DEALING WITH CULTURAL CONFLICTS WITH CONTEMPORARY CHINA: A PLURALISTIC CONFLICT-OF-LAWS APPROACH

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Ying Zhou

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YING ZHOU

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ABSTRACT

The global community has witnessed the rise of contemporary China as a new powerful economic presence in the world order. China has surpassed the U.S. as the world's top destination for new Foreign Direct Investment since 2020, and it continues to extend the geographical reach of its FDI outflows by fostering unprecedented global initiatives such as the "One Belt, One Road" project. Despite its significant contribution to the global economy, China's socialist market economy model, which has unique Chinese characteristics, has raised considerable skepticism and concern in the international community. For instance, China has been criticized for disrupting the international order of fair competition due to its pervasive "business culture of bribery." China's African investment has also witnessed an escalation of local resistance against the Chinese way of production, which is allegedly characterized by abusive labor practices. As China's business model plays an increasingly influential role in the global economy, its distinct Chinese characteristics have also aggravated the misunderstandings and conflicts between China and the rest of the world.

This dissertation seeks to understand the challenges that the Chinese business model presents to the global community from the perspective of cultural conflicts. By emphasizing the "Chinese characteristics" in its socialist market economy, the Chinese government has reminded us that culture matters—The rest of the world cannot effectively deal with conflicts with China and Chinese companies without a sophisticated understanding of their values and orientations. This dissertation studies cultural conflicts through two hypothetical cases. The first one, which is the major case study in this research, is concerned with the clash between the Chinese business culture of gift giving and the anti-bribery provisions prescribed by the U.S. Foreign Corrupt Practices Act. The second one is concerned with the clash of labor cultures between China and Zambia over working hours. Taken together, these two cases look at conflicts between Chinese and foreign business cultures in two dimensions: China as a global FDI destination and China's economic presence in overseas markets.

The approach that holds the greatest promise for revealing and dealing with the complexities of cultural conflicts, as I argue, is a pluralistic conflict-of-laws approach. Conflict of laws (conflicts), traditionally viewed as a branch of law aiming to solve transnational legal disputes between private persons or entities, offers a series of doctrines and technical steps to determine whether foreign or forum law should be applied to a specific case. This dissertation aims to show how the highly technical field of conflict of laws, when imagined and applied as an intellectual framework, offers new approaches to understanding, evaluating, and ultimately resolving cultural conflicts in international business. To this end, I draw insights from anthropological theories of legal pluralism and adopt a pluralistic approach to the conflicts analysis. This approach departs from the

traditional conflicts theories and doctrines which only deal with state-made laws, assuming that choice-of-law analyses could be applied to those unofficial cultural norms that impact business decisions. By applying this pluralistic conflict-of-laws approach to the analysis of the two hypothetical cases, I demonstrate how this approach brings cultural conflicts between China and the rest of the world into legally defensible ends in specific cases, and how it captures crucial insight of modern cultural anthropology—the insight that culture is dynamic, internally contested, and contextual—in this process.

BIOGRAPHICAL SKETCH

Ying Zhou, from China, joined Cornell Law School's J.S.D. program in 2016 with the Cornell Law School Graduate Fellowship. She holds LL.M. and LL.B. degrees from Cornell Law School and Shandong University respectively and has been admitted to practice law in New York and in the People's Republic of China. As a Chinese who has been living and conducting academic research in the United States for the past six years, she has witnessed how the escalating tensions between the world's two most powerful nations reinforce the "we/us vs. them/others" dichotomy. The construction of China as the problematic and exotic "Other" reflects and highlights the profound cultural differences between Western and Chinese worldviews. As an international scholar whose values and perspectives are deeply informed by both cultures, she realizes that at the heart of many legal and political conflicts between China and the U.S. lies a fundamental misunderstanding of each side's value system. This has sparked her interest in studying conflict resolution through the lens of culture. At Cornell, her research agenda straddles the intersection of cultural anthropology and international dispute resolution, exploring the implications of legal techniques for cultural debates. As a J.S.D. student, Ying was also a winner of the CALI Award at Cornell Law School in 2015; she served as the President of the JSD Association of Cornell Law School from 2017 to 2018 and was the organizer/coordinator of various international academic conferences. Ying has been appointed as a Post-Doctoral Global Fellow within the Global Fellows Program at NYU School of Law for the 2021-2022 academic year.

For Xinyu

The best love is the kind that makes us reach for more,

We achieved it, together.

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I also appreciate all the financial and academic support I received from Cornell Law School. It would be impossible for me to complete this research project without the tuition scholarship, research stipend, and full access to all the on-campus and electronic resources provided by Cornell Law School.

Additionally, I would like to express my gratitude to my parents for their tremendous understanding and encouragement in the past few years. As the only child in my family, pursuing a doctorate in a foreign nation entails a significant loss of company that my aging parents should have gotten. They have made enormous sacrifices for my achievement, including living for almost five years without their beloved daughter's company. I hope this dissertation lives up to their expectations and shows them that their sacrifices were well worth it.

Finally, I want to express my gratitude to my husband, Xinyu, to whom I owe the most, for being my best friend, most trusted confidant, and unwavering companion on this difficult path to J.S.D. graduation. We made so many sacrifices throughout the years to attain this accomplishment, especially when we had to live apart to pursue our individual ambitions. But, anytime frustration, perplexity, or loneliness threatened to sap my willpower, you were always there, on the phone or by my side, pulling me up and carrying me forward. Thank you for your everlasting love and support. This dissertation would not have been possible without you. A special thank you to my son, Ethan, who was born during the COVID-19 pandemic and my final year of J.S.D. studies. The responsibility of

being a role model has given me the courage, strength, and determination to complete this endeavor to the best of my ability.

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CHAPTER I: INTRODUCTION

This dissertation explores the clash of cultural values in international business, with a special focus on the conflicts between China and other cultures in anti-bribery and labor protection. Specifically, two core questions have motivated this research. First, what is the role of culture in shaping and resolving conflicts in international business? Second, whether legal techniques for conflict resolution can contribute new avenues for managing and accommodating cultural differences in an international business environment.

In this dissertation, I answer the first question by examining two hypothetical cases. The first case concerns the conflict between the Chinese custom of gift giving and the anti-bribery provisions of the U.S. Foreign Corrupt Practices Act.[1] The second case involves the clash of labor cultures between China and Zambia over working hours and overtime policies. In each case study, I aim to demonstrate how an evolving and sophisticated understanding of Chinese culture—as something dynamic, internally contested, and contextual—adds nuances and complexities to cultural analysis.

Subsequently, I find the answer to the second question in the highly technical field of conflict of laws (conflicts). While traditional conflicts methodologies are only constructed for dealing with collisions of official state-made laws, my dissertation adopts a slightly modified approach—a pluralistic conflict-of-laws approach. This approach draws directly on the anthropological theory of legal pluralism, supposing that conflicts shifts

[1] 15 U.S.C. §§ 78m(b), 78dd-1, 78dd-2, 78ff (1988) (originally enacted as Pub. L. No. 95-213,91 Stat. 1494 (1977), and amended by Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No.100-418, §§ 5001-5003, 102 Stat. 1107, 1415-25.

away from its exclusive focus on state law and deals with conflicts between unofficial cultural norms. By applying this pluralistic conflict-of-laws approach to the analysis of the two hypothetical cases, I demonstrate how this approach brings cultural conflicts between China and the rest of the world into legally defensible ends in specific cases, and how it captures crucial insight of modern cultural anthropology—the insight that culture is dynamic, internally contested, and contextual—in this process.

A. Toward a More Sophisticated Conception of Culture

Before delving into the complexities of cultural conflicts in international business, it is important to clarify what culture means in this dissertation. Part of the difficulty in approaching cultural debates lies in the multiplicity of culture's meanings and usages. The complexity is not merely conceptual or semantic, as different understandings and usages are inevitably associated with different political or ideological agendas of cultural studies. Even so, from Edward Tylor's extremely inclusive definition of culture as "a complex whole,"[2] to Kroeber's and Kluckholn's more precise yet still cumbersome definition of culture as "all those historically created designs for living, explicit and implicit, rational, irrational, and nonrational, which exist at any given time as potential guides for the behavior of men,"[3] and then to Clifford Geertz's most famous definition which sees the concept of culture as one that "denotes an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and

[2] EDWARD B TYLOR, PRIMITIVE CULTURE 1 (1958) (culture is "that complex whole which includes knowledge, belief, art, law, morals, custom, and any other capabilities and habits acquired by man as a member of society.").
[3] Kluckhohn, C. & Kelly, W.H., *The Concept of Culture, in* THE SCIENCE OF MAN IN THE WORLD CULTURE 78-105 (R. Linton ed., 1945).

attitudes toward life,"[4] one could still capture a growing consensus—the so-called "standard view"—of the concept of culture in North American anthropology:

> One can summarize the standard view by saying that 'culture' refers to community-specific ideas about what is true, good, beautiful, and efficient. To be 'cultural' those ideas about truth, goodness, beauty, and efficiency must be socially inherited and customary. To be 'cultural' those socially inherited and customary ideas must be embodied and/or enacted meanings; they must actually be constitutive of (and thereby revealed in) a way of life.[5]

When the concept of culture is used to excuse one's otherwise illegal conduct, it usually refers to a way of life.[6] While the use of culture in the court room is frequently debated and distrusted, modern cultural anthropologists generally agree on some "universal truths"[7] inherent in the concept of culture:

First, modern cultural anthropologists generally agree that the notion of culture does not imply the absence of debate among members of a community, and that culture is not a "well-bounded, fixed, and homogeneous block" as suggested by cultural essentialists.[8] As Karen Knop puts it, "…opinion has increasingly converged on an understanding of culture as dynamic rather than static, internally contested rather than monolithic, and contextual

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[4] CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 89 (1973).
[5] Richard A. Shweder & Les Beldo, *Culture: Contemporary Views, in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 582, 583 (James D. Wright ed., 2d ed., Amsterdam, Netherlands: Elsevier 2015).
[6] Alison Dundes Renteln, *Cultural Rights and Culture Defense: Cultural Concerns, in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 491, 491 (James D. Wright ed., 2d ed., Amsterdam, Netherlands: Elsevier 2015).
[7] Annelise Riles, *Cultural Conflicts*, 71 LAW & CONTEMP. PROBS 273, 285 (2008) ("Certainly, one cross-culturally universal truth is that in every culture, persons disagree about their cultural values."); Shweder & Beldo, *supra* note 5, at 587 (the concept of culture "does not carry most of the implications that are the supposed grounds for various anticultural critiques.").
[8] Shweder & Beldo, *supra* note 5, at 587; *see also* Karen Knop et al., *From Multiculturalism to Technique: Feminism, Culture and the Conflict of Laws Style*, 64 STAN. L. REV. 589, 602 (2012) (cultural essentialists carry "the underlying assumption that culture is associated with settled tradition and fixity, the assumption that it is monolithic and static.").

rather than simply rules."[9] Karen Knop's perspective has at least two implications for this present study of cultural conflicts. First, any claims about what *the* authentic culture of a given community is should be understood as claims made for particular instrumental purposes.[10] Second, culture is dynamic and inventive, the meaning of which might shift because of the possibility of cross-cultural translation.[11]

Second, the notion of culture does not imply that whatever other people value is in fact truly morally desirable and justifiable.[12] The notion of culture *per se* is not a theory of moral truth.[13] The tension between relativism and the search for cultural universals—"the notion that there are some things that all men will be found to agree upon as right, real, just, or attractive and that these things are, therefore, in fact right, real, just or attractive"—still resonates in today's human rights debates.[14] Traditional cultural relativism basically argues against the existence of transcultural or pancultural standards to judge the merit or the worth of other cultures, suggesting that all cultures should be of equal value.[15] However, soon after World Wars I and II, relativists' inability to make moral condemnation was critiqued by pro-rights anthropologists,[16] because they failed to respond to the atrocities of both World Wars. [17] Since then, rather than discarding relativism altogether,

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[9] Karen Knop, *Citizenship, Public and Private*, 71 LAW & CONTEMP. PROBS 309, 338 (Summer 2008).
[10] Riles, *supra* note 7, at 285 ("any assertions as to what 'the' authentic cultural values of a given society… are better understood as ideological or political claims made for a particular instrumental purpose.")
[11] Knop et al., *supra* note 8, at 602; JAMES CLIFFORD, THE PREDICAMENT OF CULTURE TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART 8 (1988).
[12] Shweder & Beldo, *supra* note 5, at 585.
[13] *Ibid.*
[14] GEERTZ, *supra* note 4, at 38; *see also* Karen Engle, *From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999*, 23 HUMAN RIGHTS QUARTERLY 536 (2001) (talking about the strained relations between culture and human rights regimes).
[15] *See* Melford E. Spiro, *Cultural Relativism and the Future of Anthropology*, 1 CULTURAL ANTHROPOLOGY 259, 260 (1986).
[16] Pro-rights anthropologists are those anthropologists who embrace human rights and attempt to mediate the tension between human rights and cultural relativism. *See* Engle, *supra* note 14, at 548-49.
[17] Engle, *supra* note 14, at 547; Clifford Geertz, *Distinguished Lecture: Anti Anti-Relativism*, 86 AM. ANTHROPOLOGIST 263, 267 (1984).

anthropologists have gradually come to a more compromised relativism perspective which puts limit on tolerance.[18] Some even deny tolerance as central to relativism.[19] For example, Alison Dundes Renteln argues that it is enculturation—"the idea that people unconsciously acquire the categories and standards of their culture"—rather than tolerance that is central to relativism.[20] By relating enculturation to ethnocentrism, she further contends that relativism does not preclude criticism against practices and values in other cultures, but relativists "will acknowledge that the criticism is based on their own ethnocentric standards and realize also that the condemnation may be a form of cultural imperialism."[21] Joining the attempts to separate tolerance from relativism, some anthropologists also assert that relativism is a method, not a theory.[22] According to them, relativism does not preclude moral judgments, but seeks to "understand another culture's beliefs and practices in their full cultural, material, and historical contexts" before any of these judgments might be attempted.[23] The strategies might be different, but modern anthropologists generally agree that relativism is not incompatible with the advocacy for human rights.

Third, the notion of culture does not imply human beings' lack of agency in making and remaking cultural constructions.[24] Human beings are active participants rather than passive recipients in culture.[25] This indicates that certain cultural practices are outcomes of personal choices rather than products of imposition and oppression.[26] The idea of agency

[18] Engle, *supra* note 14, at 553-56.
[19] *Ibid*.
[20] ALISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM 74 (1990).
[21] Engle, *supra* note 14, at 554-55 (citing RENTELN, *supra* note 20).
[22] Terence Turner, *Human Rights, Human Difference: Anthropology's Contribution to an Emancipatory Cultural Politics*, 53 J. ANTHROPOLOGICAL RES.273, 275 (1997).
[23] *Ibid.*
[24] Jerome Bruner, *The Language of Education*, 49 SOCIAL RESEARCH 835, 839.
[25] *Ibid.*; *see also* Shweder & Beldo, *supra* note 5, at 587.
[26] Knop et al., *supra* note 8, at 629.

therefore resists "reductive notions of identity" but embraces the possibility of multi-layered identity, especially when individuals connect themselves with different cultural communities for different aspects of their lives.[27] In his famous book The Predicament of Culture, James Clifford offered a detailed discussion of how "global relationality" has greatly complicated cultural identity.[28] In examining the case *Mashpee Tribe v. New Seabury et al.,*[29] where the court was to decide " whether the group calling itself the Mashpee Tribe was in fact an Indian Tribe," Clifford observed that the history of Mashpee "was a series of cultural and political transactions, not all-or-nothing conversions or resistances."[30] He observed that, rather than stick to their local past, "Indians in Mashpee lived and acted *between* cultures in a series of ad hoc engagements."[31] That is, cultural beliefs are revisable, and therefore People of Mashpee can be fully a U.S. citizen and fully an Indian, depending on their personal choices.[32] Just as Will Kymlicka argued, "…much of what is distinctive to a liberal state concerns the forming and revising of people's conceptions of the good, rather than the pursuit of those conceptions once chosen."[33] These insights caution future cultural analysis against not only the presumption that members of a specific ethnic community necessarily feel compelled to comply with the norms of that culture, but also the belief that "victims" of purportedly oppressive practices necessarily engage in that culture against their own will.

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[27] Knop, *supra* note 9, at 328 (talking about how the public/private divide creates layered cosmopolitan identity).
[28] CLIFFORD, supra note 11, at 274.
[29] Mashpee Tribe v. New Seabury et al., 592 F.2d 575 (1st Cir. 1979).
[30] CLIFFORD, *supra* note 11, at 277.
[31] *Id*. at 342.
[32] *Id*. at 306, 338.
[33] WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS 83 (1995).

Despite a growing consensus towards a more sophisticated vision of culture among anthropologists, however, the treatment of culture as something dynamic, internally contested, and contextual is still inadequately appreciated by scholarly discourses of cultural defense.[34] The cultural defense discourse, which addresses whether and how judges should consider litigants' cultural background in the disposition of cases, forms a crucial part of the larger debate over multiculturalism.[35] The major obstacles to the use of culture in the court room, besides some persistent bias toward barbarism, are the "presumption of assimilation" and the protection of women and children.[36] The undifferentiated exclusion of cultural evidence based on the "presumption of assimilation" has been easily countered by many authors.[37] As they are not the subject of this present study, I shall not delve deep into the arguments generated by different scholars, instead offering only the brief answers that have been offered. To borrow Will Kymlicka's words, in a liberal society, people "must…have the resources and liberties needed to lead their lives in accordance with their beliefs about value, without fear of discrimination or punishment".[38] Yet this respect for cultural diversity is not indiscriminate and uncritical,

[34] Riles, *supra* note 7, at 285.
[35] For discussions on cultural defense, *see generally* ALISON DUNDES RENTELN, THE CULTURAL DEFENSE (2004); Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV.1093 (1996); MULTICULTURAL JURISPRUDENCE: COMPARATIVE PERSPECTIVES ON THE CULTURAL DEFENSE (Foblets Marie-Claire & Alison Dundes Renteln eds., 2009) [hereinafter MULTICULTURAL JURISPRUDENCE]. For discussions on multiculturalism, *see* KYMLICKA, *supra* note 33; Leti Volpp, *Talking 'Culture': Gender, Race, Nation, and the Politics of Multiculturalism,* 96 COLUM. L. REV.1573 (1996).
[36] RENTELN, *supra* note 35, at 6 ("The main obstacle to the introduction of culture in the courtroom…is…the 'presumption of assimilation'."); Coleman, *supra* note 35, at 1095 ("…the use of cultural defense is anathema to another fundamental goal of the progressive agenda, namely the expansion of legal protections for some of the least powerful members of American society: women and children.").
[37] *See* RENTELN, *supra* note 35; KYMLICKA, *supra* note 33; Bhikhu Parekh, *Cultural Pluralism and the Limits of Diversity*, 20 ALTERNATIVES: GLOBAL, LOCAL, POLITICAL 431 (1995).
[38] KYMLICKA, *supra* note 33, at 81.

and the question therefore becomes more about how the court resolves the tension between the moral demands of its own way of life and those of others.[39]

Current scholarly works in cultural defense have been revolving around immigrants and indigenous peoples, focusing mostly on the use of culture in criminal cases involving gender equality.[40] Leti Volpp, in seeking to accommodate the protection of women's rights and multiculturalism, proposed that "the value of antisubordination must be a criterion in the decision as to when and how cultural factors should be presented as a defense."[41] She suggested that "only those who are subject to subordination should be permitted to use the evidence."[42] Her principle of antisubordination was later criticized by scholars, because it "results in a finding that it is primarily immigrant women who are subordinated and oppressed," and it therefore leads to an ironic use of cultural defense as affording special treatment to women "whether she is the victim or perpetrator."[43] Doriane Lambelet Coleman instead proposed a balancing approach to the use of cultural defense.[44] According to her, "the defendant's interest in using cultural evidence …must be weighed against the victims' and potential victims' interests in obtaining protection and relief through a non-discriminatory application of the criminal law."[45] Rather than individualize justice on a case-by-case basis, her balancing test instead yields the conclusion that "the interests of victims outweigh those of defendants, and thus that the cultural defense should be

[39] Parekh, *supra* note 37, at 435.
[40] For a summary of types of cases usually addressed in cultural defense literature, *see* Coleman, *supra* note 35, at 1093.
[41] Leti Volpp, *(Mis)Identifying Culture: Asian Women and the Cultural Defense*, 17 HARV. WOMEN'S L.J. 57, 97 (1994)
[42] Coleman, *supra* note 35, at 1146.
[43] *Ibid.*
[44] *Id.* at 1097.
[45] *Ibid.*

barred."[46] Her approach was again criticized as one "choosing rights over culture,"[47] which is grounded on the biased perception that the protection of women' rights requires the exclusion of any consideration of race and culture.[48] Other scholars seeking to propose a more restrictive use of cultural defense have also suggested that "use of the cultural defense be permitted only where consensual members of the same immigrant community are involved," or that "the length of time immigrants have been in the United States should be considered in deciding whether to allow the use of cultural defense," or that cultural defense should be used only by "those immigrants who are not in this country voluntarily."[49] These approaches, however, often place too much importance on one cultural aspect and fail to recognize the significance of other factors in influencing a person's cultural affiliation. Moreover, in cases where cultural defense is indeed allowed, these approaches leave unanswered the question of how to resolve conflicts caused by clashing cultural practices.

To summarize, on the one hand, existing literature in cultural defense tends to create a false impression that cultural arguments are only relevant in criminal cases involving gender equality.[50] On the other hand, since cultural defense discussed in these types of cases often put public policy at the foreground of investigation, this narrow focus has led scholars to wrongly disregard the necessity of more sophisticated cultural analyses even before demanding engagement on public policy discussions. More importantly, recent

[46] *Ibid.*
[47] *Id*. at 1098.
[48] Volpp, *supra* note 35, at 1850.
[49] *See* Coleman, *supra* note 35, at 1148-50.
[50] RENTELN, *supra* note 35, at 6-7 ("The cultural defense is usually treated as though it were only a defense strategy in criminal cases. Although the cases mentioned most frequently in the literature are those involving homicide, the cultural defense has been raised in many other sorts of criminal prosecutions…Cultural defenses are also raised in civil cases.").

literature focuses more on arguments for and against cultural defense than on approaches to tackling actual cultural conflicts before the court. As a result, existing cultural literature tends to raise more questions than answers, more puzzlement than solutions. In this dissertation, I will break through the narrow focus of traditional cultural literature, expanding the horizon of cultural debates to engage the discussions on anti-bribery and labor protection.

B. Revisit Cultural Debates in a New Light

Before exploring how business gift giving and labor practices add nuances and complexities to cultural debates, and how a slightly modified conflict-of-laws approach opens up an avenue to resolve cultural conflicts that are otherwise irresolvable by political means, it is first worth a brief review of how cultural debates usually unfolded in previous studies.

Cultural debates are often wrapped up in other domestic and foreign policy debates that are at first glance irrelevant to cultural conflicts. For example, beginning in 2017, cultural debates have once again grabbed world headlines as President Donald Trump successively promulgated two executive orders which, in part, called for the prohibition of those who engaged in "honor killings," or other forms of violence against women, from entering the United States.[51] Since honor killings are often mistakenly believed to be a "culturally specific form of violence"[52] particularly associated with women in Muslim

[51] *See* Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).

[52] Lila Abu-Lughod, *Seductions of the "Honor Crime"*, 22 DIFFERENCES 17, 17 (2011) (defining "honor killings" as "the killing of a woman by her relatives for violation of a sexual code in the name of restoring family honor," which "is marked as a culturally specific form of violence" often associated with Muslim communities).

communities, these executive orders have been criticized as a "thinly-veiled attempt to paint Muslim men as domestic abusers" and to enforce a Muslim ban policy in the name of saving women.[53] In the lawsuits filed against these executive orders, the cultural stereotypes and misunderstandings underpinning the depiction of Muslim men as "domestic abusers" became a crucial argument presented by *amici curiae*:

> Neither Islamic law nor its religious authorities, however, uniformly or consistently condone honor crimes…. the term 'honor crime' is commonly invoked by individuals and groups with an anti-Muslim agenda because it reinforces the [false] stigmatization of Muslims as violent and backward.[54]

As could be seen, executive orders that are purportedly about national security, when closely examined in their cultural dimensions, take us back to the familiar debates over the conception of culture as well as the limits of multiculturalism.[55] However, at the same time, the invocation of honor killings turns out to be yet another example of how cultural debates have become wrapped up in the treatment of women.[56] Recall, for example, that a French burkini ban which purportedly forbids Muslim women from wearing "burkini" for hygienic reasons has been criticized as an attempt to marginalize Muslim cultural garbs as unsanitary, even contaminated, and to eradicate Muslims from sight.[57] Previous to that, in 2010, France passed a rather controversial ban on face covering which practically

[53] Brief for New York University as Amicus Curiae in Support of Plaintiffs-Appellees and Affirmance at 20, Hawai'i v. Trump, 864 F.3d 994 (9th Cir. 2017) (No. 17-15589).
[54] Brief of Muslim Rights, Professional and Public Health Organizations as Amici Curiae, in Support of Appellees, and in Opposition to Appellants' Motion for a Stay and on the Merits at 16, Hawai'i v. Trump, 864 F.3d 994 (9th Cir. 2017).
[55] *Ibid.* ("Its presence in both Executive Orders—instruments that are purportedly about national security rather than domestic violence—is evidence of the invidious stereotypes about Muslims that underpin the Muslim ban policy.").
[56] Knop et al., *supra* note 8, 589-92 (discussing how debates about multiculturalism revolve around the treatment of women).
[57] Anya Cordell, *Burkini Bans, Muslim 'Hygiene,' and the History of the Holocaust*, HUFFINGTON POST (Aug. 25, 2016, 2:51 AM), https://www.huffpost.com/entry/new-kind-of-swimsuit-trauma-i-hatewhat-that-muslim_b_57b68c08e4b007f18197839f.

prohibited the wearing of face veils, headscarves, and all other distinctive Islamic dresses in public places largely in the name of promoting gender equality.[58] As manifested by the debates surrounding honor killings, "burkini ban," and the "ban on face covering," the conflict of cultural values in today's policy debates is mostly wrestled in contexts where minority women are at stake. It is the same case with debates over the use of cultural defense in criminal litigation.[59] The most prominent categories of cases often examined in cultural defense literature revolve around "wife beating and killing,"[60] "marriage-by-capture,"[61] "parent-child suicide,"[62] and "female genital mutilation."[63] Cultural conflicts are therefore often narrowly framed as conflicts between backward cultural norms and gender equality.[64]

By narrowly focusing on minority groups and gender oppression, previous cultural debates often pit exotic and stereotypical cultural practices directly against the legal protections of perhaps the most vulnerable members of the society.[65] As a result, the study of cultural conflicts often carries the biased perception that "culture" is a phenomenon that governs non-liberal peoples, and therefore such a perception of "culture" is inevitably associated with barbarity and is incompatible with some fundamental principles of liberal

[58] Sital Kalantry, *The French Veil Ban: A Transnational Legal Feminist Approach*, 46 U. BALT. L. REV. 201, 217-20 (2017).
[59] For discussions on cultural defense, *see generally* RENTELN, *supra* note 35; Coleman, *supra* note 35; MULTICULTURAL JURISPRUDENCE, *supra* note 35.
[60] *See* People v. Chen, No. 87-7774 (N. Y. Sup. Ct. Mar. 21, 1989).
[61] *See* People v. Kong Moua, No. 315972-0 (Cal. Super. Ct. Feb. 7, 1985).
[62] *See* People v. Kimura, No. A-091133 (L.A. Super. Ct. Nov. 21, 1985) (unpublished); People v. Wu, 286 Cal. Rptr. 868 (Cal. Ct. App. 1991).
[63] For discussions about female genital mutilation and other paradigmatic cases often examined in cultural defense literature, *see* Coleman, *supra* note 35, at 1105-13.
[64] Knop et al., *supra* note 8, at 592.
[65] *See* Coleman, *supra* note 35; Volpp, *supra* note 41; RENTELN, *supra* note 35.

society.[66] This largely explains why existing cultural literature often puts public policy at the foreground of investigation, seeking to weigh the value of multiculturalism against important public policies, such as gender equality and un-discriminatory criminal law enforcement.[67] This dissertation contends, however, that this narrow focus has led scholars to wrongly disregard the necessity of more sophisticated and nuanced cultural inquiries even before demanding engagement on public policy discussions. Such inquiries may include, for example, who has the authority to claim the contents of a particular culture and what to do when certain cultural practices are internally contested among members of a community? How could we make claims about, even make judgments on, a culture that is foreign to our own value system? To further complicate this inquiry, is it always for the best interest of a political community to impose its own value systems, or should it defer to foreign communities to effectuate their cultural values under certain circumstances? With public policy at the foreground of investigation, however, existing literature turns to focus more on arguments for and against cultural defense to the neglect of an equally, if not more, important question of how to frame, evaluate, and ultimately resolve value conflicts before court. It is fair to say that traditional study of multiculturalism has generally been plagued by an "intellectual and ethical morass," and that it calls for a breakthrough in both subject matters and methodologies.[68]

In the following chapters, this dissertation "takes a break" from those "backward" cultural practices allegedly oppressive to women's rights, shifting gears and engaging with

[66] WENDY BROWN, REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE 150-51 (2006) ("… 'culture' is what nonliberal peoples are…ruled and ordered by...").
[67] *See* Coleman, *supra* note 35; Volpp, *supra* note 41.
[68] Knop et al., *supra* note 8, at 592 (mentioning the "intellectual and ethical morass" faced by Western academic feminism in its debates over multiculturalism).

cultural conflicts through two case studies. The first case, which is the major case study in this research, concerns the conflict between the Chinese custom of gift giving and the anti-bribery provisions of the FCPA. The FCPA makes it a federal crime to offer money or anything of value to foreign government officials, political parties, and other prohibited recipients to obtain or retain business.[69] The FCPA's anti-bribery provisions establish jurisdiction over not only domestic entities (U.S. corporations and nationals), but also foreign issuers (foreign corporations with shares trading on a U.S. stock exchange) and non-issuing foreign agents or companies who take steps in furtherance of an improper payment scheme while in the U.S. territory.[70] Since 1978, transnational business conducted in China has triggered the largest number of FCPA enforcement actions in the world.[71] This has inspired profound interest in both academic and practical fields in exploring what makes China a business environment fraught with risks of bribery and how to deal with these risks.[72]

In the first hypothetical case, Avon Products Inc. ("Avon") and its wholly-owned subsidiary Avon Products (China) Co. Ltd. ("Avon China") were charged for bribing Chinese government officials with gifts, non-business meals, and entertainment to retain

[69] 15 U.S.C. §§ 78dd-1 to -3.
[70] *Id.*
[71] STAN. L. SCH. FOREIGN CORRUPT PRAC. ACT CLEARINGHOUSE, *Location of Misconduct Alleged in FCPA-Related Enforcement Actions (by Country)*, http://fcpa.stanford.edu/statistics-analytics.html?tab=8 (last visited Jan. 29, 2021).
[72] *See, e.g.*, Mary Szto, *Chinese Gift-Giving, Anti-Corruption Law, and the Rule of Law and Virtue*, 39 FORDHAM INT'L L. J. 591 (2016); Michael B. Runnels, *Rising to China's Challenge in the Pacific Rim: Reforming the Foreign Corrupt Practices Act to Further the Trans-Pacific Partnership*, 39 SEATTLE U. L. REV. 107 (2015); F. Joseph Warin et al., *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33(2010); Lindsay B. Arrieta, *Attacking Bribery at Its Core: Shifting Focus to the Demand Side of the Bribery Equation*, 45 PUB. CONT. L. J. 587 (2016).

business opportunities (hereinafter "the Avon case").[73] In the court, Avon and Avon China raised a cultural defense, arguing that certain gift-giving practices aligned with Chinese customs and were not in violation of the written laws and regulations of China. By doing so, they established a cultural conflict between different value systems as to the practice of gift giving. The facts and legal issues in this case are extracted and generalized from actual FCPA prosecutions.[74] However, it is hypothetical in the sense that the facts have been reorganized and presented in a logical way to allow a more nuanced and sophisticated analysis of cultural conflicts.

At first glance, cultural connotations behind an anti-bribery policy may seem even less apparent than those policies targeting Muslim communities. After all, the FCPA prosecutions against U.S.-based multinational corporations (MNCs) operating in China do not fall into any of the familiar discourses often appearing in cultural literature: Bribery bears no obvious connection to gender oppression, neither the alleged briber (MNCs) nor the alleged bribee (Chinese government officials) conjures up images of vulnerable minority groups, and the practices of gift giving do not seem as "exotic" as practices such as clitoridectomy and honor killings. Even recognizing the value conflicts triggered by extraterritorial anti-bribery prosecutions, readers might still find it not easy to take a strong moral stand against one way or another. Since the practice of gift giving exists, though in various forms and to different degrees, in all cultures throughout human history, readers'

[73] This hypothetical case is based on a real FCPA prosecution against Avon and its Chinese subsidiary in 2014. For information on the real Avon case, *see* Patricia Hurtado, *Avon Unit Gave Gucci Bags, Trips as China Bribes: U.S.*, BLOOMBERG BUSINESS (Dec.17, 2014), https://www.bloomberg.com/news/articles/2014-12-17/avon-ends-bribery-probe-tied-to-china-with-unit-guilty-plea-1-; Securities and Exchange Comm'n v. Avon Products, Inc., Complaint No. 14-CV-9956 (S.D.N.Y. Dec. 17, 2014).

[74] For discussions about bribery in real FCPA cases, *see* Annalisa Leibold, *Extraterritorial Application of the FCPA under International Law*, 51 WILLAMETTE L. REV. 225, 241- 49 (2015).

intuitions of the dividing line between acceptable gift-giving rituals and illegal bribery depend much on specific cultural contexts.[75]

The mundanity of gift giving in business occasions and the uncertainty of readers' moral intuitions about it, however, are perhaps precisely what makes it a promising place to study cultural conflicts. Rather than being bogged down in public policy debates over whose values *should* prevail from the very beginning, readers faced with highly context-dependent cultural conflicts are more likely to first inquire into the question of what *are* those values that are actually in conflict anyway. This opens up opportunities for a more nuanced and sophisticated analysis of cultural conflicts. For example, does there exist a singular concept called "Chinese gift-giving culture?" How do we make claims about the so-called "gift-giving culture" if its content is contested among those who hold affiliations with China? Does China's leadership transition to President Xi Jinping affect its anti-bribery policies and, as a result, its attitude towards the extraterritorial effectuation of American value systems? Even though the anti-bribery rules of both countries differ at the surface level, is the United States really interested in effectuating its policies in all instances regardless of its factual contacts with specific cases at hand? This is not to say that questions of this kind could not be asked in contexts where gender equality is at issue. For example, by passing a ban on veiling as an oppression of women, isn't France denying the agency of certain Muslim women in France to veil themselves as a freedom of religion and

[75] Carmen Antón et al., *The culture of gift giving: What do consumers expect from commercial and personal contexts?*, 13 J. CONSUMER BEHAV. 31, 31 ("Gift giving forms part of a symbolic exchange ritual that is common to all cultures and all periods of history."); Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT'L L. 155, 205 (2009) ("Local people in the South nations will likely be more sensitive to the differences between culturally appropriate gift giving rituals and outright bribery than Western business or law professors operating as amateur anthropologists from afar.").

an expression of identity?[76] But rather, by temporarily "taking a break" from gender-related discourses, this case study aims to show how mundane gift-giving rituals in business activities add nuances and complexities to cultural analysis, which would in turn open up fresh possibilities for future engagement with cultural debates over gender equality.

The second case concerns the clash of labor cultures between China and Zambia over working hours and overtime policies. In recent years, African countries have been expressing anti-Chinese sentiments over the treatment of African workers in Chinese mining operations.[77] When Zambian workers take the Chinese managers to court for allegedly abusive working conditions, there is more at issue than the rights of the Zambian workers vis-à-vis the Chinese corporations. Also at issue is the often neglected, but perhaps more fundamental, clash of values—e.g., the Chinese managers' work ethic might be radically different from that of Zambian workers. That is, what seems to be abusive from one cultural standpoint might look reasonable and even admirable from another. And, to further complicate the issue, there might even be a clash of values within China itself—the labor standards in practice might diverge from the black-letter labor laws on the books. The Zambian court confronting such a case therefore must seek to see the foreignness of the dispute, to understand, and finally to decide whether it should defer to a value system that is different from its own.

While existing Sino-African labor relations literature tends to focus on the plight of local African workers, my research studies cultural conflicts in China's African investment

[76] Kalantry, *supra* note 58, at 222-23.
[77] See HUMAN RIGHTS WATCH, "YOU'LL BE FIRED IF YOU REFUSE": LABOR ABUSES IN ZAMBIA'S CHINESE STATE-OWNED COPPER MINES (2011) [hereinafter HUMAN RIGHTS WATCH]; African Labour Research Network, *Chinese Investments in Africa: A Labour Perspective*, Anthony Yaw Baah and Herbert Jauch, eds., (2009) [hereinafter *Chinese Investments in Africa*].

through the lens of Chinese migrant workers. In the second hypothetical case, a Chinese mining worker sued the Non-Ferrous Metal China, Africa (NFCA), a Chinese state-owned mining corporation operated in Zambia, for wage and hour violations against Zambian labor law. Although this labor dispute is between a Chinese worker and a Chinese employer, it presents a conflict between Chinese and Zambian labor standards because the parties disagreed on the governing law of this dispute. By focusing on the perspective of Chinese migrant workers, this case highlights not only the various cultural values that underpin conflicting labor practices in China and Zambia, but also how China's work culture becomes internally contested among its own members as a result of encounters with other cultures. As a result, this case reveals more complexities and nuances of cultural conflicts that are difficult to capture from the perspective of a Zambian worker.

The approach that holds the greatest promise for revealing and dealing with the complexities of cultural conflicts in these two hypothetical cases, as this dissertation proposes, is a pluralistic conflict-of-laws approach.[78] Conflict of laws, traditionally viewed as a branch of law aiming to solve multistate legal disputes between private persons or entities, consists of three sub-divisions: jurisdiction, choice of law and judgment recognition.[79] It is a subject of private law that deals with cases involving foreign fact elements that give rise to reasonable doubt as to the application of law.[80] For example, the nationality of the parties, the location of the subject matter, the place of the wrong, or the principal place of business of the corporation might have connections with states other than

[78] The implications of conflicts methodologies for cultural debates was first explored by Karen Knop, Ralf Michaels, and Annelise Riles, *See* Knop et al., *supra* note 8, at 595.
[79] SYMEON C. SYMEONIDES, CHOICE OF LAW 1(2016).
[80] Gerhart Husserl, *The Foreign Fact Element in Conflict of Laws. Part II: Defining and Characterizing the Fact Element in Conflict Cases*, 26 VA. L. REV. 453, 453 (1940).

the forum.[81] Therefore, a contract dispute between parties from different states would fall within the realm of conflict of laws, as would a property dispute over lands situated in a state different from the parties' domicile or habitual residence. Under the conflicts analysis, jurisdiction and choice of law are two independent inquiries. The conflicts analysis decides not only which state provides the forum to adjudicate the dispute, but also whether the dispute will be resolved in accordance with the substantive law of the forum or that of the foreign state(s).[82] Therefore, a U.S. court can exercise jurisdiction but nevertheless decide to apply Chinese law, if the choice-of-law analysis turns out that Chinese law should be the governing law of the dispute. As a discipline dealing with foreign-related legal disputes, conflict of laws offers a series of doctrines and technical steps to determine whether foreign or forum law should be applied to a specific case. As this dissertation later argues, it is precisely the highly technical nature and the doctrinaire quality of conflicts analysis that make it a promising tool to resolve cultural conflicts.

Although standard conflict of laws does not engage in cultural analysis, its partnership with cultural anthropology is by no means arbitrary. As conflicts scholars have been notoriously depicted as inhabiting a "dismal swamp,"[83] the anthropologists, standing in the "conceptual morass" of culture, have incurred no less ill-repute.[84] Cultural anthropologists constantly struggle with the undiminished tension between cultural relativism and the human rights regime, and the concept of culture, which is often colored

[81] SYMEONIDES, *supra* note 79, at 1 ("the word 'state' is used to denote any country or territorial subdivision of a country, such as a state or province that has its own system of private law. Thus, the United States, a state of the United States, a Canadian province, or France, are 'states' within the meaning of this definition.").
[82] *Ibid.*
[83] William L. Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953).
[84] *See* GEERTZ, *supra* note 4, at 89 ("The term 'culture' has by now acquired a certain aura of ill-repute in social anthropological circles because of the multiplicity of its referents and the studied vagueness with which it has all too often been invoked.").

by barbarism and stereotype, is under frequent suspicion and debate.[85] The fact that both the subjects of conflict of laws and cultural anthropology give an impression of mystery and incomprehensibility is by no means coincidence. Both deal with the dichotomy of self and other: a permanent interplay between the "similarity and difference, the familiar and the strange, the here and the elsewhere."[86] As Annelise Riles argued:

> A partnership between anthropology and conflicts makes sense because both fields share a common foundational premise: what looks exotic or irrational in one context or from one point of view looks perfectly rational and even admirable from another, and to the extent possible, one should seek to understand other people's ways of knowing the world, on their own terms, before passing judgment on them according to one's own moral or legal criteria.[87]

Recently, a growing number of conflicts scholars have explored the potential of conflict of laws as a methodology, or an approach, to problems involving the allocation of regulatory powers among multi-leveled yet often heterarchical authorities.[88] Among these scholars, Annelise Riles, both separately and jointly with Ralf Michaels and Karen Knop, proposed conflict of laws as a new approach to the problems of multiculturalism—e.g., the conflicts between commitments to human rights and respect for cultural differences.[89]

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[85] For discussions about the tension between cultural relativism and human rights, to list only a few, *see* Engle, *supra* note 14, at 536-95; KYMLICKA, *supra* note 38; Volpp, *supra* note 41; Sally Engle Merry, *Human Rights Law and the Demonization of Culture (And Anthropology Along the Way)*, 26 POLIT LEG ANTHROPOL REV 55 (2003); Annelise Riles, *Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage*, 108 AM. ANTHROPOL. 52 (2006) [hereinafter *The Iron Cage*].

[86] CLIFFORD, supra note 11, at 146.

[87] Riles, *supra* note 7, at 275.

[88] For literature exploring Conflict of Laws as a promising approach to global governance at various levels, *see, e.g.*, Christian Joerges et al., *Conflicts Law as Constitutional Form in the Post-National Constellation: Special Issue of Transnational Legal Theory*, 2 TRANSNATL. LEG. THEORY 153 (2011); Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, 14 DUKE J. COMP. & INT'L L. 149 (2004); Jacco Bomhoff, *The Constitution of the Conflict of Laws*, *in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 262 (Horatia Muir Watt & Diego Fernandez Arroyo eds., 2014).

[89] *See* Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973 (2005) [hereinafter *A New Agenda*]; *The Iron Cage*, *supra* note 85; Riles, *supra* note 7; Knop et al., *supra* note 8; Knop, *supra* note 14.

Their theses take on the "self-conscious" technicalities of conflicts methodologies, which refers to an instrumentalist view of conflict of laws as consisting of "a set of doctrines and methods for resolving real disputes."[90] In their joint work, they took as their starting point what at first glance seemed to be an usual conflicts case that did not involve culture debates—"a hypothetical case based on an actual dispute litigated in California between a Japanese father and daughter over a transfer of shares."[91] However, on closer analysis, they found that this case revealed dimensions of cultural conflicts: the kinship relationship represented by Japanese "lineage company" collided with modern corporate practices.[92] Proceeding through the technical steps of a slightly modified conflicts analysis, they demonstrated how conflicts doctrines opened up an avenue to "turn an irresolvable political conflict into a narrowly tailored and technically specific one."[93]

This dissertation builds particularly on the scholarship co-authored by Annelise Riles, Ralf Michaels, and Karen Knop, aiming to further explore the implications of conflicts methods for cultural debates.[94] While the scholarship of Riles *et al.* investigates how conflict of laws offers new approaches to problems in feminist legal theory, this dissertation goes beyond the debates over women, aiming to reveal more possibilities that conflicts analysis can open up for cultural conflicts, especially in the area of transnational bribery regulation and labor protection.[95]

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[90] *A New Agenda*, *supra* note 110, at 89.
[91] Knop et al., *supra* note 8, at 594, 613.
[92] *Ibid.*
[93] *Id*. at 646, 649.
[94] *Ibid.*
[95] *Id.* at 590 (("More generally, conflicts can offer a new approach to the feminism/culture debate-if we treat its technicalities not as mere means to an end but as an intellectual style.").

While the doctrines and theories of traditional conflicts analysis are only constructed for dealing with collisions of official state-made laws, this dissertation adopts a slightly modified approach of conflicts analysis—a pluralistic conflict-of-laws approach.[96] It is pluralistic in the sense that it draws on anthropological theories of legal pluralism, which generally argues that law is not the exclusive artifact of the nation-state, but rather, it is produced by various communities that structure and regulate the behavior of their members.[97] For the purpose of this research, a conflicts analysis that is informed by legal pluralism requires that we depart from traditional conflict of laws which only deals with state-made law, assuming that conflicts analysis could be applied to those unofficial cultural norms that govern significant aspects of our lives. That is, a pluralist conflict-of-laws approach will recognize not only the conflicts between the respective written laws of China and the United States, but also the conflicts between unwritten cultural norms and written stipulations of both countries. By bringing together conversations about multiculturalism, legal pluralism, and a pluralistic conception of conflict of laws, this dissertation shows how conflict of laws, when imagined and applied as an "intellectual style,"[98] offers new approaches to understanding, evaluating, and ultimately resolving cultural conflicts. More than that though, by applying conflicts analysis to the resolution of cultural conflicts, conflict of laws can also benefit from cultural anthropology. For instance, the clash of cultural values regarding gift giving, as manifested by the FCPA extraterritorial bribery prosecutions, provides a concrete example to further excavate the

[96] Günther Teubner & Peter Korth, *Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society*, *in* REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION 23, 24 (Margret Young ed., 2010).
[97] Riles, *supra* note 7, at 294.
[98] Knop et al., *supra* note 8, at 590.

potentials of conflicts methods to recognize and deal with the conflicts among various state and non-state normative communities. This dissertation therefore also contributes to the greater effort to explore the regulatory function of conflict of laws in an era of globalization and legal fragmentation.[99]

Chapter II presents a case study on cultural conflicts between China and the U.S. over business gift giving. Chapter II.A first provides a brief introduction to the FCPA and the cultural debates surrounding it. The conflicts between the Chinese custom of gift giving and the FCPA has been explored extensively in its cultural dimensions.[100] However, this subsection argues that existing cultural debates tend to create the impression that there exists a singular concept called "Chinese gift-giving culture," a concept that is not debated or contested among those who hold affiliations with China and one that has not changed over time. Chapter II.B turns to a hypothetical case—the Avon case. In this case, Avon China invites expert witnesses to testify about the existence of a "Chinese gift-giving culture," arguing that its gift-giving practices align with Chinese customs. The expert witnesses also testify about the existing anti-corruption laws of China, saying that certain gift-giving practices are legal in China by default, which is achieved by leaving the acceptable practices out of the written stipulations of prohibited acts. Avon China also testifies about the significance of the *guanxi* culture and the fact that Avon China would

[99] *See, e.g.*, Ralf Michaels & Joost Pauwelyn, *Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law*, 22 DUKE J. COMP. & INT'L L. 349 (2012); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004); Robert Wai, *Transnational Liftoff and Judicial Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 COLUM. J. TRANSNAT'L L. 209 (2002); NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LOCAL LEGAL PLURALISM (Michael A. Helfand ed., 2015).

[100] *See* Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223 (1999) [hereinafter *Global Village*]; Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419 (1999) [hereinafter *A Threat to Global Harmony*]; Spahn, *supra* note 75.

have lost significant business opportunities had it deviated from Chinese customs. The Department of Justice ("DOJ")[101], on the contrary, invites professional anthropologists and historians to testify that there are no rigorous, commonly accepted definitions of a "Chinese gift-giving culture" and that China has become less tolerant towards gift giving since President Xi came to power. The discussion of the Avon case, through a hypothetical adversarial hearing, offers an opportunity to fully excavate the cultural nuances and complexities involved in FCPA prosecutions.

In Chapter III, I introduce a pluralistic conflict-of-laws approach to the analysis of the Avon case. This approach draws directly on the theory of legal pluralism, supposing that conflict of laws shifts away from its traditional exclusive focus on state law and deals with conflicts between various state and non-state normative orderings. Chapter III.A first provides a literature review of the anthropological theory of legal pluralism to define "pluralistic." It then proceeds to discuss the impact of legal pluralism on traditional conflicts doctrines and theories. It shows that while a growing body of scholars finds conflict of laws a helpful lens for revealing and recognizing the conflicts between various state and non-state normative systems, most scholars generally reject the idea that the technical rules of traditional conflict of laws could be a good solution to such conflicts. This dissertation, on the contrary, argues that it is precisely the highly technical nature and the doctrinaire quality of conflicts analysis that make it a promising tool to engage with cultural conflicts. Chapter III.B will then go through the Avon case again in accordance with a conflicts analysis. Following each technical step of conflicts analysis, readers will

[101] Enforcement of the FCPA is carried out by two agencies: the Department of Justice (DOJ) and the Securities Exchange Commission (SEC). *See* 15 U.S.C.A. § 78 (h)(9)(b) (2002).

see how a pluralistic conflict-of-laws approach could assist the court participants in recognizing, evaluating, and ultimately resolving the cultural conflicts inherent in the extraterritorial enforcement of the FCPA.

After exploring how certain conflicts doctrines contribute to the resolution of cultural conflicts in the Avon case, Chapter IV proceeds to show how another doctrine—the doctrine of renvoi in conflict of laws—provides new insights for cultural debates, this time through a different case study. Chapter IV first explores the cultural dimensions of labor conflicts in China's African investment. I demonstrate how the perspective of Chinese migrant workers makes us see not only the various cultural values that underpin conflicting labor practices, but also how a particular culture becomes internally contested among its own members as a result of encounters with other cultures. Chapter IV.B further demonstrates the complexities of cultural conflicts in China's African investment by presenting a hypothetical case, in which a Chinese worker sued a Chinese employer in Zambia for excessive working hours and underpaid overtime. Chapter IV.C then applies the doctrine of renvoi to the analysis of this case and shows that cultural conflicts can be avoided in certain cases because one cultural group may voluntarily defer to the other in deciding how to resolve them. Chapter V concludes by highlighting how a partnership between culture and law benefits both disciplines. In addition, I propose future research plans on the study of cultural conflicts between China and the rest of the world.

CHAPTER II: CULTURAL CONFLICTS BETWEEN CHINA AND THE UNITED STATES OVER BUSINESS GIFT GIVING

A. The FCPA and Its Extraterritorial Restriction of Bribery in China: Reviews and Critiques

Chapter I.A reveals a growing consensus among cultural anthropologists towards a more sophisticated conception of culture—the treatment of culture as something dynamic, internally contested, and contextual. This section turns to review recent studies on cultural conflicts resulted from the FCPA and its extraterritorial enforcement in China.

The FCPA is now widely acknowledged as the most burdensome anti-bribery statute in international transactions.[102] It was originally enacted by the United States in 1977 aiming to regulate American corporations' business conduct overseas.[103] Although the enforcement of this statute remained somewhat dormant during the first three decades of its enactment, starting from 1998, the U.S. government has become more vigorous in the number of enforcement actions and continues to extend the boundary of the FCPA's reach.[104] The FCPA, as presently enforced, allows U.S. prosecution of almost entirely foreign bribery conduct so long as the conduct has some—if even tangential—contact with the United States.[105]

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[102] Runnels, *supra* note 72, at 133.
[103] For the FCPA's initial legislative intent, *see* U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT. SECOND EDITION 1-3 (2020) [hereinafter THE RESOURCE GUIDE], https://www.justice.gov/criminal-fraud/file/1292051/download.
[104] Mateo J. de la Torre, *The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets*, 49 CORNELL INT'L L. J. 469, 470-71 (2016).
[105] Annalisa Leibold, *Extraterritorial Application of the FCPA under International Law*, 51 WILLAMETTE L. REV. 225, 226-28 (2015) ("The use of the U.S. mail can be sufficient to invoke jurisdiction so long as the mailing formed an incidental component of the underlying violation.").

The FCPA's ever-expanding extraterritorial jurisdiction has been accompanied by a growing number of criticisms that can be categorized into two approaches. The first strand of criticism draws directly on anthropological theories of cultural relativism, emphasizing the moral imperialism critiques against the FCPA.[106] Scholars in this strand generally argue that bribery is largely a cultural construct and that the United States, by imposing an American definition of bribery on global markets, is unjustifiably infringing on the sovereignty of other nations.[107] The second strand of criticism emphasizes the legislative purpose of the FCPA as manifested by its text and legislative history.[108] Scholars in this strand generally argue that the statute's rigorous extraterritorial jurisdiction and the negative effects on U.S. investment and foreign relations are significantly incongruent with its original policy goals.[109]

This section reviews major arguments of these two strands of criticisms. It aims to show that although the concern about cultural pluralism regarding bribery/gift giving has been extensively discussed in scholarly debates, existing literature fails to fully appreciate the concept of culture as something dynamic, internally contested, and contextual. Moreover, while existing literature generally recognizes the legitimacy of value variance regarding gift giving, it nonetheless fails to propose meaningful solutions to the resulting conflicts. Previous research tends to bind questions of jurisdiction with those of applicable law, assuming that a court's assertion of jurisdiction to adjudicate a cross-border bribery

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[106] *See, e.g.*, Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229 (1997) [hereinafter *Bribery in the Global Market*]; Salbu, *Global Village*, *supra* note 100; Salbu, *A Threat to Global Harmony*, *supra* note 100; Mateo J., *supra* note 104.
[107] *See supra* note 106.
[108] *See, e.g.*, Andrew B. Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 351-58 (2010).
[109] *Ibid.*

case inevitably leads to the application of the forum state's own norms on the dispute. In this vein, previous literature presumes that cultural conflicts resulting from the extraterritorial application of the FCPA could be avoided either by limiting the FCPA's jurisdiction or by promoting a worldwide anti-bribery legal unification.[110] This section will explain the failure of these solutions to generate satisfactory results for the complex cultural issues that the FCPA presents. As the focus of this Chapter is primarily on the interplay between Chinese *guanxi*, gift giving, and the FCPA, I do not attempt to review the full debates on value conflicts between the FCPA and other various normative communities. Instead, I mainly focus on cultural critiques against the FCPA in general, in addition to a specific focus on its interplay with the so-called Chinese *guanxi* and gift-giving culture.

1. The Cultural Pluralism Critiques

Cultural pluralism critics of the FCPA have as their fundamental premise that moral values toward bribery vary across cultures.[111] Moreover, they generally agree that externally imposed legal actions carry the dangers of legal or moral imperialism.[112] An often-overlooked divergence among them, however, is on the question of the *basis* for cultural pluralism: Does it lie in the moral status of bribery or in the opinions about what constitutes bribery? Some scholars posit that the moral condemnation of bribery is not a universally shared value and that certain communities simply have a "culture of corruption"

[110] Salbu, *Global Village*, *supra* note 100 (arguing that the FCPA's extraterritorial jurisdiction is crude and unwieldy and therefore should be limited); Spalding, supra note 108, at 351-58 (proposing to bring other nations into the OECD convention).
[111] Salbu, *Global Village*, *supra* note 100; Duane Windor & Kathleen A. Getz, *Multicultural Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values*, 33 CONNELL INT'L L.J. 731, 769 (2000).
[112] *See supra* note 111.

that tolerates bribery in business transactions.[113] For example, Dan Chow has depicted China as having a "business culture that tolerates petty corruption in the form of kickbacks, payoffs, gifts, and favors given in order to secure a business advantage or to build or fortify a business relationship."[114]

While this current study does not attempt to delve into the debates over bribery's moral status, it still wishes to point out that the depiction of other cultures as inherently corrupt carries its own significant dangers of reinforcing stereotypes and imperialism.[115] Those who claim that *China* tolerates petty corruption fail to first define the scope of China. Does China refer to the top strata of Chinese government officials, lower-level Chinese government employees, the top executives of MNCs operating in China, or common Chinese citizens with lower social status and incomes? Although corruption tends to be more rampant in some cultures than others, as is indicated in the Global Corruption Perception Index (CPI)[116], widespread participation does not equal approval.[117] As Andrew Wedeman has argued, although individual parts of the party-state apparatus, even some at the highest levels, become corrupted, the Communist Party of China (CPC) as a collective remained uncorrupted and made an attempt, albeit imperfectly, to fight back at the regime level.[118] Even at the local and informal level where corruption has become a deep-rooted

[113] *E.g.*, Warin et al., *supra* note 72, at 36 ("Further complicating enforcement efforts is the fact that the modern Chinese political infrastructure rests upon a culture of corruption."). Dan Chow, *The Interplay between China's Anti-Bribery Laws and the Foreign Corrupt Practices Act*, 73 OHIO ST. L. J. 1015, 1017 (2012) (China has a "business culture that tolerates petty corruption…").
[114] Chow, *supra* note 113, at 1017.
[115] Spahn, *supra* note 75, at 166.
[116] The Corruption Perception Index (CPI) is published by Transparency International to measure the perceived levels of corruption by expert assessments and opinion surveys. For further information on the CPI, *see* TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX OVERVIEW, http://www.transparency.org/research/cpi/overview.
[117] Salbu, *A Threat to Global Harmony*, *supra* note 100, at 422(1999).
[118] ANDREW HALL WEDEMAN, DOUBLE PARADOX: RAPID GROWTH AND RISING CORRUPTION IN CHINA 182 (2012).

illness, empirical studies on corruption have disclosed that people's attitudes toward corruption in their own country may significantly vary according to their social classes.[119] Philip Nichols's empirical research even revealed, counterintuitively, that government employees participating in public corruption are nevertheless more likely than others to find bribery harmful and are more willing to support reform efforts.[120] Another empirical study by a Chinese scholar, Xin Frank He, also found that lower-level government employees, central and high level Chinese government officials, and common Chinese citizens all have very different interests in and perceptions of the so-called Chinese culture of corruption.[121] In his landmark book *Selling China*, Yasheng Huang's empirical study further disclosed a surprising finding: Since wealthy MNCs provide more lucrative opportunities for Chinese government officials to take bribes, they actually enjoy a much more favorable legal and credit system than local Chinese private enterprises.[122] As a result, wealthy MNCs and local Chinese companies, although both operating in China, may experience Chinese gift-giving culture differently.

It is necessary to clarify, however, that references to the above empirical studies do not mean that this current study takes any of their findings as an authoritative description of the content of Chinese culture. In fact, as previously mentioned, modern cultural anthropologists tend to agree that no one has the authority to claim *the* authentic culture of

[119] *See* Philip M. Nichols, *The Fit between Changes to the International Corruption Regime and Indigenous Perceptions of Corruption in Kazakhstan*, 22 U. PA. J. INT'L L. 863 (2001).
[120] *Id.* at 943.
[121] *See* Xin Frank He, *Sporadic Law Enforcement Campaigns as a Means of Social Control: A Case Study from a Rural-Urban Migrant Enclave in Beijing*, 17 COLUM. J. ASIAN L. 121 (2003).
[122] YASHENG HUANG, SELLING CHINA: FOREIGN DIRECT INVESTMENT DURING THE REFORM ERA 122-28 (2003).

a given community, as the content of culture is always dynamic and internally contested.[123] A fact that obviously challenges Huang's findings, for example, is that since President Xi Jinping took office, China's anti-corruption campaign has delved ever-more deeply into the affairs of MNCs.[124] Against this background, many MNCs have started to feel that they are unwelcome in China and that they are more likely than before to be the subject of commercial bribery investigations by Chinese authorities.[125] Although additional empirical research is still needed to fully understand the internal divergent visions toward bribery within China, existing findings are nonetheless enough to reject any reductive vision of a single and undifferentiated notion of Chinese culture of corruption. Therefore, claims about a *Chinese* culture of corruption made based on only a small sub-group of the Chinese community are arbitrary, which will only reinforce the stereotype that corruption in emerging economies is widely accepted by local people.[126]

Moreover, those who claim that China tolerates petty corruption tend to ignore the fact that China might define corruption differently than the United States. Chinese social norms might characterize certain gift-giving practices more as acceptable relational etiquettes rather than bribery. Even the FCPA itself recognizes and attempts to accommodate cultural diversity by prescribing an affirmative defense, providing that if a specific payment or gift is lawful under the written laws of the country where it occurs, it

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[123] Riles, *supra* note 7, at 285 ("any assertions as to what 'the' authentic cultural values of a given society are…as in the context of claims to a cultural defense, necessarily are better understood as ideological or political claims made for a particular instrumental purpose.").

[124] Daniel C.K. Chow, *How China's Crackdown on Corruption Has Led to Less Transparency in the Enforcement of China's Anti-Bribery Laws*, 49 U.C. DAVIS L. REV. 685, 687 (2015).

[125] *Id.* at 699; Daniel C.K. Chow, *Why China's Crackdown on Commercial Bribery Threatens U.S. Multinational Companies Doing Business in China*, 31 ARIZ. J. INT'L & COMP. LAW 511, 524 (2014) [hereinafter *Doing Business in China*].

[126] Philip M. Nichols et al., *Corruption as a Pan-Cultural Phenomenon: An Empirical Study in Countries at Opposite Ends of the Former Soviet Empire*, 39 TEX. INT'L L.J. 215, 243 (2003-2004).

is not a crime under the FCPA.[127] In addition, the FCPA prohibits the payment of *anything of value* to any foreign official to obtain or retain business.[128] According to the official guide to the FCPA, no minimum threshold amount is set because "what might be considered a modest payment in the United States could be a larger and much more significant amount in a foreign country."[129] The reverse is also true: Gifts that are not considered the target of other countries' crackdown on corruption might nevertheless trigger FCPA prosecutions. Therefore, absent a universally agreed upon definition of corruption across cultures, the characterization of other cultures' behaviors as corrupt through one's own cultural lens carries its own dangers of imperialism.

Some scholars disagree with the idea that corruption is simply more tolerated in certain cultures than others.[130] They instead suggest that while all cultures prohibit corruption, they may disagree on the qualifications for that label.[131] Although these scholars avoid the charges of imperialism by making reasonable efforts to understand corruption through the lens of foreign cultures, their research in general still has two major problems.

First, their research fails to conduct a proper comparative analysis to understand what the law of a particular place actually is and to what extent the involved value systems are similar or different. Those who study the differences between the United States and China with regard to bribery, for example, often rely on a comparison between the FCPA

[127] 15 U.S.C. 78dd-1(c), 78dd-2(c) (2012).
[128] *Id.* § 78dd-1 (a)(1).
[129] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, THE RESOURCE GUIDE, *supra* note 103, at 14.
[130] Salbu, *A Threat to Global Harmony*, *supra* note 100, at 422-23. For those who argue that condemning bribery is a universal value, *see, e.g.*, JOHN T. NOONAN, JR., BRIBES (1984); RUSS VERSTEEG, LAW IN THE ANCIENT WORLD (2002).
[131] *See* Salbu, *A Threat to Global Harmony*, *supra* note 100.

and the relevant antibribery legislations of China.[132] While these scholars generally did a good job in collecting information about American and Chinese antibribery legislations, the comparison of these legislations more often focuses on the black-letter rules to the neglect of the possible inconsistencies between law on the books and law in action. For example, scholars often argue that the FCPA's definition of bribery is much broader because it prohibits the payment of *anything of value* to any foreign official to obtain or retain business.[133] The term "anything of value" does not set any minimum threshold amount for payments and could cover any forms of improper benefits including indirect and intangible gifts.[134] There have been cases where the FCPA prosecutors charged MNCs for corrupt payments as low as $ 67 and for sightseeing trips allegedly arranged as "factory inspections" or "trainings."[135] China, by contrast, sets a monetary threshold of 30,000 RMB (approximately $4332) for individuals and 200,000 RMB (approximately $28,570)

[132] *See, e.g.*, Enshen Li & Simon Bronitt, *Combating Foreign Bribery in China: Rethinking Zero Tolerance with 'Chinese Characteristics'*, 5 CHIN. J. COMP. L. 308 (2017); Shuangge Wen, *The Achilles Heel That Hobbles the Asian Giant: The Legal and Cultural Impediments to Antibribery Initiatives in China*, 50 AM. BUS. L. J. 483 (2013); Daniel C. K. Chow, *China's Anti-Corruption Crackdown and the Foreign Corrupt Practices Act*, 5 TEX. A&M L. REV. 323 (2018) [hereinafter *China's Anti-Corruption Crackdown*]; Chow, *Doing Business in China*, *supra* note 125; Warin et al., *supra* note 72.
[133] 15 U.S.C. § 78dd-1 (a)(1).
[134] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, THE RESOURCE GUIDE, *supra* note 103, at 14-16.
[135] Warin et al, *supra* note 72, at 50, 62.

for entities with only a few exceptions.[136] Moreover, scholars often refer to Article 385 of the People's Republic of China ("PRC") Criminal Law,[137] which prohibits the giving of "money or property" to government or Party officials, to argue that China's anti-corruption legislation mainly focuses on monetary payments and tangible financial assets.[138] This literal comparison of anti-bribery provisions of both countries creates a false impression that the United States does not differentiate between gifts and bribes and that any gifts, no matter how small, are likely to result in FCPA prosecutions.[139] Similarly, scholars attempting to know Chinese gift-giving culture based on a literal interpretation of Chinese anti-bribery statutes tend to fall into two traps. They either hold a romantic view of Chinese gift giving, depicting it as the reciprocal exchange of small favors that are perfectly acceptable under Chinese law, or hold a pessimistic view that various forms of gift in China are essentially disguised bribes that are tacitly permitted by omission in law, i.e., by leaving bribery in the forms of nonmonetary and intangible benefits out of the written enumeration

[136] Guanyu Banli Tanwu Huilu Xingshi Anjian Shiyong Falü Ruogan Wenti De Jieshi (关于办理贪污贿赂刑事案件适用法律若干问题的解释) [The Interpretation on Several Issues Concerning the Specific Application of the Law in the Handling of Criminal Bribery Cases] (jointly issued by the Sup. People's Ct. & Sup. People's Proc., Mar. 28, 2016, effective Apr.18, 2016), art.7. (China sets a monetary threshold of 30,000 RMB (approximately $4332) for prosecuting individuals with a few exceptions such as if the bribe was given to state functionaries in charge of supervision and administration of food, drugs, production safety and environmental protection, in which case the monetary threshold for prosecution is 10,000 RMB (approximately $1446)); Zuigao Renmin Jianchayuan Guanyu Xinghuizui Lian Biaozhun De Guiding (最高人民检察院关于行贿罪立案标准的规定) [The Sup. People's Proc. Opinions on Prosecution Thresholds of Bribe-giving Offences] (promulgated by the Sup. People's Proc., Dec. 22, 2000, effective Dec. 22, 2000), art. 3 (The threshold of prosecuting entities for accepting or offering bribes would be lowered from RMB 200,00 to RMB 100,000, if there is one of the following enumerated "aggregative factors": (i) to gain unlawful benefits through bribery; (ii) bribery of more than three persons; (iii) bribery of Party or government leaders, judicial officers, and administrative enforcement officers; or (iv) to cause significant damage to the state or the people.).

[137] Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (adopted at the 2nd Sess. of the Fifth Nat'l People's Cong. on July 1, 1979, revised at the 5th Sess. of the 8th Nat'l People's Cong. on Mar.14, 1997), art. 385.

[138] Chow, *China's Anti-Corruption Crackdown*, *supra* note 132, at 333 ("This provision and others show a focus on tangible financial assets acquired and owned by state officials.").

[139] Warin et al., *supra* note 72, at 61 ("A box of mooncakes given to a police officer, therefore, would fall under the statute's broad reach. In fact, any gift given to a foreign official in China exposes a company to potential liability under the anti-bribery provisions of the FCPA.").

of prohibited acts.[140] In either case, it seems that wealthy MNCs are mainly engaged with some customary practices of reciprocal exchange that are perfectly acceptable in China and that, as long as the U.S. FCPA does not get involved, both China and its U.S. business partners are happy.[141]

The law in action, however, is more complicated than the law on the books. On the one hand, the implication that the U.S. legislators and courts cannot distinguish between gifts and bribes, and that Americans do not appreciate gifts as "a form of common courtesy or a component of expected relational etiquette,"[142] is not true.[143] Quite the opposite, American scholarly works and juridical precedents have made great efforts to differentiate between gifts and bribes, and gift-giving also constitutes a vibrant part of U.S. business operations.[144] Moreover, although the phrase "anything of value" has been interpreted by the U.S. courts to cover various forms of payment with no minimum threshold amount, in practice, the FCPA prosecutors focus on minor gifts only when they form part of a larger and long-standing scheme or bribery.[145] The FCPA prosecutors have made it clear that appropriate gift-giving for business people to display respect is permitted and that only those gifts used to disguise bribes are prohibited.[146] On the other hand, it is also misleading to assume that Chinese law does not regulate various indirect or intangible gifts used to

[140] Szto, *supra* note 72, at 619 ("Today's gift-giving in China shows remarkable similarities to her ancient rituals. This is evident in rural communities, urban business, and official practices…it was observed that skilled gift-giving to establish *ganqing* and cultivate *guanxi* is an art."). Chow, *China's Anti-Corruption Crackdown*, *supra* note 132, at 333 ("In contrast, giving benefits to a state functionary that are not tangible financial assets is outside the scope of these (Chinese) laws and therefore not prohibited.").
[141] Spahn, *supra* note 75, at 210.
[142] Salbu, *Global Village*, *supra* note 100, at 234.
[143] Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 293 (1999).
[144] *Ibid.* (citing NOONAN, *supra* note 151, at 695; United States v. Dozier, 672 F.2d 531, 537 (5th Cir. 1982); United States v. Johnson, 621 F.2d 1073, 1076 (10th Cir. 1980)).
[145] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, THE RESOURCE GUIDE, *supra* note 103, at 14-16.
[146] *Id.* at 14.

disguise bribes solely based on the PRC Criminal Law. Although the FCPA criminalizes the offering of bribes to foreign government officials, China's anti-bribery framework is not limited to the PRC Criminal Law; it also includes the Anti-Unfair Competition Law of the People's Republic of China (AUCL)[147] and a set of policies and disciplinary rules issued by the Communist Party of China (CPC).[148] In 2016, the Supreme People's Court and Procuratorate of China issued a judicial interpretation providing that a bribe for 10,000 RMB (approximately $1446) could lead to a criminal penalty, but that does not mean bribes lower than 10,000 RMB would not be subjected to other penalties in China.[149] The AUCL, for example, provides the primary framework for administrative liability of business operators offering bribes to obtain business.[150] Unlike the PRC Criminal Law, the AUCL does not set any minimum threshold amount for corrupt payments and prohibits broader scope of gift-giving activities.[151] This again takes us back to the problem of characterization: what is characterized as a matter of criminal liability in the United States might be subject to administrative penalties in China. In fact, after a comprehensive examination of China's legislative and administrative antibribery instruments in recent years, one would hesitate to attribute the rampant bribery in China to the lack of antibribery laws on the books.[152] One is likely to find, on the contrary, that China has developed

[147] 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 People's Republic of China] (revised and adopted by Standing Comm. Nat'l People's Cong., Apr. 23, 2019, effective Apr. 23, 2019).
[148] Emily Tran, *Endemic Corruption in the People's Republic of China*, 17 SAN DIEGO INT'L L.J. 295, 296-98 (2016).
[149] The Interpretation on Several Issues Concerning the Specific Application of the Law in the Handling of Criminal Bribery Cases, art. 7.
[150] Law Against Unfair Competition of the People's Republic of China (promulgated by the National People's Congress, Sept 2, 1993, effective Sept 2, 1993), art. 8.
[151] *Id*., art. 7.
[152] *See* Wen, *supra* note 132, at 494-96; He, *supra* note 121, at 143-45 (discussing how strict laws-on-paper are routinely ignored in actual business practices in China).

systematic anti-bribery instruments in recent years that are similar to legislations in advanced legal systems elsewhere in the world.[153] Therefore, to understand the differences between the United States and China in regard to bribery, one should go beyond positive rules and inquire how antibribery laws are applied in practice.

Recently, a growing body of scholars has started to realize that a full understanding of China's antibribery efforts demands an investigation of its gift-giving social norms.[154] Shuangge Wen, for example, examines the connection between bribery and *guanxi*, a concept originally derived from Chinese language to describe the interpersonal relationships among people.[155] He has found that the essence of *guanxi* lies in the principle of reciprocity and that gift giving is commonly used by Chinese people to fulfill reciprocal obligations and to cultivate *guanxi*.[156] On the one hand, he acknowledges the continuing importance of gift giving in today's Chinese society as an ethical means to cultivate relationships; on the other hand, he also notices that *guanxi* and gift giving could be manipulated to achieve illegitimate benefits.[157] Different from previous cultural descriptions which tend to hold oversimplified visions towards gift giving, Wen argues that one should not place either a solely negative or an overly romantic label on Chinese gift giving.[158] Instead, he explores *guanxi* in its various dimensions and categorizes it into favor-seeking and rent-seeking types.[159] According to Wen, gift giving in favor-seeking

[153] Wen, *supra* note 132, at 496.
[154] Wen, *supra* note 132, at 496, at 507-40.
[155] *Ibid.*
[156] *Id*. at 519.
[157] *Id*. at 524.
[158] Spahn, *supra* note 75, at 195 ("In Salbu's vision, the bribes are 'reciprocities,' gifts exchanged with lovely rituals between visiting dignitaries and their foreign counterparts."); Wen, *supra* note 132, at 518 ("However, upon further reflection, it appears oversimplistic to place a solely negative label upon this long-standing and complicated Chinese cultural element.").
[159] Wen, *supra* note 132, at 524.

guanxi observes traditional ethical beliefs and is used to reinforce long-term sentimental connections among people, while gift giving in rent-seeking *guanxi* is often manipulated to secure illegitimate benefits.[160] In fact, previous to Wen's research, K. S. Yang published an influential study on Chinese interpersonal relationships in which he mapped Chinese *guanxi* onto three basic typologies: *Jia-ren guanxi* (existing among family members), *shu-ren guanxi* (existing among closely associated people, such as relatives, colleagues, and friends), and *sheng-ren guanxi* (existing among mere acquaintances or strangers).[161] Wen's research draws directly on Yang's three-dimensional taxonomy and further explores the forms and functions of *guanxi* in modern China.[162] While Yang suggests that gift exchange in *jia-ren* and *shu-ren guanxi* constitutes healthy expressions of reciprocity, Wen's research reveals increasing instances nowadays where *jia-ren* and *shu-ren guanxi* are manipulated to achieve opportunistic exchanges of benefits in today's Chinese society.[163] Wen therefore makes a special contribution in presenting a more complicated vision of Chinese *guanxi* and gift-giving practices, which echoes the anthropological insight that the concept of culture is always highly contextual and dynamic.

Empirical studies have also disclosed that perceptions and understandings of gift giving vary within the members of a certain community.[164] For example, as previously mentioned, Xin Frank He's empirical research reveals lower-level Chinese people's perceptions of gift giving between Chinese elites.[165] In addition to this, Yasheng Huang's

[160] *Id.*
[161] K. S. Yang, *Chinese Social Orientation: An Integrative Analysis*, *in* PSYCHOTHERAPY FOR THE CHINESE: SELECTED PAPERS FROM THE FIRST INTERNATIONAL CONFERENCE (L.Y. Cheng et al. eds., 1993).
[162] Wen, *supra* note 132, at 522.
[163] *Id.* at 524.
[164] Spahn, *supra* note 75, at 202-08.
[165] He, *supra* note 121.

research further discloses that foreign MNC investors and Chinese domestic companies differ in their attitudes toward gift giving between commercial entities and government officials.[166] These empirical data correspond to another important anthropological insight that the notion of culture does not imply the absence of debate among those who hold affiliations with a community.[167]

Moreover, recent studies on Chinese gift giving have started to appreciate the anthropological insight that culture is dynamic rather than static. This is evidenced by a growing body of literature exploring China's recent campaign against corruption and its impact on gift-giving practices.[168] In particular, in light of President Xi's new political agenda of a national crackdown on corruption, China begins to take an increasingly tougher stance against foreign bribery in commercial sectors.[169] In regard to bribery by foreign MNCs to domestic government officials, China used to focus only on the prosecution against those officials accepting bribes (the demand side of the bribe).[170] Facilitated by recent legislative reforms in anti-corruption, however, China's crackdown on bribery has now shifted to target equally both domestic recipients and foreign bribers.[171] China's recent prosecutions against Rio Tinto and GlaxoSmithKline (GSK), for example, are indicative of its hardened actions against corruption by MNCs operating in China.[172] The recent trend of anti-corruption in China at least rebuts the pragmatic business stereotype that the

[166] *See* HUANG, *supra* note 122, at 122-28.
[167] Shweder & Beldo, *supra* note 5, at 587.
[168] *See, e.g*., Tran, *supra* note 148; Szto, *supra* note 72; Chow, *Doing Business in China*, *supra* note 125; Chow, *China's Anti-Corruption Crackdown*, *supra* note 132; Li & Bronitt, *supra* note 132.
[169] Li & Bronitt, *supra* note 132, at 326.
[170] Chow, *Doing Business in China*, *supra* note 125, at 687-88.
[171] *See* Li & Bronitt, *supra* note 132.
[172] *Ibid.*

"culture of corruption" is widely accepted or tolerated by Chinese citizens and government.[173]

In general, existing studies on Chinese gift giving have started to disclose that (a) there does not exist a singular concept called "Chinese gift-giving culture," (b) perceptions of gift giving vary among those who hold affiliations with Chinese society, and (c) the connotation of gift giving may change overtime. Despite these advancements in understanding culture as dynamic and contextual, when it comes to the study on the interplay between Chinese gift giving and the FCPA, few scholars answer the question of how we actually deal with the conflict between Chinese and U.S. cultural values. That is to say, while legal practitioners are told that China and the United States have different cultural values regarding gift giving, and that the differences are more nuanced and complicated than they first thought, they have not been informed of the solutions to deal with these nuanced differences in actual FCPA cases.

Moreover, even though recent studies on Chinese gift giving start to appreciate the idea that culture is highly contextual, internally contested, and dynamic, they still fall prey to some other problems frequently seen in cultural literature.

The first problem is that current studies on the interplay between Chinese gift giving and the FCPA tend to ignore human being's agency in making and remaking cultural constructions.[174] They tend to suggest, for example, that MNCs are passive recipients of the so-called Chinese gift-giving culture and that MNCs have no choice but to make

[173] Spahn, *supra* note 75, at 203-05.
[174] Jerome Bruner, *The Language of Education*, 49 SOCIAL RESEARCH 835, 839 (1982).

"contributions" to Chinese government officials in order to continue doing business.[175] In attempting to explain the high incidence of commercial bribery by MNCs in China's business dealings, a common argument often raised in existing studies is that China has a culture of corruption, and that MNCs will be at a competitive disadvantage if they deviate from Chinese cultural practices.[176] One paradoxical aspect of today's moral imperialism critiques against the FCPA is that, on the one hand, the United States is portrayed as an aggressive value exporter trying to bring other countries in line with its own cultural identity; on the other hand, wealthy U.S.-based MNCs are portrayed as "victims" being oppressed by exotic customs of the host countries. Business realities, however, are perhaps more sordid.[177] Large and wealthy MNCs operating in China are far from innocent recipients of Chinese culture but instead are active participants—they are part of the gift-giving culture itself and play an important role in shaping it into what it is today. In fact, if one refers to the statements by Chinese state-controlled media, he will notice that MNCs have a completely different image in the eyes of Chinese government.[178] Chinese official media denounce MNCs as the main culprits in the recent rise in commercial bribery in China, saying that MNCs are taking advantage of China's vulnerable legal systems and bribing their way into the Chinese market.[179] *China Today* even commented that

[175] David Barboza, *Charges of Bribery in a Chinese Bank Deal*, NY. TIMES (Nov. 29, 2006), https://www.nytimes.com/2006/11/29/business/worldbusiness/29corrupt.html.
[176] *See, e.g.*, Warin et al., *supra* note 72 (suggesting that modern Chinese political infrastructure rests upon a culture of corruption, and that this culture poses great legal risks for MNCs doing business in China); Pedersen, *supra* note 2, at 15 ("This paper concludes that the FCPA does, in fact, put U.S. businesses at a competitive disadvantage in China; a rapidly developing country with enormous investment potential, yet a considerable problem with corruption.").
[177] Spahn, *supra* note 75, at 195 ("Reality is more sordid. In modern global grand corruption, the 'exchange ritual' is more likely to be very large sums of cash electronically transferred through blind trusts through various shell banks around the globe before it comes to rest to a Singapore, Dubai or Swiss numbered secret account in a private bank.").
[178] Chow, *Doing Business in China*, *supra* note 125, at 519.
[179] Jin Shanming, *Multinationals in China Must Operate According to Law*, CHINA TODAY (Sep. 25, 2013), http://www.chinatoday.com.cn/english/economy/2013-09/25/content_569718.htm.

"[m]ultinationals promoting business through bribery is nothing new; the concern is that they have moved their corruption battlefront to developing countries, especially emerging economies like China."[180] Far from being deterred by the allegedly exotic gift-giving culture, MNCs pour vast amount of money into the pockets of Chinese officials each year to compete with their local counterparts.[181] These bribes by foreign MNCs reinforce local officials' power to demand bribes.[182] Moreover, since large and wealthy MNCs provide much deeper pockets for bribes compared to local domestic companies, Huang's empirical research even disclosed that MNCs play a role in increasing the market value of bribes in China.[183] Rather than a sharp divide between "us" and "them," what one witnesses is that U.S.-based MNCs operating in China become part of the Chinese gift-giving culture itself, participating in and constantly shaping and reinforcing the gift-giving dynamic. Existing literature, however, tends to ignore the fact that U.S.-based MNCs hold multi-layered affiliations with various countries. As these MNCs cross national borders, what they experience is not an all-or-nothing conversions or resistances—not a complete assimilation into local cultures nor an unshakable persistence of their own values—but a constant forming and revising of their identities between cultures through a series of ad hoc engagements. Therefore, studies on cultural conflicts should not take for granted that members of a community necessarily stick to their local identity but seek to recognize their agency in shaping and reshaping cultural identities.

[180] *Ibid.*
[181] Spahn, *supra* note 75, at 220.
[182] *Ibid.*
[183] HUANG, *supra* note 122, at 122-28.

Another problem is that certain cultural relativism critiques against the FCPA suggest that relativism precludes any moral judgments from the outside.[184] Steven Salbu's arguments provide a prominent example of this position.[185] According to Salbu:

> Today's world remains diverse and heterogeneous, populated by groups that often have highly individualized cultural identities…. Whatever mechanisms one state may put into its laws to avoid inflicting its values on other states, moral imperialism is an ineluctable reality whenever one sovereign entity seeks to alter or control behavior inside the borders of another…. What constitutes bribery under Korean law might mean something quite different to a U.S. judge, with his or her cultural context and biases, than it would to a Korean judge operating in a different cultural context. The invasiveness of externally interpreting and assessing host country behaviors can be tempered only by the eventual, and perhaps even imminent, homogenization of cultures worldwide. Until and unless that day arrives, however, efforts to curb corruption by an externally imposed global mandate are not defensible.[186]

There are two aspects to Salbu's argument. First, he argued that the FCPA constitutes an encroachment on the host countries' abilities to regulate activities exclusively within their own borders.[187] This argument ignores the legitimate interest of the United States in disciplining its own MNCs' roles in overseas markets. In fact, as Elizabeth Spahn argued, given the devastating impacts of corruption on global economy, it is ethically appropriate, and perhaps even required, for the United States to regulate its own MNCs' overseas behavior in the dynamic duo of bribe givers and bribe takers.[188] Moreover, Salbu's argument ignores the legitimate interest of the United States in

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[184] *See, e.g.*, Salbu, *Bribery in the Global Market*, *supra* note 106; Salbu, *Global Village*, *supra* note 100; Salbu, *A Threat to Global Harmony*, *supra* note 100.
[185] Salbu, *Global Village*, *supra* note 100, at 252.
[186] *Ibid.*
[187] *Ibid.*
[188] Spahn, *supra* note 75, at 224.

protecting its own consumers in global transactions.[189] In fact, the effects of the so-called culture of corruption between bribe givers of the U.S.-based MNCs and their Chinese bribe-taking counterparts are not limited to China.[190] Scholars have uncovered that corruption can result in significant dangers to public health and safety, and that as a link in the global supply chain, American consumers are not immune from such dangers.[191] International law recognizes five traditional grounds[192] for a sovereign to assert jurisdictions, which include "nationality" jurisdiction over the conduct of the sovereign's own nationals and "protective" jurisdiction over conduct that may injure the sovereign's national interests.[193] Therefore, the FCPA's extraterritorial jurisdiction over bribery from U.S.-based MNCs to Chinese government officials does not violate principles of international law.

In the first aspect of his argument, Salbu emphasized the plurality of local values around the world as a basis to reject the FCPA's extraterritorial jurisdiction. This logic assumes that if a court asserts jurisdiction with regard to a particular cross-border dispute, it necessarily applies the forum law to that dispute. What Salbu's argument ignores is that the discipline of conflict of laws offers another possibility. As will be discussed later,

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[189] *Id.* at 210.
[190] *Ibid.*
[191] *Ibid.* ("Toxic toothpaste, contaminated milk, lead paint on easily swallowed small parts in children's toys, fake pharmaceuticals, and poisonous pet foods are just some of this year's costs of the culture of corruption between the elite bribe givers of the U.S. corporations and their elite bribe taking counterparts in China."); Upton Au, T*oward a Reconceived Legislative Intent behind the Foreign Corrupt Practices Act: The Public Safety Rational for Prohibiting Bribery Abroad*, 79 BROOKLYN L. REV. 925, 950 (2014).
[192] United States v. Yunis, 681 F. Supp. 896, 898 (D.D.C. 1988) ("There are five traditional bases of jurisdiction over extraterritorial crimes under international law including: territorial, wherein jurisdiction is based on the place where the offense is committed; national, wherein jurisdiction is based on the nationality of the offender; protective, wherein jurisdiction is based on whether the national interest is injured; universal, wherein jurisdiction is conferred in any forum that obtains physical custody of the perpetuator of certain offenses considered particularly heinous and harmful to humanity and passive personal, wherein jurisdiction is based on the nationality of the victim.").
[193] *Id.* at 899-900.

conflict of laws separates the question of which court has the authority to hear the case (jurisdiction) from the question of which normative community supplies the applicable law to govern the case (choice of law).[194] Even though a U.S. court claims jurisdiction over a specific case, conflict of laws envisages the possibility that the U.S. court will defer to Chinese law to decide the liabilities of the parties. In fact, this possibility is not new to the FCPA. The FCPA explicitly prescribes that it shall be an affirmative defense if the payments and gifts are lawful under the written laws of the host country.[195] Defenders of the FCPA's extraterritorial jurisdiction have constantly referred to this affirmative defense to argue that the FCPA respects and accommodates cultural diversity.[196] Spahn even commented that, by prescribing this affirmative defense, the United States actually places the power to regulate its own corporations' overseas bribery "solely in the hands of the bribe-receiving sovereign."[197] Salbu, of course, was aware of this counterargument and commented:

> Nichols, for example, parries the cultural imperialism charge against the FCPA by observing that "if a specific act is not illegal in the country in which it occurs, it cannot be prosecuted under a law modeled on the Foreign Corrupt Practices Act."[198] Were this statement true under all circumstances, the cultural imperialism critique would be weakened.[199]

Salbu did not believe that this counterargument would address his concerns and, as a response, he raised two rebuttals.[200] Salbu's first rebuttal demonstrated that the

[194] Knop et al., *supra* note 8, at 633.
[195] 15 U.S.C. 78dd-1(c), 78dd-2(c).
[196] Salbu, *A Threat to Global Harmony*, *supra* note 100, at 423.
[197] Spahn, *supra* note 75, at 172.
[198] Salbu, *A Threat to Global Harmony*, *supra* note 100, at 423 (citing Philip M. Nichols, *Outlawing Transnational Bribery Through the World Trade Organization*, 28 LAW & POL'Y INT'L BUS. 305, 365 (1997)).
[199] *Ibid.*
[200] *Id.* at 423-25.

affirmative defense only permits payments and gifts that are lawful under the written laws of the host country, which ignores the fact that the cultural divergence between the United States and China in regard to acceptable gift-giving practices "is very unlikely to be manifested in written laws."[201] He argued, therefore, that such ignorance of the possible inconsistencies between law on the books and law in action will significantly limit the ability of this affirmative defense to accommodate cultural differences.[202]

Salbu's second rebuttal argued that the affirmative defense would not reduce the concerns of moral imperialism even if it is expanded to include laws in action.[203] The reason, according to Salbu, is that understanding foreign laws is a daunting task fraught with formidable challenges of linguistic and cultural translation.[204] He believed that the process of understanding foreign laws is unavoidably tainted with a potential for biases and inaccuracies, the result of which is often a great likelihood of imposing U.S. values on the interpretation of another normative regime.[205] This rebuttal is also a manifestation of the second aspect of Salbu's argument, which emphasized the cultural situatedness of one's claims about foreign cultures.

In the second aspect of his argument, Salbu insisted that the interpretation of foreign laws can never be a truly unbiased process because U.S. prosecutors and judges are always situated in their own value system when making claims about foreign cultures.[206] In this respect, however, Salbu perhaps would gain some insights from the discipline experienced

[201] *Id.* at 425.
[202] *Ibid.*
[203] *Ibid.*
[204] *Id.* at 426.
[205] *Ibid.*
[206] *Ibid.*

in dealing with foreign laws: conflict of laws. The first task of conflicts analysis is to see whether the case involves a foreign element and if so, to prove the content of the foreign law.[207] As will be discussed later, conflicts scholars are familiar with all the difficulties in the proof of foreign law and they devise a series of techniques to overcome these difficulties.[208] One crucial insight from conflicts analysis is that conflicts lawyers are fully aware of their situatedness and the impossibility of finding foreign laws—there is no singular concept called "Chinese gift-giving culture" or "Chinese law." Conflicts lawyers are therefore experienced in dealing with a self-conscious impossibility: to make claims about foreign laws, recognizing at the same time that its content is highly indeterminable and contestable.[209] Annelise Riles, Ralf Michaels, and Karen Knop have referred to this type of reasoning as the "as if" modality of conflicts analysis.[210] According to them, conflicts analysis operates with fictions—in awareness of the indeterminable foreign laws, but holds, for the time being, "as if" the content of the foreign law could be proved for the specific case at hand.[211] This "as if" modality responds to the anthropological insight that cultural relativism does not preclude moral judgments.[212] Rather, cultural relativism seeks to understand another culture in its fully native setting and at the same time recognize one's own cultural situatedness before any judgments might be attempted.[213]

[207] Husserl, *supra* note 80, at 453.
[208] William B. Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CALIF. L. REV. 23, 32-39 (1957).
[209] Knop et al., *supra* note 8, at 644-45.
[210] *Ibid*.
[211] *Ibid.*
[212] Turner, supra note 22, at 275.
[213] *Ibid.*

2. The "Failed" Legislative Purposes

Another strand of criticism against the FCPA comes from those arguing that the statute's rigorous extraterritorial jurisdiction, and the negative effects it has on U.S. investment and foreign relations, are significantly incongruent with its original policy goals.[214] Andrew Brady Spalding provides a good example of this strand of criticism.[215] Spalding's research found that although the FCPA functions as de facto economic sanctions against emerging markets, such influential effects are incongruent with its original legislative purposes.[216] Although Spalding has done a great job of exploring the legislative history and purposes of the FCPA, he nonetheless fails to provide meaningful solutions to fix the inconsistencies between the policy goals of the FCPA and its ultimate effects . As Spalding himself concluded, "sanctioning emerging markets to effect bribery-reducing reforms is an enterprise fraught with ethical, economic, and foreign policy risks that scholars and policymakers should promptly address."[217] As to how exactly to address these ethical risks, however, he did not offer concrete methods. This sub-section will provide a brief overview of Spalding's findings about the FCPA's legislative purposes. It then proceeds to discuss why Spalding's own proposals are unsatisfactory for addressing the inconsistencies between the effects and policy goals of the FCPA.

Spalding relied on two principal sources to explore the legislative purposes of the FCPA.[218] He first examined the FCPA's text and found that,

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[214] Spalding, *supra* note 108, at 351-58.
[215] *Ibid.*
[216] *Ibid.*
[217] *Id*. at 385.
[218] *Id*. at 356.

> …. its manifest purpose is to punish those who supply bribes, and not to punish the recipients or solicitors, much less their governments or their fellow citizens…. The statute is thus "supply-side;" the "demand-side" is well beyond its purview.[219]

That is to say, the FCPA is intended only to target corporations and individuals that have significant connections to the United States, without any manifest intention to promote reforms in those countries perceived to have a greater tolerance for bribery.[220] The second source Spalding relied on is the FCPA's legislative history.[221] He found that the original motivation of the FCPA lied not in the absence of appropriate moral standards abroad but rather in the low standards of U.S. corporate behavior.[222] After closely examining the Senate Report,[223] the House Report,[224] and a series of testimonies and hearings before the Congress,[225] Spalding concluded,

> …. an absolute consensus existed on the question of the purpose and intended effects of the proposed legislation. Bribery is a foreign policy problem because it jeopardizes our relations with countries whose alliances we very much value…. Moreover, all agreed that these alliances must be maintained through the continued building of economic and political ties with vulnerable countries, and that the resulting legislation was therefore designed to promote investment in countries where bribery was occurring, rather than to withdraw investments as punishment.[226]

Clearly, the FCPA's legislators believed that U.S. corporations' widespread overseas bribery had seriously eroded public confidence in U.S. business enterprises and

[219] *Id.* at 366.
[220] *Ibid.*
[221] *Id.* at 357.
[222] *Id.* at 380-81.
[223] S. Rep. No. 95-114 (1997).
[224] H. Rep.No. 95-640(1977).
[225] Spalding, *supra* note 108, at 378-90.
[226] *Id*. at 384.

thereby impaired U.S. relations with foreign trading partners.[227] The motivation behind the FCPA is therefore first and foremost the restoration of image and confidence.[228] To be specific, the FCPA aims to reduce U.S. corporations' widespread overseas bribery by "enacting and enforcing comprehensive laws imposing on American corporations a standard of conduct in their overseas dealings fully as strict as that required at home."[229] Moreover, Spalding's research further uncovered the consensus among the legislators that the FCPA is by no means a tool to curb investment, but rather, it aims to build economic and political alliances with host countries through the promotion of ethical overseas investment.[230] To summarize, Spalding's study on the legislative purpose of the FCPA came to two basic conclusions: (a) the FCPA targets exclusively at bribe suppliers having substantial connections of some kind to the United States, without any manifest purpose to punish host-country recipients or their governments, and (b) the FCPA aims to promote, rather than deter, investment in those countries that are perceived to have higher risks of corruption.[231]

While the United States has so far partially succeeded in curbing overseas bribery, Spalding's research suggests that the FCPA generates a problematic collateral effect: It significantly deters U.S. investment in countries where bribery is perceived to be more prevalent.[232] That is, the FCPA's actual impacts are in some respects incongruent with its original legislative purposes.[233] Spalding's research, therefore, also attempts to explore

[227] *Ibid.*
[228] *Id.* at 389.
[229] *Id.* at 382 (citing Foreign and Corporate Bribes: Hearings Before the S. Comm. on Banking, Housing, and Urban Affairs, 94th Cong. 39, at 40-41 (1976) (statement of George Ball, Lehman Bros)).
[230] *Id.* at 378.
[231] *Id.* at 358.
[232] *Id.* at 355.
[233] *Ibid.*

how the FCPA could be reformed to achieve the goal of "deterring bribery without deterring investment."[234] To this end, Spalding proposed three reforms in his research.[235] The third proposal concerns a theory of liability under criminal law—*respondeat superior*—which is beyond the scope of this research. Therefore, the rest of this sub-section examines the first two reforms proposed in Spalding's research, demonstrating why his proposals are unsatisfactory in aligning the FCPA's actual effects with its policy goals.

The first proposal Spalding offered is to level the playing field for U.S. businesses in international markets.[236] He proposed to expand the signatories to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention).[237] By signing the OECD Anti-Bribery Convention, capital-rich countries that had not previously ratified anti-bribery conventions, such as China and India, are subject to the same obligation to criminalize bribery of foreign officials.[238] What Spalding proposed is the virtual equivalent of a progressive unification agenda of global anti-bribery legislations. The logic behind this proposal is that once other countries adopt similar anti-bribery laws, the United States will stop being alone in prosecuting business-related bribery of foreign government officials. Hence, U.S. corporations will be brought back onto an even playing field with foreign competitors that previously had looser rules against bribery.[239]

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[234] *Id.* at 351.
[235] *Id.* 401-06.
[236] *Id*. at 401.
[237] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I. L. M. 4 (1998) [hereinafter the OECD Anti-Bribery Convention].
[238] Spalding, *supra* note 108, at 401.
[239] *Id*. at 391-92

The first problem with this proposal, which Spalding himself admitted, is that global legal heterogeneity remains a compelling reality and, therefore, world-wide unification of anti-bribery legislations is not going to happen anytime soon.[240] As a result, Spalding's proposal fails to provide meaningful guidance to the enforcement of the FCPA in terms of the status quo of global legal heterogeneity. A more fundamental problem with his proposal, however, is that the dream of global legal unification will probably never come true. Gunther Teubner has strongly argued that any aspirations to a unification of global law are doomed from the outset.[241] According to Teubner, the fragmentation of global law is originated in the more fundamental fragmentation of global society itself, which can never be combated.[242] Paul Schiff Berman even took the 1980 Convention on Contracts for the International Sale of Goods (CISG) as an example to argue that any legal harmonization regimes are themselves the product of pluralism and could never completely eliminate pluralism.[243] This is in part because, even though the laws of each state may be uniform at the surface level, pluralism inevitably creeps in as different states might interpret and apply the same laws differently in their judicial practices.[244] China provides a good example to illustrate this argument. In fact, although China has not ratified the OECD Anti-Bribery Convention, it joined the United Nations Convention against Corruption (UNCAC)[245] in 2003 and amended its Criminal Law to prohibit bribery of foreign government officials thereafter.[246] Even so, Chinese methods of interpretation and

[240] *Id.* at 402.
[241] Teubner & Fischer-Lescano, *supra* note 99, at 1004.
[242] *Ibid.*
[243] *See* Paul Schiff Berman, *The Inevitable Legal Pluralism within Universal Harmonization Regimes: The Case of the CISG*, 2016 UNIF. L. REV. 1-18 (2016).
[244] *Id.* at 3.
[245] United Nations Convention against Corruption, Oct. 31, 2003, G.A. Res. 58/4, art. 16.
[246] Criminal Law of the People's Republic of China, art. 164.

implementation of anti-bribery provisions still overwhelmingly reflect its own cultural, historical, and political traditions, which are profoundly different from those of the United States.[247] Therefore, China could definitely join the United States in prohibiting the bribery of foreign government officials, insisting all the while that it has different moral values regarding what qualifies bribery. In other words, the discrepancies between Chinese and U.S. normative regimes regarding bribery cannot be simply eliminated through the imposition of universal codes of conduct. Instead, one should recognize pluralism as a reality that will never disappear and seek to find a legal approach to solving the conflicts between colliding normative regimes.

The second proposal Spalding offered is to call for the demand-side anti-bribery legislations.[248] Again, Spalding proposed to expand signatories to conventions that prohibit the solicitation or receipt of bribes.[249] The logic behind this proposal is that once host countries adopt laws that prohibit the solicitation or acceptance of bribery, U.S. companies will be less fearful of doing business in these countries.[250] This proposal once again ignores the fact that host countries might define bribery differently than the United States and that they might characterize the demand of certain gifts more as acceptable relational etiquettes than bribery. At core, Spalding's exclusive attention on the surface-level uniformity of anti-bribery legislations can do little to curb cultural differences between nations in the interpretation and implementation of anti-bribery regimes. Such disregard of cultural

[247] Wen, *supra* note 132, at 522, 538.
[248] Spalding, *supra* note 108, at 402.
[249] *Ibid.*
[250] *Ibid.*

differences, unfortunately, would only severely disadvantage U.S. enterprises in their host-country operations.

In summary, Spalding's proposals would not enable the FCPA to deter bribery without deterring investment. He identified the right problem but probably got the wrong solution. He correctly believed that those problematic collateral effects of the FCPA's implementation (the deterrent of U.S. overseas investment, the charges of moral imperialism, and the deteriorating foreign relations with emerging markets) are largely the result of global legal heterogeneity.[251] He then suggested, however, that such problematic effects could be eliminated by imposing universal anti-bribery laws, which I disagree. As previously discussed, the world-wide ratification of anti-bribery conventions, which Spalding clearly advocates, would not eliminate cultural differences among states in their conception and treatment of bribery. It is therefore better to adopt an opposite approach that treats global legal heterogeneity as a reality, admitting the premise that the FCPA must operate in a multivariate world. The goal is to identify the respective legislative purposes embodied in the laws of the involved states (e.g., the United States and China), determining whether each state has a reasonable interest in having its particular laws applied to a specific case to effectuate its policies. The result of this approach might well be that the United States is "disinterested" in seeing its policies effectuated in a particular bribery case, and that, therefore, it determines to defer to Chinese law to decide that case.

The approach this current study suggests draws directly on a fundamental theory of modern conflicts analysis—Brainerd Currie's theory of "governmental interest

[251] *Id.*

analysis."[252] This theory assumes that states have an interest in the outcome of multistate disputes, and that states seek to maximize their gains through having their laws applied to a matter to effectuate their policy goals.[253] In fact, the notion that a state should assert a strong interest in interstate dispute is not a novel one.[254] What is new, however, is the notion of "disinterestedness."[255] Under Currie's analysis, a false conflict refers to the situation where, although the laws of the involved states differ at the surface level, conflict does not exist because only one jurisdiction is interested in seeing its policies effectuated in a particular case."[256] That is, fewer than expected conflicts exist because a state might be disinterested in effectuating its policies with respect to particular parties in a specific case. For example, following Spalding's study on the FCPA's legislative purposes, it's not hard to detect a very basic premise behind the legislation of the FCPA. This premise assumes that bribery is an absolute wrong and that what is considered bribery in the United States is in most cases also incongruent with the cultural values of host countries, otherwise U.S. corporations' overseas bribery would not impair the esteem for the United States among foreign nations.[257] All the cultural pluralism critiques aside, which have been examined in detail in the previous sub-section, governmental interest analysis suggests looking at this premise the other way around. That is, if U.S. corporate practices are not considered corrupt in foreign host countries, the interests of the United States in protecting its general reputation in international trade and maintaining its economic alliances with foreign markets would not be jeopardized. In that case, the United States might defer to

[252] BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 138 (1963).
[253] SYMEONIDES, *supra* note 79, at 99.
[254] *Ibid.*
[255] Knop et al., *supra* note 8, at 638
[256] *Ibid.*
[257] *Id.* at 389, 400.

another value system because the application of its own laws would not benefit the policy goals of the FCPA. This interest analysis approach will be explained and applied in detail in Chapter III.B.4.

B. Bribery or Gifts? A Hypothetical Case

The previous section provides a review of existing studies on the FCPA's extraterritorial prosecution of bribery and the resulting encountered cultural conflicts. Existing studies failed to fully excavate cultural nuances and complexities involved in FCPA prosecutions. Moreover, the elimination of cultural conflicts, whether by the denial of the legitimate interest of the United States in regulating its own MNCs' roles in overseas markets, or by the imposition of universal norms upon global markets, is not productive. Before introducing the pluralistic conflict-of-laws approach to cultural conflicts, the present section first presents a hypothetical FCPA litigation. By examining this hypothetical case, readers will develop a more concrete idea of cultural conflicts in FCPA litigation.

The usage of a hypothetical case may incur skepticism; indeed, in the real world, most FCPA cases are settled through a deferred prosecution agreement (DPA) or non-prosecution agreement (NPA) rather than adversarial proceedings before a neutral judge.[258] MNCs tend to avoid formal litigation because the negative collateral consequences resulting from an FCPA prosecution are usually too great for them to afford.[259] Even the release of press commentary informing that an MNC is facing an FCPA investigation can

[258] Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the 'Culture of Compliance'*, 2012 WIS. L. REV. 689, 689 (2012).
[259] *Id.* at 696.

produce significant reputational harms, let alone a formal indictment or conviction.[260] Furthermore, even when a defendant corporation chooses to go to trial, litigating an FCPA case often demands prohibitive costs. For example, overseas collection of evidence, specialized FCPA-defense attorneys, and the use of expert witnesses all greatly increase litigation costs.[261] Sometimes, even a final judgment of acquittal is not enough to save a defendant corporation because the long-running lawsuit itself may very well lead the company to bankruptcy.[262] For such practical reasons among others, most defendant MNCs end up pleading guilty and paying a substantial fine, rather than proceeding to trial and claiming their defenses.[263] Each legal concession is therefore based on unique negotiations between prosecutors and defense attorneys, which does not necessarily reflect defendant corporations' true positions had the case been tried in adversarial proceedings. Precisely because of such conscious avoidance of formal litigation, there has been a lack of concrete case studies on cultural conflicts between the U.S. and host-country value systems regarding bribery. To take the FCPA's extraterritorial enforcement in China as an example: while research on the FCPA and Chinese gift-giving practices has made much progress, few studies address exactly how to deal with conflicts between different cultural practices in transnational bribery cases.

While insufficient real-life litigation contributes to a scarcity of corresponding academic research, the lack of case studies in turn further aggravates the unwillingness of corporations to attempt defending themselves in the court room. In fact, the dearth of

[260] *Ibid.*
[261] *Id.* at 702.
[262] *Id.* at 698 ("The U.S. Supreme Court ultimately overturned Arthur Andersen's criminal conviction but the appeal came too late to save the firm from going out of business.").
[263] *Id.* at 697.

judicially-established case law largely explains why ambiguities regarding the FCPA's scope and application remain unsettled until today. Defendant corporations are not taught how to claim culture as a defense to justify their otherwise routine practices qualified as illegal in a different cultural context. Attorneys have few binding case laws from which to advise their clients on whether a certain gift-giving practice constitutes an illegal payment under the FCPA. Similarly, judges lack enough precedents and academic resources on the manner of framing, evaluating, and ultimately resolving cultural conflicts in transnational bribery litigation. Frequent resort to settlement mechanisms may therefore result in over-enforcement of the FCPA because prosecutors might interpret and enforce the FCPA in a way that a court faced with the same case would not agree, as they lack enough case guidance as to how to reveal, recognize, and appreciate legitimate cultural practices during bribery investigations. A detailed analysis of a hypothetical FCPA litigation is therefore necessary in order to comprehend how potential defendant corporations may be assisted, and how prosecutors and judges may be guided, in the resolution of cultural conflicts in FCPA cases. The facts and legal issues in the hypothetical case are extracted and generalized from actual FCPA investigations in recent years, but they are hypothetical in the sense that the facts have been reorganized and presented in a logical way to allow a more nuanced and sophisticated analysis of cultural conflicts.[264]

[264] For discussions about real FCPA cases, *see supra* notes 73, 74.

1. *The Avon Case*[265]

In 2018, the DOJ prosecuted Avon and its Chinese subsidiary Avon China for bribing Chinese government officials in order to obtain business benefits. Avon, incorporated and headquartered in New York City, is one of the world's largest direct-sell companies dealing in beauty products. Avon issues and maintains a class of publicly traded securities registered pursuant to Section 12 (b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78l) and is required to file periodic reports with the SEC under Section 13 of the Securities Exchange Act (15 U.S.C. §78m).[266] Avon China, established and operated in Guangzhou, China, is a wholly owned subsidiary of Avon. Avon controls two other Chinese subsidiaries through Avon China: Avon Manufacturing (Guangzhou) Ltd. (Avon Manufacturing China), and Avon Healthcare Products Manufacturing (Guangzhou) Ltd. (Avon Healthcare China). Avon China's books, records, and accounts are consolidated into Avon's books and reports and reported by Avon in its financial statements.

The DOJ's general allegations may be summarized as follows:

Avon entered the Chinese market around 1990. Beginning in 1998, however, the Chinese government outlawed direct selling, which was the primary business model of Avon. For a few years, Avon had to market its products through independently owned retail operations named "Beauty Boutiques." Around 2001, as a precondition of its entry into the World Trade Organization ("WTO"), China agreed to gradually lift its ban on direct selling and decided to issue one company a temporary license to conduct direct sales. Avon China

[265] In 2014, Avon settled charges by the DOJ and SEC for violating the FCPA, *see* Philip Wahba, *Avon Settles Justice Department Charges of China Bribery for $135 Million*, FORTUNE (Dec. 17, 2014), http://fortune.com/2014/12/17/avon-bribery-probe-settlem ent/. In this dissertation though, the facts and the legal issues are hypothetical and are for academic research only.
[266] 15 U.S.C. §§ 78m, 78dd-1.

wanted to take this opportunity to become the first company in China to implement direct selling. In early 2005, the Chinese government awarded the temporary license to Avon China. Later in the same year, China officially lifted its ban on direct selling and allowed companies to apply for licenses to conduct direct sales. China's regulations require, however, that licensees have a good business reputation and a record that demonstrates no material violations of Chinese law for the preceding five years. The DOJ's investigation revealed that from at least 2004 to 2008, Avon China insured its receipt of the first direct-selling license in the Chinese market with a total of $8 million in cash, gifts, non-business meals, travel and entertainment to Chinese government officials and state media reporters. The specific incriminating evidence included:

1. Gifts to government officials: Avon China created and maintained a Corporate Affairs Group whose duties were to maintain *guanxi* with Chinese government officials and lobby those officials on behalf of Avon China. In the employment agreements, employees of the Corporate Affairs Groups agreed to bring Avon China to the attention of relevant Chinese governmental departments and to develop *guanxi* to successfully conduct business. These governmental departments include the Ministry of Commerce (MOFCOM), the State Administration for Industry and Commerce (AIC), and other governmental agencies responsible for the regulation of direct-selling licenses. The Corporate Affairs Group, and other Avon China executives and employees, routinely gave gifts such as products of Avon, vintage wines, mooncakes, and personal luxury items to Chinese government officials. In 2006, for example, it was revealed that Avon China employees falsely described an approximately $5000 gift of Louis

Vuitton products for government officials as a business entertainment expense. In 2008, Avon China falsely recorded a total of $3000 in mooncake gift sets as a public relations entertainment expense.

2. Meals and entertainment: Avon China created and maintained a "Direct Selling Special Task Force (the Task Force)," which was comprised primarily of employees from the Corporate Affairs Group. The aim of the Task Force was to obtain direct selling approvals through the establishment and maintenance of *guanxi*. From 2004-2008, employees of the Task Force routinely spent money on meals, entertainment, and lodging for Chinese government officials in order to secure selling licenses for products that did not meet government standards. Moreover, Avon China sponsored several cultural events for the MOFCOM and the AIC on important Chinese festivals, such as the Mid-Autumn Festival and the Chinese New Year.
3. Non-business travel expense: In 2005, Corporate Affairs Group employees took five officials from the Guangdong Food and Drug Administration to the headquarters of Avon in New York City and its research facility in upstate New York. During this alleged "factory inspection," Corporate Affairs Group employees also paid for hotels, meals, airfare, entertainment, and sightseeing trips in major U.S. cities, including visits to Disneyland, Universal Studio, and the Grand Canyon. It has been revealed that since 2004, Avon China employees have organized at least eight trips for Chinese government officials to cities such as New York, Vancouver, Toronto, Philadelphia, Seattle, Los Angeles, Hawaii, and Washington, DC, etc. These trips were falsely described as business-related site

visits in Avon China's books and records, notwithstanding the fact that in each case officials only spent a few days at the Avon research facility. Moreover, in 2008, Avon China paid approximately $5000 for separate trips for Chinese government officials to Guangzhou, Shenzhen, and Sanya, including the costs incurred for tour guides and sightseeing vans. On every Chinese New Year since 2004, Avon China employees have organized personal trips for several government officials and their spouses to Hainan Island, the expense of which was falsely described as business entertainment.

4. Cash to government officials: In 2006, a Corporate Affairs Group employee paid RMB10,000 to a Chinese government official's bank account to avoid a fine for violating Chinese administrative regulations. Since 2006, there have been a total of RMB1,000,000 disbursed to government officials as gifts for their personal events—wedding ceremonies, funerals, college-entrance celebrations for their children, etc.
5. Cash to suppress negative media reports: In 2006, a leading government-owned Chinese newspaper intended to publish an article exposing Avon China's improper competitive tactics which might constitute a violation of the Law Against Unfair Competition of the People's Republic of China. To avoid this negative media report, the Corporate Affairs Group paid approximately RMB20,000 to a newspaper editor in order for him to withdraw the manuscript. Thereafter, the Corporate Affairs Group set up a Special Working Group focusing especially on the maintenance of *guanxi* with key media's employees.

Avon's story and contention may be summarized as follows:

Avon China began operations in China in 1989, with direct selling as its primary model of business. Before entering the Chinese market, Avon was advised to take seriously of the role of *guanxi* in Chinese culture, which had been urged as a key (sometimes *the* key) to success in Chinese business competitions. In fact, Avon held three rounds of internal trainings on Chinese culture before it launched its Chinese operations. During these internal trainings, later executives of Avon China were informed that China is a society comprised of individuals closely connected by existing societal relationships, or the webs of *guanxi*. They were further taught that the existence of *guanxi* often denotes informal relationships that are based implicitly on reciprocal obligations and indebtedness, and that once *guanxi* is established between parties to a transaction, each might ask for a favor of the other expecting that the debt incurred will be repaid in the future. The result of these internal trainings on Chinese culture of *guanxi* was a determination among the senior executives of Avon to create a government relations department—the Corporate Affairs Group. This Corporate Affairs Group existed solely in Avon's Chinese subsidiary and was comprised primarily of local Chinese employees. The responsibility of the Corporate Affairs Group, therefore, was to build *guanxi* with Avon's business partners in China, and with officials whose approvals and assistance are crucial to Avon's success in China.

In 1998, the Chinese government banned all direct selling, which caused great difficulties for Avon China's operation. In 2001, under the request of the WTO, China finally agreed to gradually lift its ban on direct selling within three years. Avon China wanted to promote the process of the reimplementation of direct selling in China, and it also aimed to become the first company to implement direct selling once the new regulations became effective. Back at that time, there were two other local direct selling

cosmetic companies—Company A and Company B—competing with Avon China for the first direct-selling license in China. Based on collected information on competitors, Avon China found that the senior executives of Company A and Company B maintained good relationships with influential officials in the MOFCOM and the AIC, and these two competitors were attempting to manipulate these relationships to secure the direct-selling license. As part of its response, Avon China further expanded its government relations department to establish and maintain personal relationships with the MOFCOM and the AIC. At the same time, Avon China was advised that gift-giving serves as the most common method of cultivating *guanxi* in China. Avon China insisted (although the DOJ disagreed), that the gifts and payments offered by the Corporate Affairs Group were not for any immediate rent-seeking return, but to cultivate continuous, longer-term relationships with influential Chinese government officials to avoid unfair treatment due to a lack of personal acquaintance. In fact, in early 2000, China's legal framework was full of defects and uncertainties, and it was common for local Chinese corporations to manipulate *guanxi* to conduct unfair competitions. Therefore, it was Avon China's business judgment that it should adapt itself to local cultural practices (the cultivation of *guanxi*) in order to avoid unfair business results.

Avon China insisted that most of the gifts and payments it offered conform to Chinese gift-giving culture and were not expressly prohibited by the written laws of China. While Avon China did admit that the RMB10,000 cash gift to a Chinese government official for the purpose of avoiding a fine constituted a bribe, it nonetheless argued that the threshold of prosecuting entities for offering bribes is RMB 100,000 under Chinese law, when the bribes are offered for the purpose of gaining unlawful benefits or to

administrative enforcement officers.[267] Moreover, Avon China argued that it did not in fact receive any illegal gain from that payment because that payment was a product of extortion and the recipient government official, not satisfied with the amount offered, finally imposed the fine on Avon China anyway. Under the PRC Criminal Law, the bribe payor is relieved of criminal liability if the bribe was extorted and the bribe payor did not receive any illegitimate benefits.[268] Therefore, Avon China argued that the RMB10,000 cash payment it offered to the Chinese government official should be excused in accordance with relevant provisions prescribed in Chinese law. Moreover, Avon argued that some of the gifts and payments were offered by its employees for their own personal benefits without the company's knowledge, and that therefore, Avon should not be held responsible for these payments.

Regarding the cash gifts to a newspaper editor to suppress negative media reports, Avon China argued that the recipient editor should not be considered a foreign official. To the best of Avon China's knowledge, the recipient editor was only a temporary employee working at the state-owned newspaper. In fact, before the payment was issued, Avon China even required that the recipient editor provide his temporary employment contract in order to confirm that he did not qualify as a government official.

Avon and Avon China asked the court to instruct the jury on the Chinese culture of gift giving, relevant Chinese laws regarding bribery, and the FCPA's exception and affirmative defenses.

[267] The Sup. People's Proc. Opinions on Prosecution Thresholds of Bribe-giving Offences, art. 6, 8.
[268] Criminal Law of the People's Republic of China, art. 389.

2. Strategy I: Legal Defense

2.1 The FCPA exception and affirmative defenses

From the perspective of the FCPA anti-bribery provisions, Avon and Avon China's contentions are not likely to be approved by the court. As a quick reminder, the FCPA prohibits the payment of money or anything of value to foreign government officials with corrupt intent for the purpose of obtaining or retaining business.[269] The FCPA applies to American companies and their employees regardless of whether they violate the FCPA domestically or abroad.[270] The FCPA may still exercise jurisdiction over foreign nationals who act outside the United States, so long as they act on behalf of an American company as an officer, director, or employee.[271] In fact, the FCPA's jurisdiction covers every possible combination of nationality, physical location, agency relation, place of registration, and principal place of business, excluding only nonresident foreign nationals acting outside the United States without any agency, employment, and shareholder relationships with a U.S corporation.[272] Therefore, Avon's contentions that the Corporate Affairs Group existed solely in its Chinese subsidiary and was comprised primarily of local Chinese employees would not affect the application of the FCPA. Moreover, while the FCPA does require corrupt intent, it only requires the intent to wrongfully influence a foreign official to misuse his official position.[273] It does not, however, differentiate whether the gifts and payments are for immediate return or in the expectation of unspecified favors in the future. Therefore, Avon China's contention that the gifts were used as a common method of

[269] 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).
[270] United States v. Hoskins, 902 F. 3d 69, 71 (2d Cir. 2018).
[271] *Id*.
[272] *Id.*
[273] Depuydt v. FMC Corp., No. 92-16729, 1994 U.S. App. LEXIS 25256, at *1 (9th Cir. Sep. 7, 1994).

cultivating *guanxi*, an informal relationship based implicitly on indebtedness and reciprocal obligations in the future, could not prove its absence of corrupt intent under the FCPA.

One possible strategy for Avon is to avail itself of the "facilitating or expediting payments"[274] exception under the FCPA. The FCPA establishes an exception to bribery liability for "any facilitating or expediting payment to a foreign official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official."[275] "Routine governmental action" is defined as an action ordinarily performed by a foreign official which include, among others, issuing permits, licenses, or other official documents to qualify a person to do business in a foreign country.[276] Since Avon's incriminating events surrounded its receipt of the direct-selling license in China, Avon might argue that the purpose of the gifts and payments was to secure the issuance of business licenses, which should be considered a performance of "routine governmental action." The court, however, is not likely to approve this argument. This is because the FCPA exceptions have been narrowly construed to apply only to payments made for nondiscretionary, ministerial activities performed by mid-or low- level government officials.[277] The FCPA even explicitly excludes actions "involving whether to award new business or continue business" from the narrow categories of "routine governmental action."[278] Whether to award Avon the first direct-selling license in China obviously

[274] 15 U.S.C. §§ 78dd-1(b); 78dd-2(b); 78dd-3(b).
[275] 15 U.S.C.S. § 78dd-2(b).
[276] 15 U.S.C. § 78dd-1(f)(3)(A).
[277] United States v. Kay, 359 F.3d 738, 751 (5th Cir. 2004).
[278] 15 U.S.C. § 78dd-1(f)(3)(B).

constitutes a discretionary decision and therefore does not fall under the "routine governmental action" exception.

Another possible strategy for Avon is to avail itself of the two affirmative defenses prescribed under the FCPA: the local written law defense[279] and the reasonable and bona fide business expense defense.[280] For the local written law defense to apply, Avon must establish that the payment and gifts were lawful in accordance with the written laws and regulations of China.[281] Congress has made it clear, however, that "the absence of written laws in a foreign official's country would not by itself be sufficient to satisfy this defense."[282] Rather, the acts must be expressly permitted via statutes or regulations of the foreign country in order to avert bribery charges under the FCPA.[283] Therefore, Avon China's contention that most of the gifts and payments it offered conform to Chinese gift-giving culture and are not expressly prohibited by the written laws of China would not satisfy this defense. Furthermore, in *United States v. Kozeny*, the court held that even if an "individual is relieved of criminal responsibility for his actions by a provision of the foreign law," a defendant may still "be prosecuted under the FCPA" for payments that violate foreign law.[284] In other words, there is no immunity from FCPA prosecution if the relevant foreign law merely provides for exceptions to a general prohibition on bribery payments. Therefore, even though Avon China could establish that it should be relieved of criminal liability under Chinese law because either the amount of payments fell below the

[279] 15 U.S.C. §§ 78dd-1(c); 78dd-2(c); 78dd-3(c).
[280] *Id.*
[281] 15 U.S.C. §§78dd-2(c)(1), 78dd-3(c)(1).
[282] H.R. Rep. No. 100-576, at 922.
[283] *Id.*
[284] United States v. Kozeny, 664 F. Supp. 2d 369, 395 (S.D.N.Y. 2009).

threshold for criminal prosecution or the payments were a product of extortion, the court will probably still find that it could not qualify the local written law defense.

The reasonable and bona fide business expense defense seems to have greater relevance to gifts and business courtesies. The FCPA states that it shall be an affirmative defense if the payment "was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official… and was directly related to (A) the promotion, demonstration, or explanation of products or services; or (B) the execution of a contract with a foreign government or agency thereof."[285] For this affirmative defense to apply, Avon China could argue that the travels to the United States and major cities in China, together with the lodging and entertainment expenses incurred during these trips, were directly related to its application for direct-selling licenses. For example, Avon could argue that it intended to provide training to Chinese government officials in its U.S. and Chinese facilities to enable them to efficiently execute their duties relating to the evaluation of direct-selling qualification. Avon China could also argue that most of the gifts, such as mooncakes, skin-care products, vintage wines, carried Avon's name or logo and should come within this affirmative defense as the "promotion of products or services."[286] The court, however, will probably not approve Avon's arguments because this affirmative defense generally requires that the expenses be modest, and the value of the gifts be nominal.[287] Moreover, the expenses shall not cover officials' spouses

[285] 15 U.S.C. §§ 78dd-1(c); 78dd-2(c); 78dd-3(c) (2006).
[286] *Id.*
[287] U.S. DEP'T OF JUSTICE, FCPA OPINION PROCEDURE RELEASE 08-03 (July 11, 2008), http://www.justice.gov/criminal/fraud/fcpa/opinion/2008/0803.html (explaining that the payment would cover reimbursement for economy class travel and one night's lodging, which was not to exceed $ 229 per journalist).

or other family members, and the gifts should generally reflect the company's business.[288] In view of these requirements, Avon and Avon China would have a hard time justifying the travel expenses for officials' spouses and those gifts irrelevant to their beauty business, such as mooncakes and vintage wines. Even though they could justify the purpose of these expenses, they probably would still have a hard time proving that these payments and expenses were modest and nominal in accordance with the FCPA standards.

The above analysis suggests that Avon is very unlikely to avert the bribery charges via the existing exception and affirmative defenses under the FCPA. What's more, cultural arguments and evidence play little, if not none, role in existing FCPA litigation. The FCPA is simply ill-equipped to accommodate cultural differences—the only affirmative defense that is relevant to foreign value systems only exempts practices that are explicitly authorized by a written foreign law.[289] Therefore, the court might simply reject the use of cultural evidence, such as *guanxi* and its operation in Chinese society, on the ground of irrelevance.

2.2 Reinforcing stereotypes?

Although Avon's cultural arguments are unlikely to be admitted by the court in accordance with the existing FCPA provisions, the legislative history of the statute's express exception and affirmative defenses clearly demonstrates "a degree of cultural sensitivity to differing cultural norms surrounding conduct that in the United States is considered bribery."[290] Take the statutory exception for "facilitating or expediting"[291]

[288] U.S. DEP'T OF JUSTICE, FCPA OPINION PROCEDURE RELEASE 07-01 (July 24, 2007), http://www.justice.gov/criminal/fraud/fcpa/opinion/2007/0701.html.
[289] 15 U.S.C. §§ 78dd-1(c); 78dd-2(c); 78dd-3(c).
[290] Spalding, *supra* note 108, at 365.
[291] 15 U.S.C. §§ 78dd-1(b); 78dd-2(b); 78dd-3(b).at

payments for example. The 1977 House Report explains that while "payments made to assure or to speed the proper performance of a foreign official's duties may be reprehensible in the United States, the committee recognizes that they are not necessarily so viewed elsewhere in the world and that it is not feasible for the United States to attempt unilaterally to eradicate all such payments."[292] The report suggests that "host-country bribery is to some extent inevitable, and even tolerable," in the eyes of U.S. lawmakers.[293] This tolerance is even more powerfully apparent in the affirmative defense that the bribe, or gift, is legal under the "written laws and regulations" of the receiving country.[294] Therefore, FCPA defenders who rebut the charge of moral imperialism often use the exception and affirmative defenses as evidence to prove that the FCPA, far from imposing an American definition of corruption on the global market, in fact respects and accommodates cultural conflicts.[295]

On closer analysis, however, the exception and affirmative defenses prescribed under the FCPA turn on a classic stereotype which views the "developing and transition economies" as inherently corrupt: it is okay to bribe Africans and Asians, who are non-Western, non-white, and non-Christian, because they are fundamentally immoral and corrupt.[296] Notwithstanding the statutory exception for facilitating payments, Congress conveys an overt tone of distain of such payments by using the word "reprehensible."[297] The DOJ has also taken a dim view of the facilitating payments exception. The FCPA

[292] H. R. REP. NO. 95-640, at 8 (1977).
[293] Spalding, *supra* note 108, at 365.
[294] 15 U.S.C. §§ 78dd-1(c); 78dd-2(c); 78dd-3(c).
[295] Salbu, *A Threat to Global Harmony*, *supra* note 100, at 423.
[296] Spahn, *supra* note 75, at 175, 187-88 ("More importantly, the rule of geographical morality is based on a world view that non-Christian, non-Western, and non-white individuals are fundamentally immoral and corrupt when measured by European standards.").
[297] H. R. REP. NO. 95-640, at 8 (1977).

Resource Guide expresses the DOJ's disapproval of facilitating payments and notes that the United States "encourages companies to prohibit or discourage facilitating payments."[298] Although the exception does not exclusively apply to business enterprise in emerging markets, since 1978, the FCPA enforcement has been focusing primarily on emerging markets such as China, Nigeria, Mexico, and Indonesia.[299] As a result, by carving out an exception for certain corrupt behaviors believed to be prevalent "elsewhere," the FCPA is actually implicating a racially and geographically based moralism: actions in emerging markets such as Asia and Latin America do not bear the same moral qualities which the same actions would bear in the United States.[300] From this perspective, the FCPA's statutory tolerance of host-country bribery paradoxically leads to the reinforcement of negative stereotypes which view people in emerging markets as benighted barbarians who are simply incapable of understanding less corrupt methods of conducting business and government.[301]

Carving out several exceptions to the FCPA does not seem to be a promising solution to cultural conflicts in anti-corruption. On the one hand, the FCPA's statutory exception could be understood as a statement about non-U.S. business culture made by U.S. legislators: the U.S. legislators believe that the practice of assuring or speeding the proper performance of a foreign official's duties through facilitating payments is to some extent inevitable, even deeply imbedded, in the host-country business culture. This statement,

[298] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, THE RESOURCE GUIDE, *supra* note 103, at 26.
[299] STAN. L. SCH. FOREIGN CORRUPT PRAC. ACT CLEARINGHOUSE, *Location of Misconduct Alleged in FCPA-Related Enforcement Actions (by Country)*, *supra* note 71.
[300] Spahn, *supra* note 75, at 187.
[301] *Id.* at 187-88.

however, is not necessarily the truth of business cultures outside the United States.[302] For example, Chinese anti-bribery legislations do not differentiate between facilitating payments and other types of bribes. Under Chinese criminal law, facilitating payments are just as prosecutable as any other bribe.[303] Therefore, in the Avon case, even if the payments to Chinese government officials fall under the FCPA's facilitating payments exception, they probably will still subject Avon to sanctions under Chinese law—either administrative or criminal penalties depending on the severity of the circumstances. In that case, the application of the facilitating payments exception will be significantly incongruent with the FCPA's original legislative purpose in two aspects: First, it fails to punish U.S. corporations' overseas bribery, which is the primary purpose of the FCPA; second, it does no good to the accommodation of differing host-country cultural norms, which is the primary policy goal of the statutory exception, because there is no real conflict of cultural values between China and the United States in regard to the prohibition of facilitating payments.

On the other hand, although the FCPA carves out, through objective forms of legal description, exceptions for certain otherwise inculpatory payments which the U.S. legislators believed to be prevalent in foreign markets, the fact that it excludes defendants' introduction of any cultural evidence beyond written laws still exposes the narrowness of the FCPA's pretense to cultural accommodation. If FCPA legislators wish to take seriously issues of cultural conflicts, they will need to devote far more energy into the prerequisite

[302] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, THE RESOURCE GUIDE, *supra* note 103, at 26 ("Although true facilitating payments are not illegal under the FCPA, they may still violate local law in the countries where the company is operating…In addition, other countries' foreign bribery laws, such as the United Kingdom's, may not contain an exception for facilitating payments.").
[303] Warin et al., *supra* note 72, at 64.

question of how to determine foreign culture. After all, how could the FCPA prosecution and litigation be truly culturally sensitive without allowing the introduction of any empirical or sociological knowledge of foreign values and preferences?[304] Moreover, by denying the admission of cultural evidence submitted by defendants, the FCPA is actually denying the agency of those who hold affiliations with a foreign market to make their own cultural descriptions. Such cultural descriptions might be consistent with, or contrary to, what is said in U.S. law, or they may contain information that is beyond the U.S. legislators' existing knowledge about a particular foreign culture. In any case, allowing the introduction of cultural evidence, rather than simply prescribing the contents of foreign culture as a given, would enable the FCPA prosecutors and adjudicators to develop a more sophisticated and nuanced knowledge of foreign culture before any culturally-sensitive decision is reached.

3. Strategy II: Cultural Defense

This subsection presumes that the U.S. court considers the cultural background of litigants in the disposition of FCPA cases. It is necessary to clarify, first of all, that the admission of a formal cultural defense does not mean that every defendant should be exonerated. It only guarantees that the court gives proper weight to cultural evidence at various stages of the legal process. Traditional literature on cultural defense tends to focus on the admissibility of cultural evidence.[305] To be more specific, the focus has been on *why* cultural defense should, or should not, be allowed in the courtroom.[306] There has been a

[304] MARIANNE CONSTABLE, JUST SILENCES: THE LIMITS AND POSSIBILITIES OF MODERN LAW 89 (2005) ("Modern law is a matter of fact. It is grounded in empirical investigation and informed by sociological knowledge of values and preferences.").
[305] RENTELN, *supra* note 35.
[306] *Ibid.*

dearth of research on *how* exactly to deal with the complexities associated with the use of cultural defense or what those complexities could be anyway. In any case, the admission of cultural evidence is far from the end of the story. The judge must find a way to recognize, to understand, to empathize with, and to evaluate the cultural conflicts before a legitimate judgment could be made.

This subsection aims to excavate the cultural nuances and complexities associated with the use of cultural defense in FCPA cases. Several hypothetical expert testimonies from both sides—Avon and the FCPA prosecutors—will be introduced. These adversarial testimonies might constantly remind readers of those "universal truths"[307]—that culture is something dynamic, internally contested, and contextual—discussed in Chapter I. But this is precisely the point. At the end of this subsection, readers will develop a more concrete idea of what a more sophisticated conception of culture looks like in cultural defense cases.

3.1 Avon's cultural identity

One interesting aspect of the Avon case is that it offers a new model to frame cultural conflicts. As previously discussed, the traditional model of cultural conflicts often pits ethnic minorities and their exotic cultural practices directly against the government of the majorities—the defendants are usually members of an ethnic minority seeking to adjust to the life in the new country but clinging all the while strongly to their traditions, while the prosecutors and the court represent members of the majority. In this traditional model, the rationale behind the rejection of the cultural defense is most often the "assumption of assimilation," the idea that the ethnic minorities should conform to the value system of the

[307] Riles, *supra* note 7, at 285 ("Certainly, one cross-culturally universal truth is that in every culture, persons disagree about their cultural values."); Shweder & Beldo, *supra* note 5, at 587 (the concept of culture "does not carry most of the implications that are the supposed grounds for various anticultural critiques.").

new country.[308] "When in Rome, do as the Romans do" is a more familiar way to understand this assumption.[309] In the Avon case, however, one might be surprised to find that this very same rationale tends to generate a completely opposite conclusion. The "Romans" now find themselves in a foreign territory and feel the same need to do as the locals do: the U.S.-based corporation voluntarily enters Chinese market, actively participates in Chinese cultural practices, and is now faced with prosecution from its own home country. In front of the U.S. court is a defendant not from an "outgroup" but instead an "ingroup" to the United States. In other words, this litigation is not one that pits "us *versus* them" but literally "us *versus* us." The U.S. court therefore faces a new model of cultural conflicts, in which U.S. nationals voluntarily conform their behavior to a foreign culture that conflicts with U.S. cultural values.

This new model of cultural conflicts becomes even more complicated, however, if one considers Avon's agency in shaping its own cultural identities—Avon might disagree, at least for this particular case, that it is a U.S. corporation. The global economy offers opportunities for multinational corporations to situate themselves within different cultural communities and create layered cosmopolitan identities. In fact, in this particular litigation, Avon might wish to emphasize its connections with China, highlight the independence of Avon China as a subsidiary company operating entirely on Chinese territory, and play down its relevance to the United States. Although Avon is a U.S. corporation in a legal sense, as a global corporation operating with more than one identity (in a cultural sense), it might wish to assert and avail itself of its Chinese identity for this particular case. Then

[308] RENTELN, *supra* note 35, at 5.
[309] *Ibid.*

Avon, by picking for itself a foreign ethical identity, all of a sudden turns the conflict from one between "us *versus* us" back to "us *versus* them."

To further complicate this case, Avon might assert that its identity is bicultural, or multicultural, in nature, and that it should be allowed to avail itself of the laws of both countries. Avon might therefore claim the application of Chinese law and culture to some issues of the dispute but U.S. law to the others. For example, Avon's belief that the recipient newspaper editor was only a temporary employee rather than a foreign official was based on its understanding of the relevant Chinese regulations and Chinese government structures. Therefore, Avon might ask the court to apply Chinese law to decide whether the bribe recipient qualifies a foreign official in order for the case to fall within the FCPA's jurisdiction. At the same time, Avon's belief (while it could be wrong) that most of the gifts and payments, such as trips to Avon's research facilities and gifts imprinted with Avon's logos, were to secure the issuance of business licenses and therefore should be exempted from bribery charges was based on an understanding of the exceptions and affirmative defenses prescribed under the FCPA.[310] Therefore, Avon might ask the court to apply the FCPA to decide whether certain gifts and payments should be excused. The argument that different issues of a case shall be governed by the laws of different countries is a natural consequence, even an appropriate recognition, of the fact that business decisions of transnational corporations are often informed by more than one culture and competing normative orderings of each.[311] Again, this is not to say that the application of the law of different countries to the same case is good or bad. Rather, it might simply be

[310] 15 U.S.C. §§ 78dd-1(b); 78dd-2(b); 78dd-3(b).
[311] Knop et al., *supra* note 8, at 620.

an unintended result of the ever-complicated cultural identities of transnational actors in the era of globalization.

3.2 Expert Testimony A—The culture of guanxi and gift-giving

Avon's assertion that the gifts and payments were used to cultivate reciprocal, longer-term *guanxi* with government officials might sound irrelevant to a U.S. judge. After all, there is no such concept of *guanxi* in U.S. legal systems. Even if *guanxi* could be literally translated as special relationships or interconnections among people, neither the exception nor the affirmative defenses prescribed under the FCPA exempt relation-based gift-giving from bribery charges.[312] Yet what seems irrelevant to U.S. legal systems finds considerable support in Chinese cultural context. Therefore, one strategy for Avon is to raise a cultural defense that its gift-giving practices accord with Chinese culture of *guanxi* and the related gift-giving rituals.

Let us assume that anthropologist Expert A served as an expert witness for Avon and that his testimony may be summarized as follows:

Guanxi, which roughly translates as "personal connection, relationship, or network," plays a central role in Chinese society.[313] In fact, *guanxi* constitutes a foundation of the philosophy of Confucianism which has dominated Chinese mainstream ideology for more than two thousand years.[314] The essence of Confucianism lies in its acknowledgement of, and respect for, relationships.[315] Such relationships, however, have wide cultural

[312] 15 U.S.C. §§ 78dd-1(b); 78dd-2(b); 78dd-3(b).
[313] Thomas Gold et al., *An Introduction to the Study of Guanxi*, *in* SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE AND THE CHANGING NATURE OF GUANXI 3, 6 (Thomas Gold et al. eds., 2002).
[314] Wen, *supra* note 132, at 516.
[315] Irene Y.M. Yeung & Rosalie L. Tung, *Achieving Business Success in Confucian Societies: The Importance of Guanxi (Connections)*, 25 ORG. DYNAMICS 54, 55 (1996).

implications that are different in kind and intensity from comparable behavior in Western societies.[316]

Guanxi is formed when two independent individuals, or entities, establish a connection to enable a bilateral flow of transactions.[317] Both parties must benefit from the transactions, however, to make sure that a proper operation of *guanxi* could be maintained.[318] In other words, *guanxi* is based on the principle of reciprocity. There are two major differences between *guanxi* and networking patterns in the United States:

First, the time orientation is different.[319] Chinese people tend to evaluate social transactions within a long-term balance sheet.[320] To borrow the words from one executive, "Every *guanxi* relationship is regarded as 'stock' to be put away in times of abundance and plenty. The 'stock' will then be at their disposal in times of need and trouble."[321] When one side asks a favor from the other, the debt is expected to be paid off sometime in the future rather than immediately, and such a temporary disequilibrium is precisely the key to maintain *guanxi*.[322] Once the debit and credit sides of the balance sheet are in equilibrium, the *guanxi* relationship often comes to an end.[323]Therefore, the maintenance of *guanxi* relies on a dynamic equilibrium between debits and credits in continuous, long-term interactions.[324] American social transactions, in contrast, are usually evaluated in isolated occurrences, the objective of which is to maintain equilibrium in each transaction.[325] From

[316] Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 69 (2006).
[317] Yeung & Tung, *supra* note 315, at 55.
[318] *Ibid.*
[319] *Ibid.*
[320] *Ibid.*
[321] *Ibid.*
[322] *Ibid.*
[323] *Ibid.*
[324] *Ibid.*
[325] *Ibid.*

this point of view, Avon's argument that the gifts were not for any immediate rent-seeking return, but to cultivate continuous, longer-term relationships with influential Chinese government officials finds support in Chinese cultural contexts.

Second, the role of institutional law in Chinese and Western societies are different. The philosophy of Confucianism prefers governance by ethics over governance by law.[326] This largely results in a general reverence for personal power rather than institutional authorities in China, because those who occupy positions of authority often have the power to determine what is permissible in Chinese society.[327] Western observers often find that Chinese business transactions rely on *guanxi* rather than legal institutions, and that legal rules and contractual agreements are often easily broken or evaded by people of influence.[328] This is not to say that formal legal rules do not play any role in successful business operations in China. Rather, it is perhaps more appropriate to consider *guanxi* and legal institutions as complimentary.[329] In practice, *guanxi* is often considered as the "informal mediating mechanisms" to achieve constructive business results when the formal legal system itself fails to function properly.[330] Since the practice of *guanxi* emphasizes personal power, it is often subject to two uncertainties: the person with whom *guanxi* has been established and the power on which *guanxi* relies. One party of *guanxi* might cease to be available to the other for various reasons, such as the decline of personal ties or even the breakdown of a relationship. Therefore, although modern *guanxi* practices function

[326] *Id.* at 56.
[327] *Id.* at 56.
[328] TIM AMBLER & MORGEN WITZEL, DOING BUSINESS IN CHINA 149 (2d ed., 2004); Scott D. Seligman, *Guanxi: Grease for the Wheels of China*, CHINA BUS. REV., Sept.-Oct. 1999, at 34-35.
[329] Lubman, *supra* note 316, at 72; Pitman B. Potter, *Guanxi and the PRC Legal System: From Contradiction to Complementarity*, *in* SOCIAL CONNECTIONS 179, 183 (Thomas Gold et al. eds., 2002).
[330] Potter, *supra* note 329, at 195.

mostly for instrumental purposes in business context, it must still possess some affective components to maintain the warmth of the relationship.[331] In China, a stable *guanxi* with strong sentimental attachments is cultivated through continuous, long-term reciprocal interactions, which often involves gift-giving on important personal events or festivals.[332] Long-term sentimental attachments, in turn, further provide moral justifications for gift-giving as an appropriate expression of reciprocity.[333] This accounts for Avon's gifts to Chinese government officials for their personal events, such as wedding ceremony, funeral, and college-entrance celebration for their kids, because celebrating personal events often helps enhance the intensity of *guanxi*. Moreover, the proper operation of *guanxi* is also subject to other superior or competing sources of power.[334] Therefore, foreign investors wish to establish *guanxi* with local government officials who have the real decisive power in their respective positions. In practice, *guanxi* with influential government officials constitutes an important competitive advantage for MNCs doing business in China, as *guanxi* with higher level officials often means access to better resources. The United States, in contrast, relies primarily on formal legal regimes to ensure smooth business transactions.[335] This is not to say that the instrumental use of personal relationships is not common in U.S. business; but personal acquaintance was not as decisive a factor for successful business transactions in Western society and impersonal business developed earlier and faster in the West than in China.[336]

[331] Thomas Gold et al., *supra* note 313.
[332] Wen, *supra* note 132, at 521.
[333] *Ibid.*
[334] Lubman, *supra* note 316, at 72.
[335] Yeung & Tung, *supra* note 315, at 56.
[336] Lubman, *supra* note 316, at 69.

Both theoretical and empirical research shows that establishing strong *guanxi* with the right persons is crucial to business success in China.[337] Generally speaking, the significance of *guanxi* decreases over the life of the business.[338] During the initial stages of opening the Chinese market, *guanxi* networks usually play a crucial role.[339] Beyond a certain threshold level, other conditions assume greater importance in sustaining success, such as technical competence, capital, and product quality, etc.[340] Companies and scholars usually attribute the significance of *guanxi* in business contexts to the defects of Chinese legislation—Chinese business laws tend to be ambiguous and are open to interpretation by those who have authority or power.[341] Based on the DOJ's investigation, most of Avon China's incriminating events took place between 2004-2008 when China gradually lifted its ban on direct selling. During that time, Chinese legislation and regulations governing the reimplementation of direct selling were not yet mature. In fact, China's first Direct Selling Administration Ordinance officially took effect on December 1st, 2005, eight months after Avon China was granted its first temporary license to conduct direct sales in China. In the absence of complete legislation, MOFCOM and AIC were responsible for the interpretation and implementation of direct selling regulations and they enjoyed considerable discretion in selecting the first company to receive a test license of direct selling. Based on the above considerations, Avon China's decision to build *guanxi* with government officials of MOFCOM and AIC were reasonable, even necessary, in terms of facilitating its application for direct selling licenses.

[337] *See* Thomas Gold et al., *supra* note 313; Lubman, *supra* note 316.
[338] Yeung & Tung, *supra* note 315, at 60.
[339] *Ibid.*
[340] *Ibid.*
[341] *Id.* at 59-60

A more morally confusing aspect of *guanxi*, however, is gift giving which serves as the most common method of building as well as maintaining *guanxi* in business contexts.[342] In order to build *guanxi*, two hitherto discrete individuals, or entities, must establish a basis of familiarity and trust to enable subsequent transactions.[343] Since the majority of foreign investors are not related to Chinese officials by blood or geographic origin, most have to rely on gift giving to cultivate and maintain a mutually committed *guanxi* relationship. Gifts represent good will, respect, and sentimental attachments.[344] Gift exchanges in Chinese culture is not only a matter of ritual but also an important social norm.[345] Gift giving has many variations, such as entertainment at banquets, cash gifts in the form of "red envelopes" which are part of a customary practice of giving monetary gifts wrapped in a red envelope during holidays or special personal events, and overseas trips. In fact, lavish banquets were so common at one time that it was no exaggeration to say that no *guanxi* could be established without meat and wine.[346] In an interview over 19 Hong Kong and non-Hong Kong firms that have business transactions in China, all participant companies admitted that they had given gifts in various forms in the course of *guanxi* building and maintenance.[347] Therefore, Avon China's gifts and payments aligned with Chinese cultural practices and, as long as not explicitly prohibited by Chinese law, were acceptable to business dealings in Chinese market.

[342] Wen, *supra* note 132, at 519.
[343] Yeung & Tung, *supra* note 315, at 61.
[344] Wen, *supra* note 132, at 519.
[345] *Id.* at 521
[346] Yeung & Tung, *supra* note 315, at 62.
[347] *Id.*

3.3 Expert Testimony B—The polytemporal dimensions of culture

Obviously, Expert A's testimony aims to verify the existence of Chinese *guanxi* and gift-giving culture, demonstrating to the court that Avon's actions were influenced by and in accordance with Chinese culture. The DOJ, not surprisingly, confronted the defendant with two opposing expert testimonies, Expert Testimony B and Expert Testimony C, aiming to prove to the court that there still lacks a universally agreed upon definition of *guanxi* and its associated gift-giving practices. This subsection first discusses Expert Testimony B which emphasizes the withered significance of *guanxi* in China especially since Xi Jinping came to power. By pointing out the transition of cultural norms in a different historical period, Expert Testimony B reveals the polytemporal dimensions of culture—a cultural practice might have different connotations in different periods, or it may fall into desuetude in a particular era.

For a particular defendant in a cultural defense case, a once revered cultural practice in reliance on which actions were committed or relationships were formed might change, cease to exist or even be officially declared illegal by the time of litigation. Lawyers frame this problem as one of conflict of laws in time, or intertemporal conflicts law, which occurs within the confines of a single jurisdiction whenever a new law affects past relationships or conduct in reliance on prior law.[348] When an issue of intertemporal conflicts law arises, the court must determine whether the new law is to replace the old law to apply retroactively to affect previously-established rights. In a cultural defense case, the introduction of a time factor means that the court must consider not only "what are the

[348] *See* Jackie M. McCreary, *Retroactivity of Laws: An Illustration of Intertemporal Conflicts Law Issues through the Revised Civil Code Articles on Disinherison*, 62 LA. L. REV. 1321 (2002).

cultural values of a foreign community," but more specifically "what are the cultural values of a foreign community in a particular historical period." Accordingly, the problem now under consideration is not only whether the forum should defer to a foreign community to effectuate its policies, but, as a deeper and more nuanced inquiry, whether the foreign community itself is still interested in effectuating such policies as were in existence in a certain historical period. The result of this inquiry might well be that the change in the domestic laws and policies of China destroyed any real conflict of interest between China and the United States in regard to anti-corruption, and so any real problem of cultural conflicts in this particular litigation.

Let us assume that the DOJ introduced an opposing expert testimony, Expert Testimony B, which may be summarized as follows:

The significance of *guanxi* and its associated gift-giving practice have been reduced dramatically since China's current president, Xi Jinping, came to power. In late 2012, President Xi launched his anti-corruption campaign to clean up the endemic corruption he believes poses a serious threat to the ruling Communist Party.[349] This campaign especially targets Party officials involved in power-for-money deals by imposing more stringent scrutiny, more severe punishments, and more detailed regulations.[350] For example, the anti-extravagance campaign calls for a "frugal working style," strictly prohibiting government officials from spending public funding on luxury goods and extravagant banquets.[351]

[349] Andrew Jacobs, *China Presses Crackdown on Campaign Against Graft*, NY. TIMES (Apr. 21, 2013), https://www.nytimes.com/2013/04/22/world/asia/china-expands-crackdown-on-anticorruption-activists.html.
[350] Tran, *supra* note 148, at 296-98.
[351] Laura Burkitt, *China's Frugality Fight Claims New Casualties*, WALL ST. J. (Feb. 6, 2013), https://blogs.wsj.com/chinarealtime/2013/02/06/local-figures-tv-ads-take-hit-from-corruption-push/.

Moreover, President Xi, as the General Secretary of the Communist Party, stipulated the Eight-point Regulation of the Centre (hereinafter the Eight-point Regulation) which seeks to combat the culture of bureaucracy and extravagance that has eroded Chinese officialdom and to purify the atmosphere among Party members.[352] The Eight-point Regulation provides, in part, that Party officials must cut extravagance, avoiding the use of welcome banners, red carpets, floral arrangements and grand receptions for official visits.[353] Furthermore, Party officials are not allowed to attend ribbon-cutting or cornerstone-laying ceremonies, or celebrations and seminars, unless they get approval from the Central Committee.[354] The Eight-point Regulation also provides, in particular, that officials' visits to foreign countries should only be arranged when absolutely necessary, with fewer accompanying members.[355] On the whole, the Eight-point Regulation requires that Party officials practice diligence and thrift, strictly following the relevant rules and disciplines on the use of public funding and facilities.

In response to the Eight-point Regulation, the Central Commission for Discipline Inspection (CCDI), which serves as the highest internal control institution of the CPC, further requires that Party officials follow the Six Prohibitions.[356] The Six Prohibitions provides a much more detailed guideline for the anti-extravagance campaign and more specifically targets gift-giving practices among officials and bureaucrats.[357] The Six

[352] *Eight-Point Austerity Rules*, CHINA DAILY (Oct. 28, 2016), http://www.chinadaily.com.cn/china/2016-10/28/content_27199734.htm.
[353] *Ibid.*
[354] *Ibid.*
[355] *Ibid.*
[356] James Leung, *Xi's Corruption Crackdown: How Bribery and Graft Threaten the Chinese Dream*, FOREIGN AFFAIRS (May/June 2015), https://www.foreignaffairs.com/articles/china/2015-04-20/xis-corruption-crackdown.
[357] *Ibid.*

Prohibitions strictly prohibits, for example, gift exchanges among Party and government organs at all levels.[358] Government officials are also strictly prohibited from receiving and giving gifts, gift money, or payment documents in any form that may affect the proper performance of duties.[359] Moreover, the Six Prohibitions make a specific stipulation that government officials shall not take advantage of such personal events as weddings and funerals to siphon off money.[360] As for travel and entertainment, the Six Prohibitions expressly prohibits the use of public funding on expensive celebratory events and personal travel.[361] Even for business travel, expenses are still strictly limited within the reception standards prescribed for officials according to their administrative rank.[362] According to the Domestic Official Reception Standards for Party and Government Organs issued in 2013, junior suites may only be assigned to cadres at and above the provincial and ministerial levels, and no upscale cuisine such as shark fins, bird's nest, or dishes made from wildlife shall be provided in working meals or reception banquets.[363]

The institution responsible for the enforcement of Party disciplines is the CCDI. The investigations conducted by the CCDI, however, do not necessarily follow standard legal procedures. In fact, the CCDI has the authority to detain suspects for an indefinite period of time without obtaining any approval from legal authorities or issuing any formal charges. Once there is enough evidence to believe that a suspect has violated Party

[358] Liu Xiang Jin Ling (六项禁令) [Six Prohibitions] (promulgated by Zhejiang Provincial Comm. of the Communist Party of China, Dec., 2012), http://zzb.hacz.edu.cn/s/23/t/651/9e/0a/info40458.htm.
[359] *Id.*
[360] *Ibid.*
[361] *Ibid.*
[362] *Ibid.*
[363] Dangzheng Jiguan Guonei Gongwu Jiedai Guanli Guiding(党政机关国内公务接待管理规定) [The Domestic Official Reception Standards for Party and Government Organs] (promulgated by the General Office of the CPC Central Comm. and the State Council, Dec. 2013), http://jwdd.lzzy.net/djdg/content_14181.

disciplines, the CCDI will expel the suspects from the CPC. If there is also sufficient evidence to support a formal criminal charge, the CCDI will then hand the suspects over to the formal system of prosecution. According to the officially released data, the number of Party members investigated and disciplined by the CCDI has been steadily growing since 2013: 172,000 in 2013, 330,000 in 2015, 527,000 in 2017, and 621,000 in 2018.[364]

Widespread publication of anti-corruption investigations, especially those against China's most high-ranking officials, including Bo Xilai, Liu Tienan, Xu Caihou, and Zhou Yongkang, also generates a significant impact on Chinese *guanxi* and gift-giving practices. The Chinese government has outlawed television and radio advertisements that promote luxury gift giving since 2013, calling on television and radio channels to take the lead to implement the regulations of central authorities.[365] Similarly, Chinese local governments have banned outdoor billboard advertisements from using words such as "luxury", "royal", and "high class", warning that such aspirational advertisements would promote a politically unhealthy climate.[366] As a result, commercial streets in Beijing that used to be flooded with billboards for fine wines, exclusive golf clubs, luxurious watches and jewelry started to present a scene of frugality in 2013, and luxury spending in China as a whole has grown more and more slowly since then.[367] A Shanghai wealth-tracking service, Hurun Report, found that China's rich cut gift-giving 25% in 2013 alone, and Rupert Hoogewerf, the

[364] *Visualizing China's Anti-Corruption Campaign*, CHINA FILE (Aug. 15, 2018), http://www.chinafile.com/infographics/visualizing-chinas-anti-corruption-campaign.
[365] Tom Phillips, *China Cracks Down on Adverts Promoting Luxury Gifts*, THE TELEGRAPH (Feb. 2013), https://www.telegraph.co.uk/news/worldnews/asia/china/9851793/China-cracks-down-on-adverts-promoting-luxury-gifts.html.
[366] Malcolm Moore, *China bans luxury advertising in Beijing*, THE TELEGRAPH (Mar. 2011), https://www.telegraph.co.uk/news/worldnews/asia/china/8398097/China-bans-luxury-advertising-in-Beijing.html.
[367] Oliver Duggan, *How China's 'anti-extravagance' laws left Diageo's glass half empty*, THE TELEGRAPH (July 2014), https://www.telegraph.co.uk/finance/newsbysector/epic/dge/11002474/How-Chinas-anti-extravagance-laws-left-Diageos-glass-half-empty.html.

founder of the Hurun Report, commented that "with the current anti-corruption drive, officials can no longer receive blatantly expensive products, so we're seeing a trend towards less-expensive giving."[368] China's crackdown on extravagant gift-giving and corruption weighs not only on luxury brands but also on humble-looking gifts such as New Year calendars and mooncakes. Since 2013, China has banned thousands of government-owned banks and other companies from printing and giving customers free calendars.[369] Wang Qishan, secretary of the CCDI, also openly criticized the tradition of giving mooncakes as gifts during the Mid-Autumn Festival, warning that this cultural practice creates opportunities for corruption.[370] The CCDI even listed mooncake-related corruption as a reported crime, setting up a hotline for the public to report those officials seen dipping into government funding to purchase mooncakes.[371] In addition to gift business, hotel and restaurant business in China has suffered severe setbacks as a result of President Xi's anti-corruption campaign. Due to the austerity drive that prohibits exuberant spending, most of China's five-star hotels have voluntarily sought to lower their star ratings to attract government officials forced into having a frugal lifestyle.[372] Rather than compete for stars, hotels and restaurants nowadays in China have to compete on who is more low-profile,

[368] *Id.*; James T. Areddy, *New Frugality Puts Strain on Chinse Firms: Anticorruption Campaign Dashes Peak Holiday Sales*, WALL ST. J. (Jan. 2014), https://www.wsj.com/articles/new-frugality-puts-strain-on-chinese-firms-1390411190?ns=prod/accounts-wsj.
[369] Areddy, *supra* note 368.
[370] *China again warns against dark side of the mooncakes*, REUTERS (Sept. 6, 2015), https://www.reuters.com/article/us-china-corruption/china-again-warns-against-dark-side-of-the-mooncakes-idUSKCN0R702720150907.
[371] Becky Davis, *In Crackdown on Corruption, Even Mooncakes Are Not Exempt*, NY TIMES (Sept. 5, 2014), https://sinosphere.blogs.nytimes.com/2014/09/05/in-crackdown-on-corruption-even-mooncakes-are-not-exempt.
[372] Tania Branigan & Angela Monaghan, *China's top hotels shed stars to woo austerity-hit customers*, THE GUARDIAN (Jan. 23, 2014), https://www.theguardian.com/world/2014/jan/23/china-hotels-shed-stars-woo-customers-austerity.

otherwise they would not be able to win back customers supported by an ever-tightening government budget.[373]

Most recently, against the backdrop of the Covid-19 pandemic and floods in southern China, President Xi once again launched a frugality campaign against food waste.[374] This involves not only intensified legislation and supervision to stop luxurious banquet, but also initiatives to cultivate thrift habits in the whole society.[375] President Xi's repeated call for promoting thrift represents the resolution of Chinese government to ban extravagancy and profligacy, which is also an important part of his anti-corruption agenda.

President Xi's anti-corruption campaign is against not only the endemic corruption within Party and government officials but also foreign bribery cases involving MNCs. In fact, before President Xi came to power, China lacked a specific legal framework for the investigation and prosecution of foreign bribery. There seemed to be a tacit tolerance, if not an absolute immunity, of foreign bribery in China before 2013. For example, from 2003 to 2013, there were a total of 24 FCPA cases handled by the DOJ that were related to bribery of government officials in China.[376] None of the defendants involved in these cases, however, were investigated or prosecuted under Chinese law.[377] This situation has changed significantly in recent years. Chinese government's prosecution of GlaxoSmithKline ("GSK"), a UK-registered multinational pharmaceutical firm, in 2013 marks a milestone

[373] *Ibid.*
[374] Ben Westcott & Nectar Gan, *In authoritarian China, eating freely is a cherished activity. Now a food waste campaign wants to control meals, too*, CNN (updated Aug. 28, 2020, 8:12 PM ET), https://www.cnn.com/2020/08/28/asia/china-xi-jinping-clean-plate-campaign-dst-intl-hnk/index.html.
[375] *Xi Focus: Xi stresses stopping wasting food, promoting thrift*, XINHUANET (Aug.11, 2020), http://www.xinhuanet.com/english/2020-08/11/c_139282457.htm.
[376] Li & Bronitt, *supra* note 132, at 317.
[377] *Ibid.*

for the enforcement of anti-corruption policies against foreign companies in China.[378] In 2013, A seven-month investigation conducted by the Chinese government revealed that at least between 2004 and 2010, GSK was offering monetary gifts or property to state-owned hospitals, clinical institutions, and doctors across the country with the purpose of facilitating the sale of GSK drugs.[379] In 2014, the Changsha Intermediate People's Court of Hunan province fined GSK 3 billion RMB (approximately $ 479 million) which was the largest fine ever imposed by a Chinese court.[380] This marks a significant change of Chinese official attitude towards foreign bribery in China because until this case, Chinese government had focused only on the demand side (the Party and government officials who receive the bribe), but not the supply side (the payor) of foreign bribery cases. The Chinese state-controlled media hailed the GSK case as a triumph of the rule of law, blaming MNCs for taking advantage of China's vulnerable legal systems to earn illegal benefits.[381] Since 2013, China's mainstream media have singled out foreign MNCs as the prime culprits in commercial bribery, sending unmistakable signals to them that China would no longer exempt foreign business actors from bribery prosecution.[382]

On December 26, 2012, the Supreme People's Court and the Supreme People's Procuratorate jointly issued the Interpretation on Several Issues Concerning Specific Application of the Law in the Handling of Criminal Bribery Cases [hereinafter the 2013

[378] Christopher Mathews & Jessica Hodgson, *GlaxoSmithKline Probes Bribe Allegations in China*, WALL ST. J. (Jun. 12, 2013), http://www.wsj.com.articles/SB10001424127887324798904578529413574312372.
[379] Rupert Neate & Nick Fletcher, *GlaxoSmithKline Ex-boss to Be Deported Back to UK from China*, THE GUARDIAN, (Sep. 19, 2014), http://www.theguardian.com/business/2014/sep/19/glaxosmithkline-china-mark-reilly-deported-uk-guilty-bribery-hunan.
[380] *GSK China Faces Record Fine for Bribery*, CHINADAILY (Sept. 19, 2014) http://www.chinadaily.com.cn/business/2014-09/19/content_18630086.htm.
[381] Jin Shanming, *Multinationals in China Must Operate According to Law*, CHINA TODAY (Sep. 25, 2013), http://www.chinatoday.corn.cn/english/economy/2013-09/25/content 569718.htm.
[382] *Ibid.*

Interpretation].[383] This Interpretation became effective on January 1, 2013, focusing primarily on the supply side of bribe.[384] Article 1 of the 2013 Interpretation provides that "[a]ny person who pays a bribe of more than 10,000 RMB to a state functionary to seek improper benefits shall be investigated for criminal liability in accordance with Article 390 of the PRC Criminal Law."[385] Article 12 further defines the seeking of improper benefits as seeking benefits that are in violation of law, regulation, rule or policy, or requesting any state functionaries to provide any assistance or convenience in violation of law, regulation, rule, policy or industrial standards.[386] Moreover, Article 12 states that seeking competitive advantage in economic, organizational, personnel, administrative and other activities in violation of principles of justice and fairness shall be deemed seeking improper benefits.[387] The promulgation of the 2013 Interpretation, by China's highest court and prosecutorial organ, sends a strong signal to the market that China is intensifying its crackdown on payors of commercial bribes.

The various applicable Chinese anti-bribery Party disciplines and laws, the general anti- extravagancy climate of the Chinese society, along with high profile bribery cases against high-level Chinese officials and large MNCs clearly suggest that the inauguration of President Xi starts a new anti-corruption era of China. The gift-giving culture once prevailed among all levels of Chinese bureaucracy and foreign business actors before 2013 now is specifically singled out as a primary target of anti-corruption investigation.

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[383] Guanyu Banli Tanwu Huilu Xingshi Anjian Shiyong Falü Ruogan Wenti De Jieshi (关于办理贪污贿赂刑事案件适用法律若干问题的解释) [The Interpretation on Several Issues Concerning the Specific Application of the Law in the Handling of Criminal Bribery Cases] (jointly issued by the Sup. People's Ct. & Sup. People's Proc., Dec. 31, 2012, effective Jan. 1, 2013).
[384] *Ibid.*
[385] *Id.* art. 1.
[386] *Ibid.*
[387] *Ibid.*

Therefore, Avon China's allegation that it is a Chinese customary practice, even a demand of Chinese business culture, for foreign corporations to build *guanxi* with Chinese local government officials and to cultivate such *guanxi* relationships with cash, gifts, banquets, travel and entertainment in various forms shall not be admitted by the court. Even if foreign MNC investors such as Avon used to receive much more favorable treatment in regard to anti-bribery investigations and prosecutions in China, China's official attitude towards foreign bribery over recent years have shifted from one of *de facto* foreign corporate impunity to zero tolerance.[388] As a result, the argument that Avon's gift-giving practices in China are vulnerable only to the risk of prosecution under the FCPA but are acceptable under Chinese legal system shall not be admitted by the court.

It is necessary to clarify, however, that it is not the purpose of this testimony to predict the decline of *guanxi* and its associated gift-giving practices in China as an inevitable trend. In fact, a non-essentialist historical perspective on culture recognizes the fact that the nature and manifestation of *guanxi* is under constant change.[389] This testimony therefore does not deny the possibility that *guanxi* practices will adapt to China's new social order and flourish in evolving forms in the business-government realm. Whatever form it may take, however, *guanxi* conflicts with the official law of China, at least after Xi came to power in 2013, so long as it is manipulated for power-for-money deal and unfair competition.

[388] Li & Bronitt, *supra* note 132, at 308.
[389] Mayfair Mei-hui Yang, *The Resilience of Guanxi and Its New Developments: A Critique of Some New Guanxi Scholarship*, 170 CHINA Q. 459, 463 (2002).

3.4 Expert Testimony C—The internal divergence within a culture

To further rebut Avon's oversimplistic description of Chinese culture and its argument that what is considered bribery in the United States is totally acceptable in China, the DOJ introduced Expert Testimony C, aiming to demonstrate to the court that there still lacks consensus as to what constitutes a socially and legally acceptable gift-giving culture in China. In fact, the concept of *guanxi* is rather complicated and multilayered.[390] In business context, since Chinese government officials and foreign MNC investors often lack a mutual societal foundation, there is little space for them in *guanxi* relationship to draw upon stable sentimental connections or interpersonal trust in exchange for future assistance and favors.[391] As a result, *guanxi* participants in business context tend to rely on exchanges of power and personal benefits to maintain the proper operation of their relationship.[392] The dividing line between legitimate *guanxi* give-and-take and illegitimate power-for-money deal, however, is very blurry and has troubled Chinese government until today. There is no simple yes or no answer to the question of "whether *guanxi* and gift giving are acceptable cultural practices" even in Chinese community itself, as the answer always depends on a case-by-base analysis.

Expert Testimony C shall be summarized as follows:

With the development of China's economy, *guanxi* relationship takes on more diversified forms and is often so tightly knitted into commercial bribery cases that even Chinese lawmakers find it hard to distinguish between healthy *guanxi*-related gift giving and rent-seeking bribery. In 2008, in order to deal with the complexities of *guanxi*-based

[390] Wen, *supra* note 132, at 521.
[391] *Ibid.*
[392] *Ibid.*

culture in China's antibribery judicial practice, the Supreme People's Court and Procuratorate of China collectively issued the Opinions on Certain Issues Concerning the Application of Law in Commercial Bribery Cases (hereinafter the 2008 Commercial Bribery Opinion).[393] Article 10 of the 2008 Commercial Bribery Opinion deals specifically with the demarcation between bribery and healthy *guanxi*-related gift giving in Chinese judicial practice.[394] It requires that prosecutors and judges take into consideration the following factors when distinguishing between bribes and normal gifts: (a) the context of gift exchanges, such as the basis of the relationship between the payor and the recipient, e.g., whether they are related by blood or friendship, and the intensity of their past course of dealings; (b) the value of the gifts or payment; (c) why, when, and how the gifts were exchanged and whether the payor made any requests in connection with the recipient's official duty; and (d) whether the recipient actually repaid the payor by using his or her position in a corrupt way.[395] As a whole, Article 10 of the 2008 Commercial Bribery Opinion acknowledges the controversial nature of *guanxi*-based gift giving practices, seeking to offer more flexibility to the courts and procuratorates in their dealings with the complexities arising from *guanxi*-related bribes. Therefore, it is at least utopian, even illegitimate, to assume that there exists a so-called *guanxi*, or gift-giving, culture in China that is totally accepted by the Chinese society, as *guanxi*-based gift giving is so intertwined with bribery that its nature could only be determined on a case-by-case basis.

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[393] Guanyu Banli Shangye Huilu Xingshi Anjian Shiyong Falü Ruogan Wenti De Yijian(关于办理商业贿赂刑事案件适用法律若干问题的意见) [Opinions on Certain Issues Concerning the Application of Law in Commercial Bribery Cases] (promulgated by the Sup. People's Ct. & Sup. People's Proc., passed and effective on Nov. 20, 2008).
[394] *Id.* art. 10.
[395] *Ibid.*

Moreover, Avon's allegation that the so-called gift-giving culture is well accepted in China is not backed up by any comprehensive quantitative analysis of people's perceptions and attitudes about gift giving across different social classes. Avon failed to present a carefully targeted empirical data regarding whether ordinary Chinese people—the lowest level public employees, the peasants, the rural migrant workers in big cities, the blue-collar workers, and those unemployed people living below the poverty line—content with the gift giving culture espoused by Chinese government elites and their Western business partners. In fact, Chinese elite networks composed of party-state officials and entrepreneurs have long been believed to be the social basis of corruption in post-Mao China.[396] Such elite networks are built particularly through everyday forms of sociality involving banqueting, entertaining, and various forms of gift exchanges which fall exactly under those behaviors strictly prohibited by China's anti-extravagancy campaign.[397] This largely explains why reaction to President Xi's anti-extravagancy campaign has been mixed: it enjoys popular support among most ordinary Chinese but has generated discontent among government elites.[398] Therefore, Avon's argument that *guanxi*-based gift giving is a widely accepted cultural practice in China shall not be admitted by the court.

[396] John Osburg, *Making Business Personal: Corruption, Anti-corruption, and Elite Networks in Post-Mao China*, 59 CURR. ANTHROPOL. 149, 149 (2018).
[397] *Id.* at 150
[398] Guilhem Fabre, *Xi Jinping's Challenge: What Is behind China's Anticorruption Campaign?*, 5 JOURNAL OF SELF-GOVERNANCE AND MANAGEMENT ECONOMICS 7 (2017); Chris Buckley, *As China's Woes Mount, Xi Jinping Faces Rare Rebuke at Home*, NY TIMES (July 31, 2018), https://www.nytimes.com/2018/07/31/world/asia/xi-jinping-internal-dissent.html.

CHAPTER III: INTRODUCING A PLURALISTIC CONFLICT-OF-LAWS APPROACH

To understand the potential of conflict of laws as an approach to dealing with cultural conflicts, it is essential to first understand the mechanics of the choice-of-law process. The choice-of-law process typically proceeds through a series of technical steps: First, the court must determine whether the case involves a foreign element, so that a reasonable doubt as to the application of law may arise. This is usually determined by examining whether the parties or the subject matter at hand have any connections to foreign jurisdictions. Common law jurisdictions generally require that the parties plead and prove foreign law to the court, otherwise the forum law will be applied.[399] The second step is to characterize the case into a legal category such as contract, tort, and so forth. Suppose, for example, a citizen of state *A* sues her fiancé, a citizen of state *B*, for the breach of a promise to marry which was made in state *B*. Let us further suppose that a court of state *A* provides the forum and it could characterize the case either as one in contract or tort. Under the *A* conflict of law rules, contractual disputes are governed by the law of the place where the contract was made, which is *B* law, while tort liability is governed by the place of injury, which is *A* law. The court's characterization would therefore determine whether state *A* or *B* will supply the applicable law. The third step is to identity and "localize" the connecting factor, that is to determine the place of injury for torts, the place of making for contracts, and so forth. After the characterization step identifies the applicable choice-of-law rule, and the localization of connecting factors identifies the state supplying the applicable substantive law, the fourth step is to examine the law of that state (if not the forum) and

[399] William B. Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CAL. L. REV. 23 (1957).

ask certain questions before applying it. For example, should the law of that state govern the "whole" case or only certain issues? What if the application of foreign law offends the forum's public policy? Finally, the court makes its decision and applies the applicable law to the particular case or issue.

The above-mentioned mechanics of the choice-of-law process are primary components of traditional conflicts methodologies. The reason for focusing on these mechanics is that they provide a clear, albeit rigid, structure for performing conflicts analysis, and that it is precisely their mechanical and doctrinaire quality that makes conflict of laws a promising tool for cultural analysis. This section will also examine the implications of some modern choice-of-law approaches (such as governmental interest analysis), which grew out of the subsequent rejection of the traditional conflict-of-laws mechanics, for cultural debates. In general, by conflict-of-laws approach, I do not mean the conflicts rules as adopted by any particular state or in any particular historical period. Rather, I will take into consideration the broader conflicts tradition, focusing on those doctrines and theories in the tradition that hold the greatest promise for revealing and dealing with the complexities of cultural conflicts.[400] Subsection A will define the pluralistic conflict-of-laws approach, primarily through literature review on legal pluralism and its impact on conflict of laws. Subsection B will then apply this approach to the analysis of the Avon case.

[400] A slightly modified conflict-of-laws approach was also adopted by Karen Knop, Ralf Michaels, and Annelise Riles, *See* Knop et al, *supra* note 8, at 595.

A. Defining "Pluralistic"

1. Legal Pluralism

A pluralistic conflict-of-laws approach draws directly on theories of legal pluralism. Those studying legal pluralism generally argue that law is not the exclusive artifact of nation-states, but rather, it is produced by various communities that structure and regulate the behavior of their members.[401] John Griffiths has argued that the central objective of a descriptive conception of legal pluralism is "destructive."[402] The notion of legal pluralism is to destruct the ideology of legal centralism, according to which law is "a single, unified and exclusive hierarchical normative ordering depending from the power of the state."[403]

According to Griffiths, legal pluralism may be divided into two forms—legal pluralism in the weak and strong sense—depending on whether it is within or totally excluded by the ideology of legal centralism.[404] Legal Pluralism in the weak sense (weak legal pluralism) is not fundamentally inconsistent with the ideology of legal centralism because the content and validity of unofficial norms depend ultimately on the recognition of official state laws.[405] Under this category, the content of certain unofficial norms cannot be ascertained or validated by the state merely because it is not established in the ways habitual to the operatives of state legal systems, or because it is considered as offensive to the official culture of the state.[406] Legal pluralism in the strong sense (strong legal pluralism), in contrast, refers to the situation in which not all law is generated by state legal

[401] Riles, *supra* note 7, at 294.
[402] John Griffiths, *What is Legal Pluralism?* 18 J. LEG. PLUR. UNOFF. LAW 1, 4 (1986).
[403] *Ibid.*
[404] *Id.* at 38.
[405] *Id.* at 6-8.
[406] *Id.* at 7.

institutions, and in which the binding force of unofficial norms does not depend on state power.[407]

Griffiths's awareness of weak legal pluralism warns us of those descriptive conceptions of legal pluralism that in effect have "only a confusing nominal resemblance to legal pluralism" and in essence replicate legal centralism.[408] The FCPA's prescription of the local written law defense provides a good example of weak legal pluralism. Those rebutting the charge of moral imperialism against the FCPA argue that it respects and accommodates cultural pluralism by prescribing the local written law defense: If the gift is legal in the receiving country, it is not a crime under U.S. law.[409] In justifying the exclusion of unwritten local customs from the affirmative defense, Spahn argued:

> All the foreign sovereign needs to do in order for its local gift customs to control the transaction is amend its own laws to *recognize* (emphasis added) the payment as legal. Assuming…that bribe receiving is an accepted and widely practiced custom outside the United States, it should be a fairly simple matter to amend local laws to reflect the allegedly widely accepted local customs. Just call the payment a "tax," a "commission," or a "license fee" or even a legally permitted "gift" under the law of the foreign sovereign and the U.S. corporation can make the payment without fear of U.S. criminal sanction. The fact that no nation has authorized these bribe/gifts under their domestic laws, relying instead on under the table allegedly customary practices, indicates that perhaps approval of bribes is not…widespread outside the United States.[410]

Spahn argued that the FCPA respects and accommodates foreign cultural norms, but only on the condition that they are explicitly recognized or authorized by foreign

[407] *Id.* at 5.
[408] *Id.* at 8.
[409] Salbu, *A Threat to Global Harmony*, *supra* note 100, at 423.
[410] Spahn, *supra* note 75, at 173-74.

states.[411] Therefore, the local written law defense can be understood as a manifestation of weak legal pluralism, which is the virtual equivalent of legal centralism, because the validity of cultural norms ultimately depends on the recognition of sovereign states. Other scholars, though not using the term "legal pluralism in a weak sense," have also uncovered how legal centralism has plagued the study on legal pluralism. Annelise Riles has found that legal pluralism literature often merely "diversifies the range of authorities that must be factored into the analysis," but the "treatment of these authorities ultimately replicates much of the very statist model it critiques."[412] Ralf Michaels has commented that legal pluralists, though endeavoring to deny the centrality of state in law-making authority, nonetheless often end up "mak[ing] us see more clearly the centrality of the state for our thinking about law and choice of law."[413]

So far, there have been practically no universally agreed-on definitions of legal pluralism.[414] Scholars have been engaged in debates regarding the constituent elements, the locus, and the nature of legal pluralism.[415] Leopold Pospisil has argued that society, instead of being a single legal system, consists of "functioning subgroups" at different levels with well-defined (or definable) memberships, and every such subgroup has its own legal system that regulates the behavior of its members.[416] Michael Smith has argued that society consists of corporate groups and that "law" is the internal self-regulation by such

[411] *Ibid.*
[412] Riles, *supra* note 7, at 295.
[413] Ralf Michaels, *The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1258(2005).
[414] *See* Griffiths, *supra* note 402; Gordon R. Woodman, *Ideological Combat and Social Observation: Recent Debate about Legal Pluralism*, 30 J. LEG. PLUR. UNOFF. LAW 21 (1998).
[415] *See* Woodman, *supra* note 414.
[416] *See* LEOPOLD J POSPISIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY (1974).

corporations.[417] Sally Moore has pointed out that corporate groups suggested by Smith "are not the only patterners of social relations," and that there exist other "less formally bounded action-arenas" that are socially significant.[418] Griffiths has also pointed out the shortcomings of Pospisil's and Smith's theories, suggesting that they tend to "identify the social locus of law within the constitutional/juridical structure of society."[419] Griffiths believes that Eugen Ehrlich and Sally Moore have approached the discussion of legal pluralism in a different and more satisfactory manner.[420] Ehrlich differentiates between "rules for decision" and "rules of conduct," arguing that law emerges from "social associations" consisting of human groups who share certain rules of conduct, recognize them as binding, and in effect regulate their behavior according to them.[421] Moore contends that law emerges from "semi-autonomous social field" which "has rule-making capacities, and the means to induce or coerce compliance."[422] The similarity of Ehrlich's and Moore's theories is that they both tend to identify the social locus of law in rather amorphous and autonomous social fields.[423] Though legal pluralism literature shows a large variety of ways to perceive and define the locus of law, there is hardly any single theory that enjoys absolute popularity. Depending on the observer's own perspective and research purposes, one way might be preferred over another. This present study does not take sides here. The

[417] *See* M. G. SMITH, CORPORATIONS AND SOCIETY (1974).
[418] *See* Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y REV. 719 (1973).
[419] Griffiths, *supra* note 402, at 23.
[420] *Ibid.*
[421] *See* EUGEN EHRLICH & WALTER LEWIS MOLL, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW (1936).
[422] Moore, *supra* note 418, at 72.
[423] Griffiths, *supra* note 402, at 30.

key is to be aware, as Annelise Riles suggested in her study of the global swap markets, that non-state legal orders are not perfectly coherent.[424]

In tracing the historical development of legal pluralism, Sally Engle Merry generalizes two modes: "classic legal pluralism" which focuses on the interplay between Western and non-Western laws in colonial and postcolonial settings, and "new legal pluralism" which applies the concept of legal pluralism to non-colonized societies, conceptualizing a more complex and interactive relationship between official and unofficial forms of ordering. [425] Gunther Teubner and Ralf Michaels further add a third mode of legal pluralism— "global legal pluralism"—in which the focus goes beyond a single state or community and toward the transnational sphere. [426] According to Ralf Michaels, global legal pluralism does suggest something methodologically new, as it represents a shift away from the paradigm of "methodological nationalism" that has dominated both social and legal thought over the last two hundred years.[427]

Paul Schiff Berman has offered a sophisticated discussion of global legal pluralism, in which he uncovers that global legal pluralism has both *descriptive* and *normative* dimensions.[428] First, he argues that global legal pluralism is a useful *descriptive* framework

[424] *See* Annelise Riles, *The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State*, 56 AM. J. COMP. L. 605 (2008).
[425] *See* Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988).
[426] *See* Ralf Michaels, *Global Legal Pluralism*, 5 ANNU. REV. LAW SOC. SCI. 1(2009); Gunther Teubner, *Global Bukowina: Legal Pluralism in the World-Society*, *in* GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1996).
[427] Ralf Michaels, *Globalization and Law: Law Beyond the State*, *in* LAW AND SOCIAL THEORY 287 (Banakar & Travers eds., 2013).
[428] Paul Schiff Berman, *The Evolution of Global Legal Pluralism*, *in* AUTHORITY IN TRANSNATIONAL LEGAL THEORY: THEORISING ACROSS DISCIPLINES 151, 151 (Roger Cotterrell & Maksymilian Del Mar eds., 2016) ("a rich body of work has established pluralism as a useful descriptive and normative framework for understanding a world of overlapping jurisdictional assertions.").

for understanding the interaction among various normative orders in the global society.[429] From a descriptive perspective, legal pluralism gets us beyond the fruitless debates about the definition of law, directing our attention to those norms that are actually viewed as binding and followed by people.[430] Second, he argues that global legal pluralism has a normative dimension which designs the mechanisms, institutions, and discursive practices to manage pluralism.[431] From a normative perspective, legal pluralism aims to devise structures that create habits of mind in decision makers where they will be more likely to consider multiple communities and multiple sources of law.[432]

For the purpose of this study, being "pluralistic" requires that we depart from traditional conflict of laws which only deals with state law, assuming that conflicts analysis could be applied to those unofficial cultural norms that govern significant aspects of our lives. Although those studying cultural conflicts generally acknowledge that multiculturalism applied to law should lead to an acceptance of legal pluralism, their engagements with legal pluralism are often limited to the recognition of conflicts between state and non-state law.[433] There has been a lack of sophisticated studies as to the source and contents of unofficial cultural norms that are claimed to be in conflict with state law. Especially, as previously commented, the description of culture as something dynamic, internally contested, and contextual is simply inadequately appreciated by scholars who

[429] *Id.*, at 155.
[430] *Ibid.*
[431] *Ibid.*
[432] *See* Paul Schiff Berman, *Non-State Law Making Through the Lens of Global Legal Pluralism*, *in* NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LOCAL LEGAL PLURALISM 15 (Michael A. Helfand ed., 2015).
[433] *See, e.g.*, Coleman, *supra* note 35, at 1105-1113 (recognizing the conflicts between state law and the customary practices of "marriage-by-capture," "wife beating," "parent-child suicide," and "female genital mutilation.").

deal with cultural conflicts via the lens of legal pluralism. This present study therefore also aims to deliver a more nuanced account of culture in legal pluralism. That is, by bringing together conversations about legal pluralism, multiculturalism, and conflict of laws, this study seeks to develop a more sophisticated view not only about whose values and cultural norms *should* prevail, but also about what *are* those values and cultural norms anyway.

2. A Pluralistic Approach to Conflict of Laws

The discipline of conflict of laws has both descriptive and normative dimensions.[434] From a descriptive perspective, it offers a framework for understanding and structuring the interaction between various normative communities involved in multistate cases.[435] Through the proof of foreign laws either pleaded by the parties or noticed by the court *ex officio*, conflicts analysis directs our attention to the existence of other value systems that are foreign to our own, and it starts with the question of which authority provides the applicable body of law.[436] The problem this discipline deals with is therefore "not just what is the source of the authority for our laws and our judicial decisions, but whose rules or values *should* prevail, and what *are* these rules or values anyway?"[437] From a normative

[434] Ralf Michaels, *Post-critical Private International Law: From Politics to Technique*, *in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 56 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014) ("Conflict of Laws is an ambiguous name for a legal discipline. It is ambiguous because it means two things at the same time—the problem with which the field deals, and the responds to this problem given by the law.").
[435] *Ibid.*
[436] Knop et al., *supra* note 8, at 627-28.
[437] Riles, *supra* note 7, at 275.

perspective, conflict of laws offers a series of doctrines and technical steps to deal with the clash of value systems in specific cases.[438]

The doctrines and theories of traditional conflicts analysis have been constructed for managing collisions of national legal orders.[439] Recently, however, due primarily to the increasing plurality and complexity of transnational norm-generating actors, traditional territorially and nation-state based concepts of regulatory power are called into question.[440] Against this backdrop, traditional methods of conflicts analysis also become the target of criticism: their exclusive focus on state law simply fails to offer models and concepts for dealing with problems posed by non-state regulatory authorities.[441] Facing the challenges brought about by legal pluralism and globalization, a growing body of scholars proposes a "pluralistic" approach to conflict of laws which incorporates non-state and non-territorial norm-generating actors into conflicts analysis.[442] As Gunther Teubner argued,

> The point was no longer merely to theoretically reflect conflicts between national legal systems and to cope with them in practice, but to generalize conflict-of-laws thinking itself so as to yield results for conflicts between complexes of norms,

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[438] Knop et al., *supra* note 8, at 647. For criticisms against the mechanical nature and the doctrinaire quality of traditional conflicts analysis, *see* WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV.173 (1933); CURRIE, *supra* note 252. Despite such criticisms, one could still observe an irrepressible need for rules in the Restatement (Second) of Conflict of Laws. *See* Michaels, *supra* note 434, at 64 ("Some conflict of laws technique is observable in most approaches…"); *See* SYMEONIDES, *supra* note 79, at 111("The final version of the Restatement (Second), promulgated in 1969, did not join the revolution, but was a conscious compromise and synthesis between the old and new schools…").

[439] Teubner & Korth, *supra* note 96, at 24.

[440] *See* Jacco Bomhoff & Anne Meuwese, *The Meta-regulation of Transnational Private Regulation*, 38 J. LAW SOC. 138 (2011); GEALF-PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW (2010); Peer Zumbansen, *Neither 'Public' Nor 'Private', 'National' Nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective*, 38 J. LAW. SOC. 50 (2011); Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism, in* Beyond Territoriality 53 (Gunther Handl et al., eds., 2012).

[441] Teubner & Korth, *supra* note 96, at 23-54.

[442] *See, e.g.*, Horatia Muir Watt, *Private International Law Beyond the Schism*, 2 TRANSNATIONAL LEGAL THEORY 347 (2011); Dai Yokomizo, *Conflict of Laws in the Era of Globalization*, *57* JAPANESE Y.B. INT'L LAW 179 (2014); MA Helfand ed., NEGOTIATING STATE AND NON-STATE LAW: THE CHALLENGE OF GLOBAL AND LOCAL LEGAL PLURALISM (2015).

> areas of law and legal institutions, and also for those between social systems, indeed even for divergences between competing social theories.[443]

As will be discussed below, proposals found in recent literature usually tend to adopt the descriptive framework from conflict of laws but not its normative solutions—existing techniques with which to deal with conflicting regulatory norms. Therefore, even though a growing body of conflicts scholars finds conflict of laws a helpful lens for revealing and recognizing the conflicts between various state and non-state normative systems, these scholars seldom provide concrete methods to deal with these conflicts.

Andreas Fischer-Lescano and Gunther Teubner have argued that global law develops mainly from multiple sectors of civil society, and that these sectors "define the external reach of their jurisdiction along issue-specific rather than territorial lines."[444] According to Fischer-Lescano and Teubner, each societal sector forms a "self-contained regime" by generating highly specialized norms reflecting its own rationalities, and therefore a conflict of norms could be conceived as a conflict of competing rationalities of various functional regimes.[445] For example, the patent protection rules which reflect the economic rationality of global markets might collide with World Health Organization norms that derive from principles of the health system.[446] Even though Fischer-Lescano and Teubner adopt the problem descriptions from conflict of laws, they reject the idea that the technical rules of traditional conflict of laws could do justice to such inter-regime conflicts.[447] Instead, they suggest a new "substantive law approach," under which the

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[443] Gunther Teubner, *Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter*. Storrs Lectures at Yale Law School, in Oren Perez and Gunther Teubner eds., PARADOXES AND INCONSISTENCIES IN LAW 41, 50 (2006).
[444] Fischer-Lescano & Teubner, *supra* note 99, at 1009.
[445] *Id.* 1013.
[446] *Id*. 1032.
[447] *Id*. 1021-22.

concerned courts would assess and combine the relevant norms of all functional regimes involved and create a transnational body of law for the individual case at hand.[448] In the end, it seems that their approach seeks to reach a political compromise and compatibilization, rather than a legal resolution. Under their approach, conflicts rules in the technical sense could only be applied in very exceptional cases in which it is possible to apportion the legal issue in question to one or another functional regime.[449] Moreover, they suggest that conflicts rules should shift from the determination of territorial contacts to the identification of "functional connection" between the legal issue in question and the functional regimes involved.[450] As to how exactly to identify the functional connection, however, they provide no concrete methods.

Another scholar who has dealt with the relationship between legal pluralism and conflict of laws is Christian Joerges, and he proposes to reconceptualize European law as a conflict-of-laws regime.[451] To be specific, he explores the potential of a "conflicts law approach" to "organize the cooperation between different levels of governance and resolve the tensions which result within national systems from the selective interventions of European Law."[452] While Joerges has found conflict of laws a useful analytical framework to recognize the conflicts between national and supranational regulatory competencies, it is not clear whether he finds traditional conflicts methods a good solution to these conflicts.[453] Ralf Michaels has commented that, instead of exploring the extent to which

[448] *Id*. 1022-23.
[449] *Id*. 1021.
[450] *Ibid*.
[451] Joerges, *supra* note 88, at 163; *see also* Christian Joerges et al., *supra* note 88; Christian Joerges, *The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective*, 3 EUR. LAW J. 378 (2002).
[452] Joerges, *supra* note 88, at 163.
[453] Michaels, *supra* note 434, at 55.

existing conflicts techniques can deal with these conflicts, Joerges seems to prefer some type of balancing between conflicting rationalities, which is "a political, rather than a legal, response."[454]

Paul Berman also explores the impact of legal pluralism on conflict of laws.[455] He argues that people can hold multiple, sometimes non-territorial, affiliations with various non-state communities, and that they sometimes understand themselves to be bound by the norms of these communities.[456] He then proposes a cosmopolitan pluralist approach to conflict of laws: *cosmopolitan* because it recognizes the possibility that people can hold overlapping, sometimes nonterritorial, affiliations with various non-state communities; and *pluralist* because it acknowledges that both legislative and adjudicative jurisdictions could be asserted by communities that are non-state in nature.[457] While such a pluralist approach acknowledges the reality of hybridity, Berman nonetheless suggests that it is "probably impossible to resolve problems as to how best to determine when norms of one community should give way to norms of another and when, in contrast, pluralism can be maintained."[458] Instead, he argues that seeking "provisional compromises" may sometimes be the best we can do, and that each individual case should be dealt with differently depending on context.[459] While Berman's work offers crucial insights in making conflict

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[454] *Ibid.*
[455] *See* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311(2002); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L 485 (2005) [hereinafter *Law and Globalization*]; Paul Schiff Berman, *Conflict of Laws, Globalization, and Cosmopolitan Pluralism*, 43 WAYNE L. REV.1105 (2005); Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*,153 U. PA. L. REV. 1819 (2005) [hereinafter *Cosmopolitan Vision*]; Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301(2007).
[456] Berman, *Law and Globalization*, *supra* note 455, at 507-11.
[457] Berman, *Cosmopolitan Vision*, *supra* note 455, at 1821.
[458] Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV.1155, 1197 (2007).
[459] *Id.* at 1236.

of laws a site for continuing debates about hybridity and legal conflicts, less clarity exists as to how the case-by-case "provisional compromises" could be achieved via conflicts analysis.

To summarize, while numerous attempts have been made to explore conflict of laws as a helpful lens for recognizing the conflicts between various state and non-state normative communities, few have been devoted to the methodological solutions to these conflicts. Moreover, there has been relatively little discussion on the extent to which existing techniques of conflicts analysis can deal with conflicts among plural normative orderings. The scholars who first explore the implications of conflicts techniques for legal pluralism are Annelise Riles, Ralf Michaels, and Karen Knop.[460] In their collective work, they describe conflicts doctrines as technique, arguing that what makes conflict of laws a promising tool to tackle many problems that are public or even political in nature is its "highly technical nature."[461] The technical aspect of law encompasses, according to Riles,

> (1) certain ideologies—legal instrumentalism and managerialism . . . (2) certain categories of experts—especially scholars, bureaucrats and practitioners who treat the law as a kind of tool or machine and who see themselves as modest but expertly devoted technicians; (3) a problem-solving paradigm—an orientation toward defining concrete, practical problems and toward crafting solutions; (4) a form of reasoning and argumentation, from eight-part tests to reasoning by analogy, to the production of stock types of policy arguments to practices of statutory interpretation or citation to case law.[462]

[460] *See* Knop et al., *supra* note 8; Karen Knop and Annelise Riles, *Space, Time and Historical Injustice: A Feminist Conflict-of-Laws Approach to the 'Comfort Women' Settlement*, 102 CORNELL. L. REV. 853 (2017) [hereinafter A *Feminist Conflict-of-Laws Approach*]; Riles, *supra* note 7; Michaels, *supra* note 434.
[461] Knop et al, *supra* note 8, at 594.
[462] ANNELISE RILES, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS 64-65 (2011).

Therefore, technique is not limited to rules and doctrines; but rules and doctrines are important elements of technique. They further argue that technique is different from formalism which views law as a mere constraint in oblivion of politics.[463] Rather, the technicalities of conflicts analysis foreground the questions of form without denying politics, which is achieved through an "*as if*" modality.[464] That is, conflicts analysis operates with fictions—in awareness of the irresolvable political conflicts, but holds, for the time being, "as if" the politics do not exist for the specific case at hand.[465] By temporarily shifting our focus from values and politics to the formally constrained legal techniques, conflict of laws does not cut off discourse; instead, it opens up an alternative discourse within which to frame, evaluate, and ultimately resolve, at least for the time being, value conflicts that are otherwise irresoluble if tackled in another way.

This present study builds particularly on the scholarship co-authored by Annelise Riles, Ralf Michaels, and Karen Knop, aiming to further explore the implications of legal technique for cultural debates and legal pluralism. It will not only further excavate the descriptive potentials of conflicts methods to *see* the conflicts among plural normative communities, but also add to existing literature by demonstrating the normative potentials of conflicts methods to actually *deal with* these conflicts.

B. Applying a Pluralistic Conflict-of-Laws Approach to the Avon Case

Before the application of a pluralistic conflict-of-laws approach, it is helpful to briefly summarize the cultural insights discussed in previous sections:

[463] Knop et al., *supra* note 8, at 642-48.
[464] *Id.* at 647-48.
[465] *Ibid.*

(a) Respect for cultural pluralism does not preclude the U.S. legal or moral judgments on foreign cultures, but U.S. adjudicators must recognize their own cultural situatedness before any of these judgments might be attempted (*supra* Chapter I);

(b) Although the U.S. court asserts adjudicative jurisdiction, it shall give due consideration to the applicability of relevant Chinese legal and cultural norms to avoid the charge of legal imperialism (*supra* Chapter II.A.1);

(c) Fewer than expected conflicts exist because either China or the United States may be disinterested in seeing its policies effectuated in the Avon case (*supra* Chapter II.A.2);

(d) The court shall seek to recognize Avon's agency in making and remaking its cultural identities (*supra* Chapters I, II.B.3.3.1);

(e) Culture is dynamic rather than static. A cultural practice might have different connotations in different periods, or it may fall into desuetude in a particular era (*supra* Chapters I, II.B.3.3.3);

(f) Culture is internally contested. Law on the books may be inconsistent with law in action, and the contents of a specific cultural practice may be debated among those who hold affiliations with a cultural community (*supra* Chapter I, II.B.3.3.4)

With all the cultural nuances and complexities in mind, the rest of this section works through the Avon case once more in accordance with a conflict-of-laws analysis. Following each technical step of conflicts analysis, readers will see how a pluralistic conflict-of-laws

approach captures the insights of recent cultural debates and contributes to the resolution of cultural conflicts in FCPA cases.

1. Pleading and Proving Foreign Law—Knowing Culture

The pertinence of foreign law is apparent in the Avon case from its outset. Avon China allegedly bribed Chinese governmental officials while operating in China, and the FCPA states that it shall be an affirmative defense if Avon China's conduct is lawful under Chinese law.[466] Nevertheless, in the United States, and in other common law countries, a party intending to raise an issue about rules of a foreign system bears the burden of invoking and proving them.[467] Judges are not required to, and in judicial practice most of them choose not to, undertake their own research on foreign law.[468] If neither party raises the issue of foreign law, or provides proof of its content, most courts will apply the law of the forum.[469] The Federal Rule of Civil Procedure 44.1 provides:

> *Determination of foreign law.* A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.[470]

The Advisory Committee Notes accompanying Rule 44.1 further provides, that in establishing the content of foreign law,

> the court is not limited by material presented by the parties; it may engage in its own research and consider any relevant material thus found. The court may have

[466] 15 U.S.C. §§ 78dd-1(c); 78dd-2(c); 78dd-3(c).
[467] Uniform Interstate and International Procedure Act, 13 U.L.A.355 (1986); 28 U.S.C.A. Rule 44.1.
[468] *Id.*
[469] SYMEONIDES, *supra* note 79, at 88.
[470] 28 U.S.C.A. Rule 44.1.

> at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand, the court is free to insist on a complete presentation by counsel.[471]

Rule 44.1 provides procedural guidance for U.S. federal courts in the adjudication of foreign law claims. The following analysis will therefore be based primarily on this rule.

Under conflicts analysis, the process of proving foreign laws seeks to go beyond positive rules and take all the elements that constitute the "living law" of a foreign country into consideration, which includes unofficial forms of ordering.[472] By doing so, conflicts analysis reveals how a particular foreign law is applied in practice; captures the possible inconsistencies between law on the books and law in action; and ultimately understands to what extent the involved value systems are similar or different, compatible or incompatible, fulfilling the same or diverse policy goals.[473] According to Rule 44.1, for example, the court may consider any material or resource regardless of its potential admissibility and source of origin.[474] While expert testimony is the most common way to prove foreign law, both sides of the Avon case are allowed to submit any other information they deem helpful, including secondary sources such as texts, learned journals, and various unauthenticated documents relevant to Chinese anti-bribery policies.[475] In order to ascertain relevant norms on *guanxi* and gift giving, both sides may submit supporting findings from the social science literature, news reports, public statements made by the Chinese government, or

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[471] *Id.*
[472] Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L.1, 21-26 (1991).
[473] See Mathias Reimann, *Comparative Law and Private International Law*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW 1363, 1394 (Mathias Reimann & Reinhard Zimmermann eds., 2006).
[474] 28 U.S.C.A. Rule 44.1.
[475] Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp., 978 F. Supp. 266, 275 (S.D. Tex. 1997) (describing the range of materials to which a court can look).

interviews of corporate managers who have done business in China. All these materials help to present China's anti-corruption system as not only a collection of black-letter rules, but as an interplay among multiple normative regimes operating on both state and non-state levels.

In addition to party submissions, the court can undertake independent research to fill gaps or doubts left by the materials presented before it.[476] Engaged in a subject that deals specifically with foreign-related legal disputes, conflicts lawyers are experienced in researching the law of a country whose official language is not English. For example, conflicts lawyers often turn to comparative law methodologies for information about foreign law.[477] In comparative law, the functional method turns out to be a strong tool in the hands of conflicts lawyers to understand and compare different cultures.[478] In cases where a foreign normative system is completely unknown, or has no direct equivalent, in the forum, the functional method searches for foreign law not by abstract legal terms or doctrinal structures, but by events.[479] That is, each research question is formulated by presenting a case, asking questions such as how foreign legal systems react to a particular situation.[480] In the Avon case, before collecting information on Chinese law, it should be

[476] 28 U.S.C.A. Rule 44.1

[477] Ralf Michaels, *Comparative Law and Private International Law*, *in* ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 417 (Jürgen Basedow et al. eds., 2017); Ralf Michaels, *The Functional Method of Comparative Law*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW 339, 342 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

[478] A literature review on the factual method is beyond the scope of this research, for discussions about this topic, *see* Reimann, *supra* note 473, at 1387; Michaels, *Comparative Law and Private International Law*, *supra* note 477, at 420-23.

[479] Michaels, *The Functional Method of Comparative Law*, *supra* note 477, at 342; FORMATION OF CONTRACTS: A STUDY OF THE COMMON CORE OF LEGAL SYSTEMS: CONDUCTED UNDER THE AUSPICES OF THE GENERAL PRINCIPLES OF LAW PROJECT OF THE CORNELL LAW SCHOOL 31 (Pierre Bonassies et al. eds., 1968) (The "factual method" was adopted by the Cornell Project on the Formation of Contract, a comparative research project directed by Rudolf Schlesinger).

[480] Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 29 (1991).

noted that what is characterized as a matter of criminal law under the FCPA may be subject to civil liability, administrative penalty, or Party disciplines in China. Likewise, Chinese law may use different terminologies to describe activities that are termed "bribery" under U.S. law. Therefore, instead of asking how the PRC Criminal Law regulates bribery, the functional method asks how gift exchanges between business investors and government officials are regulated in China. Different conflicts lawyers might design research questions in different ways, but the key insight is to focus on factual situations rather than concepts or terminologies. Once the research question is designed appropriately, the court may refer to a wide variety of official and unofficial resources for answers. The whole process usually would enable the court to identify all relevant foreign norms that functionally resemble the FCPA, before engaging in a meaningful choice-of-law analysis.

A conflict-of-laws approach to the ascertainment of foreign law presents its own concerns. These concerns, however, are precisely where this approach captures crucial cultural insights. The first obvious concern entails the establishment of foreign law through each party's declarations. Under Rule 44.1, even though the court can conduct its own research, it is also "free to insist on a complete presentation by counsel"[481] of relevant content of foreign law. The objectivity and neutrality of each party's presentation is often questionable because they may submit evidence in a partisan fashion—only hiring experts whose testimonies are consistent with their positions, disregarding those against their views. Avon China might present the court with empirical studies on *guanxi* between Chinese government elites and their Western business partners, disregarding those studies conducted among lower-level Chinese government officials, local private enterprises, and

[481] 28 U.S.C.A. Rule 44.1.

common Chinese citizens which may reveal more negative perceptions of the *guanxi* culture. Sometimes, a litigant may purposefully avoid the application of foreign law by not raising the choice-of-law question to the court or not proving the foreign law at issue to the court's satisfaction. A litigant may even deliberately confuse the court, by painting an overly complicated picture of foreign culture with conflicting evidence, in the hope that the court will apply forum law or dismiss the case on the ground of *forum non conveniens*.[482] These are all legitimate concerns, but the conflicts approach, by vesting the initiative of pleading and proving foreign law in the hands of the litigants, also gives them the agency to decide whether to claim their affiliations with one culture or another, in addition to an opportunity to articulate their own descriptions of a specific cultural phenomenon.[483]

The issue-by-issue analysis adopted by the conflicts approach is even more conducive to a nuanced appreciation of the litigants' multi-layered cultural identities. In conflicts, if a case involves more than one issue, separate choice of law inquiry must be made with regard to each issue.[484] Applying the law of a jurisdiction to one issue does not mean that the same law will be applied to other aspects of a case.[485] Litigants and their attorneys often have to carefully compare all the applicable laws of competing jurisdictions, determining whether to put foreign law in issue for certain aspects of their case. If the court, after going through each step of conflicts analysis, applies the laws of different jurisdictions to different issues of a case, the resulting phenomenon is called dépeçage.[486] When Avon

[482] Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 891, 911 (2011).
[483] *See* Knop et al., *supra* note 8, at 629-31.
[484] SYMEONIDES, *supra* note 79, at 125.
[485] *Ibid*.
[486] *Ibid*.

China asks the court to apply Chinese law to decide whether an editor working as a temporary employee of a government-owned newspaper qualifies as a foreign official, it situates itself within Chinese culture. Avon China may choose to prove to the court that, according to the PRC Criminal Law, persons who work for state-owned companies but do not perform public duties are not government officials.[487] Under Chinese law, public duties usually refer to those activities that lead, guide, supervise and manage public affairs.[488] Avon China offered the editor cash gifts on the understanding that he did not engage in any of the public duties mentioned above and that he was only a temporary employee of that newspaper. At the same time, Avon China may also seek to avail itself of the "facilitating or expediting payments" [489] exception and the "reasonable and bona fide expenditure"[490]defense prescribed under the FCPA. Possible strategies that Avon China could adopt have been discussed in Chapter II.B. For example, it could argue that most of the gifts, such as mooncakes, skin-care products and vintage wines, carried Avon's name or logo and were used to promote its products. Avon China offered these gifts on the understanding that, under U.S. law, it is exempted from criminal liability because of the "reasonable and bona fide expenditure"[491]defense. It seems that the conflicts approach to the proof of foreign law is easily manipulated by the litigants to shop around for the most favorable laws. Avon China seeks to attain the most favorable results by invoking Chinese law only on those issues where it would benefit, sticking to forum law on all other issues.

[487] Criminal Law of the People's Republic of China, art. 93, 391.
[488] Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Zhonghua Renmin Gongheguo Xingfa Di Jiushisan Tiao Di Er Kuan De Jieshi (全国人民代表大会常务委员会关于《中华人民共和国刑法》第九十三条第二款的解释) [The Interpretation of the Standing Committee of the National People's Congress on Paragraph 2 of Article 93 of the Criminal Law of the People's Republic of China] (promulgated by 15th Sess. of the Standing Comm. of the 9th Nat'l People's Con, effective on April 29, 2000).
[489] 15 U.S.C. §§ 78dd-1(b); 78dd-2(b); 78dd-3(b).
[490] 15 U.S.C. §§ 78dd-1(c); 78dd-2(c); 78dd-3(c).
[491] *Ibid.*

Nevertheless, the conflicts approach also captures the insight that transnational actors, rather than to the culture of their home countries, live and act between cultures in different aspects of their lives. Their conducts are often informed by more than one culture, and sometimes they may realize in hindsight that they were in one value system while living in accordance with the norms of another. The conflicts approach does not decide for transnational actors who they are. Rather, it gives them agency to assert their own cultural positions when acting across borders. In the Avon case, it is also possible that Avon China does not raise the issue of Chinese law at all regarding the identity of that Chinese editor. Avon China's understanding of the nature of that editor's identity might have been shaped by U.S. norms, and it might argue that a temporary employee of state-run news media does not fall within the definition of "foreign official" under the FCPA. In any case, the conflicts approach offers Avon China the autonomy to have a say in its own cultural decisions.

In an adversarial system, the inaccuracy associated with partisanship is usually minimized because both parties can fully present any evidence about foreign law to the court.[492] The adversarial process of proving foreign law also echoes with the insight that culture is internally contested rather than monolithic. In the Avon case, the litigants have presented conflicting descriptions and interpretations of the culture of *guanxi*, primarily through competing expert testimonies which reflect attitudes toward gift giving at different levels of Chinese society. While Avon China presents how *guanxi* is perceived among Western investors, the DOJ draws the court's attention to a multitude of other participants in *guanxi* networks and how they might have experienced the same culture differently. The culture of *guanxi* must also be proved as of a specific time. *Guanxi* practices before Xi took

[492] Wilson, *supra* note 482, at 1134.

office may differ from those at different times under Xi's leadership, and they are still evolving as China's political, social and economic reforms continue to unfold. In the Avon case, as well as in other cases where a cultural defense is invoked, each party aims not at depicting an accurate or whole picture of certain cultural practices, but at making claims in furtherance of its own case. Even all the evidence before the court combined may not necessarily tell the whole story of a culture, as the litigants cannot fully represent the views of all cultural participants at all times.

Therefore, a court dealing with foreign cultures engages in a task that is paradoxical in nature. It must make claims about a foreign value system, recognizing that its content cannot be fully ascertained. A conflicts approach responds to this challenge by denying the force of stare decisis to prior court decisions on the content of foreign law.[493] It treats court decisions on foreign law as findings of fact, or "quasi-fact,"[494]in the sense that they are highly case-specific and therefore should have no binding force except between the litigants as to the particular case.[495] The court sitting before the Avon case is aware that different courts may interpret the culture of *guanxi* differently and hence its conclusion is not the authentic one. It appreciates the impossibility of a comprehensive understanding of

[493] *See* Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-hard Doctrine*, 65 MICH. L. REV. 613 (1967). *See also* Knop et al., *supra* note 8, at 630 ("More recently, in many U.S. jurisdictions the judge can conduct her own inquiry into foreign law, but the results of this inquiry have the ambiguous status of quasi-fact…Likewise, the court's decision about the nature of foreign law has no precedential value either for the foreign jurisdiction or for the meaning of the foreign law in the court's jurisdiction.").

[494] *See* Knop et al., supra note 8, at 630 (mentioning that at common law, traditional conflicts theory treated issues of foreign law as a question of fact. Even though Rule 44.1 provides that the court's determination on foreign law shall be treated as a ruling on a question of law, foreign law still has the ambiguous status of quasi-fact in terms of precedential weight).

[495] Some courts, however, did give precedential weight to prior court decisions on foreign law issues. *See, e.g.*, Nicholas E. Vernicos Shipping Co. v. United States, 349 F.2d 465 (2d Cir. 1965) (relying on a prior court decision when ascertaining the content of Greek law); People v. Russian Reinsurance Co., 225 N.Y. 415, 175 N.E. 115, 117 (1931) (relying on a prior court decision on Russian corporate law).

guanxi and carefully limits its inquiry to those aspects of Chinese culture that would materially affect the outcome of the Avon case. For example, the court might only examine how *guanxi* is practiced and perceived in a business-to-government context. It may further limit its inquiry to the rules of *guanxi* followed by Western investors and higher-level Chinese government officials. What the court applies ultimately is not *the* Chinese culture of *guanxi*, but *a* particular version of *guanxi* that will bring the Avon case to a legally defensible end, and that will only bind Avon, Avon China, and the DOJ with respect to this particular charge of bribery.[496] By limiting its judgment on *guanxi* to a specific case scenario, the court also avoids becoming entangled in the larger political debate on whether the logic of personalistic networks trumps that of rational-legal economic relations, or even whether Chinese capitalism trumps Western capitalism.[497] This also entails the "as if" modality of conflicts analysis.[498] Conflicts lawyers are fully aware of the larger political conflicts between China's state-directed mixed economy and the American way of capitalism. The specifics of such conflicts are often undefinable and irresolvable. Nevertheless, Conflicts lawyers act as if such conflicts could be phrased, defined, and ultimately resolved, at least between these specific litigants in the specific case.

2. Characterization—Dealing with Cultural Situatedness

Characterization is the process of classifying a given set of facts into one or more legal categories, such as torts, contracts, and property. Under the traditional conflicts approach, choice-of-law rules are formulated with reference to different categories of

[496] Knop et al., *supra* note 8, at 645. In judicial practice, courts can successfully apply Rule 44.1 even when the material submitted by parties does not provide the whole picture of foreign law, or in cases in which the foreign law has unresolved ambiguities. *See* Matthew J. Ahn, Ahn, Matthew, 4*4.1 Luftballons: The Communication Breakdown of Foreign Law in the Federal Courts*, 89 N.Y.U. L. REV 1343, 1355-56 (2014).
[497] Yang, supra note 389, at 474-476.
[498] *See supra* Chapter II.A.1.

law.[499] For example, courts determine tort issues by reference to the law of the place of wrong (*lex loci delicti*),[500] contract issues by reference to the law of the place where the contract was made (*lex loci contractus*),[501] and most issues pertaining to immovables by reference to the law of the situs of the property.[502] Therefore, characterization can be a result-determinative step under the traditional conflicts analysis, as it determines which choice-of-law rule is applicable, and thus the governing law, by fitting a case into a specific legal area.[503]

Although modern conflicts approaches—such as the Restatement (Second) and Brainerd Currie's governmental interest analysis—are far more flexible and less categorial in determining the applicable law, characterization can still affect the outcome of choice-of-law analysis in various respects.[504] For example, a court's characterization may affect its judgment on the relevance of certain material or source and, ultimately, the content of foreign law. If the court characterizes the Avon case as one of criminal law, it may only refer to the PRC Criminal Law for relevant Chinese anti-bribery provisions. However, if the court identifies the case as one that also involves administrative law, it may expand its scope of research to include the AUCL. Under a pluralist conflicts approach, which incorporates various official and unofficial normative systems into conflicts analysis, the court may characterize the case not by legal categories but by "issues" or "social

[499] The traditional conflicts approach mainly refers to the choice-of-law rules adopted by the First Restatement. *See* Robert Allen Sedler, *Characterization, Identification of the Problem Area and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUTGERS-CAM L.J. 8, 100 (1970) ("It has now become standard practice to analyze problems of the conflict of laws in terms of the distinction between the 'traditional' and 'modern' approaches to the choice of law process.").
[500] RESTATEMENT (FIRST) OF CONFLICT OF LAWS, § 384 (1934).
[501] *Id.* §§ 325, 326, 332.
[502] *Id*. §§ 214, 216, 217, 225.
[503] SYMEONIDES, *supra* note 79, at 65.
[504] SYMEONIDES, *supra* note 79, at 64-66.

sectors."[505] Instead of fitting the Avon case into criminal or administrative law, the court could characterize it as one that involves issues of corporate bribery. Or, to avoid the word "bribery" which often appears as a law terminology in criminal codes, the court could formulate the issue by generalizing the key facts of the case. Therefore, the Avon case may be classified as one that involves unethical business conduct or, to be more specific, one that concerns business gifts to government officials. By constructing its research around issues rather than legal categories, the court shifts away from an exclusive focus on state-made laws, giving at least some degree of attention to all relevant social norms that are considered as binding and followed by people on business gift giving. This, as a result, opens up the opportunity for culture—such as *guanxi* and the related gift-giving rituals—to come to the fore and provide the relevant substantive norms under which the case may be resolved.

Characterization is also relevant when the choice is to be made between normative regimes other than nations.[506] Conflicts scholars have proposed that a new form of conflicts analysis should be applied to deal with "collisions between distinct global social sectors," whose jurisdiction is defined "not along territorial, but along social sectoral lines."[507] Examples of such social sectors may include business, science, health, environment, the military, sport, etc.[508] Each highly specialized social sector may be considered a "self-contained regime," which generates rules that regulate itself.[509] Martti Koskenniemi has described the concept of a "self-contained regime" in the following way:

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[505] Fischer-Lescano & Teubner, *supra* note 99, at 1000.
[506] *Id.* at 1021.
[507] *Ibid.*
[508] *Id.* at 1006.
[509] *Id.* at 1013.

> A regime is a union of rules laying down particular rights, duties and powers and rules having to do with the administration of such rules, including in particular rules for reacting to breaches. When such a regime seeks precedence in regard to the general law, we have a "self-contained regime", a special case of *lex specialis*.[510]

Different regimes contain rules that reflect the unique logics and rationalities of a particular social sphere, which may conflict with one another.[511] For example:

> Standard contracts within the *lex mercatoria* reflecting the economic rationality of global markets collide with WHO norms that derive from fundamental principles of the health system. The *lex constructionis*, the worldwide professional code of construction engineers, collides with international environmental law. The WTO Appellate Panel is confronted with cases encompassing collisions between human rights regimes, environment protection regimes and economic regimes.[512]

Therefore, in its search for potentially applicable rules, the court might have to first identify the relevant social sectors or special regimes to which the legal question in issue belongs.[513] For instance, should a particular legal issue be characterization as one of trade, or environmental protection, or both? Then the court can continue its research and analyses regarding the conflicting rules and rationalities contained in the previously identified social sectors(s).

In the Avon case, by influencing the court's determination on the content of Chinese law, characterization can further affect subsequent analyses of the policy goals embodied in Chinese anti-bribery norms, what facts are relevant, and whether China has an interest

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[510] Martti Koskenniemi, *Fragmentation of International Law: The Function and Scope of the Lex Specialis Rule and the Question of 'Self-Contained Regimes': An Outline* 8-9 (2004), https://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf
[511] Fischer-Lescano & Teubner, *supra* note 99, at 1006-1007.
[512] *Id.* at 1013.
[513] *Id.* at 1021

in effectuating its policies in this case. The court which sees the Avon case as one of criminal law will be emphasizing different policies than the court which sees it as one of anti-unfair competition law. In the same vein, the court which focuses only on the enforcement of state-made laws will identify different policy concerns than the court which also seeks to test the boundary of law in a culture that relies heavily on personalistic relations. Different interpretations of the policies or objectives embodied in Chinese law will then lead to different conclusions as to whether China has a real interest in applying its law. Chapter III.B.4 of this dissertation, which navigates through the Avon case in accordance with Brainerd Currie's governmental interest analysis,[514] will elaborate this point in further detail. By subsuming the case into a particular legal category or social issue, the court will also be able to construct what facts are legally relevant under the light of the concepts and principles associated with its classification.[515] For example, whether Avon China pays Chinese government officials for immediate return or in the expectation of unspecified favors in the future becomes relevant to the court, only if the judge determines that the culture of *guanxi* provides applicable substantive norms for the case. But, in order for the culture of *guanxi* to come into play, the Avon case must be characterized in a way that draws the court's attention to this concept.

The process of characterization is not unique to conflict of laws.[516] In fact, it is performed whenever the court fits a fact situation into one or more categories that are used to divide up law.[517] In a purely domestic case, this step is easier because it is performed exclusively under a single legal system and usually is assisted by available codes or

[514] CURRIE, *supra* note 252, at 189.
[515] Sedler, *supra* note 499, at 27.
[516] SYMEONIDES, *supra* note 79, at 65.
[517] Sedler, *supra* note 499, at 26.

precedents.[518] It is also far less crucial in terms of its impact on the final decision, mainly because the norms for that decision usually can be found in the forum's statutory provisions and judicial precedents.[519] In conflicts cases, however, it can become complicated and result-determinative due to the conflict of characterization, which arises whenever the normative orders involved disagree on the nature of the problem at issue.[520] For example, as explained earlier, the Avon case may be regarded by the United States as a matter of criminal law and by China as a combined issue of law (criminal or administrative), politics and culture. Not to mention that both countries may differ on their understanding of what constitutes bribes and gifts to begin with.

When a conflict of authority arises as to the nature of a dispute, conflicts law has to answer the question of whether the process of characterization should be performed under the forum law or under the foreign legal system applicable to the case at issue.[521] As a general rule, conflicts law suggests that, under such circumstances, the judge should follow his own view, subject to the legal system of the sovereignty in which the forum is located.[522]The controversies and debates surrounding this rule are beyond the scope of this current study.[523] They have been reviewed elsewhere.[524] For the purpose of this current study, suffice it to say that it raises the concern about whether a U.S. court can properly

[518] SYMEONIDES, *supra* note 79, at 65.
[519] Sedler, *supra* note 499, at 31.
[520] Veronique Allarousse, *A Comparative Approach to the Conflict of Characterization in Private International Law*, 23 CASE W. RES. J. INT'L L.479, 479 (1991).
[521] SYMEONIDES, *supra* note 79, at 66.
[522] The Restatement (Second) provides that, with some exceptions, "[t]he classification and interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7. The exceptions apply under a few circumstances when the Restatement (Second) authorizes a renvoi. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §8.
[523] *See, e.g.*, SYMEON C. SYMEONIDES & WENDY COLLINS PERDUE, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL, CASES AND MATERIALS 56 (2019); Allarousse, *supra* note 520, at 483-88.
[524] *Supra* note 523.

apply Chinese law when a Chinese court would have adopted an alternative characterization had the case been brought before it. The same concern may continue to exist throughout the process of applying Chinese law. If the U.S. court determines that the Avon case shall be governed by Chinese legal and cultural norms, it must then interpret and apply the concepts, terms, and principles employed by such norms the way a Chinese court would follow.[525] Conflicts law refers to this process as "secondary characterization," which has to do with any additional characterization and interpretation that may arise after the selection of the applicable law.[526] It further provides that, as a general rule, this process must be performed according to the view of the jurisdiction whose norms have been selected as governing.[527] Therefore, the U.S. judge has to define *guanxi* and its related gift-giving customs *precisely* the way a Chinese court would follow, and applies norms and principles a Chinese court would consider proper to deal with them.

It soon becomes obvious that it is formidably challenging, if not completely impossible, to ask the forum to apply the law of a foreign jurisdiction exactly the way the court of that jurisdiction would do. On the one hand, that foreign jurisdiction may disagree with the forum on the nature of the issue presented to it for solution. On the other hand, the forum cannot remain totally unbiased during the process of secondary characterization, as its own view, which is deeply influenced and shaped by the value system of its jurisdiction, will inevitably creep in to its understanding of foreign norms. Uniformity is even harder to

[525] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 7.
[526] A.H. ROBERTSON, CHARACTERIZATION IN THE CONFLICT OF LAWS 64 (1940) ("A question of secondary characterization . . . only arises after the selection of the appropriate conflicts rule and the choice of the proper law.").
[527] Falcon Bridge, *Renvoi, Characterization and Acquired Rights*, 17 CAN. BAR REV. 369, 373 (1939); Beckett, *The Question of Oassification ("Qualification") in Private International Law*, 15 BRIT. Y. B. INT. LAW 46, 75 (1934).

achieve when a concept unfamiliar to the forum (such as *guanxi*) is also in a state of ambiguity in the foreign jurisdiction whose law is selected as applicable. Under such circumstances, the nature of that concept may only be determined with reference to the particular fact pattern before the court. Also, the legal consequences of practices associated with that concept would be determined based upon some kind of policy analysis, the result of which may vary from analyst to analyst.

The near impossibility of applying foreign law *exactly* the way it would be applied in a foreign jurisdiction serves as a key argument for Salbu's critiques against the FCPA.[528] As previously discussed, Salbu argued that moral imperialism is an inevitable reality whenever one sovereignty seeks to externally interpret and judge behaviors within the border of another, mainly because this process will unavoidable carry its own cultural biases.[529] Therefore, Salbu is opposed to any efforts for one jurisdiction to regulate corrupt behaviors inside the border of another until, and unless, the "homogenization of cultures worldwide" is achieved.[530] In contrast, conflicts law does not preclude external judgment of foreign values and behaviors. However, conflicts lawyers undertake this job while being fully aware of the cultural situatedness of any potential claims they may generate.[531] That is, the U.S. judge may characterize the legal essence of the Avon case in accordance with U.S. law, acknowledging at the same time that a Chinese court may disagree with his characterization. When asked to apply Chinese law, he makes a good faith attempt to understand the nature of *guanxi* and Chinese gift giving in their full cultural and historical

[528] Salbu, *Global Village*, *supra* note 100, at 252.
[529] *Ibid.*
[530] *Ibid.*
[531] Knop et al., *supra* note 8, at 635

contexts before any judgments might be attempted. Even so, he still fully acknowledges that a Chinese court, or even a different U.S. judge sitting before the same case, may interpret these concepts in a different way.

The fact that conflicts lawyers openly acknowledge the normative situatedness of the characterization process is evidenced by this field's "built-in critiques."[532] Although most courts around the world conduct the characterization process under the forum law, doctrinal and theoretical critiques against this approach also runs through the history of this discipline.[533] Of particular relevance in this current study, for example, is the critique that it would not reach justifiable results when there is no close analogy between the forum law and a foreign institution or rule.[534] Even if there is a sufficiently close analogy between the laws of the involved states, when the application of these laws would lead to different results, many courts tend to manipulate this process by starting their analysis from the back end—first selecting the applicable law and then formulating a characterization that would justify that decision.[535] This is especially the case when characterization plays a crucial role in the final outcome, such as under the First Restatement. After all, it is not necessarily right or wrong to characterize the nature of a legal problem one way or another. The Avon case could be identified as one of criminal or administrative nature. The issue to be resolved could be understood as one that is exclusively regulated by state-made laws or involves unofficial cultural norms. Both characterizations are correct when the context in which they are made and the different purposes they may serve are properly considered.

[532] *Id.* at 596, 635.
[533] Allarousse, *supra* note 520, at 481-88.
[534] *Id.* at 484.
[535] SYMEONIDES, *supra* note 79, at 65.

Conflicts scholars have also proposed two other approaches to deal with the conflict of characterization: characterization by the law that has been selected as applicable (the *lex causae* approach), and characterization by reference to universal legal concepts, which are borrowed from the general science of law rather than any particular legal system (the universal law approach).[536] The *lex causae* approach achieves uniformity in the sense that it allows the law governing the legal dispute to also control its characterization. However, it is simply a circular argument to state that the applicable law governs the characterization process even before this process, and other choice-of-law analyses that follow, have led to the selection of such a law.[537] The universal law approach minimizes the risks of misrepresenting and distorting foreign normative regimes.[538] Nevertheless, it underestimates the difficulty of searching for universal standards among different legal and cultural systems.[539] Also, even the comparative studies required in the search for universal concepts can never be truly unbiased because, again, a comparatist is always situated within his own legal and value systems, which in turn will shape his analysis.[540] In the long run, three doctrinal strands "oppose and fight each other," and conflicts scholars simply acknowledge that there is no ideal solution to the conflict of characterization.[541] As Knop, Michaels and Riles commented in their collective work:

> Conflict of laws is hardly naive about these challenges and limitations…. Far from having a case of critical amnesia, the discipline today is an improbably mix of

[536] Allarousse, *supra* note 520, at 487.
[537] *Id.* at 486.
[538] *Id.* at 488.
[539] *Id.* at 488
[540] Michaels, *Comparative Law and Private International Law*, *supra* note 499, at 424.
[541] Allarousse, *supra* note 520, at 481.

> doctrinal tools paired with normative and practical critiques of those tools. The discipline comes prepackaged with its own critiques.[542]

They referred to this feature of conflicts law as self-reflexivity paired with an "as if" modality.[543] It is self-reflexive because this discipline acknowledges that any claims about foreign law are inevitably situated and partial.[544] However, it does not aim at a truth claim from the beginning.[545] Instead, it focuses on a very limited purpose of bringing the case at hand to a legally justifiable result.[546] To this end, conflicts lawyers proceed with their analyses "as if" the result of the characterization process would be agreed upon by the legal systems involved.[547] This "as if" modality of conflicts analysis echoes with a crucial insight that cultural relativism does not oppose moral judgments on foreign cultures, but an adjudicator must do so while being fully aware of his own cultural situatedness.[548] As will be seen more clearly in the following sections, the "as if" modality manifests itself in various stages of a conflicts analysis. It is precisely how otherwise irresolvable cultural conflicts are resolved through legal techniques, and how a conflicts approach avoids criticisms of cultural imperialism to the extent possible.[549]

Before moving to the next sub-section, it is also worth mentioning that, in ordinary domestic cases, characterization is often performed automatically and unconsciously.[550] The judge places the fact situation into particular categories of legal thought, only becoming conscious of it when more difficult and borderline cases arise and a careful

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[542] Knop et al., *supra* note 8, at 645.
[543] *Id.* at 634.
[544] *Ibid.*
[545] *Ibid.*
[546] *Ibid.*
[547] *Id.* at 634-36.
[548] Turner, *supra* note 22, at 275.
[549] Knop et al., *supra* note 8, at 642-48.
[550] Sedler, *supra* note 521, at 27.

consideration of this process is required.[551] That is, nearly always a judge makes judgments without noticing that an alternative, but equally justifiable, characterization might have led to a different conclusion. Therefore, applying a conflicts approach to the resolution of FCPA cases, and making characterization a necessary analytical step, also have the merit of constantly reminding the judge that there are many different ways to understand the nature of bribery, and the U.S. way of characterization is only one of them.[552]

3. Allocating Contacts—Dealing with Cosmopolitan Cultural Identities

One of the most controversial aspects of the FCPA is its expansive extraterritorial reach. FCPA's jurisdiction covers domestic entities (U.S. corporations and nationals), foreign issuers (foreign corporations with shares trading on a U.S. stock exchange), and non-issuing foreign agents or companies who take steps in furtherance of an improper payment scheme while in the U.S. territory.[553] As to domestic entities, the FCPA applies even if an improper payment scheme is devised and executed entirely in a foreign territory. As to foreign issuers, the FCPA applies as long as the "mails or any means or instrumentality of interstate commerce" are used in furtherance of a bribery scheme. In practice, foreign issuers have been prosecuted even when the corrupt scheme in question neither originated nor was completed within U.S. borders.[554] This means that the United States can subject MNCs to FCPA jurisdiction based on a merely tangential connection between the bribery and its territory. In fact, the DOJ and SEC have asserted that the

[551] *Ibid.*
[552] Knop et al., *supra* note 8, at 628.
[553] 15 U.S.C. §§ 78dd-1–-3.
[554] Annelise Leibold, *Extraterritorial Application of the FCPA under International Law*, 51 WILLAMETTE L. REV. 225, 226 (2014-2015).

following connections between a foreign issuer and the U.S. are enough to claim FCPA jurisdiction:

> placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States.[555]

In contrast, a conflicts approach gives due consideration to the multiple contacts that exist between the parties, the alleged bribery events, and the relevant states.[556] It assigns contacts to each involved state and applies the law of the state that has the "most significant relationship" to the occurrence and the parties in issue.[557] Thus, a conflicts approach resonates with a cosmopolitan vision of cultural identity which recognizes citizens' multiple affiliations with the world beyond their local borders, as well as the spatial expansion of their rights and duties arising therefrom.[558] A conflicts lawyer would notice numerous connections between the Avon case and China: Avon China operates in China; the alleged bribery recipients are Chinese government officials; the Corporate Affairs Group, an internal department of Avon China responsible for establishing and maintaining *guanxi* with Chinese officials, is comprised primarily of local Chinese employees; most of the alleged bribery schemes took place or originated within Chinese territory; and most of the alleged bribes (monetary payments and tangible financial assets) are from China. Multiple contacts also exist between this case and the U.S.: Avon China is

[555] U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, THE RESOURCE GUIDE, *supra* note 103, at 10.
[556] SYMEONIDES, *supra* note 79, at 154-55.
[557] RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188.
[558] *See* Jeremy Waldron, *What Is Cosmopolitan*? 8 J. POLITICAL PHILOS. 227 (2000).

a wholly owned subsidiary of Avon, a U.S. company; certain alleged bribes carry Avon's name or logo; and the alleged bribes include travels to the United States.

China arguably has a greater number of contacts with this case than the United States. However, a conflicts approach seeks to perform a qualitative, rather than quantitative, evaluation of each contact.[559] As the next sub-section will show, a qualitative evaluation analyzes the relative significance of each contact in light of their roles in furthering the underlying policies of the laws of the contact states.[560] Therefore, the FCPA may be applied even if the U.S. has a smaller number of connections with Avon China and its bribery scheme, so long as those few connections make the U.S. reasonably concerned with the effectuation of its anti-bribery policies in this particular case. By the same token, Chinese law and culture may not be applied even though China otherwise has the greatest number of contacts with the Avon case, especially if neither of these contacts arouses China's interest in enforcing its laws against the particular defendant corporation(s). Hence a conflicts approach is different from Salbu's proposal, which overemphasizes the significance of a single contact, namely the place where bribery occurred, and completely rejects the FCPA's jurisdiction over any payment of bribes abroad.[561]

In addition to the policy goals of the laws of the involved states, a conflicts approach also evaluates the significance of contacts in light of the justified expectations of the parties.[562] It considers whether Avon and Avon China give advance thoughts to relevant legal and cultural norms that may be applied to determine the legal consequences of their

[559] SYMEONIDES, *supra* note 79, at 154.
[560] *Ibid.*
[561] Salbu, *Global Village*, *supra* note 100, at 252.
[562] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188, comment 1.

gift-giving practices. A conflicts approach may defer to the parties' choice of a state with a "substantial relationship" to the case, even though that state may not be the one of the "most significant relationship" absent such a choice.[563] Here, the defendant corporations clearly expect that Chinese norms be applied because (a) they have pleaded and proved Chinese law and culture to the court; (b) Avon held several rounds of internal trainings on Chinese cultural practices before entering Chinese market; and (c) Avon China has been established and operated exclusively in China. It should be noted, however, that the protection of justified expectations is a factor that varies in importance "from field to field and from issue to issue."[564] In areas where strong public policy issues are involved, such as anti-corruption and many other public law matters, courts tend not to defer to parties' expectations as much as they would do in areas that only involve private matters, such as contracts and torts. Therefore, the court's decision about whether and how much it should respect the defendant corporations' expectations may largely depend on how it characterizes the nature of this particular case in the previous analysis. It may decide that the defendants' expectations are of relatively little importance, especially if it finds that the application of the FCPA should not disappoint or surprise them either, mainly because Avon, the parent company, is incorporated and operated in the United States. Regardless of the result, the value of a conflicts approach lies in the opportunity it gives to the parties to decide what cultural norms they would like to observe and uphold. Whether a particular party's desire will override other policy concerns in the choice-of-law analysis is a different matter.

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[563] Alan D. Weinberger, *Party Autonomy and Choice-of-Law: The Restatement (Second), Interest Analysis, and the Search for a Methodological Synthesis*, 4 Hofstra L. Rev 605, 613 (1976).
[564] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188, comment on section (1) b.

Under a standard conflicts analysis, which deals exclusively with state-made laws, courts mainly consider territorial and nationality-based contacts.[565] Under a pluralistic conflicts approach, however, courts must also consider other possible ways that may connect people with various, sometimes non-state, cultural communities.[566] In the Avon case, if the court recognizes that *guanxi* is a crucial system of beliefs in Chinese culture, it may think of those who share and practice these beliefs as a cultural community. Although this cultural community mainly exists and operates within Chinese territory, its norms are not generated by the official legislative system of China, nor does the binding force of its rules depend on state power. That is, people who share common experiences of *guanxi* form a cultural community that is non-state in nature. The court must then consider what contacts exist between the defendant corporations and the *guanxi* community.

One possible connecting factor is community membership. The court may find that although the defendants are U.S. corporations, they nonetheless share a core set of beliefs, patterns of behavior and values with local Chinese when they are engaged in *guanxi*-related practices. To view the defendant corporations as members of the *guanxi* community is to acknowledge that they are active participants in the culture of *guanxi*, not passive recipients. A pluralistic conflicts approach recognizes that MNCs belong to various cultural communities or groups besides their own home culture. Being a member of a cultural community does not necessarily require loyalty.[567] MNCs "are permitted to shift identities amid a plurality of possible affiliations and allegiances" as their businesses move from place to place.[568] A pluralistic conflicts approach also recognizes that people with different

[565] Berman, *the globalization of jurisdiction*, *supra* note 455, at 320.
[566] *Ibid.*
[567] Berman, *Cosmopolitan Vision*, supra note 455, at 1859.
[568] *Ibid.*

nationalities or other political affiliations can nevertheless form a common cultural community.[569] Therefore, MNCs from all over the world can be members of the *guanxi* community, at least when they manage their Chinese businesses following *guanxi*-related norms. Iris Young has described this form of social relations as the "'being-together' of strangers."[570] Members of a common community may be strangers in the sense that they come from different cultures, histories, professions, political regimes, etc. And a community persists without having either to assimilate or to reject those differences.[571] Hence, in the Avon case, the defendants can claim to be active participants in Chinese culture (primarily via their membership in the *guanxi* community), even though they are foreign investors and have no connection with China other than business operations. It should be noted, however, that although the defendant corporations can establish a "membership connection" with the Chinese culture of *guanxi*, the significance of such a connection must be evaluated in light of relevant Chinese legal and cultural policies. The next subsection will show how policy analyses are performed under a pluralistic conflicts approach.

4. Interest Analysis—False or True Conflict?

As discussed in the previous subsection, modern conflicts analysis uses multiple connecting factors to allocate the issues of a case and the parties to different jurisdictions competing for governance. Traditional conflicts methods, however, are rather rigid and mechanical.[572] Most of the First Restatement's rules, for example, depend exclusively on

[569] *Id.* at 1858-59.
[570] Iris Marion Young, *The Ideal of Community and the Politics of Difference*, *in* FEMINISM/POSTMODERNISM (THINKING GENDER) 300, 318 (Linda J. Nicholson ed., 1990).
[571] *Id.* at 319.
[572] SYMEONIDES, *supra* note 79, at 96.

a single contact, such as the place of the wrong for torts, or the place of making for contracts, to determine applicable laws.[573] Traditional conflicts methods have also been criticized as relying solely on territorial contacts in allocating legislative jurisdictions, without contemplating the content or underlying polices of the implicated laws.[574] As a result, the traditional choice-of-law methodology has been compared to a slot machine, which is programmed to pop automatic results once the coins (the territorial contacts) are inserted.[575]

In the 1950s and early 1960s, as part of the larger movement away from formalism and toward the legal-realist conception of law as "an instrument of social control," Brainerd Currie enunciated a new approach to conflicts analysis: governmental interest analysis.[576] Currie's theory of interest analysis marked a frontal attack against the "conflicts slot machine" and significantly transformed the discipline of conflict of laws.[577] Governmental interest analysis has as its fundamental premise that a state may have an interest in applying its law to multistate disputes in order to effectuate its policies.[578] The conflicts technique of interest analysis consists of two basic steps: The court should first examine the substantive policies embodied in the laws of the involved states, primarily through the ordinary process of statutory "construction and interpretation"[579] commonly employed in wholly domestic cases. Then, the court shall determine whether each involved state has an appropriate contact with the parties, the subject matter, or the litigation, so that it is reasonable for each state to claim an interest in having its respective policies effectuated in

[573] *Id.* at 67.
[574] Cavers, *supra* note 438, at 178.
[575] *Ibid.*
[576] CURRIE, *supra* note 252, at 64.
[577] SYMEONIDES, *supra* note 79, at 103-05.
[578] CURRIE, *supra* note 252, at 189.
[579] *Id.* at 184.

a specific case.[580] Properly conceived, the analysis of state interest offers the criteria for classifying conflicts cases into three categories:

> (1) only one of the involved states is interested in applying its law (the "false conflict" pattern);
>
> (2) more than one state is interested (the "true conflict" pattern); or
>
> (3) none of the states are interested (the "no-interest" pattern or "unprovided-for case").[581]

Extensive review of Currie's governmental interest analysis and of his approach to the disposition of the three conflicts patterns is beyond the scope of this present study. That review has been conducted elsewhere.[582] Rather, this present study focuses on an important insight of the interest-analysis theory for resolving cultural conflicts: Conflict can be "minimized" or "avoided" by eliminating false conflicts, situations where only one state is found to be interested in effectuating its policies or the policies of several interested states are essentially compatible.[583] The idea of false conflicts greatly simplifies choice-of-law problems by providing a workable means of identifying the state(s) whose policies are irrelevant to the particular case presented, eliminating it (or them) from consideration, and ultimately applying the law of the only interested state.[584] In more difficult cases, where initial attempts at conflict avoidance are unsuccessful and more than one state appears to have an interest in asserting their policies (in which case a true conflict is revealed), Currie

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[580] SYMEONIDES, *supra* note 79, at 100.
[581] SYMEONIDES, *supra* note 79, at 100. In his later work, Currie introduced a fourth category, what he called an "apparent conflict," which refers to the situation where "each state would be constitutionally justified in asserting an interest, but on reflection the conflict is avoided by a moderate definition of the policy or interest of one state or the other." *See* Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS.754, 763 (1963).
[582] *See, e.g.*, J. P. Kozyris, *Interest Analysis Facing its Critics*, 46 OHIO ST. L.J. 569 (1985); Michael Traynor, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845 (1961).
[583] Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Functions*, 26 U. CHI. L. REV. 9, 10 (1959).
[584] Currie, supra note 581, at 756.

further suggested that the court give a "more moderate and restrained" reassessment of each conflicting policy to avoid the conflict if possible.[585] That is, an interest analysis aiming at conflict avoidance "counsels specifically against pushing the interpretation of an apparently conflicting policy to its constitutional or ultimate possible limit."[586] In contrast, it requires that the court construe state interests narrowly, to the extent that what initially appears to be a true conflict may be transformed into a false one.[587]

Supposing that the court characterizes the Avon case as a matter of criminal law, the potential conflicting laws will then be identified as the FCPA and the PRC Criminal Law. At a surface level, apparent conflict of laws exists between the FCPA and the PRC Criminal Law because the former prescribes no minimum threshold amount for bribery prosecution while the latter sets a monetary threshold of 30,000 RMB (approximately $4332) for individuals and 200,000 RMB (approximately $28,570) for entities with only a few exceptions.[588] Despite the apparently conflicting rules, however, an interest-analysis approach will inquire into the policy goals embodied in both laws, asking whether there is a true conflict as concerns the effectuation of these polices in this particular case.

As previously discussed in Chapter II.A.2, the policy goals of the FCPA are (a) to restore and enhance public confidence in U.S. business enterprises by "imposing on American corporations a standard of conduct in their overseas dealings fully as strict as that required at home,"[589] and (b) to build political and economic alliance with, and to

[585] *Id.* at 757.
[586] James R. Ratner, Using Currie's Interest Analysis to Resolve Conflicts Between State Regulation and the Sherman Act, 30 WM. & MARY L. REV. 705, 759 (1989).
[587] *Ibid.*
[588] *Supra* note 136.
[589] Spalding, *supra* note 108, at 382.

promote investment in, host countries where bribery is perceived to be more prevalent, primarily through the promotion of ethical overseas investment. In a word, the FCPA's policy goals will be effectuated only if it is applied in such a way as to protect America's business reputation and its political and economic relationship with foreign business partners. After determining the FCPA's policy goals, the court must then inquire whether the relationship of the United States to the Avon case is one that would bring the case within the scope of its policy concerns, and hence provide a legitimate basis for the claim that the United States has an interest in applying the FCPA in this instance.[590]

Avon is a multinational corporation incorporated and headquartered in the United States with some substantial portion of its business conducted in or through the U.S. market. Avon China, wholly owned by Avon, is an important overseas presence of America's cosmetics industry and as such represents America's business reputation in the global market. Any crisis in business ethics involving Avon and its overseas branches, therefore, would conceivably jeopardize public confidence in America's business operation. Moreover, precisely because the United States is the home country of the defendant corporations, failing to regulate its own corporations' overseas business conduct in China would also conceivably jeopardize Sino-American economic relations. Therefore, the United States has a legitimate interest in applying the FCPA to the Avon case.

[590] CURRIE, *supra* note 252, at 189("When it is suggested that the law of a foreign state, rather than the law of the forum, should furnish the rule of decision, the court should first of all determine the governmental policy-perhaps it is helpful to say the social, economic, or administrative policy-that is expressed by the law of the forum. The court should then inquire whether the relationship of the forum state to the case at bar-that is, to the parties, to the transaction, to the subject matter, to the litigation-is such as to bring the case within the scope of the state's governmental concern, and to provide a legitimate basis for the assertation that the state has an interest in the application of its policy in this instance.").

The court must then inquire into the policy concerns that possibly lie behind the PRC Criminal Law and its inclusion of a monetary threshold for bribery prosecutions. Bribe-giving and bribe-taking are integral parts of a corrupt deal. The high rate of bribe-taking crimes is inseparable from rampant bribe-giving activities. In order to send a clear signal that bribery is not acceptable and to help curb the request or receipt of bribes, China incriminates the offering of bribes as a separate offence.[591] Article 393 of the PRC Criminal Law provides that "where an entity offers bribes to state government officials for the purpose of securing illegitimate benefits…, it shall be fined, and the employees of such entity who are directly in charge of the matter in question and the employees who are directly responsible for the crime shall be sentenced to up to five years' imprisonment or criminal detention, plus monetary penalties."

China has significant relationships with the Avon case and may therefore legitimately assert an interest in applying its law. First, Avon China has its principal place of business in China and committed most of the incriminating acts within Chinese territory. Avon China, by bribing Chinese government officials, arguably reinforces local officials' power to demand bribes and thereby makes corruption more rampant in China. Second, the Corporate Affairs Group, the department established by Avon China to engage in *guanxi* and gift-giving practices, existed solely in China and was comprised primarily of local Chinese employees. China clearly has an interest in enforcing its laws against its own citizens who commit a crime within its territory.

[591] *See* Lun Xingfa Xiuzhengan (Jiu) Dui Xinghuizui De Lifa Wanshan (论刑法修正案（九）对行贿罪的立法完善) [*The Amendment IX to the Criminal Law of the People's Republic of China and Its Improvement on Legislations Concerning the Offering of Bribes*], CHINACOURT (Dec. 2, 2015), https://www.chinacourt.org/article/detail/2015/12/id/1760245.shtml.

The question then turns to whether the setting up of a minimum bar for bribery prosecution means China is disinterested in seeing its anti-corruption laws enforced on bribes below that bar. In order to answer this question, it is helpful to first understand the policy concerns behind the setting up of a threshold for bribery prosecution. While the threshold for entities remain unchanged, as previously mentioned, the 2016 Interpretation has raised the minimum bar of prosecuting individuals from RMB 10,000 to RMB 30,000 (unless the case has an aggregate factor specified in Article 7 of the 2016 Interpretation, in which case the threshold is lowered to RMB 10,000). Subsequent to the promulgation of the 2016 Interpretation, the Supreme People's Court of China (the "SPC") issued an official statement that explained the rationale for setting up a prosecution threshold.[592] The statement reiterated China's "zero tolerance" policy on corruption, but it also clarified at the same time that zero tolerance does not necessarily mean zero threshold for criminal penalties.[593] According to the SPC, the effectiveness of China's anti-corruption system depends on the coordination of a varied array of interrelated structural components, including not only criminal legislations, but also administrative penalties and political disciplines.[594] By raising the minimum bar for criminal prosecutions, necessary space can be reserved for administrative sanctions and Party disciplines to play their role in fighting corruption.[595] The setting up of a monetary threshold for prosecution not only embodies China's policy of keeping the Party discipline at the forefront of anti-corruption campaigns,

[592] Guanyu Banli Tanwu Huilu Xingshi Anjian Shiyong Falü Ruogan Wenti De Jieshi De Lijie Yu Shiyong (《关于办理贪污贿赂刑事案件适用法律若干问题的解释》的理解与适用) [The Understanding and Application of the Interpretation on Several Issues Concerning the Specific Application of the Law in the Handling of Criminal Bribery Cases] (issued by the Sup. People's Ct., 2016), http://pkulaw.cn/fulltext_form.aspx?Db=qikan&Gid=f3079a70f630179ae79686a226528c0ebdfb
[593] *Ibid.*
[594] *Ibid.*
[595] *Ibid.*

but also enhances the certainty, fairness and seriousness of criminal punishment by highlighting the focus of criminal crackdown.[596] Stated another way, China's anti-corruption system is an organic whole in which criminal prosecutions, administrative penalties, and Party disciplines complement one another and work together. It is therefore incorrect to assume that China is disinterested in seeing its anti-corruption policies effectuated in the Avon case solely based on the content of criminal law.

Moreover, even if one is to articulate the governmental interest of China solely based on an interpretation of its criminal law, the prosecution thresholds should not be singled out and analyzed in isolation from other relevant provisions—especially those recently added in the 2016 Interpretation—concerning the determination of the amount of bribes.[597] Even though the 2016 Interpretation raises the monetary thresholds for bribery prosecutions, it nevertheless expands the definition of bribes to include certain intangible benefits and further clarifies that a thank-you gift offered after improper benefits are sought constitutes bribery.[598] Previously, the PRC Criminal Law only prohibited bribes in the form of "money or property."[599] The 2016 Interpretation clarifies, however, that "money or property" includes not only cash and in-kind objects but also various "proprietary interests," which include material benefits that can be converted into money, such as home renovation, debt relief, etc., and other benefits that need to be paid using money, such as membership service, travel, etc.[600] It further clarifies that such intangible proprietary interests shall be

[596] *Ibid.*
[597] The Interpretation on Several Issues Concerning the Specific Application of the Law in the Handling of Criminal Bribery Cases (2016), art. 12.
[598] *Ibid.*
[599] Criminal Law of the People's Republic of China, art. 385.
[600] The Interpretation on Several Issues Concerning the Specific Application of the Law in the Handling of Criminal Bribery Cases (2016), art. 12.

calculated not only on the amount actually paid, but also on the amount payable, in order to deal with situations in which services, travel or other intangible benefits may have been intentionally undervalued by bribe-givers.[601] The expansion of the definition of bribes brings more bribery cases that were previously exempt from criminal liabilities into the scope of prosecution, which also reflects China's governmental interest in ramping up anti-corruption efforts by closing a perceived loophole where some companies gave intangible benefits as disguised bribes.

If one is to look beyond criminal statutes and take into account all relevant anti-bribery provisions in Chinese law, it may become apparent that the Chinese government has an interest in dealing with the interactive relationship between official and unofficial forms of ordering with regard to gift giving. Consider, for example, Article 10 of the 2008 Commercial Bribery Opinion which deals specifically with the distinction between socially and legally acceptable gift-giving practices and illicit bribes.[602] By providing four criteria by which illicit payments may be distinguished from gifts, the Chinese government in fact acknowledges the prevalence of *guanxi* and gift-giving practices as informal rules of conduct in business-to-government realms, where business investors at the bottom of the administrative hierarchy, or even outside the hierarchy (such as local private entrepreneurs and foreign investors), often have to rely on the bonds and obligations of personalistic relations to make inroads into, and benefit from, China's entrenched bureaucratic power.[603] *Guanxi* can take both positive and troublesome forms as it interacts with the official laws of China, and it often falls into the gray areas between socially acceptable and illegal

[601] *Ibid.*
[602] Opinions on Certain Issues Concerning the Application of Law in Commercial Bribery Cases, art. 10.
[603] Yang, *supra* note 389, at 470-71.

behaviors, especially when it is used by business investors to get around rules and regulations.[604] The business-to-government realm, to borrow Sally Moore's thesis, can be considered as a semi-autonomous social field.[605] On the one hand, this social field, in the process of adapting to China's economic and political reforms, constantly generates new forms and operating rules of *guanxi* internally;[606] on the other hand, the evolution of *guanxi* practices are vulnerable to externally imposed state-made legal rules.[607] The Chinese government therefore feels the need to shape the development path of *guanxi* and provide a regulatory framework for its practice, primarily through specifying in law the circumstances under which gift giving might have been transformed from etiquette to bribery. Besides Article 10 of the 2008 Commercial Bribery Opinion, a set of Party policies and disciplines targeting power-for-money deals are also state-enforceable rules that the Chinese government has consciously made to influence, and indeed have influenced, *guanxi* practices. It is therefore in the interest of the Chinese government to have its anti-bribery laws enforced and, by declaring in court decisions what aspects of Avon China's behaviors are not legally acceptable, affect the mode of compliance of *guanxi* culture to state-made legal rules.

So far, the analysis of the Avon case has presented a true conflict between the laws of the forum state and China. The FCPA prosecutes the payment of *anything of value* without a minimum threshold amount, and it does not attempt to distinguish, at least not explicitly prescribed in law, between gifts that seemingly take the form of bribes but are in essence strategies to build personal networks with state functionaries and real bribes.

[604] *Id.* at 461-62.
[605] *See* Moore, *supra* note 418.
[606] *See* Yang, *supra* note 389.
[607] *See* Moore, *supra* note 418.

Chinese anti-bribery laws, by contrast, include monetary thresholds for bribery prosecution and give due consideration to certain *guanxi* practices that may be distinguishable from bribery in nature and degree. Both states are interested in applying their laws to this case in order to effectuate relevant legislative purposes or policies. The conflict of interests therefore seems to be true and irresolvable.

The uniqueness of interest analysis in conflicts law, however, is that it aims at conflict avoidance and acts, for the time being and in this particular case, "as if" the conflict could be narrowed down to a legally resolvable level. Conflicts law achieves this goal by suggesting that, before making a choice between seemingly conflicting rules, "more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied"[608] should be given to each conflicting policy, to make the conflict disappear if possible.[609] For example, Currie's governmental interest analysis assumes that China has an interest in applying its laws only when it would benefit its own domiciliaries.[610] Chinese anti-bribery laws, with higher prosecution thresholds and a more nuanced distinction between bribery and acceptable gift-giving practices, arguably aim to protect local gift givers who are deeply influenced by Chinese cultural traditions and engage with Chinese *guanxi* networks to the extent permitted by law. In the Avon case, the gift giver is Avon China, a wholly-owned subsidiary of a U.S. corporation incorporated and headquartered in New York. Avon China entered the Chinese market as an overseas investor and was therefore not an intrinsic part of Chinese gift-giving culture. As a result, a more restrained reassessment of the policy goals underlying Chinese anti-bribery laws

[608] Currie, *supra* note 581, at 757.
[609] Ratner, *supra* note 586, at 731.
[610] SYMEONIDES, *supra* note 79, at 99.

would likely suggest that China has relatively little interest in applying its laws to protect Avon China. Thus, an actual conflict disappears because the United States turns out to be the only interested state in seeing its laws applied.

It is necessary to point out a key fact which may also exert a material influence on the outcome of the interest analysis. As previously mentioned, since Xi took office in 2013 and launched his unprecedented anti-corruption reforms, the Chinese government has made it clear that it holds a negative attitude towards gift exchanges between business actors and state functionaries. China even depicted foreign MNCs as the prime culprits in commercial bribery and has investigated ever-more deeply into the bribery scandals involving MNCs in recent years. The change in the official attitude of Chinese government towards business-to-government gift exchanges, from the often de facto connivance to explicit prohibition, destroyed any real conflict of interest between China and the United States in the Avon case. No real problem of conflict of laws exists in this case because policies underlying apparently conflicting laws are essentially compatible. Imposing criminal liability on Avon China under the FCPA does not obviously run counter to the anti-corruption policies of the Chinese government, and therefore the forum law can be applied as the governing law.

The analysis is likely to show a different result, however, if the Chinese government is tolerant of business-to-government gift giving. Assuming, for example, that Xi did not launch the anti-corruption campaign and no amendments nor supplementary interpretations were made to the then-existing anti-bribery laws after he took office, the defendant might be able to prove to the court that gifts in the forms of nonmonetary or intangible benefits are tacitly permitted by the Chinese government—either because they are not explicitly

enumerated as prohibited acts by law or because they are not subject to criminal prosecution in judicial practice. Assuming that Avon China can prove to the court, by whatever means, that its gift-giving practices are not in violation of any written laws of China, then governmental interest analysis is likely to suggest that United States has little interest in enforcing its laws on it. This is because the policy goals underlying the FCPA are to protect America's overseas business reputation and maintain its economic alliances with host countries, and such goals would not be jeopardized if America's business conducts are not considered as bribery in foreign markets. The court is therefore likely to find that no conflict of interest exists and hold that Chinese law should be applied. It is worth noting that this approach is different from the local written law defense prescribed under the FCPA.[611] As previously mentioned in Chapter III.A.1, the local written law defense defers to foreign cultural norms only if such norms are expressly permitted by foreign statutes, which according to Griffiths is a manifestation of weak legal pluralism because the validity of unofficial cultural norms depend ultimately on the recognition of official state laws.[612] The interest analysis in conflicts law, in contrast, looks beyond the literal provisions to consider the deeper-level policy concerns behind state laws. The interest of a state lies not only in the explicit prohibition or permission of certain behaviors by law, but also in deliberately excluding certain behaviors from the scope of state regulation and leaving them to be governed by other normative communities. By recognizing these two types of state interests, governmental interest analysis captures key insights of legal pluralism. On the one hand, by identifying states' interest in non-interference in certain spheres of social life, governmental interest analysis offers an

[611] 15 U.S.C. §§ 78dd-1(c); 78dd-2(c); 78dd-3(c).
[612] Griffiths, *supra* note 402, at 6-8.

opportunity to reveal the existence of other types of normative orderings that coexist with state law. It asks why Chinese anti-bribery laws do not prosecute bribes below certain monetary thresholds and why certain forms of gifts are not considered bribes, and by answering these questions it sees the complex and interactive relationship between *guanxi* and rational-legal regimes in regulating interpersonal relations in China. On the other hand, by identifying states' interest in the explicit prohibition of certain cultural behaviors, governmental interest analysis reveals the inequalities of power relations between different forms of orderings.[613] State law is fundamentally different from other normative orderings, and it often shapes and dominates other norm-generating communities by specifying in law what aspects of their practices are not allowed.[614]

In sum, applying interest analysis to the Avon case is likely to suggest that the FCPA should be applied as the governing law. Interest analysis comes to this conclusion in full recognition that China has different legal and cultural norms in regulating gift giving than the United States. It makes reasonable attempts to identify the respective policy concerns of the involved states' laws, applying the FCPA only after determining that China is disinterested in seeing its policies effectuated in this case. To be sure, different analysts may approach interest analysis in different ways, and there is plenty of room for disagreement on the conclusion that this current study reached. To say that China has an interest in applying its laws only when it would benefit its own citizens and corporations, but not when it would benefit similarly situated foreign investors, is an "as if" assertion.[615] It is also an "as if" assertion to assume that it is in the interest of China to have a U.S. law

[613] Merry, *supra* note 425.
[614] *Ibid.*
[615] Knop et al., *supra* note 8, at 639.

regulate activities exclusively on its territory simply because those activities happen to be unacceptable to the Chinese government. Nevertheless, the technical aspect of interest analysis in conflicts determines that it must make problem-solving its top priority. To this end, an analyst acts "as if" these assertions hold so that conflicts could be avoided in this particular case. While these assertions may not hold true in all cases, they are hard to refute, and conflicts lawyers are self-conscious about their narrow assumptions of the nature and scope of foreign law: they make their own assertions about Chinese law, acknowledging at the same time that Chinese legislators may disagree with their conclusion. This, again, captures the insight that respect for cultural pluralism does not preclude the U.S. legal judgments on foreign cultures, but U.S. adjudicators must recognize their own cultural situatedness before any of these judgments might be attempted.

5. The Public Policy Exception—an Afterthought

Towards the end of a conflicts analysis, if the law of a foreign jurisdiction has been designated as governing, the court must decide whether the foreign law offends a strong public policy of the forum so that its application shall be rejected.[616] This is the step in which the judge sitting before the Avon case has to decide whether the logics and ethics of *guanxi* are seriously deficient in quality or, to borrow Judge Cardozo's classic statement, "violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal" of the United States.[617]

While the weighing of conflicting values has often been at the center of existing cultural debates, the conflicts approach treats the public policy exception as almost an

[616] SYMEONIDES, *supra* note 79, at 78.
[617] Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 202 (N.Y.1918).

afterthought in the choice-of-law process.[618] Symeon Symeonides has explained the status of the public policy exception under the conflicts approach in this way:

> [P]ublic policy was not a rule of choice of law but rather an exception to all choice-of-law rules. As such, it was supposed to function only negatively, by repelling obnoxious foreign laws, rather than affirmatively, as a justification for the application of forum law.[619]

For example, the previous analyses in this section have suggested that the FCPA is likely to be the governing law of the Avon case. The court comes to this conclusion not because it has decided that the rational-legal economic relations in Western capitalism are morally superior to the ethics of *guanxi* deeply embedded in China's economy, namely the "the ethics of obligation, reciprocity, and mutual aid, and the responsibilities of friendship and kinship."[620] But rather, the court makes this choice because its analyses have suggested that the United States is the only interested state in seeing its laws applied to these particular defendants, or that the anti-corruption policies underlying both U.S. and Chinese laws are essentially compatible as effectuated in this specific case.

In its previous analyses, the court has examined the content of Chinese law and culture twice. The first time is when it proves the content of Chinese anti-bribery rules and

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[618] SYMEONIDES, *supra* note 79, at 78.

[619] *See* SYMEONIDES, *supra* note 79, at 82 (mentioning that although it has become increasingly common for courts to use the forum's public policy offensively, rather than defensively, the fact remains that this way of applying the public policy exception violates the basic prescriptions of the conflicts approach); *See also* M. Forde, *The 'Ordre Public' Exception and Adjudicative Jurisdiction Conventions*, 29 INT'L & COMP. L.Q. 259, 260 (2008) ("Here international public policy performs an essentially defensive or negative role: though in principle the issue should be subject to the foreign law, by reason of the un-acceptable consequences that law's application would give rise to it cannot be applied. Instead, the issue will be governed by the lex")

[620] Mayfair Mei-hui Yang, *The Gift Economy and State Power in China*, 31 COMP. STUD. SOC. HIST. 25, 36 (1989) (describing the relational ethics of gift economy as "the ethics of obligation, reciprocity, and mutual aid, and the responsibilities of friendship and kinship.").

the culture of guanxi. The purpose of this step is for the court to answer a question of "what"—to take notice of the existence of a value system that is foreign to its own and to know what this value system actually is. Then, when conducting the governmental interest analysis, the court looks at Chinese law and culture for a second time. Part of the purpose of this second look is to answer a question of "why." That is, if China's legal framework does tolerate, or even encourage, individuals and corporate entities to employ *guanxi* networks to obtain business benefits, the court has to understand why China has such a legal system, primarily through the examination of the legislative purposes and policy concerns behind relevant anti-bribery rules. By answering these two questions, the court understands what an alternative form of market relations looks like and how it conflicts with its own. It may frame the cultural conflicts behind the Avon case like this: the U.S business culture, which entails "an inflexible bureaucratic or market coldness to the bonds and obligations of human relations,"[621] collides with the Chinese business culture, which is heavily influenced by personalized social networks of power. Regardless of how the specifics of this conflict may be defined, judges simply lack the political power and the requisite resources to weigh conflicting cultural values and decide which one is morally superior. Under the conflicts approach, however, the court can potentially resolve this cultural conflict without having to decide which culture is better in quality. The conflicts approach allows the court to continue its choice-of-law analysis despite the larger, and perhaps irresolvable, value conflicts behind a particular case, and it offers other alternative rationales to justify a decision on the applicable law, such as the existence of the most

[621] Yang, *supra* note 389, at 472.

significant relationship and a real governmental interest in the effectuation of relevant policies.

Even in those extraordinary cases in which courts must test the quality of a foreign culture against the wisdom and fairness of the forum law, the conflicts approach sets strict limitations on the application of the public policy exception. Assuming that the previous analyses have suggested that the culture of *guanxi* should be applied to excuse the defendant corporations' otherwise illegal gift-giving behaviors, the court must then decide whether this culture is contrary to the public policy of the United States. The conflicts approach requires that, in order to override a foreign value system that might otherwise control the result of a particular case, that foreign culture must violate some "fundamental moral, ideological, social, economic or cultural standards of the forum."[622] The public policy exception must be applied with strict restraint. Therefore, a mere difference between forum and foreign culture "is not enough to show that public policy forbids us to enforce the foreign right."[623] In particular, the conflicts approach requires that the court limit its evaluation of the virtue of a foreign culture within the context of the particular case in issue. For example, although polygamy in general may threaten the fundamental conceptions of marital relations at the forum, it might be acceptable to recognize the validity of a polygamy union as the basis for inheritance rights.[624] By the same token, the court in the Avon case might reject the application of the culture of *guanxi* because it is repugnant to some fundamental business ethics in the U.S. However, this does not mean that duties created

[622] ISTVAN SZASZY, CONFLICT OF LAWS IN THE WESTERN, SOCIALIST AND DEVELOPING COUNTRIES 96 (J. Decsenyi trans., 1974).
[623] Loucks v. Standard Oil Co. of New York, 120 N.E. 198, 202 (N.Y.1918).
[624] Knop et al., *supra* note 8, at 641-42.

via *guanxi*-based monetary exchanges may not be enforced by a U.S. court in other contexts, such as in contractual disputes and debt recovery cases.

In addition, under the conflicts approach, courts usually reject the regulatory authority of a foreign culture on public policy grounds only when the forum has some important connections with the case.[625] That is, the incompatibility between the local and foreign public policies should be evaluated while taking account of the extent of connection between the case in issue and the forum state. The stronger the connection is, the more compelling the invocation of a public policy exception will be. For this reason, it is probably unjustifiable for a U.S. court to replace an otherwise applicable foreign law with the FCPA when its jurisdiction is based on a mere tangential connection (i.e., a bank wire transfer or an email) between the bribery event and the United States.

Moreover, under the conflicts approach, the morality of a foreign culture is tested only by notions at the forum, not by any values claimed to be universally recognized.[626] That is, even when conflicts lawyers reach the moment in which a value judgment on a foreign culture must be passed, they consciously limit the scope of comparison to the normative communities involved in a specific case. Therefore, a decision to repel the culture of *guanxi* on public policy grounds only means that this culture is considered corrupt by the standards of the deciding court's community, which is the United States in

[625] Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 COLUM. L. REV. 961, 981 (1956) ("[t]he overwhelming number of cases which have rejected foreign law on public policy grounds are cases with which the forum had some important connection."); SYMEONIDES, *supra* note 79, at 80 ("some codifications bring to the surface the principle that the ordre public exception should be invoked only when the forum's connection with the case is sufficiently close.").
[626] Knop et al., *supra* note 8, at 641.

the Avon case. Whether this culture is morally objectionable in some objective sense, however, is beyond the consideration of the court.

CHAPTER IV: CULTURAL CONFLICTS IN CHINA'S AFRICAN INVESTMENT

Chapter III demonstrated how a pluralistic conflict-of-laws approach captures the insights of recent cultural debates and contributes to the resolution of cultural conflicts in FCPA cases. In this Chapter, I further explore the implications of conflicts methodologies for cultural debates by examining a different case. This time, the focus is on how the doctrine of renvoi in conflict of laws reveals new possibilities for the resolution of cultural conflicts in China's African investment.

A. Understanding Sino-African Labor Disputes from "the Chinese" Perspective

In November 2011, Human Rights Watch ("HRW") published a report ("the HRW report") detailing the "abusive labor practices" against local miners in Zambia by China's state-owned enterprises ("SOEs").[627] This report was based primarily on interviews with Zambian miners, telling a story about "the Chinese" and their labor practices in Zambia through the mouths of local interviewees, with limited information available from Chinese laborer perspective.[628] As so often, the Sino-African labor relations literature and social media reports tend to focus on local grievances against Chinese employers in Africa, with

[627] HUMAN RIGHTS WATCH, *supra* note 77, at 30-97.
[628] *Id.*, at 11 (noting that interviews were conducted mostly with Zambian nationals because the interviewers are denied access to the work sites and to compounds where the Chinese workforce spends non-working hours).

less attention paid to the large number of Chinese expatriates and their perspectives.[629] The lack of voice from "the Chinese" side, however, not only makes any narratives on China in Africa susceptible to one-sided bias, but also hampers an in-depth understanding of the so-called "Chinese work culture" and the regulatory challenges it brings to African host countries.

When Zambian workers accuse Chinese employers of alleged anti-union discriminations and excessive working hours,[630] there is more at issue than the rights of the Zambian workers vis-à-vis the Chinese SOEs. Also at issue is the often neglected, but perhaps more fundamental, clash of values—e.g., "the Chinese" may have different business ethics regarding overtime hours, and their conceptions and practices of trade unions may be radically different from those of Zambia.[631] That is, what seems to be abusive from one cultural standpoint might look reasonable and even admirable from another. In her ethnographic study of Chinese state capital investing in Zambia, Ching Kwan Lee depicts "a Chinese managerial ethos of collective asceticism (or 'eating bitterness' in Chinese parlance)."[632] This ethos, which entails "both an inner moral compulsion and a practical way of life," singles out "the Chinese" among other foreign migrant workers in Zambia "for their 'excessively hard-working' and 'over-productive'

[629] Tonya Rodgers, *Note: The Center Cannot Hold: Assessing the Reach of China's Labor Protections to Migrant Workers in Africa*, 35 FORDHAM INT'L L.J. 1075, 1090 ("Outcry over China's labor practices in Africa has become increasingly widespread, and consistently focuses on the plight of local African workers….limited information is available from the Chinese worker perspective."); GILES MOHAN & DINAR KALE, THE INVISIBLE HAND OF SOUTH-SOUTH GLOBALIZATION: CHINESE MIGRANTS IN AFRICA 4-6 (2007) (calling for more research on Chinese migrant workers).
[630] HUMAN RIGHTS WATCH, *supra* note 77, at 75-96.
[631] For discussions on Chinese trade unions, *see Chinese Investments in Africa*, *supra* note 77, at 63-66; Anita Chan, *Labor in Waiting: The International Trade Union Movement and China*, NEW LABOR FORUM, no.11: 54-59 (2002); Kan Wang, *Law Resistance and Worker Attitudes towards Trade Union Reform in China*, 38 EMPL. 724 (2016).
[632] CHING KWAN LEE, THE SPECTER OF GLOBAL CHINA: POLITICS, LABOR, AND FOREIGN INVESTMENT IN AFRICA 13 (2017).

culture."[633] In their interviews with Lee, many Chinese expatriates contrast the Zambian "indolence" and "laziness" with their own culture of "eating bitterness."[634] Lee observes:

> (many Chinese expatriates) deployed the narrative of 'overcoming poverty by eating bitterness' to draw a moral boundary between them and Zambian workers, and as a summation of their experience of economic development at both the personal and national levels. To them, the willingness to work hard, defer gratification, and save methodically was the reason for their own and China's material progress. Failure to do so by the Zambians was to them a trait of cultural and moral inferiority that also explained Zambians' and Zambia's underdevelopment.[635]

While Zambian workers accuse Chinese employers of "exporting abuses along with investment,"[636] "the Chinese" narratives present how Zambians live in persistent poverty because of their inability to practice the culture of "eating bitterness," a culture that has brought China, once equally poor and backward, to today's level of development.

In the HRW report, the allegedly abusive Chinese labor practices were pitted against the human right to safe and healthy working conditions. Yet according to Lee's research, many Chinese expatriates believe that the right to a better standard of living or to development demands temporary sacrifices of the right to decent working conditions.[637] In her interviews with Chinese expatriates, Lee documents how they draw "a connection between past poverty and personal and national development through acceptance of exploitation."[638] As a Chinese worker comments, "the reason why China can develop so

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[633] *Ibid.*
[634] *Id*., at 96
[635] *Ibid.*
[636] HUMAN RIGHTS WATCH, *supra* note 77, at 2.
[637] LEE, *supra* note 632, at 113 (citing a Chinese migrant worker who believed "the reason why China can develop
so quickly is because we have sacrificed the well- being of an entire generation of migrant workers.").
[638] *Id.*, at 114.

quickly is because we have sacrificed the well-being of an entire generation of migrant workers."[639] The Chinese culture of "eating bitterness," inhuman and exploitative from a Zambian perspective, turns out to be admirable and praiseworthy in the eyes of Chinese migrant workers. This cultural conflict is a potential explanation of why Chinese investors remain "the biggest violator" of Zambian labor laws among local copper industry employers.[640] In response to the persistent confrontations with Zambian employees over labor disputes, a Chinese manager expressed his "cultural shock" in this way:

> [The laws are] really "too sound"—the standard of the legal system is a little too ahead of its time… Almost 50 percent of the people are unemployed and yet they still want to have so many housing allowances, education allowances and transportation allowances…. Inequalities are a reality at every stage of development. They should learn to accept this.[641]

Hence the conflict between "your abusive labor practices" and "my advanced labor laws" from a Zambian perspective turns into a clash between "my hardworking culture" and "your unrealistic labor protection standards" from "the Chinese" point of view. Although the issue of Sino-African labor conflicts cannot be simply reduced to a problem of cultural conflict; it cannot be properly dealt with without a sophisticated understanding of this Chinese narrative of "overcoming poverty by eating bitterness."[642]

The Chinese ethos of "eating bitterness" is a salient point of cultural contestation not only in African host countries of Chinese investments, but also increasingly within "the Chinese" community itself. Most of the literature on Sino-African labor relations focuses on the role of Chinese SOEs, creating the impression that China's workforce in Africa is

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[639] *Id.*, at 113-14.
[640] HUMAN RIGHTS WATCH, *supra* note 77, at 22.
[641] *Beyond Controversy, Development in Africa: China's Actual Situation in Zambia*, SOUTHERN WEEKEND (NANFANG ZHOUMO) (Nov. 4, 2010) (translated and cited by Human Rights Watch).
[642] LEE, *supra* note 632, at 96.

"a coherent neocolonialist strategy planned and implemented by the Chinese state."[643] While the reference to "the Chinese" as if a homogeneous community is common in African discourse,[644] recently, a growing body of empirical and ethnographic research on Chinese in Africa has revealed how heterogenous this community actually is.[645] Take the community of Chinese migrant workers in Zambia for example. This community consists of roughly two generations of workers with different socio-economic and educational background. [646] These workers are employed by companies that differ in terms of ownership categories (state-owned or privately owned) and economic sectors (mining, construction, or energy). They also differ in terms of the degree of affiliation with their home country, the degree of allegiance to the Chinese government, and the degree of integration into African societies.[647] While most migrant workers are employed by Chinese SOEs (directly or indirectly through labor dispatch agencies) and return to China after completing their contracts, a small group of expatriates overstay their visa to become long-term, even permanent, residents in Zambia.[648] This latter group is usually more deeply integrated into Zambian society by marrying local citizens, opening private businesses and

[643] Hannah Postel, *Moving Beyond "China in Africa": Insights from Zambian Immigration Data*, 46 J. CURR. CHIN. AFF.155, 155 (2017).
[644] HUMAN RIGHTS WATCH, *supra* note 77, at 11.
[645] *See,* e.g., Postel, *supra* note 643, at 157 (demonstrating that the Chinese community in Africa "is in fact typified by a multitude of both public and private actors with independent motives."); LEE, *supra* note 632, at 3 ("The global discourse about China in Africa has been hampered by most writers' generic use of the term Chinese investment, glossing over its significant internal diversity and the lack of control by the Chinese government over many companies originating from China."); MOHAN & KALE, *supra* note 629, at 7 ("they are overlain by gender, age and class differences which render any notion of a clearly defined diaspora 'community' problematic.").
[646] LEE, *supra* note 632, at 95.
[647] *See* Postel, *supra* note 643.
[648] *Id*., at 167-72.

hiring local employees, or having their descendants go to local schools.[649] As "the Chinese" community in Zambia grows and diversifies, their attitudes toward the culture of "eating bitterness" and acceptable labor practices are also increasingly divided.

In addition, Lee's research reveals how the exposure to a global labor market in Zambia has gradually undermined Chinese migrant workers' adherence to the culture of "eating bitterness."[650] According to Lee, witnessing how other foreign expatriates live and work in Zambia has produced "a sense of relative deprivation" among Chinese migrant workers employed by China's SOEs.[651] As a result, while continuing to deploy the narrative of overcoming poverty by enduring hardship, Chinese migrant workers have gradually pressured their employers to improve their working and living conditions.[652] Unsatisfied with the working culture in China's SOEs, Chinese employees with better English and sufficient financial resources may even seek opportunities to work for other international companies in Zambia or start their own businesses.[653] Lee observed,

> African cultural critique about the Chinese over-productive way of life inspired Chinese managers to expect and demand better terms of service and envision alternative careers, undermining state control over its foot soldiers. Gradually, as a minority of these managers accrued credentials and experience in a global, rather than a strictly Chinese, labor market, collective asceticism began to crack. Just as the imperatives and labor regimes of Chinese state capital were susceptible to changes and pressures emanating from local Zambian society and international political economy, its ethos was also neither carved in stone nor under total remote

[649] *See, e.g.*, LEE, *supra* note 632, at 116 (interviewing a Chinese entrepreneur who came to Zambia as a provincial-level SOE engineer and overstayed to open his own businesses.); Postel, *supra* note 643, at 164 ("overstaying visas is fairly common, leading to an underestimation of the true size of the population….Another group chose to remain to begin their own companies.").
[650] LEE, *supra* note 632, at 118-19.
[651] LEE, *supra* note 632, at 118.
[652] *Ibid.*
[653] *Id.*, at 119.

control by Beijing.[654]

Although there have been no publicly reported cases, legal confrontations between Chinese migrant workers and China's SOEs in Africa over poor labor conditions are also likely to happen in the future. After all, Chinese migrant workers face similar working conditions that are allegedly abusive against locals. As Chinese laborers move across national borders, the encounter with, even integration into, a globalized labor market will only make them re-examine their rights from a "global," rather than an exclusively "Chinese," perspective. In a globalized labor market in Africa, Chinese nationals' yardstick to assess their labor rights and duties may no longer be Chinese laws and the culture of "eating bitterness," but Zambian laws and cultures or even some international conventions on the protection of migrant workers. To recognize the internal divergence among Chinese migrant workers over the culture of "eating bitterness" is to recognize how a global labor market has greatly complicated migrant workers' cultural identity, and to appreciate their agency in making and remaking cultural constructions.[655] In addition, contrary to the popular image of Chinese colonial domination in Africa, the crack of the collective ethos of "eating bitterness" provides a fascinating glimpse into how China's labor system compromises and transforms itself in the process of engagement with local and global working cultures in Africa.[656]

Cultural conflicts within "the Chinese" community in Africa are manifested not only in the increasingly divergent attitudes toward the culture of "eating bitterness" among its members, but also in contradictions between the working conditions faced by Chinese

[654] LEE, *supra* note 632, at 157.
[655] Jerome Bruner, *The Language of Education*, 49 SOCIAL RESEARCH 835, 839 (1982).
[656] LEE, *supra* note 632, at 36, 108, 160.

migrant workers (and their African counterparts) and the labor standards stipulated in Chinese law.[657] In the HRW report, Zambian miners described the Chinese labor culture as characterized by excessively long working hours.[658] They voiced their complaints about "small overtime pay despite working as many as 30 overtime hours each week, public holidays, and Sundays."[659] Some miners complained about working a 78-hour week, while others described working 365 days a year without a day off.[660] Lee's research has also revealed that overtime labor is a common phenomenon at Chinese mining corporations in Zambia.[661] This exploitative image of Chinese working culture, however, is at odds with China's pro-labor legal framework on paper.[662] The 1995 Labor Law of the People's Republic of China ("the 1995 Labor Law"), for instance, requires that workers shall work for no more than eight hours a day and no more than 44 hours a week on the average.[663] This stipulation is even more stringent than the 48-hour work week standard recognized under Zambian labor laws.[664] Therefore, poor working conditions in Chinese-owned corporations are caused by a lack of enforcement of labor laws in business practice, not by a lack of labor standards on paper. In other words, the overtime work culture commonly found in Chinese companies is illegitimate under the official law of China and therefore not recognized by the Chinese central government.

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[657] Aaron Halegua, *The Debate Over Raising Chinese Labor Standards Goes International*, 1 HARV. L. & POL'Y REV. (Online) (Apr. 2007) (arguing that the plight of Chinese workers is not due to low labor standards on paper but low enforcement of Chinese labor laws).
[658] HUMAN RIGHTS WATCH, *supra* note 77, at 75-84.
[659] *Id*., at 81.
[660] *Id*., at 75.
[661] LEE, *supra* note 632, at 88-89, 109, 112.
[662] There are two primary sources of Chinese labor standards, which include the 1995 Labor Law of the People's Republic of China and the 2008 Labor Contract Law of the People's Republic of China.
[663] Zhonghua Renmin Gongheguo Laodong Fa (中华人民共和国劳动法)[Labor Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995) (China), art.36 [hereinafter the 1995 Labor Law].
[664] Employment Code Act, 2019 (Act No. 3 of 2019), art 74.

Yet, this overtime work culture is blatantly pervasive across industries among Chinese companies both at home and abroad, partially because its illicit and exploitative nature is often obfuscated, even tacitly permitted, by Chinese workers through the narrative of "overcoming poverty by eating bitterness."[665] On a closer analysis, however, the apparently voluntary acceptance of exploitation among many Chinese workers turns out to be an outcome of oppression. Many Chinese expatriates in Africa come from deprived backgrounds in China's interior provinces, and they choose to work overseas due to the enormous unemployment and financial pressures at home.[666] They usually lack bargaining power to improve their working conditions and are discriminated against in Chinese labor relations system.[667] Their vulnerability to exploitation is further compounded by the present labor relations system in China. As Monina Wong explained,

> The economic and labour reforms in China had effectively collapsed the socialist collective labour relations system and replaced it with a different control system that exercised politicized control through creating labour dependence on legislative protection and the party-state dominated trade unions; at the same time, it suppressed freedom of association and the collective bargaining power of labour. Such labour control mechanisms are replicated in international dispatching through state agents such as the foreign embassies and the trade association, CHINCA (China International Contractors Association); as well as through a number of state legislations and voluntary sectoral codes on labour dispatching in China.[668]

The Chinese Communist Party's control over the labor force is expressed not only in restrictions on freedom of association, but also in the reinforcement of the culture of

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[665] LEE, *supra* note 632, at 96, 108, 157.
[666] LEE, *supra* note 632, at 95; Monina Wong, *Chinese Workers in the Garment Industry in Africa: Implications of the contract labour dispatch system on the International Labour Movement*, 39 CAPITAL ET SOCIÉTÉ 68, 80-82 (2006).
[667] Wong, *supra* note 666, at 80.
[668] *Id*., at 89.

"eating bitterness" among its overseas employees through occasional visits by Communist Party cadres from corporate headquarters and the institutional construction of collective residential compounds.[669] Such labor control mechanisms have steadily eroded the ability and desire of Chinese migrant workers to fight unfair working conditions, resulting in the acquiescence of abusive labor cultures over time. In this way, the Chinese Communist Party's continued influence over labor contributes to the paradox of high labor standards on paper yet poor working conditions in practice. Nonetheless, as previously mentioned, the increasingly diversified community of Chinese expatriates is gradually undermining China's state control over its overseas labor force and challenging the culture of collective asceticism. In the future, this challenge may take on a more intense form, such as the integration of Chinese migrant workers into local African trade unions or the filing of legal suits by Chinese workers against China's SOEs for unfair labor conditions. As the cultural belief in "eating bitterness" continues to splinter, the "abusive labor culture" is also likely to change, bridging the divide between labor practices and legal requirements on paper.

Analyzing Sino-African labor disputes from the perspective of Chinese migrant workers has so far generated a more complex view of cultural clashes in China's African investment. The perspective of Chinese migrant workers draws our attention to not only the various cultural values that underpin conflicting labor practices, but also how a particular culture becomes internally contested among its own members as a result of encounters with other cultures. To further demonstrate how labor disputes in China's African investment proves to be complex in their cultural dimensions, the next section introduces a hypothetical lawsuit litigated in Zambia. In this case, a Chinese mining worker

[669] LEE, *supra* note 632, at 157.

sued the NFCA, a Chinese state-owned mining corporation operated in Zambia, for wage and hour violations against Zambian labor law. Although this labor dispute is between a Chinese worker and a Chinese employer, it presents a conflict between Chinese and Zambian labor laws because the parties disagreed on the governing law of this dispute. By examining this hypothetical case, readers will gain a better understanding of how Chinese and Zambian labor practices conflict in both substantive law and cultural dimensions, and how looking at such conflicts from the eyes of Chinese migrant workers reveals more complexities and nuances that are difficult to capture from the perspective of a Zambian worker.

B. A Hypothetical Labor Dispute

1. Mr. Cheng v. NFCA[670]

In this hypothetical case, Mr. Cheng, a Chinese migrant worker, sued NFCA, a Chinese state-owned mining corporation, in a Zambian court for excessive working hours and underpaid overtime in violation of Zambian labor laws (hereinafter *cheng*). Mr. Cheng was in his early forties and had been sent to NFCA ten years earlier by the parent company, China Nonferrous Metal Mining (Group) Co., Ltd. (CNMC). As a middle-level mine manager responsible for technical support and equipment maintenance, Mr. Cheng complained that he was forced to work more than 10 hours a day for six days a week, and he was also asked to work five 12-hour shifts a week at certain times of the year, in contrast to the eight-hour shifts that are standard in other mining corporations in Zambia. In addition, he complained that the overtime pay fell short of the requirements under Zambian labor

[670] This is a hypothetical case made up by the author, but the facts are based on Ching Kwan Lee and Human Rights Watch researchers' interviews with Chinese and Zambian workers. See LEE, *supra* note 632; HUMAN RIGHTS WATCH, *supra* note 77.

law, which stipulates that "an employer shall pay an employee who works in excess of forty-eight hours in a week, one and half times the employee's hourly rate of pay."[671]

Mr. Cheng had grown up in a poor rural region of China and had always lived a frugal lifestyle. He could not even afford to purchase a house or marry in China because of his low income. He came to Zambia to work for NFCA because the pay was on average three times higher than what he could earn in China, despite the fact that NFCA's salary level was about 20% to 30% lower than that of other international mining corporations in Zambia.[672] For him, the story of working in Zambia is one of "overcoming poverty by eating bitterness." He lived in the "China House,"[673] a fenced and gated residential compound where Chinese employees of a particular Chinese company lived together, until three years ago. Life in the "China House" was highly controlled and disciplined by the company. According to Mr. Cheng, breakfast time was 6:00 a.m., lunch at noon, and dinner was served at 6:00 p.m. The workers were transported to the mine by company bus, which would return them to the "China House" after work. After dinner, Chinese employees were usually asked to work more until they were exhausted.[674] The workload was three times that of his previous job in China, with overtime mostly underpaid; but he eventually accepted this reality because every other colleague around him was in the same situation and the job market in China was extremely competitive.

Although Mr. Cheng had been working excessively long hours since joining NFCA about ten years ago, he had only recently decided to take his Chinese employer to a

[671] Employment Code No.3, 2019, art. 75 (1).
[672] LEE, *supra* note 632, at 78.
[673] *Id*., at 99.
[674] *Id*., at 96-99.

Zambian court. Mr. Cheng's "rights awakening" started three years ago, when he married a Zambian girl and moved out of the residential compound into his own home in Zambia. As he became more integrated into the Zambian community, he began to notice how other multinational mining companies treated their executives, and how local employees had used trade unions and collective bargaining to achieve the desired work hours and wage increases. Recently, as their financial capacity grew from previous years' hard work, Mr. Cheng and his wife opened a local grocery store, and he was also in the process of applying for Zambian citizenship. He hoped that this lawsuit would result in an improvement of his working conditions, but if it did not, he planned to join his wife in running their own business or seek job opportunities in other international mining companies in Zambia.

NFCA, in contrast, argued that Chinese law should be the governing law because this dispute was between a Chinese corporation and a Chinese employee. Both parties had agreed, according to NFCA, that Chinese law would regulate the interpretation and enforcement of the labor contract between them. In response to Mr. Cheng's allegation, NFCA claimed that the need of overtime hours is due to the unique characteristics of mining operations.[675] Mr. Cheng had to return to work if there were breakdowns or equipment failures at the plant since he was in charge of technical support and equipment repair. When other managers on the next shift failed to show up for work and a crisis arose, Mr. Cheng had no choice but to continue working.[676] According to NFCA, overtime was needed since breakdowns are common in mining operations and must be repaired immediately to reduce production and safety issues. Moreover, the reason why certain work

[675] HUMAN RIGHTS WATCH, *supra* note 77, at 79.
[676] *Id.*, at 82-83.

did not qualify for overtime pay was that NFCA used to measure work on a task-by-task basis without asking how long it took, and this was a common practice among Chinese companies. As a result, NFCA concluded that its working conditions did not breach Chinese law and that it would not be held liable if this case were tried in a Chinese court.

2. Conflicts Between and Within Cultures

As previously mentioned, in comparison to Zambian labor laws, the 1995 Labor Law of China provides better labor protection in terms of working hours and overtime wages, at least on paper. But why did Mr. Cheng ask the court to apply Zambian law, and why did NFCA conclude that its working culture, which was charactered by excessive working hours and underpaid overtime, did not violate Chinese labor law? To answer this question, the form below first makes a quick comparison between the 1995 Labor Law and the Zambian Employment Code Act No. 3 of 2019 (the "ECA") in terms of working hours and overtime pay.

	The 1995 Labor Law	ECA
Standard Working Hours	Art.36:The State shall practise a working hour system wherein labourers shall work for no more than 8 hours a day and no more than 44 hours a week on the average.	Art.74 (1)(a): The normal days' work of a full-time employee shall consist of 8 hours of actual work Art.74 (2):An employer and an employee...may agree that the employee works in excess of the stipulated hours without added remuneration if the number of hours covered in a week does not exceed 48 hours....
Special Restrictions on overtime	Art.41: ... if such extension is needed for special reasons, under the condition that the health of labourers is guaranteed, the extended hours shall not exceed three hours per day. However, the total extension in a month shall not exceed thirty six hours.	N/A
Exceptions	Art.39: Where an enterprise can not follow the stipulations in Article 36 ... of this Law due to the special nature of its production, it may, with the approval of the administrative department of labour, adopt other rules on working hours and rest. Art.42: Under any of the following circumstances, the extension of working hours shall not be subject to restriction of the provisions of Article 41 of this Law : (1) Where in the event of natural disasters, accidents or for other reasons, the life and health of labourers or the safety of property is in peril, and urgent dealing is needed; (2) Where in the event of breakdown of production equipment, transportation lines or public facilities, production and public interests are affected; and rush repair must be done without any delay; or (3) Other circumstances stipulated by laws, administrative rules and regulations.	N/A
Compensation - Over time	150%	150%
Compensation - Works on rest day	200%	200%
Compensation - Work on public holiday	300%	200%
Weekly Rest	Art.38: The employing unit shall guarantee that its staff and workers have at least one day off in a week.	Art.76 (1): An employee is entitled to a rest day of at least twentyfour consecutive hours in every period of seven consecutive days.

As this form suggests, the 1995 Labor Law is more stringent than the ECA in terms of working hours and overtime. Under the 1995 Labor Law, the regular working hours are 8 hours a day, 44 hours a week, and anything above these hours is considered overtime. It further restricts how much overtime an employer can demand from an employee. An employer, for example, cannot require an employee to work more than three additional hours a day or more than thirty-six hours a month. As a result, at a surface level, there appears to be no conflict between Chinese and Zambian labor laws when it comes to working hours and overtime compensation—the former even provides better protection. However, a closer examination shows that the 1995 Labor Law contains more exceptions, which, due to their expansive and ambiguous nature, allow for flexible implementation, if not manipulation, of labor protection clauses. For example, Article 39 of the 1995 Labor Law allows an employer to deviate from the standard working hours prescribed by Article 36 due to the "special nature of its production," as long as the administrative department of labor approves. In addition, under certain circumstances, such as when a failure of production equipment threatens production interests and urgent repair is needed, Article 42 states that the extension of working hours is not subject to the restrictions set forth in Article 41. However, the 1995 Labor Law does not define what constitutes the "special nature" of production or how severe the harm to production interest must be in order for an immediate repair to be required. As a result, Chinese local governments and courts have a lot of leeway in interpreting these exceptions, and their interpretations can vary. This explains why NFCA chose to apply Chinese law while Mr. Cheng intended to avoid it.

The existence of these exceptions also explains how an excessively hard-working and over-productive work culture can appear to coexist harmoniously with China's

stringent labor protection laws at NFCA. On the one hand, as Chinese companies venture beyond Chinese territory, China's central government does not always have the oversight and coercive power to compel full compliance with Chinese labor law.[677] This creates opportunities for some enterprises to exploit loopholes in the labor law to engage in abusive labor practices. As Lee pointed out, although China's investment strategy in Africa is ordained and promoted by the central government, its implementation and outcomes are often chaotic and unpredictable.[678] Likewise, the prevalence of an abusive and overly hardworking culture among many Chinese companies in Zambia is contrary to the will of China's central government, at least according to the 1995 Labor Law. On the other hand, the Chinese Communist Party "encourages and reinforces the collective ethos of eating bitterness" among Chinese migrant workers, especially through the institutional design of residential compounds and the implementation of a highly disciplined living style.[679] While the culture of "eating bitterness" is not abusive or oppressive per se, it has the effect of obscuring the exploitative relationship between Chinese employers and their employees.[680] Since Chinese managers often use the "eating bitterness" rhetoric to draw moral and nationalistic boundaries between Chinese and African workers,[681] Chinese migrant workers are reluctant to fight for better working conditions for fear of being viewed as morally inferior. In the long run, the disparity between labor standards on paper and working culture in practice becomes increasingly apparent.

While a Zambian worker tends to frame the labor conflict as one between "Chinese

[677] LEE, *supra* note 632, at 9.
[678] *Ibid.*
[679] *Id.*, at 94.
[680] *Id.*, at 108.
[681] *Id.*, at 122.

work culture" and miners' legal rights, a Chinese worker is more likely to see the complexity and multifaceted nature of the so-called "Chinese work culture." There are several facets to the culture of "eating bitterness." For example, those that involve abusive and exploitative labor practices are criticized not only by African workers, but also by members of "the Chinese" community, including the central government of China. Therefore, when examining Sino-African labor disputes from a cultural perspective, we must consider not just the conflict between two cultures, but also the internal contestation within each culture, to avoid oversimplistic and reductive moral conclusions.

C. The Doctrine of Renvoi—Voluntary Deference of a Foreign Culture

Before introducing the doctrine of renvoi in conflict of laws, this section first briefly explores how certain conflicts doctrines laid out in Chapter III.B. help reveal and deal with the complexities of cultural conflicts in *Cheng*.

First, under the conflicts analysis, the party intending to raise an issue about Chinese law must invoke and prove it to the Zambian court, otherwise Zambian laws will be applied.[682] By vesting the initiative of pleading and proving Chinese law in the hands of the litigants, the conflicts approach gives members of "the Chinese" community the agency to decide whether to assert their affiliations with China or Zambia, and this is where the divergence within the apparently homogenous Chinese community is revealed. The adversarial process of proving foreign law further gives Mr. Cheng the opportunity to challenge NFCA's interpretations of the 1995 Labor Law of China, specifically by demonstrating how the law's expansive and ambiguous nature has been manipulated by Chinese employers to violate labor rights in practice. This process makes the court see how

[682] *Supra* Chapter III.B.1

the 1995 Labor Law is applied in practice, understand the possible inconsistencies between labor law on the books and labor practices in reality, and ultimately decide to what extent Chinese and Zambian labor standards are similar or different, compatible or incompatible, fulfilling the same or diverse policy goals.

Second, the conflicts analysis gives due consideration to the multiple contacts that exist between the parties, the allegedly abusive labor practices, and the involved states.[683] Although *Cheng* involves a labor dispute between a Chinese employee and a Chinese employer, a conflicts lawyer will notice multiple connections between the litigants and Zambia. First of all, NFCA's principal place of business is Zambia, which is also where the allegedly abusive labor practices occurred. Furthermore, Mr. Cheng had formed strong ties with Zambia. He had spent ten years living and working in Zambia and was in the process of obtaining Zambian citizenship. By giving due consideration to Mr. Cheng's connection with Zambia despite his Chinese citizenship, the conflicts analysis resonates with a cosmopolitan vision of cultural identity that acknowledges citizens' various affiliations with the world beyond their home culture.

After allocating contacts to each involved state, the court will then evaluate the significance of these contacts in light of their roles in furthering the underlying policies of Chinese and Zambian labor laws.[684] As discussed in Chapter III.B.4, the court shall determine whether each involved state has an appropriate contact with the parties, the subject matter, or the litigation, so that it is reasonable for each state to claim an interest in having its respective policies effectuated in a specific case.[685] The goal of this analysis to

[683] *Supra* Chapter III.B.3
[684] *Supra* Chapter III.B.4.
[685] SYMEONIDES, *supra* note 79, at 100.

see whether conflicts can be avoided by identifying and eliminating false conflicts. If the court examines the substantive policies embodied in the 1995 Labor Law, it will likely conclude that China is interested in seeing this law applied to *Cheng*. This is because the legislative purpose of the 1995 Labor Law is arguably to protect Chinese employees' rights and set forth Chinese employers' obligations and responsibilities. Governmental interest analysis will probably suggest that China has an interest in achieving this legislative goal in *Cheng* because both parties are Chinese nationals. This conclusion, however, is based on a Zambian court's interpretation of Chinese labor law's policy objectives, which may or may not represent the true intent of Chinese legislators. In what follows, I will explore how the doctrine of renvoi in conflict analysis enquires directly into China's intent in having its labor laws applied extraterritorially, thereby providing new insights into the resolution of cultural disputes in *Cheng*.

In conflict of laws, when the forum considers the application of the law of a foreign state, it must decide whether to apply that state's substantive law, or to apply that state's "whole" law, including its choice-of-law rules.[686] If the forum chooses to apply the whole law of the foreign state, then it follows the doctrine of renvoi.[687] In this situation, the choice-of-law rules of the foreign jurisdiction may refer back to the law of the forum state, which is called a remission.[688] When a remission occurs, as a general rule, the forum will accept the reference back and apply its own substantive law. According to Symeonides,

> Underneath all the apparent complexity of the renvoi doctrine lies a very important philosophical question: should the forum resolve conflicts problems based exclusively on its own notions about which is the proper law, or should the forum

[686] *Id*., at 73.
[687] *Ibid.*
[688] *Ibid.*

consider, in principle, the corresponding notions of other states?[689]

If a court takes the latter position, then it is said to accept renvoi. Compared to the governmental interest analysis which infers the interest of a foreign state in applying its law based on statutory construction and interpretation, renvoi is a more direct way to ascertain whether that foreign state would wish to apply its law to a particular case.

Let us assume that the Zambian court permits renvoi. It will then look at both the 1995 Labor Law (the substantive law) and the choice-of-law rules of China. The Zambian court will notice that China does not wish to have its labor law applied in this case. Article 43 of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (hereinafter the PRC Choice-of-Law Rules) provides that,

> An employment contract is governed by the law of the place where the employee works. Where the working place of the employee cannot be ascertained, the law of the principal place of business of the employer shall be applied….[690]

Article 44 further provides that,

> Tortious liability is governed by the law of the place of tortious act. Where the parties have common habitual residence, the law of their common habitual residence shall be applied.[691]

Therefore, the PRC Choice-of-Law Rules provides an authentic evidence to show that China intends Zambian labor law to govern this case, regardless of how it will be characterized by the Zambian court (e.g., labor law or torts). This conclusion stands in stark contrast to the media's traditional portrayal of Chinese colonial dominance. Rather than

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[689] *Id.*, at 75.
[690] Zhonghua Renmin Gongheguo Shewai Minshi Guanxi Falü Shiyong Fa (中华人民共和国涉外民事关系法律适用法) [The Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships] (adopted at the 17th session of the Standing Committee of the 11th National People's Congress on October 28, 2010), art. 43.
[691] *Id.*, art. 44.

exporting its "abusive labor culture" to Zambia and "enslaving" local workers, China's central government voluntarily defers to the work culture of Zambia to determine liabilities relating to labor and employment issues. Moreover, the result of renvoi in this case also reveals the internal contestation among "the Chinese" over acceptable labor culture. After all, the PRC Choice-of-Law Rules' deference to Zambian law, which arguable represents the will of China's central government, goes against NFCA's wishes. The contribution of the doctrine of renvoi to the resolution of cultural conflicts is that it draws our attention to how a cultural community delineates its own regulatory authority. It suggests that conflicts can be avoided in certain cases because one cultural group may voluntarily defer to the other in deciding how to resolve them.

CHAPTER V: CONCLUSION

This dissertation explored the potential of the conflict-of-laws analysis as a promising tool to recognize, understand, evaluate, and ultimately resolve cultural conflicts. To this end, it drew insights from anthropological theories of legal pluralism and adopted a pluralistic approach to conflicts analysis. This approach departs from traditional conflicts theories and doctrines which only deal with state-made laws, assuming that the choice-of-law analysis could be applied to those unofficial cultural norms that govern significant aspects of people's lives. I first conducted cultural analyses on a hypothetical FCPA case. In this case, the Chinese business culture, which is heavily influenced by personalized social networks of power, allegedly collides with the standards of ethical conduct in the U.S. I feel the need to clarify, though, that this research does not aim to take a position in the conflict between Chinese and Western business cultures. As has been repeatedly emphasized in the previous analyses, a conflicts approach to cultural conflicts does not

decide which value trumps in the abstract or in general. Rather, it reframes the larger, and often irresolvable, cultural clash into a "narrowly tailored and technically specific one,"[692] and the result of its analysis only represents normative preferences in the conflict concerning *these* particular parties in *this* specific case at *this* moment of litigation. Therefore, in a different FCPA case, the same conflicts approach may very well suggest that U.S. courts shall subordinate the U.S. moral values to those of China (or of any other normative communities competing for jurisdiction). I then applied the doctrine of renvoi under the conflicts analysis to the *Cheng* case. This doctrine suggests that cultural conflicts can be avoided in certain cases because one cultural group may voluntarily defer to the other in deciding how to resolve them.

It is also important to note that the aim of this dissertation is not to provide authoritative anthropological descriptions of cultural values in the United States, Zambia, or China. Any assertions of the content and nature of a specific cultural practice found in the case studies should be understood as hypothetical expert testimonies only. A thorough research on the local culture of *guanxi*, for example, is better conducted by scholars in the disciplines of anthropology, sociology, and ethnology. The purpose of this research, instead, is to explore the potential of conflict of laws to serve as an intellectual framework in which cultural analysis can be performed. To summarize briefly, the conflicts approach to "the pleading and proof of foreign law" answers the question of who has the authority to claim the content of a cultural practice and what to do when multiple sources of authority conflict. "Characterization" deals with the question of how to make sense of the nature of a cultural phenomenon that is unfamiliar to the forum. The "most significant relationship" test

[692] Knop et al., *supra* note 8, at 646-47.

provides a guideline for analysts to reveal, recognize and evaluate people's multiple affiliations with a myriad of cultural communities beyond their local borders. The "governmental interest analysis" suggests that fewer than expected cultural conflicts exist because a community might be disinterested in effectuating its policies with respect to particular parties in a specific case. The "doctrine of renvoi" draws our attention to how a cultural community delineates its own regulatory authority. In the end, if a cultural analyst must make claims about the worth and quality of a foreign value system, the conflicts approach offers guidelines to carefully restrict the effect of such value judgments within specific case contexts. As has been explained in detail, following each step of choice-of-law analyses, the conflicts approach captures crucial insights of modern cultural anthropology, which appreciates the concept of culture as something "dynamic rather than static, internally contested rather than monolithic, and contextual rather than simply rules."[693]

Although this dissertation focuses on settling conflicts in courts, the pluralistic conflict-of-laws approach can also be applied to the resolution of cultural disputes outside of the realm of the justice system. As an intellectual framework for cultural analysis, this approach can be helpful whenever one is to deal with conflicts among diverse cultural communities competing for regulatory authority. The pluralistic conflicts approach, in a broad sense, provides a mode of thinking. It is about how individuals and communities (state or non-state) view themselves and others, and how any potential "us-versus-them" conflicts can be carefully framed and properly resolved. That said, a special focus on state courts allows this dissertation to contribute to the larger conversation about the role of

[693] Knop, *supra* note 9, at 338.

domestic judicial bodies in global governance agendas.[694] In the Avon case, a U.S. court applied the conflicts approach to deal with the clash of cultural values between the U.S. and China in gift giving, business ethics and anti-corruption. The way the court approached this particular case has implications for global governance. It touches upon issues such as how to allocate governance authority and how to determine the rights and obligations of multinational corporations that hold multiple affiliations with the world. The analysis performed in the Avon case serves as a good example to demonstrate how domestic courts get involved in the regulation of transnational business activities and broader international anti-bribery efforts. The court in *Cheng* dealt with regulatory challenges brought to the host country by multinational corporations and international migrant workers. By allocating the regulatory authorities between the home and host countries, this case touched upon issues such as the global governance of labor rights.

It is worth noting that a partnership between conflict of laws and cultural anthropology benefits both disciplines. The conflicts approach provides a new framework in which legal practitioners and scholars can conduct a more nuanced and sophisticated cultural analysis. At the same time, cultural conflict case studies (such as the Avon case examined in this dissertation) provides concrete examples to excavate the potential of conflicts methodologies to deal with normative communities that are non-territorial and non-state in nature. For example, in Chapter III.B.3, the court must decide what contacts exist between the defendant corporations and the *guanxi* community. Although this community mainly exists within Chinese territory, its norms are not generated by the

[694] *See, e.g.*, Karen Knop, *Here and There: International Law in Domestic Courts*, 32 N.Y.U. J. INT'L L. & POL. 501 (1999-2000); Wai, *supra* note 99.

official legislatures of China, nor does the binding force of its rules depend on state power. Therefore, people who share common experiences of *guanxi* form a cultural community that is non-state in nature. This poses a challenge for traditional conflicts methodologies which mainly consider people's contacts with national states. In response to this challenge, this dissertation suggests that the conflicts analysis adopt community membership as a connecting factor. This enables conflict of laws to reveal, and to appreciate, people's affiliations with various unofficial cultural groups that exist within state territories but operate wholly or partly without state control. Making community membership a connecting factor is to recognize the possibility that people can have multiple cultural identities beyond their nationalities. In this sense, it is a legal recognition of Clifford's argument that "one (referring to People of Mashpee) can be fully a (U.S.) citizen and fully an Indian."

In addition, this dissertation contributes to the discipline of conflict of laws by showing how it can be applied in public-law litigation. Traditionally, conflict of laws only deals with private-law disputes──namely, disputes between private individuals or entities that do not concern the exercise of governmental authority.[695] The first hypothetical case examined in this dissertation, however, applies the conflicts approach to an FCPA case in which the United States criminally prosecutes the defendant corporations for bribing Chinese government officials. It therefore provides a concrete example to examine the potential of conflicts methodologies to deal with cross-border conflicts that involve the enforcement of public law against foreign business activities. Conflict of laws, by extending its scope of application to public law areas, also provides an alternative tool for

[695] SYMEONIDES, *supra* note 79, at 2.

domestic courts to regulate bribery in international business transactions. Overall, this dissertation represents an effort to bring together conversations about multiculturalism, legal pluralism, and modern developments of conflict-of-laws methodologies. I wish that a dialogue between law and culture not only makes cultural scholars see how legal techniques offer a fresh approach to cultural debates, but also enables legal scholars to see how culture would significantly influence the legal analysis of international regulatory regimes.

In the end, by presenting case studies with a special focus on China and its interaction with other cultures, this research sheds light on how the rest of the world can better understand and deal with China's growing global presence. To better deal with "Chinese characteristics," the global community needs not only a more nuanced and sophisticated understanding of Chinese culture, but also novel and concrete methods to deal with conflicts between Chinese and foreign cultures in international society. Just as I tried to examine the role of "Chinese culture" in shaping and resolving conflicts in international business, I would like to propose for future studies a new focus on the role of "Chinese culture" in global governance agendas. After all, as China plays an increasingly important role in shaping global strategies, so does its distinct Chinese characteristics. And by stressing "Chinese characteristics" in its social system and foreign policies, the Chinese government reminds us that culture matters.