or controlling power to administer its designated functions;
- The circumstances surrounding the entity's creation; and
- The foreign state's extent of ownership of the entity, including the level of financial support by the state (*e.g.*, subsidies, special tax treatment and loans).[25]

Neither party in the *Carson* case relied on paragraph 15 of the Commentaries[26] and, except tangentially, did not address the competitive basis exception.[27]

Recently, in *United States v. Esquenazi*, the defendants appealed their conviction for FCPA anti-bribery violations based on challenges to the trial court's jury instructions concerning what constitutes an "instrumentality" of a foreign government for the purpose of defining "foreign official" under the FCPA.[28] In its brief in the United States Court of Appeals for the Eleventh Circuit, the DOJ mentioned paragraph 15 of the Convention in passing as part of its argument that exempting state-owned enterprises from the definition of "foreign official" would not comport with U.S. treaty obligations. In a footnote, the DOJ stated: "[Haiti] Telco is a 'public enterprise' under the Convention because it is state-owned, state-controlled, holds a state-granted monopoly, and receives 'preferential subsidies' and 'other privileges.'"[29] Despite having significant evidence at its disposal to do so, the United States did not explain what these "preferential subsidies" or "other privileges" were, nor did it mention how Haiti Telco operated on a basis not "substantially equivalent to that of a private enterprise." Instead, the government supported the trial court's interpretation of the law in the jury instructions, arguing that to qualify as an instrumentality, a jury may consider similar factors to those put forth in *Aguilar*:

- Whether it provides services to the citizens and inhabitants of the country;
- Whether its key officers and directors are government officials or are appointed by government officials;
- The extent of the government's ownership of the company, including whether the government owns a majority of the company's shares or provides financial support such as subsidies, special

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24. *United States v. Aguilar, et al.*, No 2:10-cr-01031-AHM, Criminal Minutes—General (C.D. Cal. Apr. 20, 2011), ECF No. 474.
25. *United States v. Carson, et al.*, No. 08:09-cr-0077-JVS, Criminal Minutes—General (C.D. Cal. May 18, 2011), ECF No. 373.
26. The government submitted a declaration by an FBI agent setting forth evidence to show that the state-owned enterprises at issue qualified as "instrumentalities" under the FCPA. *United States v. Carson, et al., No. 08:09-cr-0007-JVS*, Declaration of Special Agent Brian Smith in Support of Government's Opposition to to [sic] Defendants' Amended Motion to Dismiss Counts One through Ten of the Indictment (C.D. Cal. Apr. 18, 2011), ECF No. 334. The declaration deals with state-owned entities in China, Abu Dhabi, Korea, Malaysia, India and Saudi Arabia, describing the ownership of these companies, how they are viewed under the laws of their relevant jurisdictions, the importance of state-owned enterprises to the Chinese economy and the connection between the Chinese Communist party and state-owned enterprises. *Id.* at ¶¶ 3-13; 34-37. In terms of whether the companies operate on a non-commercial basis, the declaration contains only a few oblique references. A Korean power company is described being subject to government rate-setting, at rates "currently below . . . production costs" (implying a special subsidy), an Abu Dhabi company is described as "exempted from government fees and taxes" (implying special treatment) and a Malaysian petroleum company has a *de jure* monopoly. *Id.* at ¶¶ 15, 23, 31. The declaration contains no such references with regard to the Chinese state-owned enterprises.
27. As Professor Mike Koehler recently pointed out, the issue was raised by testimony presented by the defense in *United States v. O'Shea*, No. 4:09-cr-00629 (S.D. Tex. 2012). *See* Mike Koehler, "Did 'Foreign Official' Impact The O'Shea Acquittal?," *FCPA Professor Blog* (July 11, 2012), http://www.fcpaprofessor.com/did-foreign-official-impact-the-oshea-acquittal.
28. *United States v. Esquenazi*, No. 11-15331-C, Brief for the United States (11th Cir. Aug. 21, 2012).
29. *Id.* at 40, n.12.

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tax treatment, loans or revenue from government mandated fees;

- The company's obligations and privileges under the country's law, including whether the company exercises exclusive or controlling power to administer its designated functions; and
- Whether the company is widely perceived and understood to be performing official or governmental functions.[30]

Absent an unforeseen development, the Eleventh Circuit's forthcoming decision in *Esquenazi* will be the first time a U.S. court of appeals will opine on the definition of foreign official in the FCPA,[31] and, whatever the outcome, the decision should bring some needed guidance to companies seeking clarity on the issue.

Conclusion

In light of their participation in global trade that is likely to trigger jurisdiction, not just under Korean law but other cross-border anti-corruption laws such as the FCPA and the UKBA, Korean companies and multinational firms operating in Korea cannot take much comfort from the trial court decision in the *China Eastern Airlines* matter. Regardless of whether the Korean government wins or loses on appeal, prosecuting authorities in the United States, the United Kingdom or elsewhere may choose to exercise jurisdiction in cross-border bribery schemes. Given the plethora of state-owned enterprises in China and other countries throughout the Asia Pacific region, a compliance approach that assumes that bribery laws apply to corrupt payments to the employees of such enterprises remains advisable.

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30. *Id.*

31. *See* Mike Kohler, "DOJ Files Response Brief In Historic 11th Circuit 'Foreign Official' Appeal," *FCPA Professor Blog* (Aug. 21, 2012), http://www.fcpaprofessor.com/doj-files-response-brief-in-historic-11th-circuit-foreign-official-appeal.

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