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Coping with Anti-Investigative Law in Global Corporate Enforcement: A Study of China's Data Protection Regime and its Implications for Cross-Border FCPA Enforcement

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COPING WITH ANTI-INVESTIGATIVE LAW IN GLOBAL CORPORATE ENFORCEMENT: A STUDY OF CHINA'S DATA PROTECTION REGIME AND ITS IMPLICATIONS FOR CROSS-BORDER FCPA ENFORCEMENT

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ABSTRACT

Recent trends in corporate criminal investigations have signaled a greater emphasis on data access and information disclosure. These trends, compounded by a significant increase in the extraterritorial enforcement of U.S. laws, will ultimately lead to rising demands for cross-border data transfers and processing. This Article seeks to investigate how U.S. law enforcement authorities should cope with foreign laws that restrict cross-border data transfers in the corporate investigation context. In this Article, laws that restrict the disclosure of investigation-related data to foreign regulators are collectively referred to as anti-investigative laws. Using China's newly enacted Data Security Law and Personal Information Protection Law as case studies, I highlight the key features of anti-investigative laws that threaten to obstruct global corporate enforcement. I then analyze how these features may affect the investigation and prosecution of Foreign Corrupt Practices Act (FCPA) cases involving China. Ultimately, this Article proposes a conflict-of-laws approach for FCPA enforcers to understand, evaluate, and balance conflicting compliance requirements in corporate enforcement actions.

I. INTRODUCTION

[1] Recent trends in United States corporate criminal investigations have signaled greater emphasis on data access held by corporations, including data held outside of the United States.[1] Broader data access and disclosure requirements, compounded by the extraterritorial reach of the U.S. authorities' law enforcement powers,[2] will ultimately lead to rising demands for cross-border data transfers and processing. At the same time, there has been a recent proliferation of data protection regimes that restrict international data transfers.[3] As a consequence, multinational corporations involved in corporate criminal investigations are increasingly likely to confront legal obligations that are inherently contradictory. Addressing these kinds of regulatory differences is at the core of the conflict of laws discipline, which has under-appreciated potential as a tool for resolving

[1] Memorandum from Deputy Att'y Gen. Lisa O. Monaco to Assistant Att'y Gen., Crim. Div. et al. 8, 11 (Sept. 15, 2022), https://www.justice.gov/opa/speech/file/1535301/download [https://perma.cc/GS6M-Z74U] [hereinafter DOJ Memo]; Memorandum from Deputy Att'y Gen. Lisa O. Monaco to Assistant Att'y Gen., Crim. Div. et al. 2–3 (Oct. 28, 2021), https://www.justice.gov/dag/page/file/1445106/download [https://perma.cc/4LA6-AK2F] [hereinafter October 2021 Memo].

[2] *See, e.g.*, KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 1–2 (Oxford Univ. Press, 2019) ("Since the mid-1970s, U.S. prosecutors have taken up many cases involving corrupt practices with little connection to the United States . . . "); Jennifer Arlen & Samuel Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 699–705 (2020); *Corporate Prosecution Registry*, LEGAL DATA LAB, https://corporate-prosecution-registry.com/browse [https://perma.cc/376U-FBQX].

[3] *E.g.*, *Data Protection and Privacy Legislation Worldwide*, UNITED NATIONS CONF. ON TRADE AND DEVEL., https://unctad.org/page/data-protection-and-privacy-legislation-worldwide [https://perma.cc/JJ4Q-C4JY]; Regulation 2016/679 of April 27, 2016, on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119) 1 [hereinafter GDPR].

cross-border conflicts in corporate criminal enforcement.[4]

[2] In October 2021 and September 2022, United States Deputy Attorney General Lisa Monaco issued two separate but related memorandums that outlined major changes to the Department of Justice's (DOJ's) corporate enforcement policies.[5] The new DOJ policies expand disclosure requirements to cover a wider range of individuals, longer time horizons, and larger geographical areas in corporate criminal investigations.[6] In order to qualify for any cooperation credit, cooperating companies must "timely preserve, collect, and disclose relevant documents located both within the United States and overseas."[7] Unlike previous policies that allowed companies to limit disclosures to individuals who are "substantially involved" in the misconduct, companies are now required to "identify all individuals involved in or responsible for the misconduct at

[4] *See* Annelise Riles, *Managing Regulatory Arbitrage: A Conflict of Laws Approach*, 47 CORNELL INT'L. L.J. 63, 68–69, 92 (2014) ("Conflict of Laws is a body of rules and a set of interpretive approaches that help decision-makers to determine whether they can legitimately assert regulatory authority over the issue at hand, or whether some other regulatory authority has a greater claim to the issue."). Recently, a growing number of 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. *See, e.g.*, Christian Joerges et al., *A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation*, 2 TRANSNAT'L LEGAL THEORY 153, 154 (2011); Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, 14 DUKE J. COMPAR. & INT'L L. 149, 179, 193 (2004); Jacco Bomhoff, *The Constitution of the Conflict of Laws*, *in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 262 (Horatia Muir Watt & Diego Fernandez Arroyo eds., 2014); Karen Knop et al., *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 STAN. L. REV. 589, 627–29 (2012); 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, 257–58 (2022).

[5] *See* DOJ Memo, *supra* note 1; October 2021 Memo, *supra* note 1.

[6] October 2021 Memo, *supra* note 1.

[7] DOJ Memo, *supra* note 1, at 8.

issue, regardless of their position, status, or seniority."[8] With these requirements, government and internal investigations may now target even "minimal participants" with "a peripheral involvement" in corporate misconduct, regardless of their geographical location.[9]

[3] In addition, prosecutors are now mandated to consider a company's historical misconduct when determining corporate resolutions.[10] In accordance with the new guidelines, prosecutors are directed to consider:

> all misconduct by the corporation discovered during any prior domestic or foreign criminal, civil, or regulatory enforcement actions against it, including any such actions against the target company's parent, divisions, affiliates, subsidiaries, and other entities within the corporate family.[11]

This language, lacking constraints on time, industry, or location, places burdensome obligations on corporations, and even affiliated entities, to gather compliance data in corporate investigations.

[4] The DOJ's new corporate enforcement policies are in line with previous efforts to equip itself with more proactive investigative tools for fighting global corporate crime.[12] On January 1, 2021, Congress enacted the Anti-Money Laundering Act of 2020 (AMLA).[13] Section 6308 of the

[8] October 2021 Memo, *supra* note 1, at 3.

[9] Lisa O Monaco, Deputy Attorney General, U.S. Dep't of Just., Keynote Address at ABA's 36th National Institute on White Collar Crime in Washington (Oct. 28, 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute [https://perma.cc/FK4R-W8HV].

[10] *Id.*

[11] October 2021 Memo, *supra* note 1, at 3.

[12] *See* DOJ Memo, *supra* note 1, at 2.

[13] Anti-Money Laundering Act of 2020, Pub. L. 116-283, 134 Stat. 4547.

AMLA significantly expands the DOJ's subpoena authority to request and obtain banking records maintained outside of the United States, while also restricting the ability of foreign banks to oppose production of those documents on the grounds of prohibitions under local secrecy or confidentiality laws.[14] In particular, the AMLA stipulates that the new subpoena authority may be exercised in "any investigation of a violation of a criminal law of the United States" and in any civil forfeiture proceeding.[15] This expanded power will significantly bolster the DOJ's investigative tools in other cross-border enforcement actions beyond anti-money laundering, such as those carried out under the Foreign Corrupt Practices Act (FCPA).[16]

[5] The trend toward more proactive corporate investigations, compounded by a significant increase in the extraterritorial enforcement of the U.S. laws,[17] will ultimately lead to rising demands for cross-border data transfers and processing. International data transfers in cross-border investigations, however, present tremendous challenges for multinational corporations. This is due primarily to the rapid global expansion and proliferation of data protection regimes that restrict international data transfers.[18]

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[14] § 6308, 134 Stat. at 4590–94; Brandon Fiscina, *Cross-Border Impacts of the Anti-Money Laundering Act of 2020*, COLUM. J. TRANSNAT'L L. (Apr. 7, 2021), https://www.jtl.columbia.edu/bulletin-blog/cross-border-impacts-of-the-anti-money-laundering-act-of-2020 [https://perma.cc/786R-YUVS].

[15] § 6308, 134 Stat. at 4590–94.

[16] Foreign Corrupt Practices Act Amendments of 1988, Pub. L. 100-418, 102 Stat. 1415; *see also* Francesca Odell et al., *New US Enforcement Priorities and Their Impact on Latin American Companies*, LATIN LAWYER (Dec. 10, 2021), https://latinlawyer.com/guide/the-guide-corporate-crisis-management/fourth-edition/article/new-us-enforcement-priorities-and-their-impact-latin-american-companies [https://perma.cc/4MD3-CQ5N] (explaining the ways the DOJ has various investigative tools at their disposal).

[17] *See* Arlen & Buell, *supra* note 2, at 705, 729 n.105; DAVIS, *supra* note 2, at 2.

[18] *See* GDPR, *supra* note 3, at 19.

[6] Many data protection regimes include localization mandates that require data to be stored or processed within national boundaries or otherwise limit the free flow of data across borders.[19] In addition to requiring firms to obtain consent from individual data subjects, data localization mandates typically require data processors to obtain approval of regulatory authorities before transferring data abroad.[20] For example, China's newly enacted Personal Information Protection Law (PIPL) provides:

> Without the approval of the competent authorities of the People's Republic of China, personal information handlers may not provide personal information stored within the mainland territory of the People's Republic of China to foreign judicial or law enforcement agencies.[21]

[19] Anupam Chander & Uyên P. Lê, *Data Nationalism*, 64 EMORY L.J. 677, 679–82 (2015) ("[Data localization] measures take a wide variety of forms—including rules preventing information from being sent outside the country, rules requiring prior consent of the data subject before information is transmitted across national borders, rules requiring copies of information to be stored domestically, and even a tax on the export of data."); INST. OF INT'L FIN., DATA FLOWS ACROSS BORDERS: OVERCOMING DATA LOCALIZATION RESTRICTIONS 1–2, 7 (2019), https://www.iif.com/Portals/0/Files/32370132_iif_data_flows_across_borders_march2019.pdf [https://perma.cc/Z6F2-AFQ7] ("On the grounds of law enforcement, national security, personal data protection, or economic protectionism, a growing number of jurisdictions have introduced or strengthened different versions of data localization requirements that impede or make costlier the offshore processing of data generated within their territory.").

[20] Zhonghua Renmin Gongheguo Geren Xinxi Baohu Fa (中华人民共和国个人信息保护法) [Personal Information Protection Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 20, 2021, effective Nov. 1, 2021), art. 41, 2021 Standing Comm. Nat'l People's Cong. Gaz. 1117, *translated in* Rogier Creemers & Graham Webster, *Translation: Personal Information Protection Law of the People's Republic of China – Effective Nov. 1, 2021*, DIGICHINA (Sept. 7, 2021), https://digichina.stanford.edu/work/translation-personal-information-protection-law-of-the-peoples-republic-of-china-effective-nov-1-2021 [https://perma.cc/9ZJU-NTYD] [hereinafter PIPL].

[21] *Id*.

[7] China's Data Security Law (DSL) similarly states that without the approval of competent authorities, "domestic organizations and individuals must not provide data stored within the mainland territory of the PRC to the justice or law enforcement institutions of foreign countries without the approval of the competent authorities of the PRC."[22] In addition, data localization mandates are frequently combined with other data privacy restrictions that limit a corporation's ability to collect, process, disclose, and retain personal data.[23] In the context of global compliance, data-transfer and other data-protection restrictions significantly reduce corporations' legal power to monitor and investigate corporate misconduct, as well as their ability to self-report or fully cooperate with foreign law enforcement officials in cross-border investigations.[24]

[8] Data transfer restrictions have a particularly strong impact on American enforcers for two primary reasons. First, U.S. regulators often pursue corporate criminal enforcement actions that concern misconduct outside the United States and involve evidence located abroad.[25] For example, from 2020 to the present, FCPA investigations and prosecutions

[22] Zhonghua Renmin Gongheguo Shuju Anquan Fa (中华人民共和国数据安全法) [Data Security Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 10, 2021, effective Sept. 1, 2021), 2021 Standing. Comm. Nat'l People's Cong. Gaz. 951, *translated in Translation: Data Security Law of the People's Republic of China (Effective Sept. 1, 2021)*, DigiChina (June 29, 2021), https://digichina.stanford.edu/work/translation-data-security-law-of-the-peoples-republic-of-china [https://perma.cc/3CNF-7UVP].

[23] *See* GDPR, *supra* note 3, at 7.

[24] Arlen & Buell, *supra* note 2, at 733–52.

[25] *Id.* at 736.

have involved corporate misconduct in Ecuador,[26] Mexico,[27] Brazil,[28] China,[29] Mozambique,[30] and many other countries. Besides disciplining its own enterprises in global markets, the United States has also asserted a strong interest in regulating foreign businesses to create a level playing field.[31] However, data localization mandates could potentially grant countries that impose such restrictions broad power to delay or thwart corporate enforcement actions undertaken by U.S. regulators.[32] Such countries thus have the opportunity to tilt the regulatory landscape in favor of their local companies, especially by shielding these companies from U.S. oversight while holding back their own enforcement on short-sighted economic or political grounds.

[9] The second reason the U.S. is particularly impacted by data transfer restrictions is because the U.S. model of corporate enforcement relies heavily on corporate cooperation and self-reporting to gather evidence.[33]

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[26] *United States v. Jorge Cherrez Miño and John Luzuriaga Aguinaga, October 15, 2021*, 10 FOREIGN CORRUPT PRACS. ACT REP. § 44:18 (2d ed. 2023).

[27] *United States v. Stericycle, Inc. (DPA)*, April 20, 2022, 10 FOREIGN CORRUPT PRACS. ACT REP. § 45:8 (2d ed. 2023).

[28] *United States v. Amec Foster Wheeler Energy Limited, June 25, 2021*, 10 FOREIGN CORRUPT PRACS. ACT REP. § 44:13 (2d ed. 2023).

[29] United States v. Airbus SE, January 31, 2020, 9 FOREIGN CORRUPT PRACS. ACT REP. § 43:2 (2d ed. 2023).

[30] *United States v. Credit Suisse, October 19, 2021*, 10 FOREIGN CORRUPT PRACS. ACT REP. § 44:19 (2d ed. 2023).

[31] *Information About the Department of Justice's China Initiative and a Compilation of China-Related Prosecutions Since 2018*, U.S. DEP'T OF JUST. (Nov. 19, 2021), https://www.justice.gov/nsd/information-about-department-justice-s-china-initiative-and-compilation-china-related [https://perma.cc/5JNR-AF64].

[32] *See* Philips Med. Sys. (Cleveland), Inc. v. Buan, No. 19CV2648, 2022 U.S. Dist. LEXIS 35635, at *22 (N.D. Ill. Mar. 1, 2022).

[33] Arlen & Buell, *supra* note 2, at 705–09.

According to Jennifer Arlen and Samuel Buell, the U.S. approach to corporate crime control strives to "induce corporations to both detect and self-report misconduct, and to aid government investigations by conducting, and sharing the fruits of, private investigations."[34] The most notable example of this approach is the DOJ Criminal Division's FCPA Corporate Enforcement Policy (CEP).[35]

[10] The CEP specifies that to receive maximum credit for full cooperation in FCPA investigations, a corporation must proactively cooperate, which includes, among other requirements, the disclosure of overseas documents, the production of witnesses located abroad, and the translation of relevant documents in foreign languages.[36] Data-transfer and other associated data-protection restrictions, however, substantially limit companies' capacity to gather evidence from employees or provide U.S. enforcers with critical corporate records maintained in specified places of operations.[37] Such restrictions threaten to obstruct the U.S. authorities' most important source of foreign evidence in cross-border corporate enforcement actions: self-reporting. As the DOJ becomes increasingly focused on data access and information disclosure in investigations, this threat will undoubtedly intensify in both frequency and scope.

[11] The tension between data protection regimes and corporate enforcement investigations remains unresolved at the international level and has therefore been left to U.S. federal regulators to tackle. On November 26, 2021, the Organization for Economic Co-operation and Development (OECD) Council issued a Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2021 Recommendation), which addresses the challenges that data protection laws

[34] *Id.* at 705.

[35] U.S. Dep't of Just., Just. Manual § 9-47.120 (2019).

[36] *Id.*

[37] Arlen & Buell, *supra* note 2, at 747–53.

present for anti-corruption compliance efforts. [38] The 2021 Recommendation explicitly states that data transfer regulations should not "unduly impede effective international co-operation in investigations and prosecutions of foreign bribery and related offences." [39] It also urges signatory countries to ensure that data transfer restrictions do not "unduly impede" corporations' anti-corruption compliance measures, such as internal investigation procedures.[40]

[12] Due to its soft law nature, however, the 2021 Recommendation may advise, but not compel, its signatory countries to align their data protection laws with global anti-corruption standards. In addition, non-OECD countries that restrict data transfers in cross-border corporate investigations, such as China, are not involved in these regulatory coordinating efforts. As a result, corporate regulators are left with a fragmented and uncoordinated global regulatory landscape in which they must constantly deal with foreign regulatory regimes that contradict, if not outright oppose, their own.

[13] This Article seeks to investigate how U.S. law enforcement authorities should cope with foreign laws that restrict cross-border data transfers in the corporate investigation context. I use the term "anti-investigative law" to refer to foreign laws that restrict the disclosure of investigation-related data to U.S. regulators. Since U.S. law enforcement agencies have only recently begun to address the problem of anti-

[38] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, XXVI, OECD/LEGAL/0378 [hereinafter *2021 Recommendation*].

[39] *Id.* at 17.

[40] *Id.*

investigative law in cross-border corporate investigations,[41] Part II of this Article begins by seeking guidance from the judicial branch on how to deal with this type of law.

[14] In Part II, the analysis of judicial responses to anti-investigative laws reveals that U.S. courts often make a distinction between two forms of such laws: blocking statutes and purpose-specific anti-investigative laws. Blocking statutes are typically enacted by foreign states with an explicit purpose to obstruct U.S. judicial or administrative procedures. By contrast, purpose-specific anti-investigative laws, while restricting the disclosure or transfer of documents to U.S. authorities, do not exist to frustrate U.S. discovery procedures. Instead, they frequently seek to safeguard narrowly focused interests or social values of the foreign enacting states that the requested disclosure may jeopardize, such as personal information privacy, bank secrecy, and data security. The key distinction in the judicial treatment of these two types of anti-investigative laws is one of interest balancing versus conflict interpretation. Specifically, in dealing with purpose-specific anti-investigative laws, U.S. courts have developed a series of conflict avoidance techniques. That is, they have employed a range of interpretive approaches and problem-solving methods in a way to convert seemingly "true" conflicts into "false" ones, and to resolve the conflict between U.S. discovery requirements and foreign nondisclosure rules without having to engage in political balancing.

[15] Part II also provides case studies to further illustrate how U.S. courts have applied conflict avoidance techniques to deal with purpose-specific anti-investigative laws. The case studies are based on recent judicial encounters with China's data protection laws in cross-border discovery disputes. In particular, the discussion highlights how recent judicial

[41] Jennifer Daskal, *Law Enforcement Access to Data Across Borders: The Evolving Security and Rights Issues*, 8 J. NAT'L SEC. L. & POL'Y 473, 473 (2016) ("The problems associated with law enforcement access to data across borders are just beginning to get the attention they deserve – overshadowed in large part by the heavy focus on intelligence collection, particularly in the aftermath of the Edward Snowden revelations. But a number of governments, corporations, and members of civil society are now focused on the issue as one of increasing importance.").

responses to China's data transfer regulations closely resemble elements of the conflict-of-laws analysis, and how, in turn, the conflict of laws doctrines provide a framework and vocabulary for appreciating the U.S. courts' prioritization of conflict avoidance in resolving cross-border discovery disputes.

[16] Part III will examine the implications of China's data transfer regulations for U.S. law enforcement in a different context—the investigation and prosecution of FCPA cases involving China.[42] Although claims of conflicting obligations under foreign data protection laws are increasingly common in FCPA investigations, U.S. law enforcement officials lack clear guidance to address any such claim. Specifically, U.S. officials lack an analytical framework to verify a company's assertion that foreign data protection laws prevented it from fully cooperating.

[17] To resolve this lack of guidance, Part IV proposes that FCPA enforcers use a conflict-of-laws approach to understand, evaluate, and resolve conflicting compliance requirements in corporate enforcement actions. This approach is inspired by conflict avoidance techniques developed by U.S. courts in cross-border discovery disputes while drawing heavily on insights from the highly technical field of conflict of laws. The conflict-of-laws approach provides a methodological tool which FCPA enforcers can use to articulate their judgment about the legitimacy of foreign anti-investigative laws on a case-by-case basis. Most importantly, this approach provides concrete analytical steps, as opposed to an abstract—and inherently unworkable—interest balancing test, for FCPA enforcers to determine whether, and to what extent, a company's assertion of conflicting legal obligations under foreign laws is legitimate. By using this approach, appropriate prosecutorial decisions can be made. Ultimately, readers will see how the conflict-of-laws approach tailors conflicts to context, opening up an avenue to turn otherwise irresolvable regime collisions into legally

[42] *See Location of Misconduct Alleged in FCPA-Related Enforcement Actions (by FCPA Matter)*, STAN. L. SCH. FOREIGN CORRUPT PRACS. ACT CLEARINGHOUSE, http://fcpa.stanford.edu/statistics-analytics.html?tab=8 [https://perma.cc/3AAW-AYKG] (showing that since 1978, transnational business conducted in China has triggered the largest number of FCPA enforcement actions in the world).

viable outcomes in specific enforcement actions.

II. JUDICIAL RESPONSES TO ANTI-INVESTIGATIVE LAW

[18] The world has reacted and is continuing to respond to the increasing extraterritorial impact of U.S. laws. On June 26, 2019, French Prime Minister Edouard Philippe ordered a parliamentary report titled "Restoring the Sovereignty of France and Europe and Protecting our Companies from Extraterritorial Laws and Measures," which stated:

> The United States of America has drawn the entire world into an era of judicial protectionism…. Since the end of the 1990s, we have witnessed a proliferation of laws extending extraterritorial reach, mainly American laws, enabling the authorities of the most powerful country, to investigate, prosecute, and convict, based on different laws (corruption, money laundering, international sanctions, etc.), business practices of business entities or individuals from all over the world.[43]

[19] The report proposed to further strengthen a long-existing French penal law (known as the French Blocking Statute), which prohibits a French party from exporting certain categories of data or responding to foreign discovery requests without going through specific legal and administrative channels.[44] France is not alone; since the 1950s, a growing number of

[43] RAPHAËL GAUVAIN ET AL., ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], RÉTABLIR LA SOUVERAINETÉ DE LA FRANCE ET DE L'EUROPE ET PROTÉGER NOS ENTREPRISES DES LOIS ET MESURES À PORTÉE EXTRATERRITORIALE [RESTORE THE SOVEREIGNTY OF FRANCE AND EUROPE AND PROTECT OUR COMPANIES FROM LAWS AND MEASURES WITH EXTRATERRITORIAL SCOPE] 3 (2019), https://www.vie-publique.fr/sites/default/files/rapport/pdf/194000532.pdf [https://perma.cc/6AHM-GFSP].

[44] Loi 68-678 du 26 juillet 1968 relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères [Law 68-678 of July 26, 1968 on the communication of documents and information of an economic, commercial, industrial,

countries have passed what I collectively refer to as anti-investigative laws. These anti-investigative laws may hinder the extraterritorial enforcement of U.S. laws, the most recent example being China's PIPL and DSL.[45]

[20] Before delving into the most recent example, it is helpful to specify what I mean by "anti-investigative law." In this Article, the term "anti-investigative law" refers to a range of laws enacted by one jurisdiction to restrict the transfer of information and documents to public authorities of a foreign jurisdiction for use in corporate-related litigation and investigation. It comes in two primary forms: a general "blocking statute" that expressly prohibits compliance with extraterritorial foreign regulations (the blocking-statute anti-investigative law),[46] or a patchwork of subject and sector-specific laws that restrict the cross-border transfer of selected categories of data (the purpose-specific anti-investigative law).[47] Although U.S. law enforcement agencies have only recently started to address the problem of

financial or technical nature to foreign natural or legal persons] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.][OFFICIAL GAZETTE OF FRANCE], July 27, 1968 [hereinafter French Blocking Statute].

[45] RESTATEMENT (THIRD) OF FOREIGN RELATIONS L. § 442 (AM. L. INST. 1987) ("As of 1986, some 15 states had adopted legislation expressly designed to counter United States efforts to secure production of documents situated outside the United States[.]"); M.J. Hoda, *The Aérospatiale Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It*, 106 CAL. L. REV. 231, 237 (2018) ("Countries began to pass these statutes in the 1950s and have continued to do so in waves—usually in response to particular, controversial U.S. extraterritorial investigations—with the most recent wave in the late 1980s."); CYNTHIA DAY WALLACE, THE MULTINATIONAL ENTERPRISE AND LEGAL CONTROL: HOST STATE SOVEREIGNTY IN AN ERA OF ECONOMIC GLOBALIZATION 804–15 (2002).

[46] Hoda, *supra* note 45, at 237 ("Blocking statutes limit the production of documents or other evidence located within the enacting state to a foreign state for purposes of foreign litigation."); *see, e.g.*, French Blocking Statute, *supra* note 44. For a review of the history of blocking statutes, *see* RESTATEMENT (THIRD) OF FOREIGN RELATIONS L. § 442 n.4 (AM. L. INST. 1987).

[47] *See, e.g.*, GDPR, *supra* note 3, at 60; PIPL, *supra* note 20.

anti-investigative law in corporate criminal investigations,[48] U.S. courts have been at the forefront of dealing with this type of law in civil discovery cases since the 1950s.[49] For more than six decades, U.S. courts have frequently confronted anti-investigative laws due to the application of U.S.-style discovery rules to evidence located abroad.[50]

[21] The judiciary provides useful guidance about how law enforcement agencies may approach anti-investigative laws in cross-border investigations. This is not only because the judiciary has developed a rich set of interpretive tools and methodologies to deal with anti-investigative laws, but also because a law enforcement request for foreign-stored data may ultimately be subject to judicial scrutiny.[51] Though judicial encounters

[48] *See, e.g.*, *2021 Recommendation*, *supra* note 38, at 17; U.S. Dep't of Just., Just. Manual § 9-47.120 (2019); Katherine Morga, *Data Privacy and the Foreign Corrupt Practices Act: A Study of Enforcement and Its Effect on Corporate Compliance in the Age of Global Regulation*, 20 COMMLAW CONSPECTUS 415, 415 (2012); Stéphane Bonifassi & Caroline Goussé, *The Impact of Blocking Statutes on the Enforcement of Anti-Corruption Laws*, *in* THE TRANSNATIONALIZATION OF ANTI-CORRUPTION LAW (Régis Bismuth et al. eds., 2021).

[49] *See, e.g.*, Société Internationale Pour Participations v. Rogers, 357 U.S. 197, 211–12 (1958); Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct., 482 U.S. 522, 524 (1987); Minpeco, S.A. v. ContiCommodity Servs., Inc., 116 F.R.D. 517, 524 (S.D.N.Y. 1987); Bodner v. Banque Paribas, 202 F.R.D. 370, 374–76 (E.D.N.Y. 2000).

[50] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(a) (AM. L. INST. 1986) ("A court or agency in the United States, when authorized by statute or rule of court, may order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside the United States."); Vivian Grosswald Curran, *United States Discovery and Foreign Blocking Statutes*, 76 LA. L. REV. 1141, 1144 (2016); Hoda, *supra* note 45, at 234 ("'Court-ordered law breaking' is an outgrowth of a well- documented problem: international conflict over the extension of the United States' discovery regime beyond its borders.").

[51] Evan Norris & Morgan J. Cohen, *How US Authorities Obtain Foreign Evidence in Cross-Border Investigations*, GLOB. INVESTIGATIONS REV. (Oct. 13, 2020), https://globalinvestigationsreview.com/review/the-investigations-review-of-the-americas/2021/article/how-us-authorities-obtain-foreign-evidence-in-cross-border-

with foreign anti-investigative laws are increasingly common, the judicial techniques to formulate, evaluate, and ultimately resolve competing—and at times irreconcilable—legal obligations in cross-border discovery disputes remain untheorized and under-appreciated. Legal scholars typically rely on empirical approaches—most notably the statistical analysis of case outcomes—to understand courts' attitudes toward foreign laws that impede U.S. discovery.[52] As a result, existing literature frequently cites courts' rejection of foreign nondisclosure rules as evidence of judicial imperialism, or a "willingness to compel discovery located in foreign states despite those states' objections."[53] The principal issue with outcome-based analyses is that they cannot provide a nuanced understanding of the rationales or justifications that led to a specific decision.[54] In particular, with its excessive emphasis on case outcomes, existing literature fails to recognize courts'—often implicit and unarticulated—distinction between blocking-statute and purpose-specific anti-investigative laws.[55]

[22] Despite their consistently dismissive treatment of blocking

investigations [https://perma.cc/Y5MJ-8PVK] ("As cross-border investigations have become an increasingly routine part of US law enforcement, the tools US authorities rely on to obtain evidence and information located in foreign countries have been used with greater frequency and, accordingly, are receiving added scrutiny.").

[52] *See, e.g.*, Hoda, *supra* note 45, at 231 ("This Note presents an empirical analysis of the blocking-statute conflict and provides fresh guidance for foreign states."); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1899 (2009) ("Legal scholars remain interested in trying to use empirical methods—most notably the statistical analysis of case outcomes—to understand the effect of extralegal factors on appellate decisionmaking.").

[53] Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 956 (2017).

[54] Carolyn Shapiro, *Coding Complexity: Bringing Law to the Empirical Analysis of the Supreme Court*, 60 HASTINGS L.J. 477, 486–87 (2009).

[55] *See, e.g.*, Hoda, *supra* note 45, at 238–39 (grouping different forms of anti-investigative laws under a single rubric of "blocking statutes").

statutes, [56] U.S. courts generally approach purpose-specific anti-investigative laws with a greater level of deference. [57] Since blocking statutes frequently pit U.S. discovery rules directly against a foreign state's core sovereign interests, courts dealing with such laws almost always put public policy at the foreground of investigation. [58] In resolving a "true conflict" between foreign and domestic law, courts have to balance "foreign interests, domestic interests, and the interest in a well-functioning international order."[59] Such balancing tests are systematically more likely to result in the application of domestic law.[60] Brainerd Currie, a legal scholar best known for his work in conflict of laws, argued:

> assessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function which should not be committed to courts in a democracy. It is a function which the courts cannot perform effectively, for they lack the necessary resources.[61]

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[56] Rich v. KIS Cal., Inc., 121 F.R.D. 254, 258 (M.D.N.C. 1988) ("In general, broad blocking statutes, including those which purport to impose criminal sanctions, which have such extraordinary extraterritorial effect, do not warrant much deference.").

[57] *See, e.g.*, Trade Dev. Bank v. Cont'l Ins. Co., 469 F.2d 35, 40–42 (2d Cir. 1972) (concluding that it was reasonable for the district court to defer to foreign law and refuse to order the disclosure of the customers of a Swiss bank, which would have violated the Bank Secrecy Act of Switzerland); Tiffany (N.J.) LLC v. Qi Andrew, 276 F.R.D. 143 (S.D.N.Y. 2011) (declining to compel a Chinese bank to produce documents in contravention of Chinese law, based on multi-factor comity analysis).

[58] Curran, *supra* note 50, at 1141.

[59] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct., 482 U.S. 522, at 555–56 (1987).

[60] *See* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 176, 178 (1959).

[61] *Id.* at 176.

Since U.S. courts are generally "ill-equipped" to balance the interests of foreign states with that of their own,[62] they will simply apply U.S. law and advance U.S. interests in true conflict cases.[63]

[23] By contrast, purpose-specific anti-investigative laws—at least at the surface level—typically define conflicting sovereign interests in more specific and less political terms. As a result, U.S. courts have been able to conduct more sophisticated and nuanced analyses of competing rights and interests even before demanding engagement on public policy debates.[64] Sometimes, U.S. courts must interpret purpose-specific anti-investigative laws; where should judges locate such laws when "law-on-the-books" and

[62] *See Société Nationale Industrielle Aérospatiale*, 482 U.S. at 552; David K. Pansius, *Resolving Conflict with Foreign Nondisclosure Laws: An Analysis of the Vetco Case*, 12 DENVER J. INT'L L. & POL'Y 13, 21 (1982) ("If, however, the public policy of one government dictates disclosure, and the public policy of the other government dictates nondisclosure, the balancing test is incapable of providing a solution since equivalent interests are at stake. In such a case the court assesses the importance of the information. If the information is necessary to the prosecution of the case, the court applies the law of the forum and imposes severe sanctions for noncompliance with the discovery order."); *In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1148 (N.D. Ill. 1979) ("The competing interests . . . display an irreconcilable conflict on precisely the same plane of national policy. . . . It is simply impossible to judicially 'balance' these totally contradictory and mutually negating actions.").

[63] Currie, *supra* note 60, at 176 ("A court need never hold the interest of the foreign state inferior; it can simply apply its own law as such. But when the court, in a true conflict situation, holds the foreign law applicable, it is assuming a great deal: it is holding the policy, or interest, of its own state inferior and preferring the policy or interest of the foreign state."); Pansius, *supra* note 62, at 23 ("The court in essence applies the law of the forum whenever the relative interests of the two sovereigns are in balance and the documents are truly needed."); *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 553 (" A pro-forum bias is likely to creep into the supposedly neutral balancing process.").

[64] Pansius, *supra* note 62, at 17–18 ("Before any kind of balancing need take place, a determination must first be made whether a genuine conflict of law exists. . . . In most instances the conflict, if any, is superficial, and can be resolved if the party subject to discovery makes reasonable efforts to obtain permission to disclose the documents in question.").

"law-in-action" diverge? Should U.S. courts defer to "a foreign state's views about the meaning of its own laws"[65] when competing explanations exist or circumstances render that foreign state's interpretation untrustworthy? Other times, the judiciary must determine if a foreign state is truly "interested" in seeing its policies effectuated in a particular case; what are the policy goals of a particular cross-border data transfer restriction? Would a "more moderate and restrained" reassessment of competing policies avoid the conflict?[66]

[24] In handling purpose-specific anti-investigative laws, U.S. courts have developed a series of conflict avoidance techniques. These techniques implicate important tradeoffs between accuracy and efficiency, as well as comity and justice, enabling judges to turn an otherwise irresolvable political conflict into one that is narrowly tailored and legally manageable.[67]

A. Blocking-Statute vs. Purpose-Specific Anti-Investigative Laws

[25] Blocking statutes are typically enacted to obstruct foreign judicial or administrative procedures.[68] For example, Article 1 of the French Blocking Statute expressly prohibits French nationals and companies from:

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[65] Animal Sci. Prods. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865, 1868 (2018).

[66] Brainerd Currie, *The Disinterested Third State*, 28 L. & CONTEMP. PROBS. 754, 757 (1963).

[67] *See* Knop et al., *supra* note 4, at 646–47.

[68] *See, e.g.*, French Blocking Statute, *supra* note 44, art.1; Curran, *supra* note 50, at 1142 ("France and Germany enacted blocking legislation in response to what those countries considered the excessive and abusive intrusion of American litigants into the affairs of their companies, often by competitors."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS L. OF THE U.S. § 442 n.4 (AM. L. INST. 1987) ("Blocking statutes are designed to take advantage of the foreign government compulsion defense . . . by prohibiting the disclosure, copying, inspection, or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities.").

> communicat[ing] to foreign public authorities, in writing, orally or by any other means, anywhere, documents or information relating to economic, commercial, industrial, financial or technical matters, the communication of which is capable of harming the sovereignty, security or essential economic interests of France or contravening public policy, specified by the administrative authorities as necessary.[69]

Article 1b of the French Blocking Statute further provides that:

> [s]ubject to international treaties or agreements and laws and regulations in force, it is prohibited for any person to request, search for or communicate, in writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature for the purposes of establishing evidence in view of foreign judicial or administrative procedures or in the context of such procedures.[70]

[26] In practice, blocking statutes provide companies in enacting countries with a "legal excuse" to oppose the extraterritorial application of foreign laws.[71] Foreign corporate defendants in U.S. litigation, for example, frequently argue that they should not be compelled to follow U.S. discovery rules when doing so would violate blocking statutes imposed by their home countries.[72]

[27] Although infringement of a blocking statute may result in criminal

[69] French Blocking Statute, *supra* note 44, art. 1.

[70] *Id.* art. 1 bis.

[71] Nat'l Assembly Report No. 1814, Comm'n on Prod. & Exchs. (Deputy Mayoud), 1979–1980, 2d Sess. (June 19, 1980) at 61, 63–64.

[72] *See* Gardner, *supra* note 53, at 968–83.

and civil penalties, these penalties are mostly put in place for protective rather than punitive purposes.[73] A report to the French National Assembly recommending the adoption of the French Blocking Statute noted that:

> it is necessary not to misunderstand the actual scope of these penalties [under the statute] . . . [because] these penalties are applied only on the improbable assumption that the companies would refuse to make use of the protective provisions offered to them. In all other cases, these potential fines will assure foreign judges of the judicial basis for the legal excuse which companies will not fail to make use of.[74]

[28] Since blocking statutes do not subject parties to "a realistic risk of prosecution,"[75] U.S. courts have consistently refused to give effect to such laws, dismissing each as a ruse to circumvent legitimate discovery through fictitious penalties that need never be imposed.[76]

[29] In deciding whether to accord deference to foreign blocking statutes, U.S. courts have also found it difficult to perform a "particularized comity analysis" to weigh the respective interests of the foreign enacting countries and the United States.[77] This is because blocking statutes typically do not

[73] *See id.*

[74] Report No. 1814, Nat'l Assembly Comm. on Production and Exchanges (Deputy Mayoud), 1979-1980, 2d Sess. (June 19, 1980) at 61, 63–64.

[75] Bodner v. Banque Paribas, 202 F.R.D. 370, 375 (E.D.N.Y. 2000).

[76] *See id.*; Curran, *supra* note 50, at 1144–45 ("Indeed, some United States courts have been highly dismissive of these blocking statutes, describing them as a ploy to evade legitimate discovery through sham punishments that need never be applied.").

[77] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct., 482 U.S. 522, 543–44, 544 n. 29 (1987) ("the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation.").

"identify the nature of the sovereign interests in nondisclosure of specific kinds of material."[78] Instead, they often adopt vague and general provisions that prohibit the cross-border transfer of "an exceedingly wide range of possible information," the scope of which is subject to discretionary interpretation by the enacting countries.[79] When interpreting the nature of the French Blocking Statute, the U.S. Supreme Court in *Société Nationale Industrielle Aérospatiale v. United States District Court* concluded that:

> the language of the statute, if taken literally, would appear to represent an extraordinary exercise of legislative jurisdiction by the Republic of France over a United States district judge, forbidding him or her to order any discovery from a party of French nationality, even simple requests for admissions or interrogatories that the party could respond to on the basis of personal knowledge. It would be particularly incongruous to recognize such a preference for corporations that are wholly owned by the enacting nation…. The lesson of comity is that neither the discovery order nor the blocking statute can have the same omnipresent effect that it would have in a world of only one sovereign.[80]

[30] Although the *Aérospatiale* opinion required a "particularized comity analysis" in addressing conflicts between U.S. discovery requests and foreign blocking statutes, it considered this analysis irrelevant where the nature of foreign interests is unclear.[81]

[31] In contrast, U.S. courts are generally more willing to make deferential inquiries into the details of and basis for purpose-specific anti-

[78] *Id.* at 544 n.29.

[79] *See* Bonifassi & Goussé, *supra* note 48.

[80] *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 544 n.29.

[81] *Id.*

investigative laws.[82] Since the 1950s, U.S. courts have been required to interpret or assess anti-investigative provisions incorporated into foreign laws governing, among other things, the right to privacy,[83] bank secrecy,[84] attorney confidentiality,[85] data security,[86] and state secrets.[87] Although such laws prohibit the disclosure or transfer of documents to U.S. authorities, they typically do not exist—or there is no legitimate basis to claim that they exist—for the purpose of frustrating U.S. discovery procedures.[88] Instead, such laws frequently seek to safeguard the more narrowly focused interests of the foreign enacting states which the requested disclosure may

[82] *See, e.g.*, *In re* Vitamins Antitrust Litig., Misc. No. 99-197, 2001 U.S. Dist. LEXIS 8904, at *44–54 (D.D.C. June 20, 2001) (allowing defendants to file a privacy log detailing exactly what requested information would be covered by the German privacy laws); Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397, 404 (S.D.N.Y. 2014) (deferring to the Swiss Banking Act and denying the release of the subpoenaed information from bank branches located in Switzerland).

[83] *See, e.g.*, *Vitamins Antitrust Litig.*, 2001 U.S. Dist. LEXIS 8904, at *43–56 (interpreting Swiss and German privacy laws).

[84] *See, e.g.*, Société Internationale Pour Participations v. Rogers, 357 U.S. 197 (1958); Hongkong & Shanghai Banking Corp. v. Comm'r, 85 T.C. 701 (1985); United States v. Vetco, Inc., 691 F.2d 1281 (9th Cir. 1981); *Uzan*, 73 F. Supp. 3d 397.

[85] *In re* Okean B.V., No. 12 Misc. 104, 2013 U.S. Dist. LEXIS 126361, at *8 (S.D.N.Y. Sep. 4, 2013).

[86] *In re* Valsartan, Losartan, & Irbesartan Prods. Liab. Litig., No. 2875, 2021 U.S. Dist. LEXIS 242593 (D.N.J. Dec. 20, 2021).

[87] *See, e.g.*, United States v. Zubaydah, 142 S. Ct. 959 (2022); *In re Valsartan*, 2021 U.S. Dist. LEXIS 242593; Wultz v. Bank of China, 942 F. Supp. 2d 452 (S.D.N.Y. 2013).

[88] *See In re* Okean B.V., 2013 U.S. Dist. LEXIS 126361, at *7–8 ("The Advokat Secrecy law and the personal data protection laws implicated here are not properly characterized as 'blocking statutes.'").

jeopardize.[89] Oftentimes, a foreign enacting state's only interest is in "protecting the privacy of its non-consenting domiciliaries," rather than defending its own judicial sovereignty.[90]

[32] U.S. courts may defer to a foreign nondisclosure rule because certain U.S. policies can be effectuated without the information sought.[91] Alternatively, U.S. courts may enforce a discovery order contrary to foreign law because the information sought pertains solely to private interests and the party whose privacy is jeopardized consents to the disclosure.[92] Courts may also cite contradictory expert testimony to prove that a foreign enacting state's public policy is ambiguous or internally contested, so that no clear policy opposing U.S. discovery rules can be identified.[93] In these instances, courts reach their conclusions not by balancing competing national interests, but by employing various techniques of conflict interpretation. In applying such techniques, U.S. courts have invoked the interpretive approaches and

[89] RESTATEMENT (THIRD) OF FOREIGN RELATIONS L. OF THE U.S. § 442 (AM. L. INST. 1987) ("In making the necessary determination of foreign interests . . . a court or agency in the United States should take into account not merely a general policy of the foreign state to resist 'intrusion upon its sovereign interests,' or to prefer its own system of litigation, but whether producing the requested information would affect important substantive policies or interests of the foreign state.").

[90] *Vetco*, 691 F.2d at 1289 ("A representative of the Swiss Federal Attorney stated that the instant case 'apparently does not concern a totally Swiss interest in confidentiality.' . . . Thus, Switzerland's only interest is in protecting the privacy of its non-consenting domiciliaries. This interest is further diminished where the party seeking the records is the IRS, which is required by law to keep the information confidential."); *see also In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1143 (N.D. Ill. 1979) ("[A] violation [of the Swiss Penal Code] can be avoided if a person with a secrecy interest in some matter consents to its disclosure[.]").

[91] Pansius, *supra* note 62, at 29.

[92] *Id.* at 16; Wultz v. Bank of China Ltd., 910 F. Supp. 2d 548, 556 (S.D.N.Y. 2012).

[93] Pansius, *supra* note 62, at 29; *In re* Valsartan, Losartan, & Irbesartan Prod. Liab. Litig., No. 2875, 2021 WL 100204, at *128 (D.N.J. Jan. 12, 2021) (holding that various Chinese agencies may have conflicting findings as to the nature of China's state secrets).

problem-solving methods typical of a conflict-of-laws analysis. In turn, the highly technical field of conflict of laws provides a framework and vocabulary for analyzing judicial responses to purpose-specific anti-investigative laws.

[33] Recent judicial encounters with China's DSL and PIPL in cross-border discovery disputes illustrate the use of such framework in this context.[94]

B. Judicial Responses to China's Data Protection Laws

[34] Data protection laws that restrict cross-border data transfers are representative examples of purpose-specific anti-investigative laws. Legal controls over cross-border flows of personal data are generally motivated by concerns about uneven levels of data protection across jurisdictions, rather than the desire to shield domestic law from foreign influence.[95] Specifically, legal controls are implemented primarily to prevent circumvention of the laws of the more protective regime and erosion of the privacy rights of individuals.[96]

[35] In recent years, the rapid global proliferation of data transfer regulations has been motivated by an increased desire to protect privacy and has simultaneously posed significant obstacles for U.S. law enforcement agencies seeking evidence abroad.[97] To ensure effective cross-border investigations, the United States has been negotiating with other national

[94] *See* PIPL, *supra* note 20, art. 36, art. 41.

[95] U.N. Conference on Trade and Development, Data Protection Regulations and International Data Flows: Implications for Trade and Development (2016), https://unctad.org/system/files/official-document/dtlstict2016d1_en.pdf [https://perma.cc/4M3S-T7VZ].

[96] *Id.*

[97] U.S. DEP'T OF JUST., PROMOTING PUBLIC SAFETY, PRIVACY, AND THE RULE OF LAW AROUND THE WORLD: THE PURPOSE AND IMPACT OF THE CLOUD ACT 2–3 (2019).

and supranational regulators to remove legal prohibitions on disclosing data in response to U.S. law enforcement orders.[98] While international regulatory coordination and cooperation are desirable goals, harmonizing disparate regulatory regimes is an exceedingly controversial and difficult process.[99] So far, the United States has only negotiated a small number of executive agreements with foreign partners, such as the European Union, the United Kingdom, and Australia, that will allow predictable and trustworthy data flows between law enforcement authorities.[100] Other cooperative mechanisms, such as Treaties on Mutual Legal Assistance in Criminal Matters (MLATs), also facilitate an exchange of data across borders and involve a wider range of countries.[101] Nonetheless, MLATs and other similar solutions are widely considered time-consuming and burdensome, rendering them incapable of meeting the rising demands for foreign-stored data in cross-border investigations.[102] Because efforts at regulatory harmonization have yet to generate adequate results, the U.S. government currently faces a patchwork of national and regional data protection regulations that may conflict with U.S. law enforcement orders for extraterritorial evidence.

[98] *Id.*

[99] Riles, *supra* note 4, at 66.

[100] *Cloud Act Resources*, U.S. DEP'T OF JUST. (Jan. 10, 2023), https://www.justice.gov/criminal-oia/cloud-act-resources [https://perma.cc/W5V8-S22H].

[101] OFF. OF INT'L AFF., U.S. DEP'T OF JUST., MUT. LEGAL ASSISTANCE TREATIES OF THE U.S. (Apr. 2022), https://www.justice.gov/criminal-oia/file/1498806/download [https://perma.cc/S3GY-7FDZ].

[102] *Promoting Public Safety, Privacy, and the Rule of Law Around the World: The Purpose and Impact of the CLOUD Act*, *supra* note 97, at 3.

[36] China's data protection laws serve as an example of the conflict-of-laws issues that may prevent multinational corporations from complying with U.S. court orders for evidence. China serves as a relevant example for two main reasons. First, for decades, China has been one of the major law enforcement regions in relation to U.S.-led, cross-border corporate investigations. Since 1978, transnational business conducted in China has triggered the largest number of foreign bribery enforcement actions under the FCPA.[103] In addition to anti-corruption, the U.S. government has also increased its cross-border investigations into Chinese-based or China-related corporations in relation to other critical compliance areas, such as trade secret, export control, and data security.[104] Consequently, there is a growing need for U.S. regulators to have access to information stored in China.

[37] The second reason China is a prime example of conflict-of-laws issues is that China recently enacted two new data protection laws, the DSL and the PIPL, which restrict cross-border data transfers.[105] Both laws have posed significant challenges for multinational corporations undertaking or responding to China-related investigations. The relevant data transfer restrictions hinder a corporation's ability to respond to a U.S. regulator's investigation into its China-based operations, to produce evidence in U.S. judicial proceedings, or to undertake an internal investigation. Unfortunately, such legal barriers are unlikely to be eliminated through a bilateral agreement at the government level any time soon. This is due not only to both countries' divergent interests in global corporate regulation, but also to their fundamental disagreements on issues such as the rule of law and human rights.[106]

[38] Despite any impediment to addressing China's laws on a legislative level, U.S. courts have resolved conflicts between U.S. discovery rules and China's data transfer regulations—not through interest balancing, but rather through conflict interpretation.

1. Cadence Design Sys. v. Syntronic AB

[39] In *Cadence Design Sytems. v. Syntronic AB*, Cadence sued Syntronic

for unlicensed use of Cadence software.[107] The Northern District of California ordered the defendant to produce 24 computers located in China for inspection in the United States.[108] On a motion for reconsideration, Syntronic argued that Article 39 of China's PIPL prohibits transfer of the computers outside Chinese territory without the consent of present and former employees.[109] Cadence countered, however, that no individual consent should be required in this case because the court's discovery order established a legal obligation sufficient to invoke an exception to Article 39.[110]

[103] *See Location of Misconduct Alleged in FCPA-Related Enforcement Actions (by FCPA Matter)*, *supra* note 42.

[104] Gary J. Gao & Berry J. Qiao, *China-related Cross-border Government Investigation after the Covid-19 Pandemic*, GLOB. INVESTIGATIONS REV. (Sept. 27, 2021), https://globalinvestigationsreview.com/review/the-asia-pacific-investigations-review/2022/article/china-related-cross-border-government-investigation-after-the-covid-19-pandemic [https://perma.cc/RYK7-Y8QS].

[105] *See* PIPL, *supra* note 20, at art. 36, art. 41.

[106] Loren M. Scolaro, *The Past, Present, and Future of United States-China Mutual Legal Assistance*, 94 N.Y.U. L. REV. 1688, 1693 (2019); *Promoting Public Safety, Privacy, and the Rule of Law Around the World: The Purpose and Impact of the CLOUD Act*, *supra* note 97, at 9 ("The challenge is to ensure that government powers to compel production of electronic data are exercised and overseen in a way that respects the rule of law, protects privacy and human rights, and appropriately reduces conflicts between the laws of the countries concerned.").

[107] *Cadence Design Sys.*, 2022 U.S. Dist. LEXIS 112275, at *2.

[108] *Id.*

[109] *Id.* at *1–2.

[110] *Id.* at *13.

[40] Article 39 of the PIPL provides as follows:

> To provide the personal information of an individual to an overseas recipient outside the territory of the People's Republic of China, the personal information processor shall inform the individual of such matters as the name of the overseas recipient, contact information, purpose and method of processing, type of personal information and the method and procedure for the individual to exercise the rights stipulated herein against the overseas recipient, and shall obtain the individual's separate consent.[111]

[41] Article 13 of the PIPL then sets forth several exceptions that permit the processing of personal information if the data subject's consent is not obtained.[112] At trial, Cadence submitted a translation of Article 13 from a Stanford University website, which reads as follows:

> Personal information handlers may only handle personal information where they conform to one of the following circumstances:
>
> 1. Obtaining individuals' consent;
> ….
> 3. Where necessary to fulfill statutory duties and responsibilities or statutory obligations;
> ….
> 7. Other circumstances provided in laws and administrative regulations.
> In accordance with other relevant provisions of this Law, when handling personal information, individual consent shall be obtained. However, obtaining individual consent is

[111] *Cadence Design Sys.*, 2022 U.S. Dist. LEXIS 112275, at *10–11.

[112] *Id.* at *11

not required under conditions in items 2 through 7 above.[113]

[42] Cadence claimed, and the defendant did not dispute, that the third item on the list "should be translated as referring to 'obligations provided by law' rather than 'statutory' duties or obligations."[114] The court accepted Cadence's translation of that item. The issues before the court, then, were "whether Article 13 applies as an exception to Article 39, and whether Syntronic's discovery obligations in this case create a cognizable legal duty for the purpose of Article 13."[115]

[43] Since the PIPL itself does not specifically address these issues, the court relied on expert testimonies submitted by the parties to determine the content and legal effects of Article 13.[116] Relying on Liu, Syntronic's Chinese legal expert's interpretation, Syntronic contended that the non-consent bases provided in Article 13 do not apply to Article 39.[117] Liu argued that the two articles exist in different chapters of the PIPL, and that Article 39 refers to "separate consent" rather than merely to "consent."[118] Wang, Cadence's Chinese legal expert, presented two arguments to refute Syntronic's claim.[119] First, Wang argued that "Article 13 does not distinguish between different chapters of the law."[120] Instead, "the chapter and section titles under which Article 13 appears—'Principles of Personal

[113] *Id.* at *11–12.

[114] *Id.* at *12.

[115] *Id.* at *13

[116] *Id.* at *13–17.

[117] *Id.* at *13.

[118] *Id.*

[119] *Id.* at *13–14.

[120] *Id.*

Information Processing' and 'General Provisions'—suggest that they contain overarching principles for the law as a whole."[121] Second, Wang submitted to the court a publication "written by experts participating in drafting the PIPL," which states that "[i]n accordance with Article 13, if providing personal information abroad is based on another non-consent basis, no individual consent should be required" under Article 39.[122] Wang argued that the publication is "the most authoritative interpretation of the PIPL" currently available and should thus be considered persuasive.[123]

[44] The court found Wang's interpretation of Article 13 to be more persuasive than Liu's.[124] The court also noted that although Wang relied on secondary sources to interpret the PIPL, Liu and Syntronic failed to submit other, more persuasive interpretations supporting their view of the law.[125] As a result, the court held that the exceptions in Article 13 apply to the consent requirement of Article 39.[126]

[45] The court then considered whether Syntronic's U.S. discovery obligations provided "a cognizable legal duty within the meaning of the third item listed in Article 13."[127] The PIPL does not specify whether Article 13's reference to obligations "provided by law" is limited to Chinese law. The court held, however, that Article 13's legal obligation exception should be interpreted to include obligations under foreign law.[128] In reaching its

[121] *Id.* at *15.

[122] *Id.*

[123] *Id.*

[124] *See id.* at *15.

[125] *Cadence*, 2022 U.S. Dist. LEXIS 112275, at *16.

[126] *Id.*

[127] *Id.*

[128] *See id.* at *17.

conclusion, the court noted that "nothing in the PIPL itself indicates that the exception is limited to Chinese law."[129] In doing so, it further adopted Wang's reasoning that the exception should reasonably include foreign legal obligations when at least some provisions of the PIPL can be applied to foreign companies operating outside of China.[130]

[46] Despite Syntronic's contention that foreign discovery obligations must be approved by a Chinese court before they may be enforced in China, the court ruled that approval was unnecessary in this case because Cadence was not seeking to enforce the discovery order through a Chinese authority.[131] In particular, the court stated that Syntronic was required to comply with U.S. discovery orders "by virtue of its status as a party to this case, without need for enforcement in China."[132] The court ultimately concluded that there was no conflict between China's PIPL and the discovery order in this case.[133] Therefore, Syntronic must follow the order and produce computers for inspection in the United States.[134]

[47] In this case, the court resolved the discovery dispute not through interest balancing—it did not even reach the parties' remaining arguments regarding comity—but through conflict interpretation. It interpreted Article 13 of China's PIPL in such a way as to convert a seemingly "true conflict" into a "false conflict."[135] By concluding that Article 13's legal obligation

[129] *See id.* at *16. (citing NML Capital v. Republic of Argentina, 2013 U.S. Dist. LEXIS 17572 (S.D.N.Y. Feb. 8, 2013)).

[130] *Cadence*, 2022 U.S. Dist. LEXIS 112275, at *17.

[131] *See id.*

[132] *Id.*

[133] *See id.* at *17–18.

[134] *Id.* at *19.

[135] Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 10 (1959).

exception includes obligations under U.S. law, the court rendered China's interest in protecting its nationals against unauthorized disclosure irrelevant to the case at issue, making the United States the only interested state in seeing its laws applied. The court's analyses turned on an implicit and unarticulated conflict-of-laws methodology: governmental interest analysis.[136] An important insight of the interest analysis method in resolving a discovery conflict is that 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 where the policies of several interested states are essentially compatible.[137]

[48] To be sure, different judges may approach conflict interpretation in different ways, and there is plenty of room for disagreement on the conclusion that the court reached in *Cadence*. However, the court managed to put otherwise irresolvable political conflicts into legally defensible ends in *Cadence*, primarily through an "as if" modality.[138] To suggest that China's PIPL exists solely to protect private interests is an "as if" assertion. It is also an "as if" assertion to assume that U.S. discovery orders establish a cognizable legal duty for the purpose of Article 13. While these assertions may not hold true in all cases, they are hard to refute in the case at issue. After all, the PIPL itself lacks particularity and specificity as to what legal obligations are sufficient to invoke the Article 13 exceptions.

[49] Most notably, the *Cadence* court justified its "as if" assertions by establishing foreign law through each party's declarations. Although U.S. courts can undertake their own research on foreign law, they are not obligated to do so. In practice most courts choose to vest the initiative of pleading and proving foreign law in the hands of the litigants.[139] By relying

[136] BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 138 (1963).

[137] Currie, *supra* note 135, at 10.

[138] *See* Knop et al., *supra* note 4, at 644–45.

[139] Unif. Interstate and Int'l Proc. Act § 1.03 (Nat'l Conf. of Commissioners on Unif. State Laws 1962).

on party submissions to ascertain foreign law, the court in *Cadence* gave the litigants an opportunity to articulate their own descriptions of a specific regulatory regime. In other words, the court gave the parties agency to assert their own business and strategic interests when acting across borders.

[50] Syntronic failed to successfully assert their strategic interests. After concluding that Wang's interpretation of Article 13 was more convincing, the court noted, in particular, that "Liu and Syntronic identif[ied] no other published interpretation supporting their view of the law."[140] By making this observation, the court implicitly acknowledged the situatedness of its claims about China's PIPL—had Syntronic submitted other or more authoritative evidence, such as official interpretations issued by the Chinese legislature, the court could have reached a different conclusion.

[51] In fact, such alternative authoritative evidence may have been available to Syntronic. Article 10 of the PIPL suggests that this law "intertwines the privacy of personal information with the protection of national security." [141] Article 10 provides that "[n]o organization or individual may … engage in personal information handling activities harming national security or the public interest."[142] Article 41 of the PIPL further prohibits the transfer of personal information stored in China to foreign judicial or law enforcement authorities without the approval of the relevant authorities of the People's Republic of China.[143] Had Syntronic invoked and proved these two articles, the court would have had to perform a separate analysis to determine whether the requested disclosure would jeopardize important public interests of China, and whether seeking approval from Chinese authorities would impose undue hardship on

[140] *Cadence*, 2022 U.S. Dist. LEXIS 112275, at *15–16.

[141] *In re* Valsartan, Losartan, & Irbesartan Prods. Liab. Litig., No. 2875, 2021 U.S. Dist. LEXIS 242593, at *134 (D.N.J. Dec. 20, 2021).

[142] *Id.*

[143] *Id.*

Syntronic.[144] However, a U.S. court is not required to take judicial notice of foreign law.[145] Therefore, when Syntronic failed to invoke these articles under the PIPL, the court in *Cadence* was free to resolve the discovery dispute "as if" they did not exist at all.

2. Philips Med. Sys. (Cleveland), Inc. v. Buan

[52] Even if Syntronic did present evidence of Article 41, that may not have been a decisive factor. In fact, in cases where the burdened party did invoke the review and approval requirement under the PIPL's Article 41, U.S. courts have still resolved the contradiction between discovery and nondisclosure through conflict interpretation. In *Philips Med. Systems (Cleveland), Inc. v. Buan*,[146] Defendants filed a motion for reconsideration of the court's previous discovery orders regarding the production of certain documents.[147] Defendants argued that certain disclosure requests were "unduly burdensome" because they either: (1) demanded the search of Chinese employees' personal mobile devices in violation of Chinese privacy law[148] or (2) imposed deadlines that were "impossible to comply with" given the approval procedures they must follow in China.[149] The court held that the relevant Chinese data protection laws did not bar the production at issue.[150] Like in *Cadence* the court reached this conclusion not through interest balancing, but rather through conflict interpretation.

[144] Société Nationale Industrielle Aérospatiale v. United States Dist. Ct., 482 U.S. 522, 546 (1987).

[145] Fed. R. Civ. P. 44.1 Advisory Committee's Note to 1966 Amendment.

[146] Philips Med. Sys. (Cleveland), Inc. v. Buan, No. 19-CV-2648, 2022 U.S. Dist. LEXIS 35635, at *13 (N.D. Ill. Mar. 1, 2022).

[147] *Id.* at *2.

[148] *Id.* at *3.

[149] *Id.* at *5.

[150] *Id.* at *18.

[53] First, the court used the common-law procedures for determining foreign law as a tool for conflict avoidance. It did not directly answer the question of whether the PIPL prohibited the production at issue; instead, the court determined that Defendants "failed to meet their burden" of proving that the information sought was indeed banned by Chinese law.[151] In the United States, the party relying on foreign law to block production bears the burden of "provid[ing] the Court with information of sufficient particularity and specificity to allow the Court to determine whether the discovery sought is indeed prohibited by foreign law."[152] In this case, the court found that Defendants:

> have not demonstrated that any personal information within the meaning of the PIPL is at issue in Plaintiffs' discovery requests. Nor have Defendants identified anything in the law to prohibit a company from directing their employees to look for *business* information stored on personal devices. (R. 380, Hr'g Tr. at 10.) Furthermore, Defendants' own expert makes clear that potential concerns under Chinese privacy law can be ameliorated by allowing employees who search their personal devices to screen out personal information from what they produce to the company. (R. 367, Defs.' Mot. Ex. 3 at 9.) In short, none of the information before the court indicates that the PIPL is in any way implicated by discovery in this case.[153]

[54] In fact, since China's PIPL features many vague provisions, especially a broad and expansive definition of personal information, it is hard for Chinese litigants to prove the law with "sufficient particularity and

[151] *Philips Med. Sys. (Cleveland), Inc.*, 2022 U.S. Dist. LEXIS 35635, at *18.

[152] Republic Techs. (NA), LLC v. BBK Tobacco & Foods, No. 16-C-3401, 2017 U.S. Dist. LEXIS 158986, at *1. (N.D. Ill. Sep. 27, 2017).

[153] *Philips Med. Sys.*, 2022 U.S. Dist. LEXIS 35635, at *19–20.

specificity." [154] While the vagueness of Chinese law may present interpretive challenges for U.S. courts,[155] it also provides an opportunity to establish a false conflict of interest. When the content of foreign law cannot be proved with "sufficient particularity and specificity," U.S. courts may conclude that no clear policy opposing U.S. discovery rules can be identified.[156]

[55] The court in *Philips* also determined that the "review and approval" requirements imposed by China's PIPL and DSL did not apply to the discovery requests at issue.[157] Defendants proved to the court that China's PIPL and DSL include provisions that restrict the ability of Chinese companies to transfer data abroad.[158] Article 41 of the PIPL provides that:

> [w]ithout the approval of the competent authorities of the People's Republic of China, personal information handlers may not provide personal information stored within the mainland territory of the People's Republic of China to foreign *judicial or law enforcement agencies* [emphasis added].[159]

Article 36 of the DSL similarly provides that:

> [t]he competent authorities . . . shall handle requests for data

[154] *Republic Tech*s., 2017 U.S. Dist. LEXIS 158986, at *1.

[155] *In re* Valsartan, Losartan, & Irbesartan Prods. Liab. Litig., No. 2875, 2021 U.S. Dist. LEXIS 242593, at *144–47 (D.N.J. Dec. 20, 2021).

[156] *Id. See generally* Pansius, *supra* note 62, at 29 (expounding upon the United States' ability to interpret foreign law with respect to domestic discovery rules).

[157] *Philips Med. Sys.*, 2022 U.S. Dist. LEXIS 35635, at *20.

[158] *Id.* at *16-17.

[159] *Id.* at *16.

> made by *foreign judicial or law enforcement authorities* [emphasis added] …. Without the approval of the competent authorities, organizations or individuals in [China] shall not provide data stored within [Chinese] territory . . . to any overseas *judicial or law enforcement body* [emphasis added].[160]

[56] Defendants further submitted expert testimonies to assert that the DSL "requires the approval of 'the Supreme People's Court of the People's Republic of China' for data to exit the country,"[161] and that "it is quite difficult to obtain the approval of the Supreme People's Court for data exit."[162]

[57] The court, however, did not address the compliance hardship imposed upon Defendants by the "review and approval" requirements. Instead, it managed to avoid the apparent conflict between such requirements and the discovery requests through the ordinary process of statutory "construction and interpretation" which is a technique used in conflicts of laws. [163] First, the court determined that China's PIPL and DSL require approval from Chinese authorities for cross-border data transfers only when such transfers are demanded by "foreign judicial or law enforcement authorities."[164] Then, the court found that no conflict of laws existed because:

> [u]nlike in civil law jurisdictions where the judge takes a leading role in collecting evidence, discovery requests and

[160] *Id.* at *17.

[161] *Id.*

[162] *Phillips Med. Sys.*, 2022 U.S. Dist. LEXIS 35635, at *17.

[163] CURRIE, *supra* note 136, at 183–84.

[164] *Phillips Med. Sys.*, 2022 U.S. Dist. LEXIS 35635, at *20.

> responses thereto in the American common law system are traded between the parties …. While the court oversees the process, it does not make the request and is not involved in the stewardship or use of the exchanged information—in other words, the data is not provided 'to the U.S. court' …. On its own terms, therefore, the DSL's review and approval requirements do not appear to apply to the American civil discovery process.[165]

[58] The court did not go further to consider whether "to the U.S. court" may be interpreted to cover scenarios in which data is exported for use in a U.S. court. Instead, the court stopped its inquiry when a false conflict was established. By doing so, the court highlighted an important insight of interest analyses in conflict of laws: 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."[166] In contrast, interest analyses require 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.[167] In interest analyses, the boundaries of what makes an overbroad interpretation of foreign law is determined by the technical aspect of conflict of laws.[168] According to Annelise Riles, executive director of the Roberta Buffett Institute for Global Studies at Northwestern University, the technical aspect of law encompasses:

> (1) certain ideologies—legal instrumentalism and

[165] *Id.* at *20–21*; see also In re* Valsartan, Losartan, & Irbesartan Prods. Liab. Litig., No. 2875, 2021 U.S. Dist. LEXIS 242593, at *136 (referring to the relationship which an injunction has on PIPL and DSL).

[166] 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).

[167] *Id.* at 759–60.

[168] ANNELIESE RILES, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS 64–65 (2011).

> managerialism . . . (2) certain categories of experts—especially scholars, bureaucrats and practitioners who treat the law as a kind of tool or machine and who see themselves as modest but expertly devoted technicians; (3) a problem-solving paradigm—an orientation toward defining concrete, practical problems and toward crafting solutions; (4) a form of reasoning and argumentation, from eight-part tests to reasoning by analogy, to the production of stock types of policy arguments to practices of statutory interpretation or citation to case law.[169]

3. The Seven-Factor Comity Analysis

[59] Despite the foregoing case studies, this Article does not assert that U.S. courts never balance competing interests in cases involving purpose-specific anti-investigative laws.[170] When attempts at conflict avoidance are unsuccessful and the foreign law in question prohibits disclosure, the court must conduct a "comity analysis."[171] The purpose is to perform "a more particularized analysis of the respective interests of the foreign nation and the requesting nation" to determine whether to compel production.[172] The Restatement (Third) of Foreign Relations Law of the United States ("Restatement") lists five factors relevant to a comity analysis:

> [1] the importance to the investigation or litigation of the documents or other information requested; [2] the degree of specificity of the request; [3] whether the information originated in the United States; [4] the availability of

[169] *Id.*

[170] *See, e.g.*, *In re* Valsartan, Losartan, & Irbesartan Prods. Liab. Litig., No. 2875, 2021 U.S. Dist. LEXIS 242593, at *17–20 (D.N.J. Dec. 20, 2021).

[171] Société Nationale Industrielle Aerospatiale v. United States Dist. Ct., 482 U.S. 522, 543–44, 546 (1987).

[172] *Id.* at 543–44.

> alternative means of securing the information; and [5] the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located.[173]

[60] The Second Circuit Court also consider two additional factors to the comity analysis:

> [6] the hardship of compliance on the party or witness from whom discovery is sought; and
> [7] the good faith of the party resisting discovery.[174]

[61] Notably, although courts have referred to this seven-factor calculus by different terms—a "balancing analysis,"[175] a "comity analysis,"[176] and so on—only factor 5 entails a balancing of competing sovereign interests.[177] As previously discussed, U.S. courts are generally ill-equipped to weigh conflicting sovereign interests, so a balancing analysis is systematically more likely to result in the application of U.S. law. Nevertheless, in cases involving purpose-specific anti-investigative laws, courts have been able to minimize conflict with foreign law to the largest extent possible, which is achieved primarily through the application of the remaining six factors.

[62] Factors 1, 2, and 4 entail an evaluation of necessity.[178] In a true

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[173] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAWS OF THE UNITED STATES § 442(1)(C) (AM. L. INST. 1987); *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 544 n.28.

[174] Wultz v. Bank of China Ltd., 910 F. Supp. 2d 548, 553 (S.D.N.Y. 2012).

[175] *In re Valsartan*, 2021 U.S. Dist. LEXIS 242593, at *123.

[176] Philips Med. Sys. (Cleveland), Inc., 2022 U.S. Dist. LEXIS 35635. at *21.

[177] *In re Valsartan*, 2021 U.S. Dist. LEXIS 242593, at *144.

[178] Pansius, *supra* note 62, at 23.

conflict case, if the documents at issue are truly needed and cannot be reasonably obtained through other channels, the court will essentially enforce a discovery order contrary to foreign law.[179] If, however, the court determines that the prosecution of the U.S. action may proceed fairly without certain requested documents, it will then reduce or eliminate sanctions for noncompliance.[180]

[63] As for alternative means of securing the requested information, the U.S. Supreme Court in *Aérospatiale* held that the Hague Convention discovery procedure does not replace the Federal Rules of Civil Procedure in a foreign discovery dispute.[181] Specifically, despite China's participation in the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, [182] U.S. courts have generally determined that pursuing evidence gathering through the Hague Convention has little prospect of success in China.[183] Therefore, the mere fact that the Hague Convention provides an alternative means for gathering evidence in China does not necessarily mean that it is an effective procedure for doing so.

[64] In criminal cases, U.S. courts have similarly decided that the United States can pursue evidence abroad without first going through the

[179] *Id.*

[180] *Id.*; *see Wultz*, 910 F. Supp. 2d at 558 ("If the information sought can easily be obtained elsewhere, there is little or no reason to require a party to violate foreign law.") (internal quotations omitted) (quoting Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1475 (9th Cir. 1992)).

[181] *See In re Valsartan*, 2021 U.S. Dist. LEXIS 242593, at *121 ("Thus, the Aérospatiale Court considered the obligations of the then-current signatories, which included the PRC, and concluded that the Hague Convention discovery procedure does not supersede the FRCP in a foreign discovery dispute.").

[182] CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, Mar. 18, 1970, T.I.A.S. No. 7444, 23 U.S.T. 2555.

[183] *See* Gucci Am., Inc. v. Weixing Li, No. 10 Civ. 4974, 2012 U.S. Dist. LEXIS 171529, at * 19 (S.D.N.Y. Nov. 2012); *Wultz*, 910 F. Supp. 2d at 553–54.

procedures set forth in MLATs.[184] Although China has signed a Mutual Legal Assistance Agreement (MLAA) with the U.S., the MLAA has the greatest potential for use only when both countries' interests align.[185] As both countries have moved toward unilateral prosecution of transnational crimes in recent years, their interests in global corporate regulation have increasingly diverged.[186] As a result, U.S. courts are unlikely to regard the MLAA between China and the U.S. as an effective or efficient means of obtaining evidence in corporate enforcement investigations and prosecutions. Even without following the MLAA, the U.S. Supreme Court has ruled that when it is necessary to seek evidence abroad, U.S. courts must closely monitor pretrial proceedings to prevent discovery abuses.[187] By ensuring that the documents sought are important to the litigation or prosecution, U.S. courts, to the greatest extent feasible, prevent needless intrusion into the judicial sovereignty of other countries.

[65] In addition to the safeguard of monitoring pretrial proceedings, U.S. courts also require that discovery requests be specific, even when the party seeking disclosure has persuasively proved the importance of the requested information.[188] For example, in *Wultz v. Bank of China Ltd*.,[189] the court was to determine whether the scope of discovery against Bank of China (BOC) was overbroad.[190] The court held that:

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[184] *In re* Grand Jury Investigation of Possible Violations of 18 U.S.C. §1956 and 50 U.S.C. §1705, 381 F. Supp. 3d 37, 69, 41 (D.D.C 2019).

[185] Scolaro, *supra* note 106, at 1693.

[186] *Id.*

[187] Société Nationale Industrielle Aérospatiale, 482 U.S. at 546.

[188] Wultz, 910 F. Supp. 2d at 555–56.

[189] *Id.* at 550.

[190] *Id.*

> to the extent that plaintiffs' narrowed discovery requests call for the production of confidential regulatory documents created by the Chinese government whose production is clearly prohibited under Chinese law, I decline to order production of such regulatory documents.[191]

It further reasoned that:

> ordering the production of the non-public regulatory documents of a foreign government may infringe the sovereignty of the foreign state and violate principles of international comity to a far greater extent than the ordered production of private account information in contravention of foreign bank secrecy laws, and consequently deserves close and distinct attention.[192]

Ultimately, the court ordered the plaintiffs to narrow their discovery requests to exclude the production of confidential regulatory documents generated by the Chinese government.[193]

[66] Factor 3 considers whether the information sought originated in the United States. If the requested information originated in a foreign country, this factor would weigh against discovery.[194] Factor 3 turns on a classic conflict-of-laws rule which allocates regulatory authority based on the territorial contacts between the parties, the information sought, and the

[191] *Id.* at 556.

[192] *Id.*

[193] *Wultz*, 910 F. Supp. 2d at 556.

[194] *Id.*

relevant states.[195] To be sure, not all of the factors in the comity analysis are equally weighted—factor 5 carries the most weight, with the remaining considerations tipping factor 5 one way or the other.[196] The mere fact that certain data originates or is stored in another nation does not preclude a U.S. court from ordering its disclosure. In fact, even in a conflict-of-laws analysis, courts seek to perform a qualitative, rather than quantitative, evaluation of territorial contacts.[197] A qualitative evaluation analyzes the significance of territorial contacts in light of their roles in furthering the underlying policies of the laws of the involved states.[198] Nonetheless, by giving weight to the territorial contacts between the data sought and the states involved, factor 3 gives due regard to foreign states' legislative, executive, or judicial sovereignty over information produced or held in their territory.

[67] Factors 6 and 7 seek to protect the interests of foreign nationals by avoiding overly burdensome discovery requests. When a discovery dispute involves China's anti-investigative laws, two considerations influence U.S. courts' analysis of these factors. First, there have been few reported cases in which Chinese corporations have been punished for disclosing information to foreign regulators.[199] For example, even though China's data protection laws threaten to impose severe civil and criminal penalties for violations, the enforcement of these penalties lacks certainty, predictability, and transparency.[200] In *Cadence*, the plaintiff proved to the court that:

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[195] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188 (AM. L. INST. 1977) (explaining how conflict of laws assigns contacts to each involved state and applies the law of the state that has the "most significant relationship" to the occurrence and the parties in issue).

[196] *In re* Valsartan, Losartan, & Irbesartan Prods. Liab. Litig., No. 2875, U.S. Dist. LEXIS 242593, at *144 (D.N.J. Dec. 20, 2021).

[197] SYMEON C. SYMEONIDES, CHOICE OF LAW 154 (Stephen M. Shepard ed., 2016).

[198] *Id.* at 155.

[199] *In re Valsartan*, 2021 U.S. Dist. Lexis 242593, at *153–54.

[200] *Id.* at *154–55.

> given that the PIPL has just been enacted, there has not been any case involving penalty of cross-border transmission of personal data upon the orders of a foreign court…. We also did not find any announcements of a PIPL violation in the context of a cross-border transfer of employee personal information, much less pursuant to a court order.[201]

[68] The court in *In re Valsartan* also found that China's anti-investigative laws are:

> a sword of Damocles to keep international business in line but infrequently wielded if ever against a titan of the PRC economy. Both the unproven nature of the liability and the PRC's apparent reluctance to carry out such liability against a successful PRC enterprise mitigate the weight accorded this factor [referring to factor 6].[202]

[69] As a result, U.S. courts have been reluctant to use factor 6 in favor of Chinese defendants.[203] However, if Chinese defendants can prove active execution of China's anti-investigative laws in future cases, U.S. courts may rule differently. The second consideration is one of good faith. In judicial practices, so long as Chinese litigants exercise good faith during the discovery process, U.S. courts have generally been willing to take active measures to minimize disclosure of information.[204] This is done in an effort to assist good-faith Chinese litigation in navigating "the legal (and possibly

[201] Cadence Design Sys. v. Syntronic AB, No. 21-CV-03610, 2022 U.S. Dist. LEXIS 112275, at *10.

[202] *In re* Valsartan, 2021 U.S. Dist. Lexis 242593, at *155.

[203] *Id.*

[204] *Id.* at *155–56.

political) dilemma" that a discovery dispute may present them with.[205]

[70] A comity analysis must be carried out when attempts at conflict avoidance are unsuccessful. However, in cases involving purpose-specific anti-investigative laws, a U.S. court is still able to minimize conflict with foreign interests at various points during a comity analysis. The discipline of conflict of laws gives us the language to appreciate the conflict avoidance and reduction techniques adopted by U.S. courts in cross-border discovery cases. China's data protection laws have been an example of how this applies as the U.S. attempts to enforce the FCPA.

III. IMPACT OF CHINA'S DATA PROTECTION LAWS ON FCPA ENFORCEMENT

[71] The FCPA represents one of the most prominent examples of U.S. law enforcement's extraterritorial expansion of powers. As such, it serves as an ideal case study for examining the potential complications that may arise when U.S. law is enforced beyond American borders. The FCPA makes it a federal crime to offer money or anything of value to foreign government officials, political parties, and other prohibited recipients to obtain or retain business.[206] Its 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 anyone other than an issuer or domestic person who takes steps in furtherance of an improper payment scheme while in the U.S. territory.[207] Over the last three decades, the FCPA's enforcement agencies have been pushing the limits of the law's jurisdictional reach, particularly over foreign

[205] *Id.*

[206] 15 U.S.C. § 78dd-1(a)(1)–(3).

[207] *Id.* § 78dd-2(a), (h)(1); *id.* § 78dd-3(a), (f)(1).

nationals and businesses.[208] 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.[209]

[72] By criminalizing the payment of bribes in foreign jurisdictions, the FCPA arguably provides the United States with a powerful tool to leverage its own market power to promote more ethical business investments worldwide. Within the last decade, FCPA investigations have involved improper business payments in more than 100 countries.[210] Among these countries, China stands out as the highest-ranked location for alleged misconduct in FCPA-related enforcement actions.[211] This means that a considerable number of foreign bribery cases investigated by U.S. authorities involve gathering evidence from China. However, collecting and exporting evidence from China has become increasingly problematic as a

[208] *See* 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. 470, 470–471 (2016) (discussing how the FCPA has "territorial jurisdiction" over foreign individuals and businesses committing certain acts within U.S. territories); Natasha N. Wilson, *Pushing the Limits of Jurisdiction Over Foreign Actors Under the Foreign Corrupt Practices Act*, 91 WASH. U. L. REV. 1063, 1070 (2014) ("The jurisdictional reach of the FCPA has expanded significantly over time. Some of those changes came through statutory amendment in response to problematic gaps in the law. Others have come about in practice as the DOJ and SEC have charged and settled cases that include expanded jurisdictional bases.").

[209] *See* Annalisa Leibold, *Extraterritorial Application of the FCPA under International Law*, 51 WILLAMETTE L. REV. 225, 228 (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.").

[210] *See Location of Misconduct Alleged in FCPA-Related Enforcement Actions (by FCPA Matter)*, *supra* note 42.

[211] *Id.*

result of the country's recently passed data protection laws.[212] Prior to the implementation of the DSL and the PIPL in 2021, China had a set of laws and regulations in place that made it illegal for any entities or individuals within Chinese territory to provide evidence to foreign judicial or law enforcement agencies without prior approval from a competent Chinese authority.[213] The newly promulgated data protection laws, however, further complicate and expand the cross-border data transfer regulatory landscape

[212] *See* Steve Kwok et al., *Recent Trends in China-Related Cross-Border Enforcement*, SKADDEN (Aug. 4, 2022), https://www.skadden.com/insights/publications/2022/08/recent-trends-in-china-related-cross-border-enforcement [https://perma.cc/D9JD-NYBK] ("Recent People's Republic of China (PRC) blocking statutes and laws on cyber and data security and privacy have made cross-border enforcement more challenging."); Helen Hwang & Eric Carlson, *China's Proposed Data Security and Personal Information Protection Laws Will Impact Investigations*, THE FCPA BLOG (May 18, 2021), https://fcpablog.com/2021/05/18/chinas-proposed-data-security-and-personal-information-protection-laws-will-impact-investigations [https://perma.cc/GA8D-MQHK] ("[I]f a judicial or enforcement agency outside of China requests data stored in China — either personal data or non-personal data — companies must first obtain the approval of the Chinese government before transferring the data, or face potential penalties, such as fines."); Gary J. Gao, *China-related Cross-border Investigation under New Data Protection Legislations*, GLOB. INVESTIGATIONS REV. (Sept. 30, 2022), https://globalinvestigationsreview.com/review/the-asia-pacific-investigations-review/2023/article/china-related-cross-border-investigation-under-new-data-protection-legislations [https://perma.cc/39PZ-SN73] ("[I]t could be seen that multinational corporations (MNCs), or Chinese companies – either state-owned or private with businesses or entities in foreign jurisdictions (Companies) – might face a difficult situation between the data provision requested in cross-border government investigation and China's new data protection legislation, which has created new and challenging compliance obligations for Companies.").

[213] *See* Ryan Rohlfsen et al., *China Enacted "Blocking Statute" for International Criminal Judicial Assistance*, ROPES & GRAY (Feb. 25, 2019), https://www.ropesgray.com/en/newsroom/alerts/2019/02/china-enacted-blocking-statute-for-international-criminal-judicial-assistance [https://perma.cc/D7P2-6B9V] (discussing the 2018 International Criminal Judicial Assistance Law which serves as a blocking statute that requires approval by PRC governmental authorities before any institution, organization, or individual within the territory of the PRC can provide evidence materials and assistance to any foreign countries' criminal proceedings).

in China by imposing restrictions on the collection, processing, and sharing of personal data by and among private entities.[214]

[73] A quick review of how U.S. law enforcement agencies conduct cross-border corporate investigations will be helpful in understanding the impact of China's data protection laws on FCPA-related enforcement proceedings. Broadly speaking, U.S. authorities rely on two main channels to gather evidence from abroad: intergovernmental collaboration and corporate cooperation.[215] Intergovernmental collaboration can be formal or informal.[216] Formal requests for assistance from foreign law enforcement agencies are typically transmitted through MLATs or executive agreements.[217]

[74] However, as previously discussed, the pursuit of evidence through formal requests frequently involves cumbersome and time-consuming procedures, hindering the ability of U.S. law enforcement agencies to conduct timely and effective investigations of alleged crimes.[218] As a result, U.S. regulators increasingly rely on informal relationships with their foreign counterparts for information sharing and investigative coordination.[219]

[214] *See, e.g.*, PIPL, *supra* note 20, art. 38.

[215] Arlen & Buell, *supra* note 2, at 726 (discussing how a cooperative corporation can reduce problems for government investigators because of their access to electronic evidence and data); Jason Linder et al., *How US Authorities Obtain Foreign Evidence in Cross-border Investigations*, GLOB. INVESTIGATIONS REV. (Oct. 15, 2021), https://globalinvestigationsreview.com/review/the-investigations-review-of-the-americas/2022/article/how-us-authorities-obtain-foreign-evidence-in-cross-border-investigations [https://perma.cc/VM4V-S5XZ].

[216] Linder et al., *supra* note 215.

[217] *Id.*

[218] Arlen & Buell, *supra* note 2, at 726 ("Production of foreign documents can be ordered only with cumbersome procedures provided through mutual legal assistance treaties.").

[219] Linder et al., *supra* note 215.

Many of these relationships are formed through international law enforcement conferences or prior collaborations in multi-jurisdictional corporate investigations, and they frequently allow for more efficient and productive transfers of evidence across borders.[220] However, as long as political and economic tensions between the United States and China persist, it is unlikely that law enforcement officers will develop close, productive relationships that promote a free flow of evidence from one country into the other.

[75] Because of the complexities and uncertainties associated with intergovernmental collaboration, U.S. law enforcement has heavily relied on cooperating companies as the primary source of foreign evidence.[221] The FCPA corporate enforcement policy, for example, strives to induce corporate self-reporting and cooperation, primarily by offering more favorable forms of resolution and reduced fines.[222] According to Arlen and Buell, corporate cooperation is extremely valuable to the U.S. government in detecting and prosecuting corporate crime because of "a range of U.S. laws that give firms a comparative advantage over enforcers in gathering evidence of corporate misconduct."[223] In particular:

> [c]orporations in the United States generally have the right to access work-related electronic evidence, including employees' emails, on servers or company-owned computers, even when this information contains employees' personal data. As a result, corporations can better detect misconduct in the first instance by routine monitoring of employees' emails, data storage facilities, and other

[220] *Id.*

[221] *Id.*; Arlen & Buell, *supra* note 2, at 702.

[222] Arlen & Buell, *supra* note 2, at 700.

[223] *Id.* at 704.

electronic evidence.[224]

[76] The expected value of corporate cooperation will be dramatically diminished, however, if foreign data protection laws limit a corporation's ability to freely monitor employees' communications or evaluate electronic documents.[225] China's PIPL, for example, restricts companies' capacity to monitor and process employee emails and other work-related documents because these inevitably contain personal information.[226] Under the PIPL, personal information is broadly defined to include "all kinds of information, recorded by electronic or other means, related to identified or identifiable natural persons."[227] A corporation engages in "personal information processing" whenever it performs any "collection, storage, use, processing, transmission, provision, disclosure, or deletion" of personal information.[228] Personal data may only be processed if a corporation obtains individuals' explicit voluntary consent or has a legal justification specified by the PIPL.[229] Notably, the PIPL further provides heightened protections for "sensitive personal information," which is broadly defined to include information on "biometric characteristics, religious beliefs, specially-designated status, medical health, financial accounts, individual location tracking, etc."[230] Processing sensitive personal information requires a specific purpose, substantial necessity, and includes stricter protective

[224] *Id.* at 726–27.

[225] *Id.* at 748.

[226] PIPL, *supra* note 20, art. 2, 4 (defining the scope of the law in Article 2 and defining the term "personal information" in Article 4).

[227] *Id.* art. 4.

[228] *Id.*

[229] *Id.* art. 13.

[230] *Id.* art. 28.

measures.[231] Separate consent must also be obtained, and written consent may be required if provided by other laws or administrative regulations.[232] These requirements, together with the potential liability risks for noncompliance, may significantly reduce the incentives and ability of China-related corporations to implement robust internal compliance systems to monitor, investigate, and mitigate employee wrongdoing.

[77] Even if a company has managed to conduct investigations and collect evidence in Chinese territory, it may still face obstacles in sharing the fruits of investigations outside of China.[233] Under the PIPL, companies must obtain approval from the competent Chinese authorities before disclosing personal information stored in China to foreign judicial or law enforcement agencies.[234] In practice, it is often difficult to obtain approval with sufficient specificity as to the scope of personal information permissible to export to foreign authorities, and the approval procedures themselves can be lengthy and cumbersome.[235] No such authorization from a Chinese authority is required if the cross-border transfer of evidence is unrelated to investigations or proceedings by foreign judicial or enforcement authorities. Nonetheless, the PIPL may still impose onerous requirements on companies that seek to share personal information stored in China with private entities and individuals located in a foreign jurisdiction.[236] Article 38 of the PIPL provides that:

> [w]here personal information handlers truly need to provide

[231] PIPL, *supra* note 20, art. 28.

[232] *Id.* art. 29.

[233] *Id.* art. 38–43.

[234] *Id.* art. 41.

[235] *See In re* Valsartan, Losartan, & Irbesartan Prods. Liab. Litig., No. 2875, 2021 U.S. Dist. LEXIS 242593, at *158–59 (D.N.J. Dec. 20, 2021).

[236] PIPL, *supra* note 20, art. 38.

> personal information outside the borders of the People's Republic of China for business or other such requirements, they shall meet one of the following conditions:
>
> 1. Passing a security assessment organized by the State cybersecurity and informatization department according to Article 40 of this Law;
> 2. Undergoing personal information protection certification conducted by a specialized body according to provisions by the State cybersecurity and informatization department;
> 3. Concluding a contract with the foreign receiving side in accordance with a standard contract formulated by the State cyberspace and informatization department, agreeing upon the rights and responsibilities of both sides;
> 4. Other conditions provided in laws or administrative regulations or by the State cybersecurity and informatization department.[237]

[78] On July 7, 2022, the Cyberspace Administration of China (CAC) released the Outbound Data Transfer Security Assessment Measures ("Measures"), which further specifies the circumstances under which a security assessment is required before transferring data outside of China.[238] Article 4 of the Measures provides that:

> [d]ata handlers providing data abroad shall, in any of the following circumstances, apply for outbound data transfer security assessment with the national cybersecurity and informatization department through their local provincial-level cybersecurity and informatization department:

[237] *Id.*

[238] Rogier Creemers et al., *Translation: Outbound Data Transfer Security Assessment Measures – Effective Sept. 1, 2022*, DIGICHINA (July 8, 2022), https://digichina.stanford.edu/work/translation-outbound-data-transfer-security-assessment-measures-effective-sept-1-2022/ [https://perma.cc/BT54-6SMQ] [hereinafter Measures].

> 1. Where the data handler provides important data abroad;
> 2. Critical information infrastructure operators and data handlers handling the personal information of over 1 million people providing personal information abroad;
> 3. Data handlers providing abroad the personal information of more than 100,000 people or the sensitive personal information of more than 10,000 people since January 1 of the previous year;
> 4. Other circumstances where the State cybersecurity and informatization department provides data export security assessment must be applied for.

[79] The term "important data" is vaguely and broadly defined as "data that, if it is altered, destroyed, leaked, illegally acquired or illegally used,… may harm national security, economic operations, social stability, public health or security…."[239] This provision further limits the ability of Chinese-adjacent companies to participate in and comply with self-regulation.

[80] Given that the Measures only recently went into effect on September 1, 2022, much of their potential impact on cross-border corporate investigations remains to be explored. It is certain, however, that Article 38 of the PIPL and the Measures further complicate the already convoluted procedures for exporting data out of China. With the new data transfer restrictions in place, foreign private entities, such as overseas headquarters or certain foreign self-regulatory organizations with the power and expertise of supervising and regulating transnational business activities, will have much less access to the fruits of investigations conducted in China.[240] This may have a substantial negative impact on FCPA-related enforcement actions, particularly because U.S.-based corporate headquarters and financial self-regulatory organizations are important avenues through which the U.S. government may detect and investigate foreign bribery.[241] For

[239] *Id.*

[240] Gao, *supra* note 212.

[241] *Id.*

instance, without an ongoing FCPA investigation, a U.S. headquarters may request cross-border transfers of internal investigation findings gathered by its Chinese subsidiary as part of a routine self-governance procedure. If the U.S. headquarters detects misconduct by its Chinese subsidiary, it may choose to report its findings to enforcers and cooperate with government investigations by supplying documentary records already transferred from its Chinese subsidiary to the United States. This may be the case even if the initial motivation for the internal data transfer request was not to prepare for FCPA-related investigations.

[81] Similarly, financial self-regulatory organizations, such as Nasdaq and the Chicago Mercantile Exchange (CME), may request document transfers from Chinese issuers as part of an investigation into suspicious trading or dealing practices.[242] If signs of foreign bribery are uncovered in this process, these organizations may notify FCPA enforcers and cooperate with government investigations. However, because China's newly enacted data transfer regulations significantly restrict companies' ability to share internal investigation findings gathered in Chinese territory with both U.S. public authorities and private entities, future China-related FCPA violations may become increasingly difficult to detect and investigate.

[82] As evidenced by the potential impact of China's data protection laws on FCPA enforcement actions, purpose-specific anti-investigative laws can pose significant obstacles to U.S. corporate criminal investigations. Foreign data transfer restrictions, by limiting companies' capacity to gather evidence from employees or provide U.S. enforcers with critical corporate records maintained in specified places of operations,[243] threaten to obstruct the U.S. authorities' most important source of foreign evidence in cross-border corporate enforcement actions. U.S. enforcers should evaluate the validity of a company's assertion that foreign anti-investigative laws prevent it from cooperating more fully. A conflict-of-laws approach can be used for FCPA

[242] *Id.*

[243] *See* Arlen & Buell, *supra* note 2, at 747–48.

enforcers to understand, evaluate, and balance conflicting compliance requirements in foreign bribery enforcement actions.

IV. A CONFLICT-OF-LAWS APPROACH TO ANTI-INVESTIGATIVE LAW

[83] Conflict of laws, traditionally viewed as a branch of law aiming to solve multistate legal disputes between private persons or entities, consists of three sub-divisions: jurisdiction, choice of law, and judgment recognition.[244] Under the conflicts analysis, jurisdiction and choice of law are two independent inquiries.[245] 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 accordance with the substantive law of the forum or that of the foreign state(s).[246] Should Chinese law or U.S. law apply, for instance, when a dispute arises over what a corporation headquartered in the U.S. can do with employee data held by a Chinese subsidiary? As a discipline dealing with foreign-related legal disputes, conflict of laws offers a series of doctrines and technical steps to guide the allocation of regulatory authority in multijurisdictional cases. The conflicts analysis may contribute to the resolution of conflicting compliance requirements in the context of cross-border FCPA investigations.

[84] To understand the potential of conflict of laws as a normative framework for dealing with foreign anti-investigative laws, it is essential to first understand the mechanics of the choice-of-law process. The choice-of-law process typically proceeds through a series of technical steps. First, the court must determine whether the case involves a foreign element, meaning that a reasonable doubt may arise as to the application of law. Common law jurisdictions generally require that the parties plead and prove foreign law

[244] *See* SYMEONIDES, *supra* note 197, at 1.

[245] *Id.* at 3.

[246] *Id.* at 1.

to the court, otherwise the forum law will be applied.[247] The second step is to characterize the case into a legal category, such as contracts, torts, and so forth. Under the traditional conflicts approach, choice-of-law rules are formulated with reference to different categories of law.[248] For example, courts determine tort issues by reference to the law of the place of wrong (*lex loci delicti*)[249] and contract issues by reference to the law of the place where the contract was made (*lex loci contractus*). [250] Therefore, characterization can be a result-determinative step under the traditional conflicts analysis, as it determines which choice-of-law rule is applicable and thus the governing law, by fitting a case into a specific legal area.[251]

[85] For example, an action for unauthorized disclosure of employees' personal data may be characterized as a breach of contract or tort. According to the forum's conflict of laws rules, contractual disputes may be governed by the law of the place where an employee privacy agreement was signed, whereas tort liability may be governed by the law of the place of the tortious act. The laws of the two places may differ as to what constitutes personal employee information and the court's characterization could thus have an impact on the outcome of the case.

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[247] *See* William B. Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CAL. L. REV. 23, 24–25 (1957).

[248] *See* Robert Allen Sedler, *Characterization, Identification of the Problem Area and the Policy-Centered Conflict of Laws: An Exercise in Judicial Method*, 2 RUTGERS-CAM L.J. 8, 26 (1970) ("It has now become standard practice to analyze problems of the conflict of laws in terms of the distinction between the 'traditional' and 'modern' approaches to the choice of law process," with the traditional approach mainly referring to the choice-of-law rules adopted by the First Restatement).

[249] *See Lex Loci Delicti Rejected in Torts Conflicts of Law - Griffith v. United Airlines, Inc.*, 25 MD. L. REV. 238, 238 (1965).

[250] *See* James Audley McLaughlin, *Conflict of Laws: The Choice of Law Lexi Loci Doctrine, the Beguiling Appeal of a Dead Tradition, Part One*, 93 W. VA. L. REV. 957, 963 (1991).

[251] *See* SYMEONIDES, *supra* note 197, at 64.

[86] The third step is to identify and "localize" the connecting factor, which entails the determination of the place of injury for torts, the place of creation for contracts, and so forth. After the characterization step identifies the applicable choice-of-law rule, and the localization of connecting factors identifies the state supplying the applicable substantive law, the fourth step is to examine the law of that state (if not the forum) and ask pointed questions before applying it. For example, should the law of that state govern the "whole" case or only certain issues? What if the application of foreign law offends the forum's public policy? Finally, the court makes its decisions and applies the applicable law to the particular case or issue.

[87] The aforementioned mechanics of the choice-of-law process are primary components of traditional conflicts methodologies. I will also explore the implications of some modern choice-of-law approaches (such as governmental interest analysis), which grew out of the subsequent rejection of the traditional conflict-of-laws mechanics for resolving cross-border conflicts in corporate criminal enforcement. In general, when I refer to "the conflict-of-laws approach," I do not mean the conflicts rules as adopted by any particular state or in any particular historical period. Rather, I will take into consideration the broader conflicts tradition, focusing on those doctrines and theories in the tradition that hold the greatest promise for coping with foreign anti-investigative laws in the corporate investigation context.[252] Subsection A defines the conflict-of-laws approach, primarily through a literature review of recent scholarly works that explore how conflict of laws may contribute to global governance. Subsection B then suggests how FCPA enforcers should use this approach to deal with foreign anti-investigative laws.

A. Introducing the Conflict-of-Laws Approach

[88] The field of conflict of laws has both descriptive and normative

[252] *See generally* Knop et al., *supra* note 4, at 595 (adopting a slightly modified conflict-of-laws approach).

dimensions.[253] From a descriptive viewpoint, this field offers a framework for understanding and structuring the interaction between various communities involved in multistate cases.[254] Through the proof of foreign laws either pleaded by the parties or noticed by the court *ex officio*, the conflicts analysis directs our attention to the existence of regulatory regimes foreign to our own, and it starts with the question of which authority provides the applicable body of law.[255] The problem this discipline deals with is therefore "not just what is the source of the authority for our laws and our judicial decisions, but whose rules or values *should* prevail, and what *are* these rules or values anyway?"[256] From a normative perspective, conflict of laws offers a series of doctrines and technical steps to deal with the clash of regulatory systems in specific cases.[257]

[89] In its advocacy for conflict of laws as a promising model for global governance, recent literature typically adopts the descriptive framework from conflict of laws but not its normative solutions—existing techniques

[253] *See* Ralf Michaels, *Post-critical Private International Law: From Politics to Technique*, *in* PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 54, 56 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014) ("Conflict of Laws is an ambiguous name for a legal discipline. It is ambiguous because it means two things at the same time—the problem with which the field deals, and the responds to this problem given by the law.").

[254] *See id.*

[255] *See* Knop et al., *supra* note 4, at 627.

[256] Annelise Riles, *Cultural Conflicts*, 71 LAW & CONTEMP. PROBS. 273, 275 (2008).

[257] *See* Knop et al., *supra* note 4, at 647. For criticisms against the mechanical nature and the doctrinaire quality of traditional conflicts analysis, *see generally* WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS (1942); David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); CURRIE, *supra* note 136. Despite such criticisms, one could still observe an irrepressible need for rules in the Restatement (Second) of Conflict of Laws. *See* Michaels, *supra* note 253, at 64 ("Some conflict of laws technique is observable in most approaches…"); *see also* SYMEONIDES, *supra* note 197, at 111 ("The final version of the Restatement (Second), promulgated in 1969, did not join the revolution, but was a conscious compromise and synthesis between the old and new schools[.]").

with which to deal with conflicting regulatory norms. Therefore, even though a growing body of conflicts scholars finds conflict of laws to be a helpful lens for revealing and recognizing the conflicts between various regulatory regimes, these scholars seldom provide concrete methods for how to deal with these conflicts.

[90] Andreas Fischer-Lescano and Gunther Teubner have argued that in a fragmented global society, the focus of the conflicts analysis should be reoriented away from "conflicts between national legal orders" to "conflicts between sectoral regimes."[258] According to Fischer-Lescano and Teubner, global law develops mainly from multiple sectors of civil society, which "define the external reach of their jurisdiction along issue-specific rather than territorial lines."[259] Since each societal sector forms a "self-contained regime" by generating highly specialized norms reflecting its own rationales, a conflict of norms could be conceived as a conflict of competing rationales of various functional regimes.[260] For example, patent protection rules reflecting the economic rationality of global markets may collide with World Health Organization norms derived from principles of the health system.[261] Similarly, as demonstrated in this Article, the privacy rationale behind data protection regimes may be incompatible with the transparency rationale of transnational anti-corruption regimes. Although Fischer-Lescano and Teubner adopt the problem descriptions from conflict of laws, they reject the idea that the technical rules of traditional conflict of laws could do justice to such inter-regime conflicts.[262] Instead, they propose a new "substantive law approach," whereby the concerned courts would assess and combine the relevant norms of all functional regimes involved

[258] 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, 1020 (2004).

[259] *Id*. at 1009.

[260] *Id.* at 1013.

[261] *See id*. at 1032.

[262] *Id*. at 1021–22.

and create a transnational body of law for the individual case at hand.[263] Their approach seeks to achieve political compromise and compatibility, rather than a legal resolution.[264]

[91] Christian Joerges is another scholar who has explored the potential of conflict of laws for global governance. [265] He proposes reconceptualization of European law as a conflict-of-laws regime.[266] More specifically, he explores the potential of a "conflicts law approach" to "organize the cooperation between different levels of governance and resolve the tensions which result within national systems from the selective interventions of European Law."[267] While Joerges considers conflict of laws to be a useful analytical framework for recognizing conflicts between national and supranational regulatory competencies, it is unclear whether he considers traditional conflicts methods to be effective in resolving these conflicts.[268] Ralf Michaels has commented that, rather than investigating the extent to which existing conflicts techniques may address these conflicts, Joerges seems to prefer some type of balancing between competing rationales, which is "a political, rather than a legal, response."[269]

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[263] Fischer-Lescano & Teubner, *supra* note 258, at 1021–23.

[264] *Id.* at 1022–23 ("This leaves only one possible solution: developing substantive rules through the law of inter-regime-conflicts itself. . . . Concerned courts—national courts and transnational instances of conflict resolution—would be required to meet the challenges of creating transnational substantive norms out of this chaos, seeking for the individual case at hand appropriate legal norms beyond their territorial, organizational and institutional legal spheres and taking responsibility for combining them norms in order to develop a transnational body of law.").

[265] Joerges, *supra* note 4, at 163; Joerges et al., *supra* note 4; Christian Joerges, *The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective*, 3 EUR. L.J. 378, 378 (2002).

[266] *See, e.g.*, Joerges et al., *supra* note 4.

[267] Joerges, *supra* note 4, at 163.

[268] Michaels, *supra* note 253, at 55.

[92] Meanwhile, Paul Schiff Berman has explored how traditional conflict of laws doctrines should respond to the realities of global legal pluralism.[270] He argues that people can hold multiple, sometimes non-territorial, affiliations with various non-state communities, and that they sometimes understand themselves to be bound by the norms of these communities.[271] Berman proposes a cosmopolitan pluralist approach to conflict of laws: *cosmopolitan* because it recognizes the possibility that people can hold overlapping, sometimes non-territorial, affiliations with various non-state communities; and *pluralist* because it acknowledges that both legislative and adjudicative jurisdictions could be asserted by communities that are non-state in nature.[272] While this modified conflict-of-laws analysis provides a descriptive framework for recognizing the reality of regulatory hybridity, Berman resists using the technical rules of a choice-of-law analysis to manage global legal pluralism.[273] Instead, he argues that

[269] *Id.*

[270] *See* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 311 (2002); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485, 485 (2005) [hereinafter *Law and Globalization*]; Paul Schiff Berman, *Conflict of Laws, Globalization, and Cosmopolitan Pluralism*, 43 WAYNE L. REV. 1105, 1105 (2005); Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*,153 U. PA. L. REV. 1819, 1819 (2005) [hereinafter *Cosmopolitan Vision*]; Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301, 302 (2007).

[271] *Law and Globalization*, *supra* note 270, at 507.

[272] *Cosmopolitan Vision*, *supra* note 270, at 1821.

[273] Paul Schiff Berman, *Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Legal Pluralism*, 20 IND. J. GLOB. LEGAL STUD. 665, 666 (2013) ("Indeed, the entire field of conflict of laws (sometimes called private international law) aims to provide rules to determine what norms apply in disputes among multiple communities. These rules often devolve into formalistic questions, such as whether a particular share certificate memorializing ownership of a company or a particular Internet server is physically located within the territorial boundaries of one jurisdiction or another. Yet, the issues of how to manage pluralism must not be relegated to such technocratic inquiries.")

seeking "provisional compromises" may sometimes be the best we can do, and that each individual case should be dealt with differently depending on context.[274] While Berman's work offers crucial insights into making conflict of laws a basis for continuing debates about hybridity and legal conflicts, less clarity exists as to how the modified conflicts analysis could be used to achieve the case-by-case "provisional compromises."[275]

[93] To summarize, while numerous attempts have been made to explore conflict of laws as a helpful lens for recognizing the conflicts between different regulatory regimes, few have been devoted to the methodological solutions to these conflicts. Particularly, there has been relatively little discussion on the extent to which existing techniques of the conflicts analysis may be utilized to manage regulatory pluralism at a global level. The rejection of conflict-of-laws methodologies for the resolution of regulatory conflicts is largely attributable to the field's highly technical quality.[276] The conflicts analysis has long been criticized for its rigidity and mechanical operation.[277] Most of the rules of the First Restatement of Conflict of Laws, for example, depend exclusively on a single contact, such as the place of the wrong for torts, or the place of making for contracts, to determine applicable laws.[278] Traditional conflicts methods have also been criticized for relying solely on territorial contacts in allocating legislative jurisdictions, without contemplating the content or underlying policies of the implicated laws.[279] As a result, the traditional conflicts analysis has been compared to a slot machine, which is programmed to pop automatic

[274] Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1236–37 (2007).

[275] *Id.*

[276] *See* Riles, *supra* note 4, at 96.

[277] SYMEONIDES, *supra* note 197, at 96.

[278] *Id.* at 67.

[279] Cavers, *supra* note 257, at 178.

results once the coins (the territorial contacts) are inserted.[280]

[94] Compare modern conflicts approaches—such as the Restatement (Second) of Conflict of Laws and Brainerd Currie's governmental interest analysis—which are far more flexible and less mechanical in determining the applicable law. However, these approaches still prioritize technical legal questions over public policy considerations. The conflicts technique of interest analysis, for example, consists of two basic steps: The court should first examine the substantive policies embodied in the laws of the involved states, primarily through the ordinary process of statutory "construction and interpretation"[281] commonly employed in wholly domestic cases. Then, the court shall determine whether each involved state has an appropriate contact with the parties, the subject matter, or the litigation, so that it is reasonable for each state to claim an interest in having its respective policies effectuated in a specific case.[282] Regarding the first step, Currie urged moderation and restraint in construing governmental interests in an effort to reduce the number of true conflicts.[283] In other words, the interest analysis prioritizes conflict avoidance over generating a comprehensive picture of competing state policies. In the second step, Currie's interest analysis would determine the legitimacy of a state's interests in effectuating its policies in a specific case based primarily on a domiciliary nexus.[284] In almost all instances, Currie would identify a genuine governmental interest based on the fact that one of the parties was domiciled in the implicated state(s), a conclusion he derived from the assumption that "states have special interests in litigation

[280] SYMEONIDES, *supra* note 197, at 96.

[281] Friedrich K. Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 9 (1984).

[282] SYMEONIDES, *supra* note 197, at 100.

[283] Ratner, *supra* note 166, at 759.

[284] Juenger, *supra* note 281, at 9–10.

that affects persons who are domiciled or residing within their borders."[285] Consequently, in the evaluation of state interests, domicile or residence almost always plays a decisive role in the interest analysis, and the most interested state will almost certainly be the state of at least one of the parties' domicile.[286]

[95] The controversies and debates surrounding the technical quality of the conflicts analysis are beyond the scope of this study and have been reviewed elsewhere.[287] For the purpose of this study, however, suffice it to say that the conflicts analysis, with its excessive emphasis on technicalities, risks obscuring or diluting the underlying political and social tensions that give rise to the surface-level legal disputes.[288] Yet as Annelise Riles and others have argued, it is precisely the technical aspect of conflict of laws that makes it a promising tool for the management of regulatory pluralism.[289] According to Riles:

> the technical effect of Conflicts provides a register for moving beyond overt politics in discussions of politically contentious transnational questions. Conflicts treats political questions *as if* they were merely technical ones. It provides

[285] John Bernard Corr, *Interest Analysis and Choice of Law: The Dubious Dominance of Domicile*, 4 UTAH L. REV. 651, 653 (1983).

[286] *Id.* at 665.

[287] *See, e.g.*, Knop et al., *supra* note 4, at 594; Riles, *supra* note 4, at 95–96; RILES, *supra* note 168, at 64–65; Annelise Riles, *Is the Law Hopeful?*, *in* HOPE IN THE ECONOMY 126, 138–39 (Hirokazu Miyazaki & Richard Swedberg eds., 2012); PIERRE SCHILAG, THE ENCHANTMENT OF REASON 109–12 (1998).

[288] Knop et al., *supra* note 4, at 643.

[289] Karen Knop et al., *International Law in Domestic Courts: A Conflict of Laws Approach*, 103 AM. SOC'Y INT'L L. PROC. 269, 271 (2010) ("Here, the technicality of conflict of laws is not a shortcoming but a strength. The 'conflict-of-laws machine,' we argue, is a way to reach a result without yielding to arbitrariness in the face of otherwise insurmountable complexity."); Knop et al., *supra* note 4, at 594; Riles, *supra* note 4, at 96.

> a framework, a series of technical pathways for discussion, which obviates and transforms the political questions so experts can approach them anew. The field is populated by a cadre of legal experts, who are cosmopolitan in their outlook and who think more in terms of technical puzzle solving than in terms of political banner-waving. The field's studied technicality may serve to practical advantage in cases where the more straightforwardly political approaches to harmonization—transnational negotiations at the state level— have failed to produce adequate results.[290]

[96] Notably, Riles emphasizes that technique is different from formalism which views law as a mere constraint in the oblivion of politics.[291] Rather, the technicalities of the conflicts analysis stresses the questions of form without denying politics, which is achieved through an "*as if*" modality.[292] That is, the conflicts analysis operates with fictions—aware of the irresolvable political conflicts, but holding, for the time being, "as if" the politics do not exist for the specific case at hand.[293] By temporarily shifting our focus from values and politics to the formally constrained legal techniques, conflict of laws does not cut off discourse; instead, it opens up an alternative discourse within which to frame, evaluate, and ultimately resolve, at least for the time being, value conflicts that are otherwise irresoluble if tackled in another way.[294]

B. Application in Cross-Border FCPA Enforcement

[97] As previously discussed, the conflicts doctrines and techniques are

[290] *See* Riles, *supra* note 4, at 96.

[291] Knop et al., *supra* note 4, at 642.

[292] *Id.* at 647–48.

[293] *Id.*

[294] *See id.* at 647.

already operating in the background of judicial analysis of China's PIPL and DSL in cross-border discovery disputes.[295] In particular, U.S. courts have resolved conflicts between U.S. discovery rules and China's data transfer regulations not by balancing competing national interests, but by employing various techniques of conflict interpretation. In applying such techniques, U.S. courts have invoked the interpretive approaches and problem-solving methods typical of a conflict-of-laws analysis.

1. Pleading and Proving Foreign Law

[98] The pertinence of foreign law is apparent in FCPA cases: the FCPA's anti-bribery provisions have extraterritorial jurisdiction and can even apply to an improper payment scheme devised and executed entirely outside the United States.[296] 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.[297]

[99] The conflict-of-laws approach to the ascertainment of foreign law requires that the law be pleaded and proved with sufficient particularity and specificity.[298] Most notably, under the conflicts analysis, the process of proving foreign laws seeks to go beyond positive rules and take all the elements that constitute the "living law" of a foreign country into consideration, which may include the gap between the statutory design and

[295] *See supra* Part II.B.

[296] Leibold, *supra* note 209, at 226–28 ("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.").

[297] *See* FED. R. CIV. P. 44.1.

[298] Riles, *supra* note 4, at 108.

actual implementation.[299] By doing so, the conflicts approach reveals how a particular foreign law is applied in practice, captures the possible inconsistencies between law on the books and law in action, and ultimately understands to what extent the involved regulatory regimes are similar or different, compatible or incompatible, fulfilling the same or diverse policy goals.[300] Therefore, if a corporation alleges that China's data protection laws prevent it from cooperating with FCPA-related investigations, it will need to prove the following information to the satisfaction of U.S. enforcers: (1) What exactly is the substance of Chinese law that prevents disclosure of the requested information? (2) Are there any legislative, judicial, administrative, or other authoritative interpretations of the meaning, scope, or application of the relevant data transfer regulations? (3) Do China's data transfer restrictions establish a real threat of punishment, i.e., is there evidence that Chinese government authorities have in fact sanctioned corporations who have disclosed investigation-related data stored in China to U.S. law enforcement agencies?

[100] The issue-by-issue analysis adopted by the conflicts approach further increases the need for specificity when proving the content of foreign law. In the conflicts analysis, if a case involves more than one issue, a separate choice-of-law inquiry must be made with regard to each issue because 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.[301] Litigants and their attorneys often have to carefully compare all the applicable laws of competing jurisdictions before determining whether to put foreign law in issue for certain aspects of their case. If the court, after going through each

[299] *See generally* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 21–26 (1991) ("The exegetical, historical, rational, and sociological methods, as well as legal realism, all look to reality and hence appreciate the importance of judicial decisions.").

[300] *See* Mathias Reimann, *Comparative Law and Private International Law*, *in* OXFORD HANDBOOK OF COMPARATIVE LAW 1363, 1394 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

[301] SYMEONIDES, *supra* note 197, at 125.

step of a conflicts analysis, applies the laws of different jurisdictions to different issues of a case, the resulting phenomenon is called dépeçage.[302]

[101] The concept of dépeçage has significant implications for FCPA enforcers in evaluating the level of specificity of a corporation's proof of foreign anti-investigative laws. Under the FCPA Corporate Enforcement Policy (CEP), corporate cooperation can take numerous forms and occur at various points in an anti-corruption investigation.[303] Although a corporation will receive maximum credit for full cooperation only if it has "voluntarily self-disclosed, fully cooperated, and timely and appropriately remediated" its misconduct, not every corporation will meet all the components of full cooperation.[304] This is "either because they decide to cooperate only later in an investigation or they timely decide to cooperate but fail to meet all of the criteria" listed in the CEP.[305] Nonetheless, corporations that find ways to assist with investigations will still receive credit from FCPA prosecutors.[306] Conversely, penalties may be imposed upon corporations that deliberately strive to capitalize on foreign data protection regulations to avoid any kinds of cooperation.[307] Therefore, when assessing a corporation's claim that foreign anti-investigative laws prevent full cooperation, FCPA prosecutors must consider whether the corporation has established the existence of any restrictions on specific forms of cooperation, as well as whether the corporation has actively identified and provided alternative forms of cooperation permitted under the foreign law at issue.

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[302] *Id.*

[303] *See* FCPA Corporate Enforcement Policy, *supra* note 35.

[304] *Id.*

[305] *Id.*

[306] *Id.*

[307] *Id.*

2. Conflict Avoidance

[102] Let us assume that a cooperating corporation has pleaded and proved foreign anti-investigative laws with sufficient specificity and particularity, and that there does exist—at least on the surface—a conflict of compliance obligations. What should an FCPA enforcer do next under the conflict-of-laws approach?

[103] Brainerd Currie's governmental interest analysis could provide critical insight at this point. This study borrows Currie's theory and focuses on an important insight of the interest-analysis theory for resolving cross-border conflicts in FCPA investigations: conflict can be "minimized" or "avoided" by eliminating false conflicts, situations in which only one state is found to be interested in effectuating its policies, or where the policies of several interested states are essentially compatible.[308]

[104] In cross-border corporate enforcement actions, prosecutors can determine cooperation credit by considering the extent to which the cooperating corporation has contributed to the goal of conflict avoidance. For example, has the corporation used its best good faith efforts to identify alternative methods of obtaining or disclosing pertinent information? Is the corporation willing to collaborate with prosecutors to narrow the scope of data transfer requests so that critical information about individual wrongdoing can be supplied without violating foreign anti-investigative law? Has the corporation pursued or secured the necessary approvals for processing the requested data in a timely and proactive manner?

3. Comparative Impairment Analysis

[105] If attempts at conflict avoidance are unsuccessful despite a corporation's good faith cooperation, should FCPA enforcers compel the production of requested evidence or defer to foreign anti-investigative laws? The conflict-of-laws approach answers this question by conducting a

[308] Currie, *supra* note 135, at 10.

"comparative impairment analysis." [309] The comparative impairment approach to the resolution of true conflicts "seeks to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state."[310] In *Bernhard v. Harrah's Club*, the court held that the comparative impairment analysis:

> proceeds on the principle that true conflicts should be resolved by applying the law of the state whose interest would be the more impaired if its law were not applied. Exponents of this process of analysis emphasize that it is very different from a weighing process. The court does not 'weigh' the conflicting governmental interests in the sense of determining which conflicting law manifested the 'better' or the 'worthier' social policy on the specific issue . . . . [The process] can accurately be described as . . . accommodation of conflicting state policies, as a problem of allocating domains of law-making power in multi-state contexts—limitations on the reach of state policies—as distinguished from evaluating the wisdom of those policies (internal citation omitted).[311]

[106] When presented with a true conflict, the comparative impairment approach requires FCPA enforcers to reconsider the respective interests of the foreign enacting state and the United States. The analytical process can be imagined as "a hypothetical rational bargaining scenario between the two states in the context of repeated cases and multiple plays of the game."[312] In this hypothetical scenario, each state would make the sensible choice to

[309] William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 20 (1963).

[310] Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 917 (Cal. 2006).

[311] Bernhard v. Harrah's Club, 546 P.2d 719, 723–24 (Cal. 1976).

[312] Riles, *supra* note 4, at 115.

compromise on less significant issues, recognizing that such compromise and cooperation would benefit all parties involved.[313] In conducting a comparative impairment analysis, an FCPA enforcer should make case-specific determinations as to the following: (1) the importance of the requested evidence to the investigation, i.e., in the absence of the requested information, would the company still be held accountable for its misconduct and duly sanctioned; (2) whether the corporation under investigation will be subject to effective prosecution in another jurisdiction; and (3) the potential penalties for violating the foreign anti-investigative law at issue, and how do they compare to those for FCPA violations?

[107] Even though an FCPA enforcer would still most likely compel the production of evidence in violation of foreign anti-investigative law under the comparative impairment analysis, this analysis nonetheless demonstrates respect for regulatory pluralism and avoids charges of "American imperialism" to the greatest extent possible.[314]

V. CONCLUSION

[108] The discipline of conflict of laws, when imagined and applied as a normative framework, offers new approaches for FCPA enforcers to understand, evaluate, and balance conflicting compliance requirements in corporate enforcement actions. This Article makes three principal contributions to the study of global corporate enforcement. First, it explores the distinction—often implicit and unarticulated—drawn by U.S. courts between blocking-statute and purpose-specific anti-investigative laws. The key distinction in courts' treatment of blocking-statute versus purpose-

[313] *Id.*

[314] Primarily because of its expansive extraterritorial jurisdiction, the FCPA has long been subject to critiques of cultural and moral imperialism. *See* Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 275 (1997); Steven R. Salbu, *Extraterritorial Restriction of Bribery: A Premature Evocation of the Normative Global Village*, 24 YALE J. INT'L L. 223, 227 (1999); Steven R. Salbu, *The Foreign Corrupt Practices Act as a Threat to Global Harmony*, 20 MICH. J. INT'L L. 419, 422 (1999); Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT'L L. 155, 155 (2009).

specific anti-investigative laws is one of interest balancing versus conflict interpretation. This Article also examines how the highly technical field of conflict of laws provides a framework and vocabulary for analyzing the often under-appreciated judicial techniques of conflict avoidance in handling purpose-specific anti-investigative laws.

[109] Second, this Article proposes an analytical framework for FCPA enforcers to evaluate the validity of a company's assertion that foreign anti-investigative laws prevent it from cooperating more fully. This framework will assist FCPA enforcers in determining whether, and to what extent, a company's assertion of conflicting legal obligations under foreign laws is legitimate, so that appropriate prosecutorial decisions can be made.

[110] Finally, this Article explores the implications of China's newly enacted data protection laws for cross-border FCPA enforcement, shedding light on how the United States should regulate China-related business activities. Ultimately, by proposing conflict of laws as a promising approach for resolving cross-border conflicts in corporate criminal enforcement, this Article contributes to the larger conversation about the potential of conflicts methodologies for global governance. In particular, it contributes to the discipline of conflict of laws by showing how it can be applied in public law cases. Traditionally, conflict of laws only deals with private-law disputes—namely, disputes between private individuals or entities that do not concern the exercise of governmental authority. This Article, however, provides a concrete method to examine the potential of conflicts methodologies to deal with cross-border conflicts that involve the enforcement of public law against foreign business activities. In this sense, this Article also shows its novelty by proposing to employ the private law toolbox to address problems typical of public law.