

LEGAL ISSUES RELATED TO ANTI-CORRUPTION  
IN ASIAN COUNTRIES:  
THE CASE OF US COMPANIES IN CHINA

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**Contents**

- I. Introduction
  - A. Anti-Corruption International Legal Framework: Focus on Asia —
- II. International Legal Instruments Dealing with Corruption
  - 1. The Preventive and Repressive Approach
  - 2. The Status of Ratification and Implementation of International Conventions in Asian Countries
- III. Chinese Approach: *Guanxi*, Laws and the Campaign against Corruption
  - B. The Case of a US Company operating in China —
- IV. The Avon Products (China) Case Settled in December 2014
  - 1. The Extraterritorial Reach of US Law
- V. Concluding Remarks: Why Cooperation Matters

I. *Introduction*

Corruption has impinged on societies over the centuries. The “corrupt cities” described by Machiavelli are but an example of decay affecting governments which are not inspired by the pursuance of the “common good” (Machiavelli 1531, 18).<sup>1</sup> The Florentine statesman and political writer considered corruption as ‘an absence of *virtù*, a kind of laziness [...] of the customs, of the habits of the citizens, their unwillingness to put the common good above private or factional interests’ (Viroli 1998, 131).

At present time, corruption has taken different forms: It may refer to the embezzlement of public assets, the acceptance of bribes by a public official, the so-called trading in influence,<sup>2</sup> but also to advantages obtained by the managers of a private company.<sup>3</sup> Accordingly, it emerges both in the public and in the private sector. Corruption is more than an offence, it is ‘a complex social, political and economic phenomenon [which] undermines democratic institutions.’<sup>4</sup> In other words, corruption permeates politics and economics and encourages

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<sup>1</sup> See also Viroli 2013.

<sup>2</sup> Trading in influence occurs when a person who has real or apparent influence on the decision-making of a public official exchanges this influence for an undue advantage. See OECD, 2007, 25.

<sup>3</sup> Corruption and bribery are usually used as synonyms. To be precise, bribery is a specific act of corruption, which in turn is a wider phenomenon encompassing acts like the embezzlement of public assets.

<sup>4</sup> Definition given by UN Office on Drugs and Crime, <http://www.unodc.org/unodc/en/corruption/index.html?ref=>

incorrect behaviours which are mainly guided by personal interests. Although corruption affects all States, it is in poor countries that corruption ‘represents a major threat to rule of law and sustainable development [...] it has a disproportionate, destructive impact on the poor and most vulnerable, but it is also quite simply bad for business. Corruption stifles economic growth, distorts competition and presents serious legal and reputational risks.’ (UNODC 2013, iii).

In recent years, globalization has given a dimension of transnationality to corrupt behaviours. Corruption is seldom if ever limited to one country, indeed. A corporation may offer advantages to the public officials of the country in which it desires to establish its own activity. In this case, the element of transnationality is clear. However, even in the hypothesis in which a company in State X corrupts public officials of the same State, money can be transferred and laundered in foreign countries in order to hide its illegal origin. As a consequence, corruption must be fought at the international level, in order to identify a common ground of judicial and police cooperation in suppressing and preventing the offence. However, within the international legal framework, which is composed of both hard law (international treaties) and soft law (recommendations and guidelines), national legal systems still play an important role, since international conventions and standards to counter corruption must be transposed at domestic level.

The purpose of this contribution is first to briefly<sup>5</sup> illustrate the international legal instruments in force aimed at the prevention and suppression of corruption, focusing on the number of ratifications of international conventions in the field by Asian Countries. Second, we will turn to a specific case of corruption that involved a United States (US) company, Avon Products Inc., and its subsidiary in China. We will reflect on the extraterritorial reach of US law and on the anti-corruption measures in China, bearing in mind the traditional phenomenon of *guanxi*. The contribution will demonstrate that international cooperation is an essential tool in the fight against corruption, combined with the commitment by countries to counter a threat to market stability and to the society taken as a whole.

## — A. *Anti-corruption International Legal Framework: Focus on Asia* —

### II. *International Legal Instruments Dealing with Corruption*

Corruption is morally condemned and legally prohibited worldwide.<sup>6</sup> Nevertheless, the response at the international level is quite recent. In the United Nations Convention against transnational organized crime, adopted in 2000 and entered into force in 2003, corruption is defined as ‘(a) *The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) The solicitation*

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menside.

<sup>5</sup> It is not the purpose here to describe in-depth anti-corruption law at the international level. A wide literature exists. See, for example, Carr 2007, Dormoy 2010, Bacio Terracino 2012, Wouters-Ryngaert-Cloots 2013, Rose 2015.

<sup>6</sup> Condemnation of corruption in the form of bribery may have begun as early as 3000BC. References can be found in several ancient sources (Code of Hammurabi, 2200 BC; Roman emperors in the fourth century legislated on several occasions between 316 and 398 ad against judicial corruption).

*or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.*<sup>7</sup> Both active and passive bribery are therefore criminalized. To the contrary, the United Nations Convention against corruption, adopted in 2003 and entered into force in 2005, which is 'the most comprehensive and universal instrument on corruption',<sup>8</sup> does not contain a general definition of corruption, but rather establishes the offences for a range of corrupt behaviours. The treaty, ratified by 183 Countries, differentiates between two groups: bribery of national public officials, bribery of foreign public officials and officials of foreign international organizations and the embezzlement of property by a public official, on the one hand; and trading in influence, abuse of functions, illicit enrichment, bribery in the private sector, embezzlement in the private sector, on the other hand. The convention acknowledges that the phenomenon of corruption can assume so many different forms that a common definition is difficult to achieve.

Another instrument aimed at preventing and suppressing corruption, which is precedent to the UN conventions, is the OECD convention on combating bribery of foreign public officials in international business transactions, adopted in 1997 and ratified by 43 States.<sup>9</sup> Its scope of application is limited to the bribery of foreign public officials in international business transactions, and to active bribery, which means that it criminalizes the act of bribing and not the act of receiving a bribe. The international organization has however adopted over the years a series of recommendations aimed at completing the action against corruption, starting from the 1997 twenty guiding principles for the fight against corruption to the 2009 recommendation of the OECD Council for further combating bribery of foreign public officials in international business transactions. These recommendations are addressed to States. In particular, the 2009 recommendation asks Parties to encourage companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery (UNODC 2013, 6).

At the regional level, the anti-corruption framework encompasses the Inter-American Convention against corruption, which entered into force in 1997; the African Union's Convention on preventing and combating corruption, which was adopted in 2003; the Council of Europe's criminal law convention on corruption (adopted in 1998) and the civil law Convention on corruption (adopted in 1999). The European Union has developed its own policy against corruption, which started with two conventions: the Convention on the protection of the European Communities' financial interests (1995) and the Convention against corruption involving European officials or officials of Member States of the European Union (1997). A Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law was adopted in July 2017; its legal basis is Article 83(1).<sup>10</sup> The Directive defines passive corruption as 'the action of a public official who, directly or through an intermediary, requests or receives advantages of any kind, for himself or for a third party, or accepts a promise of such an advantage, to act or to refrain from acting in

<sup>7</sup> Article 8. Parties to the Convention: 189 (as of September 2017).

<sup>8</sup> UN GA Resolution A/RES/68/195, 18 February 2014, preamble.

<sup>9</sup> All OECD countries and 8 non-OECD countries.

<sup>10</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, p. 29–41.

accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests,' and active corruption as the action of a person who promises, offers or gives, directly or through an intermediary, an advantage of any kind to a public official for himself or for a third party for him to act or to refrain from acting in accordance with his duty or in the exercise of his functions in a way which damages or is likely to damage the Union's financial interests' (Article 4).

An effective action against corruption cannot be limited to obligations imposed on States, but must include measures for business activities.<sup>11</sup> At UN level, for example, anti-corruption is the tenth principle elaborated by the UN Global Compact, which reads as follows: 'Businesses should work against corruption in all its forms, including extortion and bribery.' The then UN Secretary General Kofi Annan announced in 2004 the introduction of this principle in the corpus of recommendations for corporations. As it is clear from the wording, the principle *calls upon* enterprises to incorporate in their policies measures aimed at fighting extortion and bribery. Despite being non-mandatory, several corporations have decided to respect and include in its internal codes of conduct this guiding principle in order to protect corporate reputation towards consumers.<sup>12</sup> The OECD has also adopted its own guidelines for multinational enterprises, revised in 2011, among which no. VII on 'Combating Bribery, Bribe Solicitation and Extortion.' The recommendation includes specific actions that enterprises should undertake in order to fight against corrupt practices.<sup>13</sup> The International Chamber of Commerce (ICC) elaborated in 2012 a specific clause to be included in contracts, according to which parties commit to respect ICC Rules on Combating Corruption or commit to put in place and maintain a corporate anti-corruption compliance programme; the purpose is to prevent corruption in the phases of negotiation and performance of contracts (ICC 2012).

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<sup>11</sup> See for a comprehensive analysis, also under a comparative perspective, Manacorda et al. 2014; Del Vecchio-Severino 2014.

<sup>12</sup> [https://www.unglobalcompact.org/issues/transparency\\_anticorruption/](https://www.unglobalcompact.org/issues/transparency_anticorruption/) See for example the company's code of conduct and anti-bribery policy, including an anti-corruption compliance program, adopted by a well-known company in the sector of soft drinks. <http://www.coca-colacompany.com/our-company/governance-ethics/anti-corruption>.

<sup>13</sup> 'Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortion. In particular, enterprises should: 1. Not offer, promise or give undue pecuniary or other advantage to public officials or the employees of business partners. Likewise, enterprises should not request, agree to or accept undue pecuniary or other advantage from public officials or the employees of business partners. Enterprises should not use third parties such as agents and other intermediaries, consultants, representatives, distributors, consortia, contractors and suppliers and joint venture partners for channelling undue pecuniary or other advantages to public officials, or to employees of their business partners or to their relatives or business associates. 2. Develop and adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting bribery, developed on the basis of a risk assessment addressing the individual circumstances of an enterprise, in particular the bribery risks facing the enterprise (such as its geographical and industrial sector of operation). These internal controls, ethics and compliance programmes or measures should include a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of bribing or hiding bribery. Such individual circumstances and bribery risks should be regularly monitored and re-assessed as necessary to ensure the enterprise's internal controls, ethics and compliance programme or measures are adapted and continue to be effective, and to mitigate the risk of enterprises becoming complicit in bribery, bribe solicitation and extortion. 3. Prohibit or discourage, in internal company controls, ethics and compliance programmes or measures, the use of small facilitation payments, which are generally illegal in the countries where they are made, and, when such payments are made, accurately record these in books and financial

## 1. The Preventive and Repressive Approach

Let us now turn to the main measures included in the aforementioned conventions, in particular in the UN Convention against bribery. Prevention plays a pivotal role in countering any transnational crimes. Therefore, an entire chapter of the Convention is dedicated to this kind of measures, such as the establishment of anti-corruption bodies and the promotion of anti-corruption policies and practices both in the public and private sectors. Corruption is a phenomenon that permeates most countries, indeed, and must be fought through a combined action of law and good practices. Article 9 is entirely devoted to public procurement which is considered to be one of the most vulnerable sectors to money laundering and corruption. The Convention obliges States to 'take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, *inter alia*, in preventing corruption.' As for the private sector, States are asked to 'enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures' (Article 12). It is interesting to observe that this chapter precedes the one regarding criminalisation, therefore emphasising the importance of adopting preventive measures to counter the phenomenon. The chapter on criminalisation requires States parties – which must or may comply depending on the offence - to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law. An interesting aspect of the treaty is that it also includes offences such as the trading in influence and the concealment and laundering of the proceeds of corruption, along with the most "traditional" forms of corruption such as bribery. The Convention also requires States to establish the liability of legal persons. Another chapter deals with international cooperation, which includes cooperation in prevention, investigation, and the prosecution of offenders. Different levels of cooperation are envisaged: cooperation between national authorities but also between national authorities and the private sector. Common to all international criminal conventions are the provisions on mutual legal assistance and extradition. Furthermore, States are obliged to establish mechanisms aimed at overcoming bank secrecy in cases of domestic criminal investigations. Joint investigations and law enforcement cooperation are essential tools in the phase of repression. A fundamental element of the Convention is asset recovery. Article

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records. 4. Ensure, taking into account the particular bribery risks facing the enterprise, properly documented due diligence pertaining to the hiring, as well as the appropriate and regular oversight of agents, and that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents engaged in connection with transactions with public bodies and State-owned enterprises should be kept and made available to competent authorities, in accordance with applicable public disclosure requirements. 5. Enhance the transparency of their activities in the fight against bribery, bribe solicitation and extortion. Measures could include making public commitments against bribery, bribe solicitation and extortion, and disclosing the management systems and the internal controls, ethics and compliance programmes or measures adopted by enterprises in order to honour these commitments. Enterprises should also foster openness and dialogue with the public so as to promote its awareness of and cooperation with the fight against bribery, bribe solicitation and extortion. 6. Promote employee awareness of and compliance with company policies and internal controls, ethics and compliance programmes or measures against bribery, bribe solicitation and extortion through appropriate dissemination of such policies, programmes or measures and through training programmes and disciplinary procedures. 7. Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Political contributions should fully comply with public disclosure requirements and should be reported to senior management.'

53 provides that States shall 'take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences.' Technical assistance and information exchange are regulated in a separate chapter.

## 2. The Status of Ratification and Implementation of International Conventions in Asian Countries

Asian countries are Parties to all the aforementioned conventions with some important *distinguo*. The UN Convention against transnational organized crime has been ratified by almost all Asian countries, except Bhutan, which has not even signed the treaty. Japan has only recently ratified the Convention.<sup>14</sup> China, which is of interest for our analysis, ratified the Convention on 23 September 2003. The UN Convention against corruption has been signed and not ratified by Syria; the Democratic People's Republic of Korea has not even signed the treaty. Bhutan ratified the Convention on 21 September 2016 and Japan on 11 July 2017. China, which ratified the Convention on 13 January 2006, appended reservations on the article of the two conventions regarding the competence of the International Court of Justice in resolving international disputes. As for the OECD Convention, the scenario changes. As a matter of fact, China has not yet ratified the Convention, whereas Japan did it in 1998. Lacking a coherent system at the regional level, Asian countries have started initiatives aimed at coordinating their efforts in countering corruption. Within the framework of OECD, 31 States belonging to the Asia-Pacific region committed in 1999 to take action against corruption: for this purpose, they created the Anti-Corruption Action Plan in 2001, which also includes an implementation plan composed of capacity development, policy analysis, capacity building and partnerships with organizations and institutions at the international level. Furthermore, in 2003 the Istanbul Anti-Corruption Action Plan was launched; it is aimed at supporting anti-corruption reforms through country reviews and continuous monitoring of implementation of recommendations. Participating countries are Armenia, Azerbaijan, Georgia, Kyrgyz Republic, Kazakhstan, Tajikistan, Ukraine, Uzbekistan.<sup>15</sup>

At the UN level, UNODC and five countries of Central Asia signed a new Programme of partnership for the period 2015-2019. The agreement represents the key strategic framework under which UNODC provides technical assistance and advisory services in the region.<sup>16</sup>

### III. Chinese Approach: Guanxi, Laws and the Campaign against Corruption

For the purpose of our contribution, let us now focus on China and its anti-corruption

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<sup>14</sup> On 11 July 2017.

<sup>15</sup> The third round of monitoring took place between 2013-2015. The 2016 report – *Anti-Corruption Reforms in Eastern Europe and Central Asia – Progress and Challenges, 2013-2015* – issued on 14 September 2016, acknowledges that countries in Eastern Europe and central Asia have introduced a number of new important anti-corruption reforms in recent years. However, corruption continues to remain high in the region. <http://www.oecd.org/corruption/acn/istanbulactionplan/anti-corruption-reforms-eastern-europe-central-asia.htm>

<sup>16</sup> UNODC 2015. Countries involved are Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan, the Republic of Kazakhstan, the Republic of Uzbekistan.

policy. Actions against corruption have been undertaken in China as early as the Qin Dynasty (221-207 BC), during which the criminal code provided severe penalties against the perpetrators of corrupt practices. However, the phenomenon of corruption has developed over the centuries, especially during China's economic growth, and has now permeated 'nearly all areas of daily life,' for example 'the admission to universities where students can buy the necessary marks in their entry examinations at a specific price per grade-point, the access to business and product specific import/export licenses which are issued at the discretion of government officials, as well as business - and especially sourcing - contracts which are decided at the mercy of managers maximizing individual income at the expense of corporate profits, etc.' (Taube 2013, 90) Reflecting on corruption in China requires to take into consideration the ancient phenomenon of *guanxi*, which can be defined as 'a system of transactions tied to persons as well as implicit and relational contracts' (Taube-Schramm 2003).<sup>17</sup> *Guanxi* networks are based on personal relations among people coming from the same village, belonging to the same school or association, sharing the same values and environment. The process can be simplified as follows: A person accepts a gift or service, and doing so he/she obligates him/herself to perform an undefined reciprocal service at an unspecified time in the future. In the words of two authors:

On the basis of this co-ordinating mechanism which clearly reduces the transaction costs of economic exchanges, the Chinese *guanxi* networks have advanced the development of the division of labour in the economic process (and also economic development) in Chinese society over the centuries, and they continue to exist as complementary and parallel mechanisms for ordering economic interaction (Taube-Schramm 2003, 6).

From this short description of the phenomenon, it seems clear that corruption and *guanxi* are 'somehow connected' (Li 2011, 3). The question is not whether there is a link between the two phenomena, but rather how they are linked. Commentators are divided on this issue. According to a Chinese author:

It is not that the participants of corruption are compelled to corrupt conduct because of the existence of certain reciprocal relationship, but on the contrary, these participants adopt *guanxi*-practice as an enabling operating mechanism that facilitates corruption. In this sense, *guanxi*-practice is not only "fuelling" corruption, but it is a necessary and integral part of corruption in China' (Li 2011, 20).

As two authors outline, the elimination of corruption through a formal legal system is a Herculean task (Schramm-Taube 2004, 193) It is not the purpose of our research to further explore this topic; however, measures aimed at countering corruption cannot be understood without taking into consideration the Chinese social environment.

Against this backdrop, China presents three main legal instruments on anti-corruption: its criminal law (which punishes criminal acts of bribery), the anti-unfair competition law (which punishes acts of bribery undertaken by private parties for a business purpose), and internal discipline regulations of the government and Chinese Communist Party (CCP), targeted at public officials and CCP members (Rose Fulbright 2014, 42). After the ratification of the UN

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<sup>17</sup> On *guanxi*, see, *inter alia*, Xiaotong 1992; Yan 1996; Gold et al. 2002; Wilson 2002; Li 2011; Taube 2013; Cavalieri 2017.

Convention against corruption, Chinese criminal law was amended in 2011 and now includes the prohibition of bribes to ‘foreign officials’ and ‘officials of international public organizations.’ Furthermore, the Chinese government started in 2013 an anti-corruption campaign, which targets officials, state-owned enterprises, and domestic and foreign private companies (Rose Fulbright 2014, 43). All business operators are required to adopt adequate measures in response to this campaign, such as codes of conduct, and employee policies. Leaving aside the question of whether or not this campaign is effective (Fabre 2015, Zhang 2017), we should acknowledge that the measure is in line with international obligations China has accepted as sovereign State. The initiative has however arisen several doubts among foreign businesses. According to a research published by the Economist, ‘a crackdown on official corruption has made it impossible to win friends in government. And antitrust authorities have taken a tough line with foreign carmakers, drugmakers and other firms that had hoped their *guanxi* (connections) offered them protection. Many foreign bosses are now convinced that the golden age for multinationals in China is over’ (Fabre 2015). Moreover, as reported by Business Insider, ‘multinational corporations with Chinese outposts have become increasingly aware that the Chinese government will investigate them for corruption — sometimes during unannounced early-morning raids.’<sup>18</sup> For US companies that operate in China, it means that now they are subject both to US anti-corruption law and to Chinese anti-corruption policy.

A case regarding the application of US anti-corruption law will shed some lights on the actions undertaken by countries to counter corruption and on the effects these actions produce on businesses.

### — B. The Case of a US Company Operating in China —

#### IV. *The Avon Products (China) Case Settled in December 2014*

Avon Products Inc. (hereinafter Avon) is a US international manufacturer and direct-selling company in beauty, household, and personal care products. It was found in 1886 by David H. McConnell, a traveling book salesman, who realized that his female customers were also very interested in the free perfume samples he offered.<sup>19</sup> At the end of the 19. Century, he started a new business and offered an opportunity to women to work by selling door-to-door beauty products.<sup>20</sup> The company has developed worldwide and on the web in the past century, but it maintained its main characteristic of direct selling. In its code of conduct, Avon commits to ‘comply with the laws in all countries where we do business.’ In particular, Avon declares that ‘we do not offer or accept bribes, whether directly or indirectly. Bribes harm our

<sup>18</sup> Business Insider, *Why China is Raiding Foreign Companies at Dawn*, 16 January 2015, <http://uk.businessinsider.com/china-raiding-foreign-companies-in-anti-corruption-crackdown-2015-1? r = US, Reuters, Food and flirting; how firms learn to live with China antitrust raids>, available at <http://www.reuters.com/article/2014/08/10/us-china-antitrust-raids-idUSKBN0GA0UX20140810>, and International Business Times, *How China’s Anti-Corruption Campaign Is Putting Pressure On A Slowing Economy*, 22 March 2016, available at <http://www.ibtimes.com/how-chinas-anti-corruption-campaign-putting-pressure-slowing-economy-2308834>.

<sup>19</sup> <http://www.avoncompany.com/aboutavon/history/index.html>

<sup>20</sup> <http://www.avoncompany.com/aboutavon/history/mcconnell.html>



communities, undermine fair trade, and are contrary to our values.<sup>21</sup>

In China direct selling was made illegal in 1998. However, as a condition to its entry into the World Trade Organization, China lifted the ban in 2001. In 2005, Chinese authorities awarded the test license, which was temporary, to Avon Products (China) Co.Ltd. (hereinafter Avon China), a wholly owned subsidiary of Avon Products Inc. One year after, the company obtained permanent authorization.<sup>22</sup> It was the first national direct selling business license granted by Chinese authorities. From April 2005 to March 2006, it was reported that Avon China offered 100,000 dollars in cash or things of value to Chinese officials to get the license.<sup>23</sup> After March, a “zero penalty policy” was adopted, which meant gifts given to public authorities in order to avoid potential fines and negative news articles. In sum, from 2004 to 2008, Avon China falsified books and records in order to disguise the things of value Avon China executives and employees provided to government officials in China.<sup>24</sup> Luxury items such as designer wallets, bags, and watches, but also travels, entertainment, cash and meals were offered to Chinese officials to obtain business benefits. These expenses were not properly documented in Avon China’s books. Avon China’s practice was not unknown to Avon. As a matter of fact, the financial results of Avon’s wholly owned subsidiaries are consolidated into the financial statement of Avon. In April 2005, Avon’s global internal audit considered the gifts to government officials as an area of concern. A report was drafted in September that year. The situation was also brought to the attention of Avon’s general counsel. In December 2006, the investigation was resumed by the new head of internal audit at Avon. No improvement was registered; problematic payments and inadequate record keeping continued. In May 2008 Avon China corporate affairs executive wrote to Avon’s chief executive officer alleging improper payments to Chinese government officials. An audit committee commenced therefore an internal investigation. As a consequence, in October 2008 Avon informed the Securities and Exchange Commission and the Department of Justice.

The US attorney charged Avon China with conspiracy in violating the books and records provisions of the US *Foreign Corrupt Practices Act*, adopted in 1977, in particular 15 USC § 78 m(b)(2)(A), 78 m (b)(5), and 78 ff (a): “The defendant, together with others known and unknown, willfully and knowingly did combine, conspire, confederate and agree together and with each other to commit offences against the US.”<sup>25</sup> Avon China pleaded guilty to the criminal information filed in the US District Court for the Southern District of New York on 17 December 2014. Avon, the parent company, entered into a deferred prosecution agreement and admitted its criminal conduct, including its role in the conspiracy and its failure to implement internal controls. Penalties amounted to 67,648,000 dollars. Avon also agreed to implement rigorous internal controls, to cooperate with the Department of Justice, and to be monitored for at least 18 months. Another complaint was issued by the Securities and Exchange Commission

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<sup>21</sup> [http://www.avoncompany.com/documents/ethics\\_and\\_compliance/Code\\_of\\_Conduct.pdf](http://www.avoncompany.com/documents/ethics_and_compliance/Code_of_Conduct.pdf), p. 24.

<sup>22</sup> US District Court, Southern district of New York, *US v. Avon Products (China) Co. Ltd.*, Superseding information, 17 December 2014, <http://www.justice.gov/file/188581/download>.

<sup>23</sup> All the information on the case are taken from the website of the Securities and Exchange Commission (SEC), and the Department of Justice (DOJ). See the complaint filed by SEC for the details of the case available at <http://www.sec.gov/litigation/complaints/2014/comp-pr2014-285.pdf>

<sup>24</sup> <http://www.sec.gov/litigation/complaints/2014/comp-pr2014-285.pdf>

<sup>25</sup> District Court, Southern district of New York, *US v. Avon Products (China) Co. Ltd.*, Superseding information, cit., para. 55.

against Avon, the US corporation, because it 'failed to accurately and fairly reflect payments by Avon Products China.' In particular, the charges referred to the violation of Section 13 (b)(2)A of the Exchange Act [15 USC 78 m(b)(2)(A)] 'by failing to make and keep books records and accounts, which, in reasonable detail, accurately and fairly reflected the transactions and dispositions of the assets of the issuer.'<sup>26</sup> Avon therefore decided to settle a related FCPA matter with the US Securities and Exchange Commission and accepted to pay an additional 67,365,013 dollars in disgorgement and prejudgment interest.<sup>27</sup>

### 1. The Extraterritorial Reach of US Law

The Avon case is useful to reflect on the role of national laws in punishing corrupt practices occurred abroad. In the case at issue, US authorities invoked the application of the 1977 Foreign Corrupt Practices Act.<sup>28</sup> The act was enacted 'for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business and is divided into anti-bribery provisions and accounting provisions.'<sup>29</sup> It implies civil and criminal liability. Since 1977, the anti-bribery provisions of the FCPA have applied to all U.S. persons and certain foreign issuers of securities. Furthermore, companies whose securities are listed in the United States are required to meet FCPA's accounting provisions, in particular to (a) make and keep books and records that accurately and fairly reflect the transactions of the corporation and (b) devise and maintain an adequate system of internal accounting controls. For the purposes of the act, Avon was an issuer, which means that it issues publicly traded securities registered pursuant to the Exchange Act of 1934.

The anti-bribery provisions are composed of three separate sections that define the addressees. The provisions at issue are applicable to issuers, and non-issuers that are U.S. citizens, nationals, or residents as well as companies that are either incorporated in the United States or that have their principal place of business in the United States. In both cases, they also cover acts committed outside the US. The third category is composed of foreign citizens, residents, and corporations whose acts that further the crime occur 'while in the territory of the United States' (Ross 2012, 454). The 1998 amendments to the FCPA, which implemented the OECD Convention, introduced the alternative jurisdiction sections to § 78dd-1 and § 78dd-2, which explicitly call for extraterritorial application (Ross 2012, 454).

As for the accounting provisions, they apply to every issuer as defined by US law, to companies whose stock trades in the over-the-counter market in the United States and which file periodic reports with the Commission. Furthermore, issuer's books and records include those of its consolidated subsidiaries and affiliates. In other words, 'an issuer's responsibility [...] extends to ensuring that subsidiaries or affiliates under its control, including foreign subsidiaries and joint ventures, comply with the accounting provisions.'<sup>30</sup> Only in the case where the parent

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<sup>26</sup> Complaint filed by SEC for the details of the case available at <http://www.sec.gov/litigation/complaints/2014/comp-pr2014-285.pdf>, para. 7.

<sup>27</sup> Department of Justice, Avon China Pleads Guilty to Violating the FCPA by Concealing More Than \$ 8 Million in Gifts to Chinese Officials, 17 December 2014, <http://www.justice.gov/opa/pr/avon-china-pleads-guilty-violating-fcpa-concealing-more-8-million-gifts-chinese-officials>

<sup>28</sup> <http://www.justice.gov/criminal/fraud/fcpa/>

<sup>29</sup> <http://www.justice.gov/criminal/fraud/fcpa/>

company owns 50 per cent or less of the subsidiary, the parent company's obligation is limited to exercise a control in good faith. Furthermore, both issuers and subsidiaries may face civil liability for aiding and abetting or causing an issuer's violation of the accounting provisions. According to Exchange Act (15 U.S.C. § 78m(b)(5)), '[n]o person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account ....' Criminal liability emerges when companies and/or individuals knowingly fail to comply with the FCPA's books and records or internal controls provisions.<sup>31</sup> The actions must be committed "wilfully". Furthermore, companies, including subsidiaries, and individuals may be accused of conspiring to commit or of aiding and abetting violations of the accounting provisions.<sup>32</sup>

US anti-corruption law therefore applies to companies incorporated abroad which are subsidiary of a US company. It is clear that a US company, being an issuer, is in violation of the accounting provisions of the FCPA when the financial results of a subsidiary – of which it owns more than 50 per cent – are consolidated into the financial statement of the parent company. The extraterritorial application emerges when a foreign company is charged with conspiracy to commit a violation of US anti-corruption law. In the case of Avon, the US attorney brought the case against Avon China, charged with 'conspiracy [...] to commit offences against the US.' It seems therefore interesting that, in explaining the charges, the US attorney found a sort of "territorial link", by outlining that 'in furtherance of the conspiracy and to effect the illegal object thereof, the following overt acts were committed in the Southern District of New York and elsewhere.'<sup>33</sup> The extraterritorial reach of US law is not unknown.<sup>34</sup> Nonetheless, the position taken by the legislator and by the jurisprudence is to find a link – sometimes weak – to US.<sup>35</sup> As a matter of fact, the violation of US law eventually occurred in the US, since Avon China's books were included in Avon's financial statement. The interpretation of the Act

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<sup>30</sup> Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act*, 2012, available at <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>, pp. 42-43. It is reported a case similar to the Avon case. DOJ and SEC brought enforcement actions against a California company for violating the FCPA's accounting provisions when two Chinese joint ventures in which it was a partner paid more than \$400,000 in bribes over a four-year period to obtain business in China.<sup>247</sup> Sales personnel in China made the illicit payments by obtaining cash advances from accounting personnel, who recorded the payments on the books as "business fees" or "travel and entertainment" expenses. Although the payments were made exclusively in China by Chinese employees of the joint venture, the California company failed to have adequate internal controls and failed to act on red flags indicating that its affiliates were engaged in bribery. The California company paid \$1.15 million in civil disgorgement and a criminal monetary penalty of \$1.7 million.

<sup>31</sup> U.S. Securities and Exchange Commission, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act*, 2012, p. 44.

<sup>32</sup> A case similar to the one of Avon is reported in the U.S. Securities and Exchange Commission, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act*, 2012, p. 45: 'the subsidiary of a Houston-based company pleaded guilty both to conspiring to commit and to aiding and abetting the company's books and records and anti-bribery violations. The subsidiary paid bribes of over 4 million dollars and falsely characterized the payments as "commissions," "fees," or "legal services," consequently causing the company's books and records to be inaccurate. Although the subsidiary was not an issuer and therefore could not be charged directly with an accounting violation, it was criminally liable for its involvement in the parent company's accounting violation.'

<sup>33</sup> Superseding information, cit. para. 59. Furthermore, 'if U.S. authorities can establish jurisdiction over one conspirator, they have jurisdiction over all members of the conspiracy, regardless the location of the latter members. This concept has been applied in several recent FCPA enforcement actions, including one against Alcatel, where several non-U.S. subsidiaries were charged with conspiracy to violate the FCPA, and the DOJ alleged that "at least one of the

is still not clear. As posited by an author, 'deferred-prosecution agreements have become the norm in FCPA actions, which has led to a dearth of judicial guidance on the FCPA's jurisdictional scope' (Ross 2012, 459). Furthermore, corporations are induced to plead guilty in order to preserve their own reputation towards consumers. Avon has clearly taken action to comply with international anti-corruption standards since 2008. It would have been counterproductive to deny its involvement in the corrupt practices of its own subsidiary before the US court.

### V. *Concluding Remarks: Why Cooperation Matters*

The Avon's case demonstrates that actions against corruption must be taken at different levels. First of all, the international one. Treaties and recommendations provide the framework for cooperation among States. Second, regional law, where anti-corruption policies are among the competences of the organization, as it happens in the EU. Third, the domestic level: in order to comply with international obligations, States must transpose treaties and standards into national law. As State practice shows, national law might include provisions addressed to foreign companies or to companies incorporated under domestic law operating abroad. Beyond States' obligations, corporations can accept commitments at the international level aimed to respect guidelines and recommendations adopted by the UN and the OECD or to include in their contract the ICC anti-corruption clause.

In order to prevent companies from bribing foreign public officials, US law is extremely stringent, since it also applies to non-US corporations operating abroad, provided that they present some (even weak) links to the US. Uncertainty, expenses, and the 'potential for reputational harm' induce corporations to settle an agreement with the US Department of Justice and the US Securities and Exchange Commission, instead of going to court (Ross 2012, 459).

Shifting to China, its campaign against corruption is in line with the obligations the country has accepted by ratifying international conventions. States must combat bribery and corruption using preventive and repressive mechanisms. Nonetheless, the campaign has not been exempted from criticism and has been considered a way to protect domestic companies. According to a commentator, 'President Xi Jinping's campaign against corruption is also a campaign to centralize power. He is targeting political rivals such as ex-security chief Zhou Yongkang, who was friendly with onetime insider Bo Xilai. In the process, Xi has found an opportunity to go after Western firms in order to help favored domestic firms.'<sup>36</sup> To dissipate all doubts, according to the Economist, the Prime Minister, Li Keqiang, at the 2015 World Economic Forum's meeting in Davos, Switzerland, promised to businesses that his country would 'treat Chinese and foreign companies as equals' and 'rigorously reject protectionism.'<sup>37</sup>

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co-conspirators committed or caused to be committed" various acts in the U.S.' See Tween et al. 2013.

<sup>34</sup> See, *inter alia*, Herdegen 2013, p. 88 ff.

<sup>35</sup> See also the *Kiobel* case, which confirmed the presumption against extraterritoriality. US Supreme Court, *Kiobel, individually and on behalf of her late husband Kiobel et al. v. Royal Dutch Petroleum co. et al.*, certiorari to the US Court of Appeals for the Second Circuit, no. 10-1491, 17 April 2013.

<sup>36</sup> D. Blumenthal, *Why China Is Shooting Itself in the Foot by Cracking Down on Foreign Companies*, in *Foreign policy*, 30 September 2014.

<sup>37</sup> The Economist, *You are still Welcome*, 24 January 2015, <http://www.economist.com/news/business/21640329->

Leaving aside political considerations on the reasons underlying Chinese decision, one cannot but acknowledge that China has taken some steps towards anti-corruption. During the Conference of the States Parties to the UN Convention against corruption held from 25 to 29 November 2013,<sup>38</sup> for example, China joined a draft resolution proposed by the Russian Federation on 'Enhancing the effectiveness of law enforcement cooperation in the detection of corruption offences in the framework of the United Nations Convention against Corruption',<sup>39</sup> and a draft resolution on 'Facilitating international cooperation in asset recovery', sponsored by Canada, Egypt, Ghana, Nigeria and the United States.<sup>40</sup> Furthermore, China will be under review in the fourth year of activity of the *Implementation Review Mechanism* established within the framework of the UN Convention against corruption.<sup>41</sup> The outcome will be an evaluation of the laws and policies adopted by China in countering corruption. Since the problem of corruption has gained momentum in recent years, anti-corruption policies should be included in investment treaties between countries in order to address the concern of corporations, which fear protectionism in favour of domestic companies, and should be considered as a priority by governments in order to respond to the compelling need to combat a serious "public order" crime.

#### REFERENCES

- Bacio Terracino, Julio. 2012. *The International Legal Framework against Corruption*. Cambridge: Intersentia.
- Carr, Indira. 2007. "Fighting Corruption through Regional and International Conventions: A Satisfactory Solution?" *European Journal of Crime, Criminal Law and Criminal Justice* 15: 121-153.
- Cavalieri, Renzo R. 2017. "Fa Versus Guanxi: Legality with Chinese Characteristics and Implications for Italian Business in China" in *Understanding China Today An Exploration of Politics, Economics, Society, and International Relations* edited by AAVV. Berlin: Springer Verlag.
- Del Vecchio, Angela, and Severino, Paola (edited by). 2014. *Il contrasto alla corruzione nel diritto interno e nel diritto internazionale*. Padova: Cedam.
- Dormoy, Daniel. *La corruption et le droit international*. Bruxelles: Bruylant.
- Fabre, Guilhem. 2015. *The Lion's share (II): What is Behind China's Campaign against Corruption?* FMSHWP-2015-92. 2015. <halshs-01143800>
- Gold, Thomas, Guthrie, Doug, and Wank, David (edited by). 2002. *Social Connections in China: Institutions, Culture, and the Changing Nature of Guanxi*. Cambridge: Cambridge

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countries-leaders-seek-reassure-nervous-foreign-businesses-youre-still-welcome.

<sup>38</sup> CAC/COSP/2013/18.

<sup>39</sup> CAC/COSP/2013/L.6/Rev.2.

<sup>40</sup> CAC/COSP/2013/L.11/Rev.1

<sup>41</sup> 'The Implementation Review Group was established by the Conference of the States Parties to the United Nations Convention against Corruption in its resolution 3/1, entitled "Review mechanism", as an open-ended intergovernmental group of States parties to operate under its authority and report to it. The Group is to have an overview of the review process in order to identify challenges and good practices and to consider technical assistance requirements in order to ensure effective implementation of the Convention.' <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/13-15October2014/V1406930e.pdf>

- University Press.
- Herdegen, Matthias. 2013. *Principles of International Economic Law*. Oxford: Oxford University Press.
- ICC. 2012. *Anti-Corruption Clause*, Paris, 2012.
- Li, Ling. 2011. "Performing Bribery in China: Guanxi Practice, Corruption with a Human Face." *Journal of Contemporary China* 20 (68): 1-20.
- Machiavelli, Niccolò. 1531. *Discorsi sopra la prima deca di Tito Livio*, I. Firenze: B. Giunti.
- Manacorda, Stefano et al (edited by). 2014. *Preventing Corporate Corruption: The Anti-Bribery Compliance Model*. Switzerland: Springer.
- Norton Rose Fulbright, *Business Ethics and Anti-Corruption*. *Asia Pacific Laws*, October 2014.
- OECD. 2007. *Corruption. A glossary of international criminal standards*.
- Parisi, Nicoletta, et al. 2014. *Argomenti di diritto penale europeo*. Torino: Giappichelli.
- Rose, Cecily. 2015. *International Anti-Corruption Norms. Their Creation and Influence on Domestic Legal Systems*. Oxford: Oxford University Press.
- Ross, Lauren Ann. 2012. "Using Foreign Relations Law to Limit Extraterritorial Application of the Foreign Corrupt Practices Act." *Duke Law Journal* 62: 445-485.
- Schramm, Matthias, and Taube, Markus. 2004. "Private ordering of corrupt transactions." In *The New Institutional Economics of Corruption: Norms, Trust, and Reciprocity* edited by Graf Lambsdorff, Johann et al. London: Routledge: 181-197.
- Taube, Markus, and Schramm, Matthias. 2003. "The Institutional Economics of legal institutions, Guanxi, and Corruption in the PR China." In *Fighting Corruption in Asia. Causes, Effects and Remedies*, edited by Kidd, John, and Richter, Frank. New Jersey: World Scientific. [http://www.icgg.org/downloads/contribution10\\_schramm.pdf](http://www.icgg.org/downloads/contribution10_schramm.pdf).
- Taube, Markus. 2013. "Relational corruption in the PR China. Institutional foundations and its (Dys)-functionality for economic development and growth." *Z Vgl Polit Wiss* 7: 89-116.
- Tween, Douglas, et al. 2013. *Inside the FCPA: The (Very) Long Arm of the Law: FCPA Jurisdiction Over Non-U.S. Companies and Individuals*, [http://insights.ethisphere.com/wp-content/uploads/Inside\\_the\\_FCPA\\_-\\_Spring\\_2013\\_Issue.pdf](http://insights.ethisphere.com/wp-content/uploads/Inside_the_FCPA_-_Spring_2013_Issue.pdf).
- UNODC. 2013. *An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide*. [http://www.unodc.org/documents/corruption/Publications/2013/13-84498\\_Ebook.pdf](http://www.unodc.org/documents/corruption/Publications/2013/13-84498_Ebook.pdf).
- UNODC. 2015. *Central Asia: new regional cooperation platform against organized crime, illicit drugs*, 8 May 2015, [http://www.unodc.org/unodc/en/frontpage/2015/May/central-asia\\_new-regional-cooperation-platform-against-organized-crime--illegal-drugs.html?ref=fs1](http://www.unodc.org/unodc/en/frontpage/2015/May/central-asia_new-regional-cooperation-platform-against-organized-crime--illegal-drugs.html?ref=fs1)
- Viroli, Maurizio. 1998. *Machiavelli*. Oxford: Oxford University Press.
- Viroli, Maurizio. 2013. *Scegliere il principe*. Roma: Laterza.
- Wilson, Scott. 2002. *Remade in China Remade in China: Foreign Investors and Institutional Change in China*. Oxford: Oxford University Press US.
- Wouters, Jan, Ryngaert, Cedric, and Cloots, Ann Sofie. 2013. "The International Legal Framework Against Corruption: Achievements And Challenges". *Melbourne Journal of International Law* 14: 1-75.
- Xiaotong, Fei, trans. 1992. *From the Soil*. Berkeley: University of California Press.
- Yan, Yunxiang. 1996. *The Flow of Gifts*, Stanford, Stanford University Press, 1996.
- Zhang, Chris. 2017. *Where Is China's Corruption Crackdown?*. The Diplomat, 21 July 2017, <https://thediplomat.com/2017/07/where-is-chinas-corruption-crackdown/>