

3-1-2022

## Dealing with U.S.-China Cultural Conflicts in FCPA Enforcement: A Pluralistic Conflict-of-Laws Approach

Ying Zhou

Follow this and additional works at: [https://scholars.unh.edu/unh\\_lr](https://scholars.unh.edu/unh_lr)



Part of the [Law Commons](#)

---

### Repository Citation

Ying Zhou, *Dealing with U.S.-China Cultural Conflicts in FCPA Enforcement: A Pluralistic Conflict-of-Laws Approach*, 20 U.N.H. L. Rev. 251 (2022).

This Article is brought to you for free and open access by the University of New Hampshire – Franklin Pierce School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in The University of New Hampshire Law Review by an authorized editor of University of New Hampshire Scholars' Repository. For more information, please contact [sue.zago@law.unh.edu](mailto:sue.zago@law.unh.edu).



Ying Zhou

## Dealing with U.S.-China Cultural Conflicts in FCPA Enforcement: A Pluralistic Conflict-of-Laws Approach

20 U.N.H. L. REV. 251 (2022)

**ABSTRACT.** The U.S. Foreign Corrupt Practices Act (FCPA) criminalizes payments and gifts to foreign government officials to gain an improper business advantage. While the FCPA arguably provides the United States with a powerful tool to promote more ethical business investments worldwide, its expansive extraterritorial jurisdiction has been the subject of continued criticism. One major criticism is that the FCPA, by imposing U.S. values about gift giving on foreign markets, constitutes a form of cultural and moral imperialism. To properly address this criticism, the FCPA needs legal techniques and mechanisms to deal with cultural conflicts resulting from its extraterritorial enforcement. This Article proposes a pluralistic conflict-of-laws approach to the resolution of cultural conflicts in FCPA cases, with a special focus on the clash of cultural values between China and the U.S. over gift giving. I will apply this approach to the analysis of a hypothetical FCPA case in which the Chinese business culture, which is heavily influenced by personalized social networks of power, allegedly collides with the standards of ethical conduct in the United States. Following each analytical step, I demonstrate how the pluralistic conflict-of-laws approach turns otherwise irresolvable cultural conflicts into legally viable outcomes in specific cases, and how it captures a crucial insight of modern cultural anthropology—that culture is dynamic, internally contested, and contextual—in this process.

**AUTHOR.** LL.B. (China), LL.M., J.S.D. (Cornell), Post-Doctoral Global Fellow affiliated with the U.S.-Asia Law Institute at New York University School of Law. This Article has benefited from presentations at the Global/Emile Noël Fellows Forum held by the Hauser Global Law School Program at NYU Law. The Author would like to thank Professors Kevin Davis, Frank Upham, Annelise Riles, Xingzhong Yu, Mitchel Lasser, and Muna Ndulo for their comments on drafts. All mistakes are the Author's.

INTRODUCTION .....	253
I. DEALING WITH CULTURAL CONFLICTS IN FCPA ENFORCEMENT: WHY EXISTING APPROACHES FAIL .....	257
A. <i>Rejecting the FCPA’s Extraterritorial Reach</i> .....	258
B. <i>Promoting a Worldwide Anti-Bribery Legal Unification</i> .....	262
II. BRIBERY OR GIFTS? A HYPOTHETICAL CASE.....	263
A. <i>The Avon Case</i> .....	264
B. <i>The FCPA Is Ill-Equipped to Accommodate Cultural Differences</i> .....	268
C. <i>The Complexities of Cultural Conflicts in the Avon Case</i> .....	274
III. APPLYING A PLURALISTIC CONFLICT-OF-LAWS APPROACH TO THE AVON CASE .....	287
A. <i>Pleading and Proving Foreign Law—How Culture Is Seen and Ascertained</i> .	287
B. <i>Allocating Contacts—Dealing with Cosmopolitan Cultural Identities</i> .....	295
C. <i>Interest Analysis—Identifying False Conflict</i> .....	297
D. <i>The Public Policy Exception—When and How a Moral Judgment Is Made</i> ..	308
CONCLUSION .....	311

## INTRODUCTION

The Foreign Corrupt Practices Act (“FCPA”)<sup>1</sup> 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.<sup>2</sup> The FCPA’s anti-bribery provisions establish jurisdiction over domestic entities (U.S. corporations and nationals), foreign issuers (foreign corporations with shares trading on a U.S. stock exchange), and any person other than an issuer or domestic concern who takes steps in furtherance of an improper payment scheme while in U.S. territory.<sup>3</sup> Over the last three decades, there has been a substantial increase in FCPA enforcement as the U.S. government continues to expand the FCPA’s extraterritorial reach.<sup>4</sup> The FCPA, as currently 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.<sup>5</sup>

Primarily because of its expansive extraterritorial jurisdiction, the FCPA has long been subject to critiques of cultural and moral imperialism.<sup>6</sup> Specifically, it has been accused of unilaterally and forcibly imposing U.S. values about gift giving on foreign markets.<sup>7</sup> To address this concern, scholars have proposed either the rejection of the FCPA’s extraterritorial jurisdiction or the unification of worldwide anti-bribery laws.<sup>8</sup> This Article argues that both these proposals fail to solve

---

<sup>1</sup> 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).

<sup>2</sup> 15 U.S.C. §§ 78dd–1 to –3.

<sup>3</sup> *Id.*

<sup>4</sup> 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, 470–72 (2016).

<sup>5</sup> 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.”).

<sup>6</sup> See 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 Salbu, *Bribery in the Global Market*]; Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT’L L. 223 (1999) [hereinafter Salbu, *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 Salbu, *A Threat to Global Harmony*]; Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT’L L. 155 (2009).

<sup>7</sup> See sources cited *supra* note 6.

<sup>8</sup> Salbu, *Global Village*, *supra* note 6 (arguing that the FCPA’s extraterritorial jurisdiction is crude and unwieldy and therefore should be limited); Andrew B. Spalding, *Unwitting Sanctions:*

problems of cultural conflicts in the FCPA enforcement. The proposals either ignore the legitimate interest of the United States in disciplining its own companies' roles in overseas markets or hold an unrealistic vision of the prospect of global legal unification. Moreover, existing exceptions<sup>9</sup> and affirmative defenses<sup>10</sup> prescribed under the FCPA are also ill-equipped to accommodate cultural differences. The "local written law defense," for example, exempts only those payments and gifts that are "lawful under the written laws and regulations" of the host country.<sup>11</sup> As a result, this defense fails to accommodate those unofficial cultural norms that, although not explicitly stipulated in law, are otherwise socially acceptable and not officially outlawed in the host country. The "facilitating or expediting payments" exception,<sup>12</sup> by carving out an exception for certain corrupt behaviors believed to be prevalent elsewhere, reinforces the cultural stereotype that emerging markets are associated with corruption and unsound governance. Overall, the question of how cultural conflicts can be properly resolved in the FCPA enforcement has not yet received a satisfactory answer from either the academic or legislative field.

This Article proposes a pluralistic conflict-of-laws approach to the resolution of cultural conflicts in FCPA cases.<sup>13</sup> Conflict of laws, traditionally viewed as a branch of law aiming to solve multistate legal disputes between private persons or entities, consists of three subdivisions: jurisdiction, choice of law, and judgment recognition.<sup>14</sup> Conflicts is a field of private law that deals with cases involving foreign fact elements that give rise to reasonable doubt as to the application of law.<sup>15</sup> Under the conflicts analysis, jurisdiction and choice of law are two independent inquiries.<sup>16</sup> The conflicts analysis decides not only which state provides the forum to adjudicate the dispute, but also whether the dispute is to be resolved in

---

*Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 351–58 (2010) (promoting global legal unification on combating bribery of foreign government officials).

<sup>9</sup> *E.g.*, 15 U.S.C. § 78dd–1(b).

<sup>10</sup> *E.g.*, 15 U.S.C. § 78dd–1(c).

<sup>11</sup> *E.g.*, 15 U.S.C. § 78dd–1(c)(1).

<sup>12</sup> *E.g.*, 15 U.S.C. § 78dd–1(b).

<sup>13</sup> The implication of conflict-of-laws methodologies for cultural debates was first explored by Karen Knop, Ralf Michaels, and Annelise Riles. See Karen Knop et al., *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589 (2012).

<sup>14</sup> SYMEON C. SYMEONIDES, *CHOICE OF LAW I* (Stephen M. Shepard ed., 2016).

<sup>15</sup> 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).

<sup>16</sup> SYMEONIDES, *supra* note 14.

accordance with the substantive law of the forum or that of the foreign state(s).<sup>17</sup> Therefore, a U.S. court can exercise jurisdiction but nevertheless decide to apply Chinese law, if the choice-of-law analysis reaches the conclusion 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. This Article 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 FCPA cases.

Although standard conflict of laws does not require engaging in cultural analysis, its partnership with cultural anthropology is by no means arbitrary. Both disciplines 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.”<sup>18</sup> As Annelise Riles has 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.<sup>19</sup>

Recently, a growing number of conflicts scholars have explored the potential of conflict of laws as a methodology to approach problems involving the allocation of regulatory powers in the international arena.<sup>20</sup> 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 conflict between commitments to human rights and respect for cultural

---

<sup>17</sup> *Id.*

<sup>18</sup> JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, LITERATURE, AND ART* 146 (1988).

<sup>19</sup> Annelise Riles, *Cultural Conflicts*, 71 *L. & CONTEMP. PROBS.* 273, 275 (2008).

<sup>20</sup> For literature exploring the implication of conflict of laws for global governance at various levels, see, e.g., 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); Christian Joerges et al., *Conflicts Law as Constitutional Form in the Post-National Constellation: Special Issue of Transnational Legal Theory*, 2 *TRANSNAT’L 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).

differences.<sup>21</sup> Their proposal takes 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.”<sup>22</sup> In their joint work, they took as their starting point what at first glance seemed to be a 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.”<sup>23</sup> However, on a closer analysis, they found that this case revealed dimensions of cultural conflicts: the kinship relationship represented by a Japanese “lineage company” collided with modern corporate practices.<sup>24</sup> Proceeding through the technical steps of a slightly modified conflicts analysis, Riles, Michaels and Knop demonstrated how conflicts doctrines opened up an avenue to turn an otherwise irresolvable cultural conflict into a narrowly tailored and technically specific choice-of-law problem.<sup>25</sup>

This Article continues their efforts to further explore the implications of conflicts methodologies for cultural debates, with a special focus on the conflict between U.S. and Chinese gift-giving culture in FCPA cases. While the doctrines and theories of conflicts analysis have traditionally been constructed for coping with collisions of official state-made laws,<sup>26</sup> this Article adopts a slightly modified approach of conflicts analysis—a pluralistic conflict-of-laws approach. This approach is pluralistic in the sense that it draws on anthropological theories of legal pluralism, which generally argue that law is not the exclusive artifact of the nation-state but is rather produced by various communities that structure and regulate the behavior of their members.<sup>27</sup> For the purpose of this Article, a conflicts analysis that is informed by legal pluralism requires that we depart from a traditional approach to 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

---

<sup>21</sup> See Knop et al., *supra* note 13; Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 *BUFF. L. REV.* 973 (2005) [hereinafter Riles, *A New Agenda*]; Annelise Riles, *Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage*, 108 *AM. ANTHROPOLOG.* 52 (2006) [hereinafter Riles, *The Iron Cage*]; Riles, *supra* note 19.

<sup>22</sup> Riles, *A New Agenda*, *supra* note 21, at 977.

<sup>23</sup> Knop et al., *supra* note 13, at 593–94, 613.

<sup>24</sup> *Id.* at 594, 613.

<sup>25</sup> *Id.* at 646, 649.

<sup>26</sup> Gunther 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).

<sup>27</sup> Riles, *supra* note 19, at 294.

aspects of our lives. That is, a pluralist conflict-of-laws approach will recognize not only the conflicts between the respective written laws and stipulations of China and the United States, but also the conflicts between the unwritten cultural norms of both countries.

I will demonstrate the contribution of the pluralistic conflict-of-laws approach through the analysis of a hypothetical FCPA case. In this case, Avon Products Inc. (“Avon”) and its wholly owned subsidiary Avon Products (China) Co. Ltd. (“Avon China”) have been charged with bribing Chinese government officials with gifts, non-business meals, and entertainment to retain business opportunities (hereinafter “the Avon case”).<sup>28</sup> In court, Avon and Avon China raise a cultural defense, arguing that certain gift-giving practices aligned with Chinese customs and were not in violation of China’s written laws and regulations. By doing so, they establish 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.<sup>29</sup> 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. Following each analytical step, one will see how this approach allows cultural conflicts to be articulated in legally defensible terms in FCPA cases. In addition, the analysis performed under this approach captures a crucial insight of modern cultural anthropology—that culture is dynamic, internally contested, and contextual.<sup>30</sup>

## I. DEALING WITH CULTURAL CONFLICTS IN FCPA ENFORCEMENT: WHY EXISTING APPROACHES FAIL

The FCPA’s ever-expanding extraterritorial jurisdiction has been accompanied by a growing number of criticisms. One of the major criticisms draws directly from anthropological theories of cultural relativism, critiquing the FCPA as a form of

---

<sup>28</sup> 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 Complaint, Securities and Exchange Comm’n v. Avon Products, Inc., No. 14-CV-9956 (S.D.N.Y. Dec. 17, 2014); 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-> [perma.cc/E6KQ-TEYV].

<sup>29</sup> 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).

<sup>30</sup> Karen Knop, *Citizenship, Public and Private*, 71 LAW & CONTEMP. PROBS 309, 338 (Summer 2008) (“... opinion has increasingly converged on an understanding of culture as dynamic rather than static, internally contested rather than monolithic, and contextual rather than simply rules.”).



moral imperialism.<sup>31</sup> Scholars who levy such critiques 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.<sup>32</sup> While these scholars generally recognize the legitimacy of value variance regarding bribery and gift giving,<sup>33</sup> they nonetheless fail to propose meaningful solutions to the resulting conflicts. Proposed solutions that ignore conflicts-of-laws analysis tend to bind questions of jurisdiction with those of applicable law, assuming that a court's assertion of jurisdiction to adjudicate a cross-border bribery case inevitably leads to the application of the forum state's own norms on the dispute.<sup>34</sup> In this vein, the traditional approach presumes that cultural conflicts resulting from the extraterritorial application of the FCPA could be avoided either by rejecting the FCPA's extraterritorial jurisdiction or by promoting a worldwide anti-bribery legal unification.<sup>35</sup> This section explains the failure of these solutions to generate satisfactory results for the complex cultural issues that the FCPA presents.

#### ***A. Rejecting the FCPA's Extraterritorial Reach***

Steven Salbu's arguments provide a prominent example of the proposition that the FCPA's extraterritorial jurisdiction should be rejected to avoid the moral imperialism critiques.<sup>36</sup> 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 . . . . 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.<sup>37</sup>

There are two aspects to Salbu's argument. First, he argues that the FCPA

---

<sup>31</sup> See, e.g., de la Torre, *supra* note 4; Salbu, *Bribery in the Global Market*, *supra* note 6; Salbu, *Global Village*, *supra* note 6; Salbu, *A Threat to Global Harmony*, *supra* note 6.

<sup>32</sup> See sources cited *supra* note 31.

<sup>33</sup> See, e.g., Salbu, *Global Village*, *supra* note 6, at 232–40.

<sup>34</sup> See, e.g., Salbu, *Global Village*, *supra* note 6, at 252; Spalding, *supra* note 8, at 351–58.

<sup>35</sup> See sources cited *supra* note 8.

<sup>36</sup> Salbu, *Global Village*, *supra* note 6, at 252.

<sup>37</sup> *Id.*

constitutes an encroachment on the host countries' abilities to regulate activities exclusively within their own borders.<sup>38</sup> This argument ignores the legitimate interest of the United States in disciplining its own multinational corporations ("MNCs") in overseas markets. In fact, as Elizabeth Spahn has 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 corrupt interactions of bribe givers and bribe takers.<sup>39</sup> Moreover, Salbu's argument ignores the legitimate interest of the United States in protecting its own consumers in global transactions.<sup>40</sup> For example, 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.<sup>41</sup> Scholars have shown 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.<sup>42</sup> International law also recognizes the FCPA's jurisdiction over the conduct of U.S. nationals abroad, and over conduct that takes place overseas but injures the interest of U.S. nationals.<sup>43</sup> International law recognizes five traditional grounds 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.<sup>44</sup> Therefore, the FCPA's extraterritorial jurisdiction over bribery from U.S.-based

---

<sup>38</sup> *Id.*

<sup>39</sup> Spahn, *supra* note 6, at 224.

<sup>40</sup> *Id.* at 210.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 211 ("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, *Toward 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).

<sup>43</sup> *United States v. Yunis*, 681 F. Supp. 896, 899–900 (D.D.C. 1988) ("[T]here 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 perpetrator of certain offenses considered particularly heinous and harmful to humanity[; and] passive personal, wherein jurisdiction is based on the nationality of the victim.").

<sup>44</sup> *Id.*

MNCs to Chinese government officials does not violate principles of international law.

In the first aspect of his argument, Salbu emphasizes the plurality of local values around the world as a basis to reject the FCPA's extraterritorial jurisdiction.<sup>45</sup> 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 ignores is that the discipline of conflict of laws offers another possibility. As will be discussed later, 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).<sup>46</sup> 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 and culture 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.<sup>47</sup> Defenders of the FCPA's extraterritorial jurisdiction have constantly referred to this affirmative defense to argue that the FCPA respects and accommodates cultural diversity.<sup>48</sup> Spahn has 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."<sup>49</sup>

Salbu does not believe that this affirmative defense addresses his concerns and, as a response to those defenders, he raises two rebuttals.<sup>50</sup> Salbu's first rebuttal points out that the 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 the host country in regard to gift giving "is very unlikely to be manifested in written laws."<sup>51</sup> He argues, 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.<sup>52</sup>

---

<sup>45</sup> Salbu, *Global Village*, *supra* note 6, at 232–40.

<sup>46</sup> Knop et al., *supra* note 13, at 633.

<sup>47</sup> *E.g.*, 15 U.S.C. § 78dd–1(c).

<sup>48</sup> Salbu, *A Threat to Global Harmony*, *supra* note 6, at 424.

<sup>49</sup> Spahn, *supra* note 6, at 174.

<sup>50</sup> Salbu, *A Threat to Global Harmony*, *supra* note 6, at 423–25.

<sup>51</sup> *Id.* at 425.

<sup>52</sup> *Id.*

Salbu's second rebuttal argues that the affirmative defense will not reduce the concerns of moral imperialism even if it is expanded to include laws in action.<sup>53</sup> The reason, according to Salbu, is that understanding foreign laws is a daunting task fraught with formidable challenges of linguistic and cultural translation.<sup>54</sup> The process of understanding foreign laws, Salbu argues, is unavoidably tainted with the potential for bias and inaccuracy, the result of which is often a great likelihood of imposing U.S. values on the interpretation of another normative regime.<sup>55</sup> This rebuttal also anticipates the second aspect of Salbu's argument, which emphasizes the cultural situatedness of one's claims about foreign cultures.

In the second aspect of his argument, Salbu insists 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.<sup>56</sup> In this respect, however, Salbu perhaps would gain insight from the discipline expressly devoted to dealing with foreign laws: conflict of laws. The first step of the conflicts analysis is to see whether the case involves a foreign element and, if so, to prove the content of the foreign law.<sup>57</sup> 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.<sup>58</sup> One crucial insight from the 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 law, while recognizing at the same time that the law's content is highly indeterminable and contestable.<sup>59</sup> Riles, Michaels and Knop refer to this type of reasoning as the "as if" modality of conflicts analysis.<sup>60</sup> Conflicts analysis, they argue, operates with fictions—the analysis acknowledges the indeterminable nature of foreign laws, but operates, for the time being, "as if" the content of the foreign law could be proved for the specific case at hand.<sup>61</sup> This "as if"

---

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 426.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Husserl, *supra* note 15, at 453.

<sup>58</sup> William B. Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CALIF. L. REV. 23, 32–39 (1957).

<sup>59</sup> Knop et al., *supra* note 13, at 644–45.

<sup>60</sup> *Id.* at 645–47.

<sup>61</sup> *Id.*

modality responds to an important anthropological insight that cultural relativism does not preclude moral judgments.<sup>62</sup> Rather, cultural relativism seeks to understand another culture in its fully native setting, while at the same time recognizing one's own cultural situatedness before any judgment is attempted.<sup>63</sup>

### **B. Promoting a Worldwide Anti-Bribery Legal Unification**

Andrew Spalding's arguments provide a good example of the proposition that the ethical risks inherent in the FCPA's extraterritorial jurisdiction can be addressed by unifying international anti-bribery legislation.<sup>64</sup> Spalding suggests expanding the signatories to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention).<sup>65</sup> By signing the OECD Anti-Bribery Convention, capital-rich countries that have not previously ratified anti-bribery conventions, such as China and India, are subject to the same obligation to criminalize bribery of foreign officials.<sup>66</sup> Spalding proposes the virtual equivalent of a progressive unification agenda of international anti-bribery legislation. The logic behind this proposal is that once other countries adopt similar anti-bribery laws, the FCPA-style legislation can avert charges of exporting morality.

The first problem with this proposal, which Spalding himself admits, is that global legal heterogeneity remains a compelling reality and, therefore, worldwide unification of anti-bribery laws is not going to happen anytime soon.<sup>67</sup> 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. Andreas Fischer-Lescano and Gunther Teubner have strongly argued that any aspirations to a unification of global law are doomed from the outset.<sup>68</sup> Fischer-Lescano and Teubner contend that the fragmentation of global law originates in the more fundamental fragmentation of global society itself, which

---

<sup>62</sup> Terence Turner, *Human Rights, Human Difference: Anthropology's Contribution to an Emancipatory Cultural Politics*, 53 J. ANTHROPOLOGICAL RES. 273, 275 (1997).

<sup>63</sup> *Id.*

<sup>64</sup> Spalding, *supra* note 8, at 351–58.

<sup>65</sup> 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].

<sup>66</sup> Spalding, *supra* note 8, at 401.

<sup>67</sup> *Id.* at 402.

<sup>68</sup> 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, 1004 (2004).

can never be completely erased.<sup>69</sup> Paul Schiff Berman even took the 1980 Convention on Contracts for the International Sale of Goods (CISG) as an example to argue that all legal harmonization regimes are themselves the products of pluralism and thus could never completely eliminate pluralism.<sup>70</sup> Even though the laws of each state may be uniform at the surface level, Berman argues, pluralism inevitably creeps in as different states might interpret and apply the same laws differently in their judicial practices.<sup>71</sup>

China provides a good example to illustrate Berman's argument. In fact, although China has not ratified the OECD Anti-Bribery Convention, it joined the United Nations Convention against Corruption (UNCAC)<sup>72</sup> in 2003 and thereafter amended the Criminal Law of the People's Republic of China ("the PRC Criminal Law") to prohibit bribery of foreign government officials.<sup>73</sup> Even so, Chinese methods of interpretation and 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.<sup>74</sup> 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 simply be eliminated through the imposition of universal codes of conduct. Instead, one must recognize pluralism as a reality that will never disappear and seek a realistic legal approach to resolving the conflicts between colliding normative regimes.

## II. BRIBERY OR GIFTS? A HYPOTHETICAL CASE

In the previous section, I argued that the elimination of cultural conflicts, either by denying the legitimate interest of the United States in regulating its own MNCs in overseas markets, or by imposing universal norms upon global markets, is simply

---

<sup>69</sup> *Id.* at 1004–05.

<sup>70</sup> See Paul Schiff Berman, *The Inevitable Legal Pluralism within Universal Harmonization Regimes: The Case of the CISG*, 21 UNIF. L. REV. 23 (2016).

<sup>71</sup> *Id.* at 24–25.

<sup>72</sup> G.A. Res. 58/4, annex, United Nations Convention against Corruption (Oct. 31, 2003), art. 16.

<sup>73</sup> 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. 164.

<sup>74</sup> 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, 522, 538 (2013).

impossible. Before introducing the pluralistic conflict-of-laws approach to cultural conflicts, this present section first presents a hypothetical FCPA case. By examining this case, readers will develop a more concrete idea of the kinds of cultural conflicts that arise in FCPA cases.

### A. *The Avon Case*<sup>75</sup>

In 2018, the Department of Justice (“DOJ”)<sup>76</sup> 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.<sup>77</sup> 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 Securities Exchange Commission (“SEC”) under Section 13 of the Securities Exchange Act (15 U.S.C. §78m).<sup>78</sup> Avon China, established and operated in Guangzhou, China, is a wholly owned subsidiary of Avon. 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 and established Avon China around 1990.<sup>79</sup> 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.<sup>80</sup> The specific incriminating evidence included:

---

<sup>75</sup> 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-settlement/> [perma.cc/A74S-HBEG].

References in this Article to the facts and the legal issues of that case are hypothetical and are for academic research only.

<sup>76</sup> Enforcement of the FCPA is carried out by two agencies: the Department of Justice (DOJ) and the Securities Exchange Commission (SEC). See A Resource Guide to the U.S. Foreign Corrupt Practices Act (updated July 2020), <https://www.justice.gov/criminal-fraud/file/1292051/download> [perma.cc/DKP8-GXLR].

<sup>77</sup> Plea Agreement at 12, *United States v. Avon Products (China) Co.*, No. 14-cr-00828-GBD (S.D.N.Y. Dec. 15, 2014).

<sup>78</sup> 15 U.S.C. §§ 78m, 78dd–1.

<sup>79</sup> Complaint at ¶ 14, *Securities and Exchange Comm’n v. Avon Products, Inc.*, No. 14-CV-9956 (S.D.N.Y. Dec. 17, 2014).

<sup>80</sup> Plea Agreement, *supra* note 77, at 17.

1. Gifts to government officials: Avon China established and maintained a Corporate Affairs Group whose responsibilities included “maintaining *guanxi*<sup>81</sup> with [Chinese] government officials and lobbying those officials Avon China’s behalf.”<sup>82</sup> In their 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.<sup>83</sup> 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.<sup>84</sup> The Corporate Affairs Group, and other Avon China executives and employees, routinely gave gifts such as Avon products, vintage wines, mooncakes, and personal luxury items to Chinese government officials.<sup>85</sup>
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 through 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.<sup>86</sup>
3. Non-business travel expenses: 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 Hawaii, Las Vegas, and Los Angeles.<sup>87</sup>

---

<sup>81</sup> *Guanxi* can be roughly translated as “personal connection, relationship, or network” and plays a central role in Chinese society. For more detailed discussions about *guanxi*, see *infra* Section II.C.2.

<sup>82</sup> See Plea Agreement, *supra* note 77, at 13, 15.

<sup>83</sup> *Id.*

<sup>84</sup> Complaint, *supra* note 79, at ¶15.

<sup>85</sup> Plea Agreement, *supra* note 77, at 16, 19.

<sup>86</sup> *Id.* at 20–21.

<sup>87</sup> *Id.* at 21–23.



4. Cash to government officials: In 2006, a Corporate Affairs Group employee paid RMB10,000 (approximately \$ 1538) 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 (approximately \$153,846) disbursed to government officials as gifts for their personal events—wedding ceremonies, funerals, college-entrance celebrations for their children, etc.<sup>88</sup>
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 (approximately \$3076) to a newspaper editor in order to induce 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.<sup>89</sup>

Avon responded as follows. 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 the Chinese marketplace.<sup>90</sup> In fact, Avon held three rounds of internal trainings on Chinese culture before it launched its Chinese operations. During these internal trainings, executives of Avon China were informed that China is a society composed of individuals closely connected by existing societal relationships, or webs of *guanxi*.<sup>91</sup> They were further taught that the existence of *guanxi* often denotes informal relationships 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.<sup>92</sup> The result of these internal trainings on the Chinese culture of *guanxi* was a determination among the senior executives of Avon to create a government relations department—the Corporate Affairs Group.<sup>93</sup> This Corporate Affairs Group existed solely in Avon's Chinese subsidiary and was composed primarily of local Chinese employees. The

---

<sup>88</sup> *Id.* at 23–25.

<sup>89</sup> *Id.* at 25–26.

<sup>90</sup> For detailed discussions about the culture of *guanxi*, see *infra* Section II.C.2.

<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

<sup>93</sup> Plea Agreement, *supra* note 77, at 13.

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 were crucial to Avon's success in China.<sup>94</sup>

In addition, Avon China was advised that gift giving serves as the most common method of cultivating *guanxi* in China.<sup>95</sup> 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 the early 2000s, 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.<sup>96</sup> 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 for prosecuting entities for offering bribes under Chinese law is RMB100,000 (approximately \$15,384) when the bribes are offered for the purpose of gaining unlawful benefits or to administrative enforcement officers.<sup>97</sup> Moreover, Avon China argued that it did not 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.<sup>98</sup> Therefore, Avon China argued that the RMB10,000 cash payment it offered to the Chinese government official should be

---

<sup>94</sup> *Id.*

<sup>95</sup> *See infra* Section II.C.2.

<sup>96</sup> Andrew Millington et al., *Gift Giving, Guanxi and Illicit Payments in Buyer-Supplier Relations in China: Analysing the Experience of UK Companies*, 57 *J. BUS. ETHICS* 255, 255–56 (2005).

<sup>97</sup> *Zuigao Renmin Jian Cha Yuan Guanyu Xinghui Li'an Biaozhun De Guiding* (最高人民法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. on Dec. 22, 2000, effective on Dec. 22, 2000), art. 2.

<sup>98</sup> *Zhonghua Renmin Gongheguo Xingfa* (中华人民共和国刑法) [Criminal Law of the People's Republic of China] (promulgated by Standing Comm. Nat'l People's Cong., Mar. 14, 1997, effective Oct. 1, 1997), art. 389.

excused in accordance with relevant provisions prescribed in Chinese law.

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 to confirm that he did not qualify as a government official.

### **B. *The FCPA Is Ill-Equipped to Accommodate Cultural Differences***

#### 1. The FCPA exceptions and affirmative defenses

Avon and Avon China's cultural arguments are not likely to win the court's approval under existing FCPA provisions. 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.<sup>99</sup> The FCPA applies to American companies and their employees regardless of whether they violate the FCPA domestically or abroad.<sup>100</sup> The FCPA may also apply to 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.<sup>101</sup> 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, or shareholder relationship with a U.S. corporation.<sup>102</sup> Therefore, Avon's contention that the Corporate Affairs Group existed solely in its Chinese subsidiary and was composed 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.<sup>103</sup> It does not, however, differentiate whether the gifts and payments are made for an 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 cultivating *guanxi*, an informal relationship based implicitly on indebtedness and reciprocal obligations in the future, could not prove its absence of corrupt intent

---

<sup>99</sup> *E.g.*, 15 U.S.C. § 78dd-1(a).

<sup>100</sup> *United States v. Hoskins*, 902 F.3d 69, 71 (2d Cir. 2018).

<sup>101</sup> *See id.*

<sup>102</sup> *See id.*

<sup>103</sup> *DePuydt v. FMC Corp.*, No. 92-16729, 1994 WL 481925, at \*4 (9th Cir. Sept. 7, 1994).

under the FCPA.

One possible strategy for Avon is to avail itself of the “facilitating or expediting payments”<sup>104</sup> 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.”<sup>105</sup> “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.<sup>106</sup> Since the events incriminating Avon surrounded its receipt of the direct-selling license in China, it 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; 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.<sup>107</sup> The FCPA even explicitly excludes actions “involving whether to award new business or continue business” from the narrow categories of “routine governmental action.”<sup>108</sup> Whether to award Avon the first direct-selling license in China obviously 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”<sup>109</sup> and the “reasonable and bona fide business expense defense.”<sup>110</sup> 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.<sup>111</sup> 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.”<sup>112</sup> Rather, the acts must be expressly permitted via statutes or regulations of the foreign country in order to

---

<sup>104</sup> *E.g.*, 15 U.S.C. § 78dd-1(b).

<sup>105</sup> 15 U.S.C. § 78dd-2(b).

<sup>106</sup> 15 U.S.C. § 78dd-1(f)(3)(A).

<sup>107</sup> *United States v. Kay*, 359 F.3d 738, 751 (5th Cir. 2004).

<sup>108</sup> 15 U.S.C. § 78dd-1(f)(3)(B).

<sup>109</sup> *E.g.*, 15 U.S.C. § 78dd-1(c).

<sup>110</sup> *Id.*

<sup>111</sup> *E.g.*, 15 U.S.C. § 78dd-2(c)(1).

<sup>112</sup> H.R. REP. NO. 100-576, at 922 (1977).

avert bribery charges under the FCPA.<sup>113</sup> 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 a defendant "is relieved of criminal responsibility for his actions by a provision of the foreign law," he may still "be prosecuted under the FCPA" for payments that violate foreign law.<sup>114</sup> 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 could establish that it should be relieved of criminal liability under Chinese law because either the amount of payments fell below the threshold for criminal prosecution or the payments were a product of extortion, the court will probably still find that it could not satisfy 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.<sup>115</sup>

For this affirmative defense to apply, Avon could argue that the Chinese officials' travel to the United States, together with the lodging and entertainment expenses incurred during these trips, were directly related to its application for direct-selling licenses in China. For example, Avon could argue that it intended to provide training to Chinese government officials in its U.S. facilities to enable them to efficiently execute their duties relating to the evaluation of direct-selling qualification. Avon 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."<sup>116</sup> The court, however, will probably not approve these arguments because this affirmative defense generally requires that the expenses be modest, and the value of the gifts be

---

<sup>113</sup> *Id.*

<sup>114</sup> *United States v. Kozeny*, 664 F. Supp. 2d 369, 395 (S.D.N.Y. 2009).

<sup>115</sup> *E.g.*, 15 U.S.C. § 78dd-1(c).

<sup>116</sup> *Id.*

nominal.<sup>117</sup> Moreover, the gifts should generally reflect the company's business.<sup>118</sup> In view of these requirements, Avon and Avon China would have a hard time justifying those gifts irrelevant to their beauty business, such as mooncakes, vintage wines, and travels to Hawaii, Las Vegas, and Los Angeles. 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.

By any analysis, Avon is unlikely to avert the bribery charges via the existing exception and affirmative defenses under the FCPA. Cultural arguments and evidence of cultural practice play little if no role in existing FCPA cases. The FCPA is simply ill-equipped to accommodate cultural differences—the single affirmative defense that relates directly to foreign value systems only exempts practices that are explicitly authorized by a written foreign law.<sup>119</sup> As a result, the court might simply reject Avon's cultural evidence, such as *guanxi* and its operation in Chinese society, on grounds of irrelevance.

## 2. Existing FCPA provisions reinforce cultural stereotypes

Although Avon's cultural arguments are unlikely to prevail in court under the existing FCPA provisions, the legislative history of the statute's 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.”<sup>120</sup> Take, for example, the statutory exception for “facilitating or expediting”<sup>121</sup> payments: the 1977 House Report on the FCPA 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.<sup>122</sup>

The report suggests that “host-country bribery is to some extent inevitable, and even tolerable,” in the eyes of U.S. lawmakers.<sup>123</sup> This tolerance is even more

---

<sup>117</sup> U.S. DEPT OF JUSTICE, *FCPA Opinion Procedure Release* 08-03 (July 11, 2008) (explaining that the payment would cover reimbursement for economy class travel and one night's lodging, which was not to exceed \$229 per journalist).

<sup>118</sup> U.S. DEPT OF JUSTICE, *FCPA Opinion Procedure Release* 07-01 (July 24, 2007).

<sup>119</sup> *E.g.*, 15 U.S.C. § 78dd-1(c).

<sup>120</sup> Spalding, *supra* note 8, at 365.

<sup>121</sup> *E.g.*, 15 U.S.C. § 78dd-1(b).

<sup>122</sup> H.R. REP. NO. 95-640, at 8 (1977).

<sup>123</sup> Spalding, *supra* note 8, at 365.

powerfully apparent in the affirmative defense available where the bribe, or gift, is legal under the “written laws and regulations” of the receiving country.<sup>124</sup> Therefore, FCPA defenders who rebut the charge of moral imperialism often raise the exception and affirmative defenses as evidence that the FCPA, far from imposing an American definition of corruption on the global market, in fact respects and accommodates cultural differences.<sup>125</sup>

On a closer analysis, however, the exception and affirmative defenses prescribed under the FCPA turn on a classic stereotype that views “developing and transition economies” as inherently corrupt: it is okay, in the terms of this stereotype, to bribe Africans and Latin Americans, who are non-Western, non-white, and non-Christian, because they are fundamentally immoral and corrupt.<sup>126</sup> Notwithstanding the statutory exception for facilitating payments, Congress conveys an overt tone of disdain toward such payments by using the word “reprehensible.”<sup>127</sup> The DOJ has also taken a dim view of the facilitating payments exception. The FCPA Resource Guide expresses the DOJ’s disapproval of facilitating payments and notes that the United States “encourages companies to prohibit or discourage facilitating payments.”<sup>128</sup> Although the exception does not exclusively apply to business enterprises in emerging markets, since 1978, the FCPA enforcement has focused primarily on emerging markets such as China, Nigeria, Mexico, and Indonesia.<sup>129</sup> As a result, by carving out an exception for certain corrupt behaviors believed to be prevalent “elsewhere,” the FCPA actually implicates a racially- and geographically-based moralism: actions in emerging markets such as Asia and Latin America do not bear the same moral weight that the same actions would bear in the United States.<sup>130</sup> From this perspective, the FCPA’s statutory tolerance of host-country bribery paradoxically reinforces negative stereotypes that

---

<sup>124</sup> *E.g.*, 15 U.S.C. § 78dd-1(c).

<sup>125</sup> Salbu, *A Threat to Global Harmony*, *supra* note 6, at 423.

<sup>126</sup> Spahn, *supra* note 6, 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.”).

<sup>127</sup> H.R. REP. NO. 95-640, at 8 (1977).

<sup>128</sup> U.S. DEPT OF JUST. & U.S. S. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 26 (2d ed. 2020) [hereinafter THE RESOURCE GUIDE], <https://www.justice.gov/criminal-fraud/file/1292051/download> [<https://perma.cc/V2DB-BD27>].

<sup>129</sup> FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, *Location of Misconduct Alleged in FCPA-Related Enforcement Actions*, <http://fcpa.stanford.edu/statistics-analytics.html?tab=8> [<https://perma.cc/T4FD-EUSP>].

<sup>130</sup> Spahn, *supra* note 6, at 187.

view people in emerging markets as benighted barbarians who are simply incapable of understanding less corrupt methods of conducting business and government.<sup>131</sup>

Carving out several exceptions to the FCPA does not seem to be a promising solution to cultural conflicts in an anti-corruption campaign. 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: Congress believes 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, however, is not necessarily the truth of business cultures outside the United States.<sup>132</sup> For example, Chinese anti-bribery legislation does not differentiate between facilitating payments and other types of bribes.<sup>133</sup> Under Chinese criminal law, facilitating payments are just as prosecutable as any other bribe.<sup>134</sup> 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;<sup>135</sup> second, it fails to accommodate 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, the FCPA's exceptions for certain otherwise inculpatory payments<sup>136</sup> still exclude defendants' introduction of any cultural evidence beyond written laws, exposing the narrowness of the FCPA's pretense to cultural accommodation. Had the framers of the FCPA taken seriously issues of cultural

---

<sup>131</sup> *Id.* at 187–88.

<sup>132</sup> THE RESOURCE GUIDE, *supra* note 128, 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.”).

<sup>133</sup> F. Joseph Warin et al., *FCPA Compliance in China and the Gifts and Hospitality Challenge*, 5 VA. L. & BUS. REV. 33, 64 (2010).

<sup>134</sup> *Id.*

<sup>135</sup> Spalding, *supra* note 8, at 378–90.

<sup>136</sup> *E.g.*, 15 U.S.C. §§ 78dd–1(b) (the “facilitating or expediting exception”); 15 U.S.C. §§ 78dd–1(c) (the “reasonable and bona fide business expense defense”).



conflicts, they would have devoted far more energy into the prerequisite question of how to determine foreign culture. After all, how could FCPA prosecution and litigation be truly culturally sensitive without allowing the introduction of any empirical or sociological knowledge of foreign values and preferences?<sup>137</sup> Moreover, by denying the admission of cultural evidence submitted by defendants, the FCPA is 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.

### ***C. The Complexities of Cultural Conflicts in the Avon Case***

This subsection presumes that U.S. courts consider the cultural background out of which the case facts of FCPA cases emerge. 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.<sup>138</sup> To be more specific, the focus has been on *why* a cultural defense should, or should not, be allowed in the courtroom.<sup>139</sup> There has been a dearth of research on *how* exactly to deal with the complexities associated with the use of cultural defenses or even what those complexities could be. In any case, the admission of cultural evidence is far from the end of the story. The judge must still find a way to recognize, to understand, to empathize with, and to evaluate the cultural conflicts before making a legitimate judgment.

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. The goal of these adversarial testimonies is to present the concept of culture as something dynamic, internally contested, and contextual. At the end of

---

<sup>137</sup> 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.”).

<sup>138</sup> See, e.g., ALISON DUNDES RENTELN, THE CULTURAL DEFENSE 5–9 (2004).

<sup>139</sup> See *id.*

this subsection, readers will develop a more concrete idea of the complexities of cultural conflicts in FCPA cases.

1. Avon's multilayered cultural identity

The global economy offers opportunities for multinational corporations to situate themselves within different cultural communities and to create layered cosmopolitan identities. In fact, in this particular case, 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.

Avon might even 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 newspaper editor 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.<sup>140</sup> 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 the competing normative orderings of each.<sup>141</sup> 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 an unintended result of the complicated and multi-faceted cultural identities of transnational actors in the era of globalization.

---

<sup>140</sup> *E.g.*, 15 U.S.C. § 78dd-1(b).

<sup>141</sup> Knop et al., *supra* note 13, at 620.

## 2. Avon's Expert Testimony: Introducing 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.<sup>142</sup> Yet what seems irrelevant to U.S. legal systems finds considerable support in a 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 Expert A, an anthropologist, served as an expert witness for Avon and testified as follows. *Guanxi*, which roughly translates as "personal connection, relationship, or network," plays a central role in Chinese society.<sup>143</sup> In fact, *guanxi* constitutes a foundation of the philosophy of Confucianism, which has dominated Chinese mainstream ideology for more than two thousand years.<sup>144</sup> The essence of Confucianism lies in its acknowledgement of, and respect for, relationships.<sup>145</sup> Such relationships, however, have wide cultural implications that are different in kind and intensity from comparable behavior in Western societies.<sup>146</sup>

*Guanxi* is formed when two independent individuals, or entities, establish a connection to enable a bilateral flow of transactions.<sup>147</sup> Both parties must benefit from the transactions, however, to make sure that the proper operation of *guanxi* is maintained.<sup>148</sup> 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.

---

<sup>142</sup> *E.g.*, 15 U.S.C. § 78dd-1(b).

<sup>143</sup> 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).

<sup>144</sup> Wen, *supra* note 74, at 517.

<sup>145</sup> Irene Y.M. Yeung & Rosalie L. Tung, *Achieving Business Success in Confucian Societies: The Importance of Guanxi (Connections)*, 25 *ORG. DYNAMICS* 54, 55 (1996).

<sup>146</sup> Stanley Lubman, *Looking for Law in China*, 20 *COLUM. J. ASIAN L.* 1, 69 (2006).

<sup>147</sup> Yeung & Tung, *supra* note 145, at 55.

<sup>148</sup> *Id.*

First, the time orientation is different.<sup>149</sup> Chinese people tend to evaluate social transactions within a long-term balance sheet.<sup>150</sup> To borrow the words from one executive, “[e]very *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.”<sup>151</sup> 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 maintaining *guanxi*.<sup>152</sup> Once the debit and credit sides of the balance sheet are in equilibrium, the *guanxi* relationship often comes to an end.<sup>153</sup> Therefore, the maintenance of *guanxi* relies on a dynamic equilibrium between debits and credits in continuous, long-term interactions.<sup>154</sup> American social transactions, in contrast, are usually evaluated in isolated occurrences, the objective of which is to maintain equilibrium in each transaction.<sup>155</sup> From 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 the Chinese cultural context.

Second, the role institutional law plays in Chinese society is different from the role it plays in Western society. The philosophy of Confucianism prefers governance by ethics over governance by law.<sup>156</sup> This preference 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.<sup>157</sup> Western observers often find that Chinese business transactions rely on *guanxi* rather than on legal institutions, and that legal rules and contractual agreements are often easily broken or evaded by people of influence.<sup>158</sup> 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

---

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 56.

<sup>157</sup> *Id.*

<sup>158</sup> TIM AMBLER & MORGEN WITZEL, *DOING BUSINESS IN CHINA* 34–35 (2d ed. 2004); Scott D. Seligman, *Guanxi: Grease for the Wheels of China*, *CHINA BUS. REV.*, Sept.-Oct. 1999, at 34–35.

consider *guanxi* and legal institutions as complementary.<sup>159</sup> In practice, *guanxi* is often considered as the “informal mediating mechanism” used to achieve constructive business results when the formal legal system itself fails to function properly.<sup>160</sup>

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 mostly for instrumental purposes in business context, the *guanxi* relationship must still possess some affective components to maintain its warmth.<sup>161</sup> 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.<sup>162</sup> Long-term sentimental attachments, in turn, further provide moral justifications for gift giving as an appropriate expression of reciprocity.<sup>163</sup> This accounts for Avon’s gifts to Chinese government officials for their personal events, such as wedding ceremonies, funerals, and college-entrance celebrations 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.<sup>164</sup> 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.<sup>165</sup> The United States, in contrast, relies primarily on formal legal regimes to ensure smooth business transactions.<sup>166</sup> This is not to say that the instrumental use of personal relationships is not common in U.S. business; but personal acquaintance is not as decisive a factor

---

<sup>159</sup> Lubman, *supra* note 146, at 72; Pitman B. Potter, *Guanxi and the PRC Legal System: From Contradiction to Complementarity*, in *SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE AND THE CHANGING NATURE OF GUANXI* 179, 183 (Thomas Gold et al. eds., 2002).

<sup>160</sup> Potter, *supra* note 159, at 195.

<sup>161</sup> See Thomas Gold et al., *supra* note 143.

<sup>162</sup> Wen, *supra* note 74, at 521.

<sup>163</sup> *Id.*

<sup>164</sup> Lubman, *supra* note 146, at 72.

<sup>165</sup> Yeung & Tung, *supra* note 145, at 59–61.

<sup>166</sup> *Id.*, at 56.

for successful business transactions in Western society, and the culture of “impersonal” business developed earlier and faster in the West than in China.<sup>167</sup>

Both theoretical and empirical research shows that establishing strong *guanxi* with the right persons is crucial to business success in China.<sup>168</sup> Generally speaking, the significance of *guanxi* decreases over the life of the business.<sup>169</sup> During the initial stages of opening the Chinese market, *guanxi* networks usually play a crucial role.<sup>170</sup> Beyond a certain threshold level, other conditions assume greater importance in sustaining success, such as technical competence, capital, and product quality, etc.<sup>171</sup> 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.<sup>172</sup>

Based on the DOJ’s investigation, most of the events incriminating Avon China took place between 2004 and 2008, when China gradually lifted its ban on direct selling.<sup>173</sup> 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 1, 2005, eight months after Avon China was granted its first temporary license to conduct direct sales in China.<sup>174</sup> 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 was reasonable, even necessary, in terms of facilitating its application for direct-selling licenses.

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

---

<sup>167</sup> Lubman, *supra* note 146, at 69.

<sup>168</sup> See Thomas Gold et al., *supra* note 143; Lubman, *supra* note 146, at 69.

<sup>169</sup> Yeung & Tung, *supra* note 145, at 60.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 59–60.

<sup>173</sup> Plea Agreement, *supra* note 77, at 14–15.

<sup>174</sup> Zhixiao Guanli Tiaoli (直销管理条例) [Direct Selling Administration Ordinance] (promulgated by the State Council, Aug. 10, 2005, effective Dec. 1, 2005).

contexts.<sup>175</sup> In order to build *guanxi*, two hitherto discrete individuals must establish a basis of familiarity and trust to enable subsequent transactions.<sup>176</sup> 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.<sup>177</sup> Gift exchanges in Chinese culture are not only a matter of ritual but also an important social norm.<sup>178</sup> 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.”<sup>179</sup> In an interview with nineteen Hong Kong and non-Hong Kong firms that conduct business in China, all participant companies admitted that they had given gifts in various forms in the course of *guanxi* building and maintenance.<sup>180</sup> 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.

### 3. DOJ’s Expert Testimony: The polytemporal dimensions of culture

The DOJ confronted the defendants with the testimony of two opposing experts, Expert B and Expert C, aiming to prove to the court that there is still no universally agreed upon definition of *guanxi* and its associated gift-giving practices. This subsection first discusses the testimony of Expert B, which emphasizes the withered significance of *guanxi* in China, especially since President Xi Jinping came to power. By pointing out the transition of cultural norms in a different historical period, Expert B highlights 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 outlawed by the time of litigation. Lawyers frame this problem as one of conflict of laws in time, or intertemporal

---

<sup>175</sup> Wen, *supra* note 74, at 519.

<sup>176</sup> Yeung & Tung, *supra* note 145, at 61.

<sup>177</sup> Wen, *supra* note 74, at 520–21.

<sup>178</sup> *Id.* at 521.

<sup>179</sup> Yeung & Tung, *supra* note 145, at 62.

<sup>180</sup> *Id.*

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.<sup>181</sup> When an intertemporal conflict of laws arises, the court must determine whether the new law applies retroactively to affect previously-established rights.<sup>182</sup> In a cultural defense litigation, the introduction of a time factor means that the court must evaluate not only the cultural values of a foreign community, but also what those values are within a specific historical period. Accordingly, the problem now under consideration is not only whether the forum should defer to the cultural norms of 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 past historical period. The result of this inquiry might well be that recent changes in the domestic laws and policies of China destroyed any real conflict of interest between China and the United States with regard to anti-corruption efforts, and so any real problem of cultural conflicts in this particular case.

Let us assume that the Expert B's testimony comprised the following. The significance of *guanxi* and its associated gift-giving practices 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 believed to pose a serious threat to the ruling Communist Party.<sup>183</sup> This campaign especially targeted Party officials involved in power-for-money deals by imposing more stringent scrutiny, more severe punishments, and more detailed regulations.<sup>184</sup> For example, the anti-extravagance campaign called for a "frugal working style," strictly prohibiting government officials from spending public funding on luxury goods and extravagant banquets.<sup>185</sup> Moreover, President Xi, as the General Secretary of the Communist Party, adopted the Eight-Point Regulation of the Centre (hereinafter the "Eight-Point Regulation") which sought to combat the

---

<sup>181</sup> See Jackie M. McCreary, *Retroactivity of Laws: An Illustration of Intertemporal Conflicts Law Issues through the Revised Civil Code Articles on Disinheritance*, 62 LA. L. REV. 1321, 1321 (2002).

<sup>182</sup> *Id.* at 1321–23.

<sup>183</sup> Andrew Jacobs, *China Presses Crackdown on Campaign Against Graft*, N.Y. TIMES (Apr. 21, 2013), <https://www.nytimes.com/2013/04/22/world/asia/china-expands-crackdown-on-anticorruption-activists.html> [<https://perma.cc/7F2U-RK65>].

<sup>184</sup> See Emily Tran, Comment, *Endemic Corruption in the People's Republic of China*, 17 SAN DIEGO INT'L L. J. 295, 296–98 (2016).

<sup>185</sup> 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/> [<https://perma.cc/6P7U-XE2H>].



culture of bureaucracy and extravagance that had eroded Chinese officialdom and to purify the atmosphere among Party members.<sup>186</sup> The Eight-Point Regulation provides, in particular, that officials' visits to foreign countries should only be arranged when absolutely necessary, with fewer accompanying members.<sup>187</sup>

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 required that Party officials follow the Six Prohibitions.<sup>188</sup> 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.<sup>189</sup> The Six Prohibitions strictly prohibits, for example, gift exchanges among Party and government organs at all levels.<sup>190</sup> 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.<sup>191</sup> Moreover, the Six Prohibitions specifically stipulates that government officials shall not take advantage of such personal events as weddings and funerals to siphon off money.<sup>192</sup>

President Xi's ongoing anti-corruption campaign is against not only the endemic corruption within Party and government officials but also foreign bribery cases involving MNCs.<sup>193</sup> 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 of, if not an official immunity from prosecution

---

<sup>186</sup> *Eight-Point Austerity Rules*, CHINA DAILY (Oct. 28, 2016), [http://www.chinadaily.com.cn/china/2016-10/28/content\\_27199734.htm](http://www.chinadaily.com.cn/china/2016-10/28/content_27199734.htm) [<https://perma.cc/X8LU-ZJU8>].

<sup>187</sup> *Id.*

<sup>188</sup> 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> [<https://perma.cc/9DWT-FLQ6>].

<sup>189</sup> *Id.*

<sup>190</sup> Liu Xiang Jin Ling (六项禁令) [Six Prohibitions] (promulgated by Zhejiang Provincial Comm. of the Communist Party of China, Dec. 2012), [https://zjrb.zjol.com.cn/html/2012-12/27/content\\_1930977.htm?div=-1](https://zjrb.zjol.com.cn/html/2012-12/27/content_1930977.htm?div=-1) [<https://perma.cc/QE8Q-247F>].

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Christopher Mathews & Jessica Hodgson, *GlaxoSmithKline Probes Bribe Allegations in China*, WALL ST. J. (June 12, 2013), <https://www.wsj.com/articles/SB10001424127887324798904578529413574312372> [<https://perma.cc/DZW2-A9VK>].

for, foreign bribery in China before 2013.<sup>194</sup> For example, from 2003 to 2013, a total of twenty-four FCPA cases were handled by the DOJ that were related to bribery of government officials in China.<sup>195</sup> None of the defendants in these cases, however, were investigated or prosecuted under Chinese law.<sup>196</sup> This situation has changed significantly in recent years. The Chinese government's 2013 prosecution of GlaxoSmithKline ("GSK"), a UK-registered multinational pharmaceutical firm, marked a milestone for the enforcement of anti-corruption policies against foreign companies in China.<sup>197</sup> By 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.<sup>198</sup> 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.<sup>199</sup> This marks a significant change of Chinese official attitude towards foreign bribery in China: until this case, the 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) in 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 system to earn illegal benefits.<sup>200</sup> Since 2013, China's mainstream media have singled out foreign MNCs as the prime culprits in commercial bribery, sending unmistakable signals to foreign investors that China would no longer exempt them from bribery prosecution.<sup>201</sup>

---

<sup>194</sup> Enshen Li & Simon Bronitt, *Combating Foreign Bribery in China: Rethinking Zero Tolerance with 'Chinese Characteristics'*, 5 CHIN. J. COMP. L. 308, 319 (2017).

<sup>195</sup> *Id.* at 317.

<sup>196</sup> *Id.* at 319.

<sup>197</sup> Rupert Neate & Nick Fletcher, *GlaxoSmithKline Ex-boss to Be Deported Back to UK from China*, THE GUARDIAN (Sept. 19, 2014), <http://www.theguardian.com/business/2014/sep/19/glaxosmithkline-china-mark-reilly-deported-uk-guilty-bribery-hunan> [<https://perma.cc/GzQT-J3RS>].

<sup>198</sup> *Id.*

<sup>199</sup> *GSK China Faces Record Fine for Bribery*, CHINADAILY (Sept. 19, 2014) [http://www.chinadaily.com.cn/business/2014-09/19/content\\_18630086.htm](http://www.chinadaily.com.cn/business/2014-09/19/content_18630086.htm) [<https://perma.cc/8Y56-W5AU>].

<sup>200</sup> Jin Shanming, *Multinationals in China Must Operate According to Law*, CHINA TODAY (Sept. 25, 2013), [http://www.chinatoday.com.cn/english/economy/2013-09/25/content-\\_569718.htm](http://www.chinatoday.com.cn/english/economy/2013-09/25/content-_569718.htm) [<https://perma.cc/L5HY-KAF2>].

<sup>201</sup> *Id.*

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 Interpretation").<sup>202</sup> This Interpretation became effective on January 1, 2013, focusing primarily on the supply side of bribes.<sup>203</sup> Article 1 of the 2013 Interpretation provides that "[a]ny person who pays a bribe of more than RMB10,000 to a state functionary to seek improper benefits shall be investigated for criminal liability in accordance with Article 390 of the PRC Criminal Law."<sup>204</sup> 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.<sup>205</sup> 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.<sup>206</sup> 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 contemporary Chinese society, along with high-profile bribery cases against large MNCs clearly suggest that the inauguration of President Xi began a new anti-corruption era of China. The gift-giving culture that 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. Therefore, evidence proffered by Avon China that it is a customary Chinese 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, should not be admitted by the court. Even if foreign investors such as Avon used to receive much more favorable treatment in regard to anti-bribery

---

<sup>202</sup> 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 promulgated by the Sup. People's Ct. & Sup. People's Proc., Dec. 31, 2012, effective Jan. 1, 2013).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at art. 1.

<sup>205</sup> *Id.* at art. 12.

<sup>206</sup> *Id.*

investigations and prosecutions in China, China's official attitude towards foreign bribery over recent years has shifted from one of de facto foreign corporate impunity to one of zero tolerance.<sup>207</sup> As a result, the argument that Avon China's gift-giving practices in China are vulnerable to the risk of prosecution only under the FCPA, but are acceptable under the Chinese legal system, should 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 that the nature and manifestation of *guanxi* is under constant change.<sup>208</sup> This testimony therefore does not preclude 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, the traditional practice of *guanxi* conflicts with the official law of China, at least after President Xi came to power in 2013, so long as it is manipulated as a power-for-money deal to further unfair competition.

#### 4. DOJ Expert Testimony: 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 the testimony of Expert C, aiming to demonstrate to the court that there is still no 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.<sup>209</sup> In a business context, since Chinese government officials and foreign MNC investors often lack a mutual societal foundation, there is little space for them within the *guanxi* relationship to draw upon stable sentimental connections or interpersonal trust in exchange for future assistance and favors.<sup>210</sup> As a result, *guanxi* participants in business contexts tend to rely on exchanges of power and personal benefits to maintain the proper operation of their relationship.<sup>211</sup> The dividing line between legitimate *guanxi* give-and-take and an illegitimate power-for-money deal, however, is very blurry and has troubled the Chinese government until today. There is no simple yes-or-no answer to the

---

<sup>207</sup> Li & Bronitt, *supra* note 194, at 308.

<sup>208</sup> 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).

<sup>209</sup> Wen, *supra* note 74, at 521.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

question of whether *guanxi* and gift giving are acceptable cultural practices even within the Chinese community itself, as the answer always depends on a case-by-case analysis.

Expert C's testimony can be summarized as follows. With the development of China's economy, *guanxi* relationships take on more diversified forms and are 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 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 "2008 Commercial Bribery Opinion").<sup>212</sup> 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.<sup>213</sup> 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.<sup>214</sup> As a whole, Article 10 of the 2008 Commercial Bribery Opinion acknowledges the complex nature of *guanxi*-based gift-giving practices, seeking to offer more flexibility to the courts and procuratorates in dealing with the complexities arising from *guanxi*-related bribes. Therefore, it is at least utopian, even incorrect, 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 the difference between the two can only be determined on a painstaking case-by-case basis.

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.

---

<sup>212</sup> 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., Nov. 20, 2008, effective Nov. 20, 2008).

<sup>213</sup> *Id.* at art. 10.

<sup>214</sup> *Id.*

Avon failed to present carefully targeted empirical data regarding whether ordinary Chinese people—including low-level public employees, peasants, rural migrant workers in big cities, blue-collar workers, and unemployed people living below the poverty line—are 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 source of corruption in post-Mao China.<sup>215</sup> 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.<sup>216</sup> This discrepancy of opinion 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.<sup>217</sup> Therefore, Avon’s argument that *guanxi*-based gift giving is a widely accepted cultural practice in China should not be admitted by the court.

### III. APPLYING A PLURALISTIC CONFLICT-OF-LAWS APPROACH TO THE AVON CASE

With all the cultural nuances and complexities in mind, this section works through the Avon case once more in accordance with a pluralistic conflict-of-laws approach. Following each step of a conflicts analysis, readers will see how this approach makes cultural conflicts legally articulable in the context of FCPA cases, and how it captures a crucial insight of modern cultural anthropology—that culture is dynamic, internally contested, and contextual—in this process.<sup>218</sup>

#### A. *Pleading and Proving Foreign Law—How Culture Is Seen and Ascertained*

The first step of a conflicts analysis is to determine whether the case involves a foreign element, so that a reasonable doubt as to the application of law may arise. The pertinence of Chinese law is apparent in the Avon case from its outset. Avon China allegedly bribed Chinese governmental officials while operating in China,

---

<sup>215</sup> John Osburg, *Making Business Personal: Corruption, Anti-corruption, and Elite Networks in Post-Mao China*, 59 CURR. ANTHROPOL. 149, 149 (2018).

<sup>216</sup> *Id.* at 150.

<sup>217</sup> Guilhem Fabre, *Xi Jinping’s Challenge: What Is behind China’s Anticorruption Campaign?*, 5 J. OF SELF-GOVERNANCE AND MGMT. ECON. 7, 7 (2017); Chris Buckley, *As China’s Woes Mount, Xi Jinping Faces Rare Rebuke at Home*, N.Y. TIMES (July 31, 2018), <https://www.nytimes.com/2018/07/31/world/asia/xi-jinping-internal-dissent.html> [<https://perma.cc/8PDS-VUB3>].

<sup>218</sup> Knop, *supra* note 30, at 338.

and the FCPA states that it shall be an affirmative defense if Avon China's conduct is lawful under Chinese law.<sup>219</sup> 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.<sup>220</sup> Judges are not required to, and in judicial practice most of them choose not to, undertake their own research on foreign law.<sup>221</sup> If neither party raises the issue of foreign law, or provides proof of its content, most courts will apply the law of the forum.<sup>222</sup> 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.<sup>223</sup>

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 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.<sup>224</sup>

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 a conflicts analysis, the process of proving foreign laws seeks to go beyond positive rules and to take all the elements that constitute the "living law" of a foreign country into consideration, which includes unofficial forms of ordering such as social customs.<sup>225</sup> 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

---

<sup>219</sup> *E.g.*, 15 U.S.C. § 78dd-1(c).

<sup>220</sup> Unif. Interstate and Int'l Proc. Act § 1.03 (Nat'l Conf. of Commissioners on Unif. State Laws 1962); FED. R. CIV. P. 44.1.

<sup>221</sup> Unif. Interstate and Int'l Proc. Act § 1.03.

<sup>222</sup> SYMEONIDES, *supra* note 14, at 88.

<sup>223</sup> FED. R. CIV. P. 44.1.

<sup>224</sup> FED. R. CIV. P. 44.1 advisory committee's note to 1966 amendment.

<sup>225</sup> Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 21-26 (1991).

involved value systems are similar or different, compatible or incompatible, fulfilling the same or diverse policy goals.<sup>226</sup> According to Rule 44.1, for example, the court may consider any material or resource regardless of its potential admissibility and source of origin.<sup>227</sup> 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.<sup>228</sup> 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 interviews of corporate managers who have done business in China. All these materials help to present China's anti-corruption system not only as 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.<sup>229</sup> 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.<sup>230</sup> 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.<sup>231</sup> 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

---

<sup>226</sup> See Mathias Reimann, *Comparative Law and Private International Law*, in OXFORD HANDBOOK OF COMPARATIVE LAW 1363, 1394 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

<sup>227</sup> 28 U.S.C.A. Rule 44.1.

<sup>228</sup> *In re Arb. Between 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).

<sup>229</sup> FED. R. CIV. P. 44.1 advisory committee's note to 1966 amendment.

<sup>230</sup> See Ralf Michaels, *Comparative Law and Private International Law*, in ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 417 (Jürgen Basedow et al. eds., 2017); see also Ralf Michaels, *The Functional Method of Comparative Law*, in OXFORD HANDBOOK OF COMPARATIVE LAW 339, 342 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

<sup>231</sup> Reimann, *supra* note 226, at 1387; Michaels, *Comparative Law and Private International Law*, *supra* note 230, at 420–23.



structures, but by events.<sup>232</sup> That is, each research question is formulated by presenting a case and then asking questions, such as how foreign legal systems react to a particular situation.<sup>233</sup>

In the Avon case, before collecting information on Chinese law, it should be 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.<sup>234</sup> 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 on 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 should 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”<sup>235</sup> of the 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

---

<sup>232</sup> See Michaels, *The Functional Method of Comparative Law*, *supra* note 230, at 342 (“functionalist comparative law is factual, it focuses not on rules but on their effects, not on doctrinal structures and arguments, but on events.”); see also Rudolf B. Schlesinger et al., *Formation of Contracts—A Study of the Common Core of Legal Systems: Introduction*, 2 CORNELL INT’L L.J. 1, 31 (1968) (The “factual method” of functionalist comparative law was adopted by the Cornell Project on the Formation of Contract, a comparative research project directed by Rudolf Schlesinger).

<sup>233</sup> Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 29 (1991).

<sup>234</sup> China is unlikely to characterize certain gifts as bribes if their monetary value is less than RMB30,000 and the gifts are presented to create stable, long-term connections with powerful Chinese government officials rather than for immediate rent-seeking return. However, the United States may still classify such gifts as bribes if they are used for the purpose of obtaining or retaining business. For relevant discussions, see *supra* Section II.C.2.

<sup>235</sup> FED. R. CIV. P. 44.1 advisory committee’s note to 1966 amendment.

testimony is consistent with their positions, disregarding those who hold contrary 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 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 by 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*.<sup>236</sup> 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, as well as an opportunity to articulate their own descriptions of a specific cultural phenomenon.<sup>237</sup>

The issue-by-issue analysis adopted by the conflicts approach is even more conducive to a nuanced appreciation of the defendants' multi-layered cultural identities. In conflicts, if a case involves more than one issue, a separate choice-of-law inquiry must be made with regard to each issue.<sup>238</sup> 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.<sup>239</sup> 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*.<sup>240</sup> When Avon China argues that an editor working as a temporary employee of a government-owned newspaper does not qualify as a foreign official, it situates itself within Chinese law. 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

---

<sup>236</sup> 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).

<sup>237</sup> See Knop et al., *supra* note 13, at 629–31.

<sup>238</sup> SYMEONIDES, *supra* note 14, at 125.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

duties are not government officials.<sup>241</sup> Under Chinese law, public duties usually refer to those activities that lead, guide, supervise and manage public affairs.<sup>242</sup> 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”<sup>243</sup> exception and the “reasonable and bona fide expenditure defense”<sup>244</sup> prescribed under the FCPA. Possible strategies that Avon China could adopt have been discussed in Section II.B.1. 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 defense.”<sup>245</sup> It would therefore seem 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. Nevertheless, the conflicts approach also captures the insight that transnational actors, rather than being stuck only within the culture of their home countries, live and act between cultures in different aspects of their lives. Their conduct is often informed by, and takes place within, 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 complex cultural positions when acting across borders. In the Avon case, it is also possible that Avon China may not raise the issue of Chinese law at all regarding the

---

<sup>241</sup> Zhonghua Renmin Gongheguo Xingfa (中华人民共和国刑法) [Criminal Law of the People’s Republic of China] (promulgated by Standing Comm. Nat’l People’s Cong., Mar. 14, 1997, effective Oct. 1, 1997), arts. 93, 391.

<sup>242</sup> 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 Cong., Apr. 29, 2000, effective Apr. 29, 2000).

<sup>243</sup> *E.g.*, 15 U.S.C. § 78dd–1(b).

<sup>244</sup> *E.g.*, 15 U.S.C. § 78dd–1(c).

<sup>245</sup> *Id.*

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 as to the cultural context within which its decisions will be understood — and the legal context within which they will be adjudicated.

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.<sup>246</sup> 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 President Xi took office may differ from those at different times under his 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 the content of that value system 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.<sup>247</sup> It treats court decisions on

---

<sup>246</sup> Wilson, *supra* note 236, at 932.

<sup>247</sup> 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, 623–24 (1967); see also Knop et al., *supra* note 13, 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.").

foreign law as findings of fact, or “quasi-fact,”<sup>248</sup> 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.<sup>249</sup> 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 *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 make cultural conflicts legally articulable in the Avon case, and that will only bind Avon, Avon China, and the DOJ with respect to this particular charge of bribery.<sup>250</sup> By limiting its judgment on *guanxi* to a specific case scenario, the court also avoids becoming entangled in the larger socio-political debate on whether the logic of personalistic networks trumps that of rational-legal economic relations, or even whether Chinese capitalism trumps Western capitalism.<sup>251</sup> This is achieved precisely by the “as if” modality of conflicts analysis.<sup>252</sup> Conflicts lawyers recognize and accept the limitations of what can be known cross-culturally, carefully restricting cultural claims to those that can be supported by the facts at hand. In the Avon case, the court is fully aware of the impossibility of understanding the larger political conflicts between China’s state-

---

<sup>248</sup> See Knop et al., *supra* note 13, 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).

<sup>249</sup> 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, 467–68 (2d Cir. 1965) (relying on a prior court decision when ascertaining the content of Greek law); *Beha ex rel. People v. Russian Reins. Co.*, 175 N.E. 115, 117 (N.Y. 1931) (relying on a prior court decision on Russian corporate law).

<sup>250</sup> Knop et al., *supra* note 13, 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, *44.1 Luftballons: The Communication Breakdown of Foreign Law in the Federal Courts*, 89 N.Y.U. L. REV. 1343, 1355–56 (2014).

<sup>251</sup> Yang, *supra* note 208, at 474–76.

<sup>252</sup> Knop et al., *supra* note 13, at 642–48.

directed mixed economy and the American way of capitalism: the specifics of such conflicts are often undefinable and irresolvable. Nevertheless, it acts as if such conflicts could be phrased, defined, and ultimately resolved, at least between these specific litigants in this specific case.

### ***B. Allocating Contacts—Dealing with Cosmopolitan Cultural Identities***

In practice, foreign issuers have been prosecuted even when the corrupt scheme in question neither originated nor was completed within U.S. borders.<sup>253</sup> In practice, the United States can subject MNCs to the FCPA based on a mere tangential connection between the bribery and its territory. In fact, the DOJ and SEC have asserted that the 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.<sup>254</sup>

In contrast, a conflicts approach gives due consideration to the multiple contacts that exist between the parties, the alleged bribery events, and the relevant jurisdictions.<sup>255</sup> It assigns contacts to each jurisdiction involved and applies the law of the jurisdiction that has the “most significant relationship” to the occurrence and the parties in issue.<sup>256</sup> 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.<sup>257</sup> 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 composed 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) were from China. Multiple contacts also exist between this case and the U.S.: Avon China is a wholly owned subsidiary of Avon, a U.S. company; certain alleged

---

<sup>253</sup> Annelisa Leibold, *Extraterritorial Application of the FCPA under International Law*, 51 WILLAMETTE L. REV. 225, 226 (2015).

<sup>254</sup> THE RESOURCE GUIDE, *supra* note 128, at 10.

<sup>255</sup> SYMEONIDES, *supra* note 14, at 154–55.

<sup>256</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188 (Am. L. Inst. 1971).

<sup>257</sup> See Jeremy Waldron, *What Is Cosmopolitan?*, 8 J. POL. PHIL. 227, 227 (2000).

bribes carried Avon's name or logo; and the alleged bribes included travel to and within 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.<sup>258</sup> As the next subsection will show, a qualitative evaluation analyzes the relative significance of each contact in light of its role in furthering the underlying policies of the laws of the contact states.<sup>259</sup> 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 none 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.<sup>260</sup>

Under a standard conflicts analysis, which deals exclusively with state-made laws, courts mainly consider territorial and nationality-based contacts.<sup>261</sup> Under a pluralistic conflicts approach, however, courts must also consider other possible contacts that may connect people with various, sometimes non-state, cultural communities.<sup>262</sup> 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

---

<sup>258</sup> See SYMEONIDES, *supra* note 14, at 154.

<sup>259</sup> *Id.*

<sup>260</sup> See Salbu, *Global Village*, *supra* note 6, at 252.

<sup>261</sup> Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 320 (2002).

<sup>262</sup> *Id.*

members of the *guanxi* community is to acknowledge that they are active participants and not passive recipients in the culture of *guanxi*. 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.<sup>263</sup> MNCs “are permitted to shift identities amid a plurality of possible affiliations and allegiances” as their businesses move from place to place.<sup>264</sup> A pluralistic conflicts approach also recognizes that people with different nationalities or other political affiliations can nevertheless form a common cultural community.<sup>265</sup> 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.”<sup>266</sup> 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.<sup>267</sup> 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.

### C. Interest Analysis—Identifying False 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.<sup>268</sup> Most of the rules of the first Restatement of Conflict of Laws, for example, depend exclusively on a single

---

<sup>263</sup> Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1859 (2005).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 1858–59.

<sup>266</sup> Iris Marion Young, *The Ideal of Community and the Politics of Difference*, in FEMINISM/POSTMODERNISM (THINKING GENDER) 300, 318 (Linda J. Nicholson ed., 1990).

<sup>267</sup> *See id.* at 319.

<sup>268</sup> SYMEONIDES, *supra* note 14, at 96.



contact, such as the place of the wrong for torts, or the place of making for contracts, to determine applicable laws.<sup>269</sup> Traditional conflicts methods have also been criticized as relying solely on territorial contacts in allocating legislative jurisdictions, without contemplating the content or underlying policies of the implicated laws.<sup>270</sup> 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.<sup>271</sup>

In the 1950s and early 1960s, as part of the larger movement away from formalism 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.<sup>272</sup> Currie’s theory of interest analysis marked a frontal attack against the “conflicts slot machine” and significantly transformed the discipline of conflict of laws.<sup>273</sup> 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.<sup>274</sup> The conflicts technique of interest analysis consists of two basic steps. First, the court should examine the substantive policies embodied in the laws of the involved states, primarily through the ordinary process of statutory “construction and interpretation”<sup>275</sup> 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, enough that it is reasonable for each state to claim an interest in having its respective policies effectuated in a specific case.<sup>276</sup> 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

---

<sup>269</sup> *Id.* at 67.

<sup>270</sup> David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178 (1933).

<sup>271</sup> SYMEONIDES, *supra* note 14, at 96.

<sup>272</sup> BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 64 (1963).

<sup>273</sup> *See* SYMEONIDES, *supra* note 14, at 103–05.

<sup>274</sup> *See* Cavers, *supra* note 270, at 189–90.

<sup>275</sup> *See id.* at 184.

<sup>276</sup> SYMEONIDES, *supra* note 14, at 100.

“unprovided-for case”).<sup>277</sup>

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.<sup>278</sup> 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.<sup>279</sup> 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.<sup>280</sup> 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 (a true conflict), Currie further suggested that the court give a “more moderate and restrained” reassessment of each conflicting policy to avoid the conflict if possible.<sup>281</sup> 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.”<sup>282</sup> In contrast, the conflict-avoidance technique of Currie’s interest analysis 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.<sup>283</sup>

In the Avon case, the potential conflicting laws will likely be identified as the FCPA and the PRC Criminal Law. At the surface level, an apparent conflict of laws

---

<sup>277</sup> SYMEONIDES, *supra* note 14, 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).

<sup>278</sup> See, e.g., P. John Kozyris, *Interest Analysis Facing its Critics*, 46 *OHIO ST. L. J.* 569, 569 (1985); Michael Traynor, *Conflict of Laws: Professor Currie’s Restrained and Enlightened Forum*, 49 *CALIF. L. REV.* 845, 845–46 (1961).

<sup>279</sup> Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 *U. CHI. L. REV.* 9, 10 (1959).

<sup>280</sup> Currie, *supra* note 277, at 756.

<sup>281</sup> *Id.* at 757.

<sup>282</sup> 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).

<sup>283</sup> *Id.*

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 RMB30,000 (approximately \$4615) for individuals and RMB200,000 (approximately \$30,769) for entities, with only a few exceptions.<sup>284</sup> 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 policies in this particular case.

Spalding has conducted a detailed analysis of the legislative history and policy goals of the FCPA.<sup>285</sup> He first examined the FCPA's text and found that "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 . . . [t]he statute is thus 'supply-side'; the 'demand-side' is well beyond its purview."<sup>286</sup> 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.<sup>287</sup> Spalding then examined the FCPA's legislative history, concluding that the original motivation of the FCPA lay not in the absence of appropriate moral standards abroad but rather in the low standards of U.S. corporate behavior.<sup>288</sup> After closely examining the Senate Report,<sup>289</sup> the House Report,<sup>290</sup> and a series of testimonies and hearings before Congress,<sup>291</sup> Spalding concluded that

---

<sup>284</sup> China sets a monetary threshold of 30,000 RMB (approximately \$4615) 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 \$1538). See *The Interpretation on Several Issues Concerning the Specific Application of the Law in the Handling of Criminal Bribery Cases* (2016), art. 7. The threshold of prosecuting entities for accepting or offering bribes would be lowered from RMB 200,000 to RMB 100,000, if one of the following enumerated "aggregative factors" is indicated: (i) gaining 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) causing significant damage to the state or the people. See *The Sup. People's Proc. Opinions on Prosecution Thresholds of Bribe-giving Offences*, art. 3.

<sup>285</sup> See Spalding, *supra* note 8, 351–58.

<sup>286</sup> *Id.* at 358, 366.

<sup>287</sup> *Id.* at 366.

<sup>288</sup> *Id.* at 380–81.

<sup>289</sup> S. REP. NO. 95–114 (1997).

<sup>290</sup> H. REP. NO. 95–640 (1977).

<sup>291</sup> Spalding, *supra* note 8, at 378–90.

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.<sup>292</sup>

Clearly, the FCPA's legislators believed that widespread overseas bribery by U.S. firms had seriously affected the country's business reputation and, as a result, impaired U.S. relations with foreign trading partners.<sup>293</sup> The primary motivation behind the FCPA is, therefore, the restoration of image and confidence.<sup>294</sup> 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."<sup>295</sup> Moreover, Spalding's research further uncovers the consensus among 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.<sup>296</sup> To summarize, Spalding's study on the legislative purpose of the FCPA comes to two basic conclusions: the FCPA (a) exclusively targets bribe suppliers having substantial connections to the United States, without any manifest purpose to punish host-country recipients or their governments, and (b) aims to promote, rather than deter, investment in those countries that are perceived to have higher risks of corruption.<sup>297</sup> That is to say, 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.

Under the interest-analysis approach, after determining the FCPA's policy goals, the court must then inquire into 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

---

<sup>292</sup> *Id.* at 384.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 389.

<sup>295</sup> *Id.* at 382 (quoting *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)).

<sup>296</sup> *Id.* at 378.

<sup>297</sup> *Id.* at 358.

has an interest in applying the FCPA in this instance.<sup>298</sup> Avon is a multinational corporation incorporated and headquartered in the United States with a 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.

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 criminalizes the offering of bribes as a separate offence.<sup>299</sup> 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.<sup>300</sup>

Chinese society has significant relationships with the Avon case and may therefore legitimately assert an interest in applying its law. First, Avon China has

---

<sup>298</sup> Currie, *supra* note 279, at 9–10 (“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 assertion that the state has an interest in the application of its policy in this instance.”).

<sup>299</sup> 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], (promulgated by Standing Comm. Nat'l People's Cong., Aug. 29, 2015, effective Nov. 1, 2015).

<sup>300</sup> *Id.*

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 composed 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.

The question then turns to whether the setting of a minimum bar for bribery prosecution means China is uninterested in seeing its anti-corruption laws enforced on bribes below that bar. 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 remains unchanged, as previously mentioned, the 2016 Interpretation has raised the minimum bar of prosecuting individuals from RMB10,000 to RMB30,000 (unless the case has an aggregate factor specified in Article 7 of the 2016 Interpretation, in which case the threshold is lowered to RMB10,000). 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.<sup>301</sup> 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.<sup>302</sup> 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 legislation, but also administrative penalties and political discipline.<sup>303</sup> 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.<sup>304</sup> The setting up of a monetary threshold for prosecution not only embodies China's policy of keeping Party disciplines at the forefront of anti-corruption campaigns, but also enhances the certainty, fairness, and seriousness of criminal punishment by highlighting the

---

<sup>301</sup> 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] (promulgated by the Sup. People's Ct., Apr. 18, 2016, effective Apr. 18, 2016) [hereinafter "the 2016 Interpretation"].

<sup>302</sup> See *id.* at art. 1.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

focus of criminal crackdown.<sup>305</sup> 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 uninterested 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 concerning the determination of the amount of bribes—especially those recently added in the 2016 Interpretation.<sup>306</sup> 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 accepting a thank-you gift offered after improper benefits are sought constitutes bribery.<sup>307</sup> Furthermore, previously, the PRC Criminal Law only prohibited bribes in the form of “money or property.”<sup>308</sup> 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, and other benefits that need to be paid using money, such as membership service, travel, etc.<sup>309</sup> It further clarifies that such intangible proprietary interests shall be 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.<sup>310</sup> 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.

Looking beyond criminal statutes and taking into account all relevant anti-bribery provisions in Chinese law, the Chinese government's interest in dealing with the interactive relationship between official and unofficial forms of ordering with regard to gift giving is clear. Consider, for example, Article 10 of the 2008

---

<sup>305</sup> *See id.*

<sup>306</sup> *See id.* at arts. 1–11 (setting new prosecution thresholds).

<sup>307</sup> *Id.* at art. 13.

<sup>308</sup> Criminal Law of the People's Republic of China, art. 385.

<sup>309</sup> The 2016 Interpretation, *supra* note 301, at art. 12.

<sup>310</sup> *Id.*

Commercial Bribery Opinion which deals specifically with the distinction between socially and legally acceptable gift-giving practices and illicit bribes.<sup>311</sup> By providing four criteria by which illicit payments may be distinguished from gifts, the Chinese government 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 personal relationships to make inroads into, and to benefit from, China's entrenched bureaucratic power.<sup>312</sup>

*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 behaviors, especially when it is used by business investors to get around rules and regulations.<sup>313</sup> The business-to-government realm, to borrow Sally Moore's thesis, can be considered as a semi-autonomous social field.<sup>314</sup> 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;<sup>315</sup> on the other hand, the evolution of *guanxi* practices is vulnerable to externally imposed state-made legal rules.<sup>316</sup> The Chinese government therefore feels the need to shape the development path of *guanxi* and to provide a regulatory framework for its practice, primarily through specifying in law the circumstances under which gift giving may have transformed from etiquette to bribery. Besides Article 10 of the 2008 Commercial Bribery Opinion, the Chinese government has also implemented a set of Party rules and disciplines to combat power-for-money deals, which has greatly influenced *guanxi* practices.<sup>317</sup> 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, to 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,

---

<sup>311</sup> 2008 Commercial Bribery Opinion, *supra* note 212, at art. 10.

<sup>312</sup> Yang, *supra* note 208, at 470–71.

<sup>313</sup> *Id.* at 461–62.

<sup>314</sup> 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, 720 (1973).

<sup>315</sup> See Yang, *supra* note 208, at 460.

<sup>316</sup> See Moore, *supra* note 314, at 720.

<sup>317</sup> For discussions about relevant Party rules and disciplines, see *supra* Section II.C.3.



at least not explicitly, between gifts that seemingly take the form of bribes but are in essence strategies to build personal networks with state functionaries and real bribes.<sup>318</sup> 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.<sup>319</sup> Both states are interested in applying their laws to this case 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, a “more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied”<sup>320</sup> should be given to each conflicting policy, to make the conflict disappear if possible.<sup>321</sup> 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.<sup>322</sup> 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 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 state interested in seeing its laws applied.

It is necessary to point out a key fact that may also exert a material influence on the outcome of the interest analysis. As previously mentioned, since President 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

---

<sup>318</sup> *E.g.*, 15 U.S.C. § 78dd–1(a).

<sup>319</sup> *See* The 2016 Interpretation, *supra* note 301, at art. 7.

<sup>320</sup> Currie, *supra* note 277, at 757.

<sup>321</sup> Ratner, *supra* note 282, at 731.

<sup>322</sup> SYMEONIDES, *supra* note 14, at 99.

more deeply into the bribery scandals involving MNCs in recent years.<sup>323</sup> The change in the official attitude of the 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 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 tolerates business-to-government gift giving. Let us assume, for example, that President Xi did not launch the anti-corruption campaign and no amendments or supplementary interpretations were made to the then-existing anti-bribery laws after he took office. In such a world, 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. Let us further assume that Avon China can prove to the court that its gift-giving practices are not in violation of any written laws of China. In that case, the governmental interest analysis is likely to suggest that the United States has little interest in enforcing its laws on it: 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 in this instance 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.<sup>324</sup> As previously mentioned in Section II.B.1, the “local written law defense” defers to foreign cultural norms only if such norms are expressly permitted by foreign statutes. 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

---

<sup>323</sup> Yin Pumin, *Clamping Down on Corporate Bribery*, BEIJING REV. (July 30, 2013), [http://www.bjreview.com.cn/business/txt/2013-07/29/content\\_557941.htm](http://www.bjreview.com.cn/business/txt/2013-07/29/content_557941.htm) [<https://perma.cc/AG4S-G6KB>].

<sup>324</sup> See, e.g., 15 U.S.C. § 78dd–1(c).

of state regulation and leaving them to be governed by other normative communities. By identifying a state's interest in non-interference in certain spheres of social life, governmental interest analysis offers an 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.

In sum, applying the governmental interest analysis to the Avon case is likely to suggest that the FCPA should be applied as the governing law. The 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 uninterested in seeing its policies effectuated in this case. To be sure, different analysts may approach the interest analysis in different ways, and there is plenty of room for disagreement on the conclusion that this current study has 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.<sup>325</sup> It is also an "as if" assertion to assume that it is in the interest of China to have a U.S. law regulate activities exclusively on its territory simply because those activities happen to be unacceptable to the Chinese government.

Nevertheless, as a legal technique, the interest analysis views problem-solving as its top priority. To this end, an analyst acts "as if" these assertions hold so that conflicts may 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 captures a crucial cultural 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 is attempted.<sup>326</sup>

#### ***D. The Public Policy Exception—When and How a Moral Judgment Is Made***

Under the conflicts approach, the court does not need to make moral judgments

---

<sup>325</sup> Knop et al., *supra* note 13, at 639.

<sup>326</sup> See Terence Turner, *Human Rights, Human Difference: Anthropology's Contribution to an Emancipatory Cultural Politics*, 53 J. ANTHROPOLOGICAL RSCH. 273, 275 (1997).

about a foreign culture until later in the analysis process. A moral judgment becomes necessary only when the law of a foreign jurisdiction has been designated as governing, and the court must decide whether the foreign law offends a strong public policy of the forum so that its application shall be rejected.<sup>327</sup>

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."<sup>328</sup> But rather, the court makes this choice because its analyses have suggested that the United States is the only state interested 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 probes the content of Chinese anti-bribery rules and 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, within the constraining context of a particular set of facts, 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 determine why China has such a legal system, primarily through the examination of the legislative purposes and policy concerns behind relevant anti-bribery rules.

By conducting this examination, the court comes to understand 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: U.S. business culture, which entails "an inflexible bureaucratic or market coldness to the bonds and obligations of human relations,"<sup>329</sup> collides with 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

---

<sup>327</sup> SYMEONIDES, *supra* note 14, at 78.

<sup>328</sup> Mayfair Mei-hui Yang, *The Gift Economy and State Power in China*, 31 COMPAR. STUD. SOC'Y 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.").

<sup>329</sup> Yang, *supra* note 208, at 472.

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 non-value-based rationales to justify a decision on the applicable law, such as the existence of the most 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. Let us assume 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."<sup>330</sup> 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."<sup>331</sup> 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 polygamous union as the basis for inheritance rights.<sup>332</sup> 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 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

---

<sup>330</sup> ISTVAN SZASZY, CONFLICT OF LAWS IN THE WESTERN, SOCIALIST AND DEVELOPING COUNTRIES 96 (J. Decsenyi trans., 1974).

<sup>331</sup> *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918).

<sup>332</sup> Knop et al., *supra* note 13, at 641–42.

some important connections with the case.<sup>333</sup> 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.<sup>334</sup> 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 the Avon case. Whether this culture is morally objectionable in some objective sense, however, is beyond the consideration of the court.

## CONCLUSION

This Article explores how the discipline of conflict of laws, when imagined and applied as an intellectual framework, offers new approaches to understanding, evaluating, and ultimately resolving cultural conflicts in FCPA cases. 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, by assuming that the choice-of-law analysis could be applied to those unofficial cultural norms that govern significant aspects of people's lives.

With this in mind, I have applied the pluralistic conflict-of-laws approach to the analysis of a hypothetical FCPA case. In this case, the Chinese business culture, which is heavily influenced by personalized social networks of power, allegedly

---

<sup>333</sup> SYMEONIDES, *supra* note 14, 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.”); 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.”).

<sup>334</sup> Knop et al., *supra* note 13, at 641.

collides with the standards of ethical conduct in the United States. I shall clarify that this Article 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,”<sup>335</sup> 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 moral values of the U.S. to those of China (or to those of any other normative communities competing for jurisdiction).

In sum, a pluralistic conflict-of-laws approach makes two principal contributions to the resolution of cultural conflicts in FCPA cases. First, from a descriptive perspective, it offers a framework for understanding and structuring the interaction between various normative communities involved in cross-border corruption cases. In identifying conflicting regulatory norms, it goes beyond official state-made laws and directs the court’s attention to those norms that are actually viewed as binding and followed by people in international business practices. It creates habits of mind in decisionmakers where they will be more likely to consider multiple cultural communities and multiple sources of law in FCPA cases. Second, from a normative perspective, a pluralistic conflict-of-laws approach offers a series of doctrines and technical steps to deal with cultural conflicts in specific cases. It not only provides concrete methods to turn value conflicts into legally viable outcomes, but also opens up opportunities for decisionmakers to conduct a more nuanced and sophisticated cultural analysis.

Moreover, by focusing on the resolution of transnational cultural conflicts in state courts, this Article also contributes to the larger conversation about the role of domestic judicial bodies in global governance agendas. In the Avon case as this Article has explored it, the U.S. court applied the pluralistic conflict-of-laws 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 multiple states and with the world as a whole. The analysis performed in this Article, therefore, also serves as a good example to demonstrate how domestic courts may be ethically involved in the regulation of transnational business

---

<sup>335</sup> *Id.* at 646–47.

activities and broader international anti-bribery efforts.