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I. Introduction

A formalist model imagines that judges and arbitrators resolve disputes in a wholly deliberative and rationale way.[1] The assumption is that they identify the appropriate legal principles, objectively apply them, and ultimately reach predictable results. This model of decision-making as highly predictable and objective, however, is illusory.[2] Judges and arbitrators instead are more human and less mechanical—they pour more of themselves into their cognitive processing. As Kahan indicates, they unwittingly shape outcomes consistent with their own innate preferences.[3]

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1. BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 1 (2010); Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?* 16 LEGAL THEORY 111 (2010).

2. *See e.g.*, Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 19–29 (2007); Tracey E. George & Taylor Grace Weaver, *The Role of Personal Attributes and Social Backgrounds on Judging*, *in* THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR 286–298 (2017); Kahan et al., *infra* note 3, at 356–368; Holger Spamann & Lars Klein, *Justice is Less Blind and Less Legalistic Than We Thought: Evidence from an Experiment with Real Judges*, 45 J. LEGAL STUD. 255, 255–259, 268–277 (2016); Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 731–761, 793–807 (2010) (research exploring humanness of judicial decision-making).

3. Dan M. Kahan et al., *"Ideology" or "Situation Sense"?: An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 356 (2016).

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"Motivated cognition" theory is an emerging model for explaining how legal decision makers process information (such as laws and facts) and reach their conclusions (case outcomes).[4] Provocative research on judges and motivated cognition exists;[5] research on arbitrators and motivated cognition is scarce. The model debunks the assumption that legal decision-makers are either intentionally biased or absolutely neutral, arguing instead that this binary framework does not adequately explain what is happening. Motivated cognition instead conceives legal decision-making as being affected by the fertile environmental and psychological context within which it occurs.

This article extends the motivated cognition model to the global economic stage, probing arbitration of international business disputes of two world powers: The United States and China. Through a first-of-its-kind empirical study of Chinese arbitration of international business disputes, it further develops the model by focusing on a particular kind of motivated cognition, motivated cultural cognition.[6] Motivated cultural cognition analyzes how culture affects motivated cognition and the decision-maker's model of justice. When applied to decision-makers with vastly different cultures—and with mega-corporations at stake—the implications can be massive.

Indeed, a better understanding of the international business arbitration process is important because so many disputes between businesses of different countries are resolved in international arbitration rather than the courts.[7] International arbitration is the "traffic cop" for the worldwide economy and the trillions of dollars at stake. Within that ecosystem, China is one of the biggest players in international trade and direct foreign investment. Since the late 1980s, China has been a world star in foreign trade and direct foreign activity.[8] In 2015, for instance, China was the largest recipient of direct foreign investment in the world.[9] Disputes between Chinese and foreign parties are inevitable with all of this business activity, and each party's resolutions are critical to ongoing trade and investment functioning.[10]

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4. Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 307 (2013).

5. *See id.* at 318–19.

6. *See id.* at 314–15.

7. *See* Pat K. Chew, *Opening the Red Door to Chinese Arbitrations: An Empirical Analysis of CIETAC Cases 1990-2000*, 22 HARV. NEGOT. L. REV. 241, 245–46 (2017); *see also* CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 1 (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011) (exploring the limitations and concerns of China's judicial system).

8. Chew, *supra* note 7.

9. *See e.g.*, *China Overtakes U.S. for Foreign Direct Investment*, BBC NEWS (Jan. 30, 2015), http://www.bbc.com/news/business-31052566.

10. *See* DANIEL C. K. CHOW, A PRIMER ON FOREIGN INVESTMENT ENTERPRISES AND PROTECTION OF INTELLECTUAL PROPERTY IN CHINA 9–11 (1st ed. 2002) (describing range of issues and resulting conflicts of direct foreign investment enterprises).

When it comes to U.S.-Chinese business disputes, the parties, arbitrators, and the Chinese International Economic Trade and Arbitration Commission (CIETAC) all want a convenient and reasonably efficient resolution of this dispute, but also paramount is a fair arbitration process. Both parties believe they have sound justifiable positions. With often sizeable commitments at stake, they want a presumptively equal playing field for all parties regardless of their nationality.[11]

Part I of this article explores the relationship between motivated cultural cognition and Chinese arbitrators' decision-making.[12] It investigates the model's implications for dispute outcomes and the possible role of Chinese arbitrators' core cultural beliefs in decision mechanisms that unwittingly lead to their "preferred outcomes."

Based on a novel empirical study of over 1,000 Chinese arbitrations, Part II discusses evidence of Chinese arbitrators demonstrating motivated cultural cognition.[13] It finds a relationship between the arbitrators' decision-making and the claimants' cultural similarity or cultural dissonance to the Chinese arbitrators' culture. The bottom line is what appears to be an advantage for Chinese parties and a disadvantage for foreign parties, particularly U.S. parties. The article concludes by exploring whether "just" results are culturally-specific, as motivated cultural cognition suggests, or if the answer depends on who is asking the question.

II. Motivated Cultural Cognition

A. Motivated Cognition Model

Individuals are always making decision or resolving disputes. The "motivated cognition" model posits that we are unwittingly influenced to reach a preferred outcome.[14] We believe we are absolutely open-minded about the alternatives and gathering all relevant information. Yet our cognitive processing of the dispute unconsciously shapes our reasoning

11. *See e.g.*, Jerome A. Cohen, *Time to Fix China's Arbitration*, Far E. Econ. Rev. 31, 31 (2005); Jerome A. Cohen, *Settling International Business Disputes With China—Then and Now*, 47 Cornell Int'l L. J. 555, 558–64 (2014); Frederick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 Berkeley J. Int'l L. 329, 341 (1997); William B. Grenner, *The Evolution of Foreign Trade Arbitration in the People's Republic of China*, 21 N.Y.U. J. Int'l L. & Pol. 293, 311 (1988-1989); William Heye, *Forum Selection for International Dispute Resolution in China—Chinese Courts vs. CIETAC*, 27 Hastings Int'l & Comp. L. Rev. 535, 536 (2003-2004); Justin Hughes, *Foreign lis alibi pendens, Non-Chinese Majority Tribunals and Other Problems of Neutrality in CIETAC Arbitration*, 13 Arb. Int'l 63, 69–83 (1997) (offering practitioner's perspective); Randall Peerenboom, *Seek Truth From Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 Am. J. Comp. L. 249 (2001) (for discussions of foreign investors' concerns).

12. *See supra* text accompanying note 7.

13. *See supra* text accompanying note 2.

14. Ziva Kunda, *The Case for Motivated Reasoning*, 108 Psychol. Bull. 480, 483 (1990); Sood, *supra* note 4, at 308–10.

process, drawing us to an outcome that serves some personalized interest (the preferred outcome).

This phenomenon is demonstrated in all kinds of situations, including how we evaluate ourselves and others, political judgments, business judgments, and moral behavior.[15] It shapes how we explain the nature, cause, and likelihood of events. It also is evidenced in a broad array of legal-related judgments.[16]

In one study, the participants are presented with a First Amendment related case, where the law requires a finding of harm, but the content is not legally-relevant.[17] Half of the participants' facts have a nudist holding up a pro-choice sign in favor of legalized abortion, while the other half's facts have a nudist holding up a pro-life sign against the legalization of abortion.[18] Participants impute more harm to the act of public nudity when the nudist's position was contrary to their own abortion views (which had been measured in a separate survey).[19]

Another experiment deals with a woman whose dogs maul a child to death.[20] The woman is either described as pleasant and of "good character" (sociable, generous, and healthy) or as unpleasant and of "bad character" (antisocial and unhealthy).[21] The participants who are presented with her as a bad character attributed more responsibility and intentionality to her than those who are presented with her as a good character, even though her character is unrelated to the dog-mauling incident and is a legally irrelevant factor.[22] In other research, legal judgments appeared unconsciously driven by the decision-makers' political preferences and ideology, their cultural commitment, and their group memberships.[23] As subsequently explored, one's cultural values can be a major determinant.[24]

How is motivated cognition operationalized? Researchers find that decision-makers arrive at their desired conclusions by engaging in inadvertently biased processes for "accessing, constructing, and evaluating beliefs."[25] For example, three such pre-conscious cognitive mechanisms that filter what is ultimately consciously considered include: (i) "[S]elective

15. Kunda, *supra* note 14, at 481–83; Sood, *supra* note 4, at 308.

16. Sood, *supra* note 4, at 310–15.

17. Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Criminalization Goals*, 100 CAL. L. REV. 1313, 1336–42, 1348 (2012).

18. *Id.*

19. *Id.*

20. Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 285–87 (2012).

21. *Id.* at 285.

22. *Id.* at 286-87.

23. *See e.g.*, Joshua R. Furgeson et al., *Do a Law's Policy Implications Affect Beliefs About its Constitutionality? An Experimental Test*, 32 L. & HUM. BEHAV. 219, 226 (2008) (effect of political ideology); Anca M. Miron et al., *Motivated Shifting of Justice Standards*, 36 PERSONALITY SOC. PSYCHOL. BULL. 768, 777–76 (2010).

24. *See supra* note 2.

25. Sood, *supra* note 4, at 309; Kunda, *supra* note 14, at 480.

internal searching through their memory or external searching through available information to find existing facts, beliefs[,] or rules that support the outcome they prefer;" (ii) "[C]reatively combin[ing] accessed knowledge to construct new beliefs that could logically support the desired conclusion;" and (iii) "Preference-inconsistent information is evaluated in a more critical manner than preference-consistent information."[26] As Sood continues:

> Instead of either relinquishing their own sense of justice or blatantly flouting the law, legal decision makers may engage in a motivated construal of relevant information to achieve their desired . . . outcomes . . . especially when the law leaves room for ambiguity or interpretation.[27]

Decision-makers also engage in a kind of naïve realism. They see themselves as objective.[28] They do not recognize their biases, instead seeing others as biased. This sincere belief in their own objectivity allows them to confirm the integrity of their decision-making. They can, in good faith, represent to others and believe themselves that they are neutral decision makers. Further, when decision-makers are confronted with their illusion of objectivity, for instance, by making the preferential ideological factor apparent, the motivated cognitive effect can be eliminated.[29] Neuroscientists using functional magnetic resonance imaging (fMRI) also find that the regions of the brain activated by motivated cognition are not the same as ones associated with rationale reasoning tasks, consistent with the belief that motivated cognition is unconscious.[30]

B. MOTIVATED CULTURAL COGNITION AND CHINESE ARBITRATION

Motivated cognition research finds that decision-makers' culture plays a very important role in their decisions.[31] Core cultural values provide the foundation for beliefs about what is important and prioritized; they are the basis on which the world is perceived and processed. These beliefs directly shape the criteria for decisions, which in turn leads to certain preferred outcomes.

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26. Sood, *supra* note 4, at 309-12.

27. *Id.*

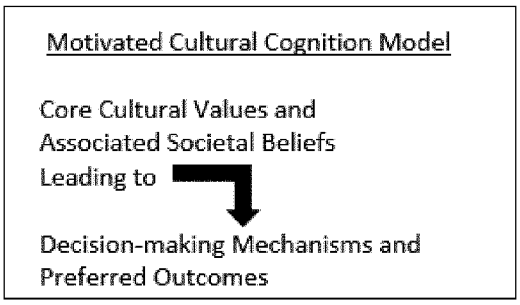
28. *See* Kunda, *supra* note 14; Emily Balcetis & David Dunning, *See What You Want to See: Motivational Influences on Visual Perception*, 91 J. PERSONALITY SOC. PSYCHOL. 612, 612–13 (2006).

29. Sood & Darley, *supra* note 17, at 1357.

30. *See* Drew Westen et al., *Neural Bases of Motivated Reasoning: An fMRI Study of Emotional Constraints on Partisan Political Judgment in the 2004 U.S. Presidential Election*, 18 J. COGNITIVE NEUROSCIENCE 1947, 1955 (2006).

31. See Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 888–90 (2012) [hereinafter Kahan, *"They Saw a Protest"*]; Dan M. Kahan & Donald Braman, *The Self-Defense Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1, 1 (2008); Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 787, 799 (2010) (prolific research by Kahan and colleagues).

In the particular context of Chinese arbitration, Chinese arbitrators, as members of Chinese culture, share "core cultural values" that are the basis for their key "societal beliefs."[32] As illustrated, these values and beliefs, in turn, shape arbitrators' positions on how disputes should be approached and the criteria for their resolutions (decision-making mechanisms). These cognitive processes result in their arbitration awards (outcomes), such as in the kinds of disputes subsequently described.[33]



1. *Core Values and Societal Beliefs*

Anthropologists and other social scientists have long studied countries' core cultural values. They describe culture as a society's "learned system of meanings rooted in symbols . . . language . . . and actions."[34] Values are the reference points that a culture uses to "give order and guidance to [its] thoughts and actions."[35] Various frameworks are used to conceptualize cultural values across nations.[36] Geert Hofstede is a pioneer in identifying and researching cultural dimensions.[37] Two prominent dimensions of cultural values, recognized by Hofstede and other social scientists, are collectivism versus individualism and hierarchical versus egalitarian orientations.[38] Motivated cultural cognition scholars find these dimensions particularly salient in understanding legal decision-making.

32. *Id.*

33. *See infra* Part III.A.

34. Rebecca LeFebvre & Volker Franke, *Culture Matters: Individualism vs. Collectivism in Conflict Decision-Making*, 3 SOCIETIES 128-146 at 132; Kevin Avruch & Peter W. Black, *Conflict Resolution in Intercultural Settings*, in THE CONFLICT & CULTURE READER 7-14 (PAT CHEW, ED. 2001).

35. LeFebvre & Franke, *supra* note 34.

36. *Id.* at 132-33.

37. *See generally* Geert Hofstede, *Dimensionalizing Cultures: The Hofstede Model in Context*, ONLINE READINGS IN PSYCHOLOGY AND CULTURE 1,1 (Dec. 1, 2011), https://scholarworks.gvsu.edu/cgi/viewcontent.cgi?article=1014&context=orpc; Denise Rotondo Fernandez et al., *Hofstede's Country Classification 25 Years Later*, 137 J. SOC. PSYCHOL. 43, 43 (1997).

38. *See generally* Kahan, *"They Saw a Protest"*, *supra* note 31, at 864–65, 869–70; Boonghee Yoo et al., *Measuring Hofstede's Five Dimensions of Cultural Values at the Individual Level: Development and Validation of CVSCALE*, 23 J. INT'L CONSUMER MKTG. 193, 194–195 (2011).

Simply stated, a collectivist culture values community interests over individual interests.[39] The group is the priority, with group values and group coherence protected. In contrast, an individualist culture values individual interests over collective interests. The individual is the priority, with individual autonomy and rights to be protected. As Hofstede explains, this dimension describes the degree to which people are integrated into groups.[40] For individualists, "ties between individuals are loose: everyone is expected to look after him/herself."[41] Collectivists "from birth onward are integrated into strong, cohesive in-groups . . . that continue protecting [each other] in exchange for unquestioning loyalty."[42]

As further revealed by anthropological studies, the two cultural orientations are associated with distinctly different attributes and beliefs.[43] Collectivists define themselves in group terms. They are regulated by groups norms that tend to be homogenous.[44] They avoid confrontation, aspiring instead to remain in harmony in the group.[45] They compromise personal goals if it serves group goals to do so. Individualists are more detached from group norms; societal norms are more heterogeneous.[46] When prioritizing individual interests and goals above group goals, they often engage in a cost-benefit analysis.[47] Confrontation is accepted as part of natural human dynamics.[48]

A second important dimension is hierarchical versus egalitarian orientations. This is also called power distance orientation because this construct is associated with a society's acceptance of the distribution of power among groups in society.[49] In a hierarchical society, there is a comfort with class stratifications. Individuals expect that some groups will have more power, status, and wealth (recognized elites). This stratification seems reasonable and has certain societal utility, such as predictability and order. In contrast, an egalitarian society is not as comfortable with unequal distribution of powers among groups in society. Instead, it theoretically

39. *See* Harry C. Triandis et al., *Multimethod Probes of Individualism and Collectivism*, *in* THE CONFLICT & CULTURE READER 52, 52–54 (Pat K. Chew ed., 2001); Kahan, *"They Saw a Protest"*, *supra* note 31, at 864–65; Hofstede, *supra* note 37, at 11.

40. Hofstede, *supra* note 37, at 8.

41. *Id.* at 11.

42. *Id.*

43. *See id.*; Triandis, *supra* note 39, at 53.

44. Triandis, *supra* note 39, at 53.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Hofstede, *supra* note 37, at 9–10; Jiing-Lih Farh et al., *Individual-Level Cultural Values as Moderators of Perceived Organizational Support-Employee Outcome Relationships in China: Comparing the Effects of Power Distance and Traditionality*, 50 ACAD. MGT. J. 715, 716 (2007).

aspires to more equal peer relationships. Ideally, power, status, and wealth are widely dispersed and disparities between groups are minimized.[50]

Substantial research measures countries' general cultural profiles, including whether a country is more collectivist versus individualist or hierarchical versus egalitarian.[51] These studies consistently confirm that Chinese culture is a classic example of collectivist and hierarchical orientations.[52] For instance, in Hofstede's country comparisons, on a scale of zero to 100, with 100 being totally individualist and zero being totally collectivist, China has a score of twenty.[53] On a scale of zero to 100, with 100 being totally hierarchical and zero being totally egalitarian, China has a score of eighty.[54]

Chinese arbitrators, as prominent members of this culture, intuitively bring culturally associated attributes to their decision-making roles. As collectivist-hierarchical oriented, they are motivated to protect their group's status and their own standing in the group.[55] Further, they implicitly acknowledge that there is a hierarchy of which they are a part and subject to, including top-down messaging from different levels of government and from their institutions. Chinese business parties to the dispute also share the same core cultural values and associated beliefs. In these very fundamental ways, they are in sync with the Chinese arbitrators.

Foreign parties in these disputes come from countries with a range of core cultural values, some similar and others quite dissonant from that of Chinese arbitrators and Chinese parties. As subsequently discussed, U.S. culture interestingly represents the opposing cultural orientations. In the same way that China is considered a prime example of collectivist-hierarchical orientations, the United States is considered a prime example of individualist-egalitarian orientations.[56] Thus, a U.S. party to the dispute is out of sync in these culturally fundamental ways with the Chinese arbitrators and Chinese parties.

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50. As further explained by Hofstede, "[a]ll societies are unequal, but some are more unequal than others." This dimension "suggests that a society's level of inequality is endorsed by the followers as much as by the leaders." Hofstede, *supra* note 37, at 9.

51. While recognizing that individuals in every national culture vary, these countries' profiles provide a useful generalized baseline. *See e.g.*, *Country Comparison*, HOFSTEDE INSIGHTS [hereinafter Hofstede Insights], *available at* https://www.hofstede-insights.com/country-comparison/the-usa/.

52. *See e.g.*, Lei Wang et al., *Collectivist Orientation as a Predictor of Affective Organizational Commitment: A Study Conducted in China*, 10 INT'L J. ORG. ANALYSIS 226, 236 (2002).

53. Hofstede Insights, *supra* note 51.

54. *Id.*

55. This is consistent with the general attributes of these cultural orientations. *See* Triandis, *supra* note 39, at 53 (table describing general attributes of collectivist cultures); Hofstede, *supra* note 37, at 9, 11 (tables describing general attributes of collectivist and high-power distance cultures).

56. Hofstede Insights, *supra* note 51.

China		*U.S.*
Collectivist	←--------→	Individualist
Hierarchical	←--------→	Egalitarian

These inverse cultural frameworks create an inherently complicated and influential backdrop when disputes arise. Nesbitt summarizes the differences between relatively interdependent societies, such as China, with relatively independent societies, such as the United States.[57] He notes a preference for collective action versus an "insistence on individual freedom," a "preference for blending harmoniously with the group" versus "individual distinctiveness," "an acceptance of hierarchy and ascribed status" versus "egalitarianism and achieved status," and a preference for approaches that consider context and relationships versus universal rules for proper behavior.[58] By describing these contrasting features, Nesbitt anticipates how these core cultural values and their attributes shape Chinese arbitrators' decision-making.

2. *Arbitrators' Decision-making Mechanisms*

Motivated cultural cognition theory posits that Chinese arbitrators unconsciously draw from their core cultural values, such as their collectivist and hierarchical orientations and use cognitive processes consistent with those values and associated attributes. As they review and consider the parties' arguments, they engage in a number of steps. They determine what information is relevant, which facts are believable, which laws are applicable, and which decision-making standards are used to resolve the dispute.

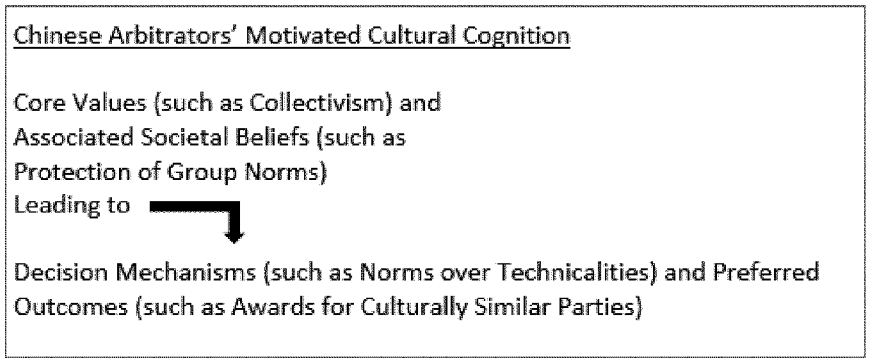
These stages in arbitral decision-making conveniently offer arbitrators opportunities for unconscious cognitive mechanisms used in motivated cognition because these steps deal with how arbitrators might selectively access, construct, and evaluate their beliefs."[59] For instance, Chinese arbitrators can use dispute resolution approaches and select decision-making standards that inadvertently favor one party. In addition, they can determine that the most credible sources of information are those that are more likely to support another party.[60]

57. RICHARD E. NISBETT, THE GEOGRAPHY OF THOUGHT: HOW ASIANS AND WESTERNS THINK DIFFERENTLY. . .AND WHY 68 (2003).

58. *Id.* at 61–62.

59. Sood, *supra* note 4, at 309.

60. As consistent with cognitive mechanisms in motivated cognition theory. *See id.* at 309–10.



A careful study of Chinese arbitrators' decision-making reveals mechanisms that affect how information on the parties' positions are accessed, constructed, and evaluated. First, arbitrators favor informal dispute resolution processes.[61] They tend to emphasize norms and flexibility over technicalities and their rigidity.[62] In addition, cultural networking practices (*guanxi*) shape how the norms develop and what the norms are.[63] Second, arbitrators prioritize state and institutional authority over parties' and arbitrators' autonomy.[64]

These cognitive mechanisms are natural consequences of the collectivist-hierarchical values in the Chinese arbitration process. Taken together, they also create the Chinese arbitrators' model of justice and ultimately influence the arbitrators' awards. Consistent with the motivated cultural cognition framework, these awards are likely to be the arbitrators' preferred outcomes.

a. Norms and Flexibility Trump Technicalities and Rigidity

Distinctive dispute resolution approaches are long-standing in China.[65] Embedded in a highly collectivist culture, these approaches have persisted through many political changes. Chinese arbitrators and Chinese parties are

61. *See* CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA, *supra* note 7. This informality also facilities the arbitrators' goal of "harmonious arbitration." GU WEIXIA, ARBITRATION IN CHINA: REGULATION OF ARBITRATION AGREEMENTS AND PRACTICAL ISSUES 32–33 (2012). Dispute resolution is characterized by traditional Chinese ideas of "moderation in all things," the "rule of propriety" where the correct relationships should be preserved and accommodated, and "harmony as valuable." Conflict is seen as a deviation from harmony that needs to be restored. Consistent with this goal of "harmonious arbitration," Chinese arbitrators view themselves more as conciliators and mediators than as adjudicators. They represent the institution or the state. They see their role as helping the parties to restore balance in their relationship, rather than as adjudicators of each party's rights. This conception is also consistent with the arbitrators' expansive discretion in their use of norms and a minimizing of the importance of legal technicalities and literal contract terms, and subsequently described.

62. Weixia, *supra* note 61, at 37.

63. *Id.*

64. *Id.* at 38.

65. *See* Shi Weisan, *Arbitration and Conciliation: Resolving Commercial Disputes in China*, 12 LOY. L.A. INT'L & COMP. L. J. 93, 96 (1989) (dispute resolution as mediation-like); Alison Bailey,

embedded in that legacy. In very fundamental ways, they share common premises: informal social and moral norms over technicalities and fairness principles flexibly applied.

Chinese dispute resolution prefers informal means, such as mediation, over formal processes, such as litigation.[66] Deference to norms is preferred over deference to rigid rules including legal rules.[67] While a traditional Western view considers laws as guarantors of individual rights, China has a different history with law.[68] Law was a form of unfair and abusive punishment by the state.[69] Chinese society thus prefers non-legal norms and values.[70] Legal processes and the rigidity of legal rules are viewed as the last recourse, not the first.[71]

Likewise, Chinese arbitrators view contract terms flexibly.[72] Contract terms follow but do not lead the process of dispute resolution. Instead, judges and arbitrators rely on the principles of *heqing*, *heli*, and *hefa*, which translate generally to human feelings, principles of reasonableness, and Chinese laws, in interpreting the contract terms.[73] This flexibility in the interpretation of legal rules or contract terms is especially apt if there is a gap in legislation on the issue or there is ambiguity in the meaning of contract provisions.[74] Arbitrators can then use this "white space" to interpret the dispute, the law, and the contract in ways that are compatible with cultural forces and government priorities.[75]

Consistent with this emphasis on what is fair and reasonable, equitable and moral principles play an important role in dispute resolution in traditional China and in arbitration practice more currently. As Fan describes:

> Like the ancient officials (judges) who relied heavily on the unique features of the special circumstance and on reasonableness to determine each individual case, today's arbitrators in China also rely heavily on equitable principles. Law is only one of the factors to be considered to

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Living Law: Typicality, Variability and Practicality: The Imperial Chinese Code, Sub-statutes, and Judicial Reasoning (paper on file with the author); Brown & Rogers, *supra* note 11, at 333.

66. KUN FAN, ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS 181–89 (2013) (explaining Chinese legal culture and its arbitration practice, including emphasis on ritual of li over legalism of fa); Karen G. Turner, *The Problem of Paradigms*, *in* THE LIMITS OF THE RULE OF LAW IN CHINA 7 (Karen G. Turner et al. eds., 2000).

67. Fan, *supra* note 66, at 185–200.

68. To illustrate, the West and China have different conceptions of the rule of law. *Id.* at 210, 114–15, 234; Turner, *supra* note 66, at 5.

69. Turner, *supra* note 66, at 7.

70. *Id.*

71. *Id.*

72. *See e.g.*, Lucie Cheng & Arthur Rosett, *Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarchy to Market*, 1978-1989, 5 J. CHINESE L. 143, 216-17 (1991); FAN, *supra* note 66, at 220–21.

73. Fan, *supra* note 66, at 220.

74. *Id.* at 172.

75. *Id.* at 172, 224, 229; Weixia, *supra* note 61, at 39.

> determine the rights of the parties, together with equity and reasonableness. In the Chinese saying, 'a just decision must be in conformity with law and reasonableness' (he li he fa).[76]

These notions are also incorporated into the Chinese Arbitration Law, which allows arbitral discretion with its declaration that "disputes shall be resolved on the basis of facts, in compliance with the law and *in an equitable and reasonable manner*."[77] Ironically then, Chinese law itself opens the door to a non-legal normative analysis.

Reviews of awards from early years reveal arbitrators were "keen on resolving disputes in a way that would result in each disputing party making a compromise," and thus some "pertinent legal issues may not have been adequately treated."[78] More current research continues to indicate that most Chinese arbitrators consider fairness quite relevant in their determinations.[79] An extensive review of recent Chinese arbitration practices reveals a continuing marked gap between "laws written on paper" and their application in actual arbitrations.[80]

But how are norms of reasonableness and fairness determined? Historically, Confucian philosophy conveniently offered guidelines on correct behavior and an order in relationships.[81] The most important bonds were between "the ruler and the ministers," between key family members, and between friends.[82] These bonds are achieved through loyalty, social rules, wisdom, and sincerity.[83]

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76. Fan, *supra* note 66, at 209.

77. Zhonghua Renmin Gongheguo zhong cai fa (中华人民共和国仲裁法) [Arbitration Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Sept. 1, 1995), art. 7, http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4624.htm.

78. Guiguo Wang, *The Unification of the Dispute Resolution System in China: Cultural, Economic and Legal Contributions*, 13 J. INT'L ARB. 5, 30 (1996).

79. Weixia, *supra* note 61, at 38 (tentative nature of contract given relations); Fan, *supra* note 66, at 208 (flexibility in interpreting laws and contract terms), at 227 (indicating Chinese high tolerance for uncertainty); Randall Pereenboom, *Dispute Resolution in China: Patterns, Causes and Prognosis*, 4 EAST ASIA L. REV. 1, 29 (2009).

80. Fan, *supra* note 66, at 209 (but notion of "finding flexible ways around the laws" is more likely to lead to less predictable results). *See also* Peerenboom, *supra* note 11, at 56 ("The weak normative force of the law is perhaps to be expected given the many factors that undermine the authority of law and make it difficult for the populace to accept and respect law as a source of order in China today. The lurking influence of traditional attitudes toward law as an inferior albeit necessary means of achieving social order may be one factor. The persistence of an instrumental view of law whereby law is seen as a tool to be used for whatever purposes the state deems appropriate surely detracts from the law's moral authority. As does the fact that other sources of normative order, whether the CCP, local officials, or personal connections, are still often more important than the law. Moreover, the weakness of the legal system as a whole and the courts in particular feeds a vicious cycle whereby the legal system is not taken seriously.").

81. Fan, *supra* note 66, at 192–93.

82. *Id.*

83. *Id.*

China's culturally engrained *guanxi* networking practices are derived from this cultural history and are influential in shaping social norms. *Guanxi* is the long-standing social practice of building and utilizing relationships.[84] These relationships serve as the fundamental units of society.

Guanxi is a natural way of conducting life, including business and work.[85] Its networks and the shared insights are integral to the Chinese business and professional world, including foreign trade and investment. Business contacts result from personal relations,[86] increased information is shared between *guanxi* colleagues,[87] and executives are more likely to trust those with whom they have *guanxi* ties.[88] *Guanxi* may particularly fill a void when a lack of structural and formal guidelines exists.[89]

As prominent and successful members in Chinese society and bureaucratic institutions, Chinese arbitrators have mastered and are themselves integral to the *guanxi* system.[90] They are likely involved in business, legal, and political activities, typically having roles in the commercial and legal communities, in addition to being arbitrators.[91] As members of the elite, they are vested in common political and economic goals and are linked to each other.[92] Thus, they are particularly inclined to protect the system and their membership in it.

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84. *See* Chao C. Chen, et. al., *Chinese Guanxi: An Integrative Review and New Directions for Future Research*, 9 MGMT. ORG. REV. 167 (2010) (meta-review of research on *guanxi*).

85. *Id.* at 170, 182.

86. *Id.* at 192.

87. *Id.* at 188.

88. *Id.* at 183. Chinese managers in foreign trade and investment projects are more likely than American managers to use and maintain guanxi ties. *Id.* at 192. Likewise, stronger beneficial effects of guanxi ties were found where the direct foreign investment project had Chinese partners and Chinese cultural roots. *Id.* at 187.

89. *Id.* at 175. Also see the author's consideration of ethical and justice issues prompted by *guanxi* networks. *Id.* at 185, 188-89, 193.

90. Fan, *supra* note 66, at 127 (relationship between CIETAC and arbitrators), 208–12 (historical and modern emphasis on relations), 221 (aversion to formal dispute resolution), 222 (*guanxi* integral to social and economic lives and like circles in a lake); Weixia, *supra* note 61, at 37–38 (closed panel system often drawn from staff who share relations with others in community); Brown & Rogers, *supra* note 65, at 335–36; Hughes, *supra* note 11, at 63 n.2 (noting "foreign" arbitrators are mostly from Hong Kong); Ge Liu & Alexander Lourie, *International Commercial Arbitration in China: History, New Developments, and Current Practice*, 28 J. MARSHALL L. REV. 539 (1995); Peerenboom, *supra* note 11 (use of *guanxi)*; William W. Park, *A Fair Fight: Professional Guidelines in International Arbitration*, 30 J. LONDON CT. INT'L ARB. 409 (2014); Lucie Cheng & Arthur Rosett, *Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarch to Market, 1978-1989*, 5 J. CHINESE L. 143 (1991).

91. *See e.g.*, CIETAC roster of possible arbitrators at CIETAC Arbitrator Search, http://www.cietac.org/index.php?g=user&m=arbitrator&a=index&l=en (last visited July 6, 2018). Each arbitrator's resume has nationality, gender, education, work experience and expertise; very few arbitrators are non-Chinese.

92. Strong collectivist culture in China emphasizes the differences between in-groups (e.g., Chinese in *guanxi* network) and out groups (e.g., foreign businesspersons with unclear roles in Chinese society). Fan, *supra* note 66, at 210.

Sharing *guanxi* networks as well as political and cultural backgrounds, Chinese arbitrators are likely to identify with the Chinese party's concerns and perspectives, naturally finding their arguments intuitive and worthy. As Wexia explains, these relationships have a "delicate psychological impact."[93] While not directly relying on their *guanxi* networks in any particular dispute, arbitrators' *guanxi* relationships over time surely shape their perspectives on the important issues in the type of dispute, the reputations of the parties, and the credibility of the expert witnesses before them.[94]

b. Authority over Autonomy

Arbitrators also determine how to construct and evaluate the arguments and information presented by the parties. Consistent with both China's hierarchical and collectivist orientations, arbitrators tend to prioritize institutional authority over the arbitrators' and parties' autonomy in these cognitive processes. They can do this in more or less explicit ways.[95]

As a top-down socialist system, the Chinese government's stated goals for nation-building and strengthening the political agenda are clear.[96] The link between a successful economy and successful Chinese involvement in direct foreign investment and foreign trade also is clear. That means arbitrators' reaching decisions facilitate, or at least in the aggregate, do not harm Chinese parties' in their entrepreneurial endeavors.

The relevant administrative entities also communicate, both implicitly and expressly, these messages. CIETAC, the Chinese institution that administers Chinese arbitrations, is technically independent of the government. But it remains part of the China Council for the Promotion of International Trade (CCPIT), the government agency directed to administer and develop foreign business and investment.[97]

Thus, unlike the Western conception of arbitration as bottom-up and driven by the arbitrators' and parties' autonomy, Chinese arbitration is more top-down.[98] CIETAC and its arbitrators are cognizant of their roles as quasi-government players in the state's agenda and are motivated to interpret disputes and the parties' positions consistent with these goals.[99] Arbitrators' considerable discretion in interpreting laws and contract terms and the informality of the arbitration process also allows arbitrators' marked flexibility in achieving these goals.

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93. Weixia, *supra* note 61, at 39.

94. Arbitrators can filter their perceptions of expertise, credibility, and authority accordingly. They can "creatively combine accessed knowledge to construct new beliefs that could logically support the desired conclusion." Kunda, *supra* note 14, at 485–86.

95. This shifting of criteria is also illustrated in Miron, *supra* note 23, at 768-79.

96. Fan, *supra* note 66. Arbitrators, for instance, could unknowingly impose a less-demanding evidentiary standard on a party whose conduct is consistent with institutional priorities. In another example, they could judge experts who minimize parties' autonomy as more credible than those who do not.

97. *Id.*

98. *Id.* at 179.

99. Brown & Rogers, *supra* note 65, at 331; Fan, *supra* note 66, at 175, 216.

Further, the Western conception of parties' autonomy, for instance, is that parties are free to negotiate the specific terms of their relationship and that those terms will be expressly enforced.[100] Thus, their reasonable expectation is that arbitrators will respect and thus defer to their contract provisions.[101] But as described earlier, Chinese arbitrators may not give interpret contract terms as technically or rigidly as the contract's literal terms would indicate. Instead, contract terms (and, thus, the parties' autonomy in this regard) may take a back seat to institutional and social priorities.[102]

3. *Foreign Parties and Contrasting Decision Mechanisms*

But what about the core values and associated attributes of the foreign parties in these arbitration cases? What if they are neither collectivist nor hierarchical? To the extent that they contrast from the Chinese arbitrators' values, as described above, they may presume and expect different decision-making standards and reasoning processes than those actually occurring.

As widely studied by comparative social scientists, the Western approach, as modeled by the United States, tends to be individualist-oriented (focused on individual interests and rights) and short-term (focused on this transaction and dispute).[103] In addition, the United States emphasizes egalitarian values. Consistent with these prevalent cultural norms, it is likely that the U.S. parties (and for that matter, U.S. arbitrators) adhere to these values in the arbitration process. While they might anticipate decision-making mechanisms in sync with their core values, the Chinese arbitrators' decision-making contrast with those expectations markedly.

For example, while Chinese arbitrators prioritize norms overs technicalities, the U.S. decision rule would be the reverse. The United States views laws as important safeguards of individual rights, including those rights embodied in contracts.[104] Legal rules are expected to trump social or political norms, thus ensuring the predictability and efficiency upon which business parties depend. The formalities of dispute resolution also are associated with due process assurances, so an informal conciliation-oriented arbitrator again would be contrary to expectations. Similarly, the United States emphasizes contract terms as the agreement of the parties, believing that those terms should be strictly followed.[105] The contract is viewed as a reflection of the parties' autonomy to govern their own relationship, without regard to the cultural or political context in which the parties operate.

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100. *See generally* Charles Fried, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION, (2nd ed. 2015); E. Allan Farnsworth, FARNSWORTH ON CONTRACTS VOL. I, 199–205 (3rd ed. 2004).

101. Farnsworth, *supra* note 100, at 17–22.

102. *See* text accompanying note 76.

103. *See e.g.*, Triandis, *supra* note 39, at 52; Nisbett, *supra* note 57; Fan, *supra* note 66, at 226–27.

104. *See* Roscoe Pound, *The Foundation of Law*, 10 AMER. U. L. REV. 124, 129 (1961).

105. *See* text accompanying notes 103.

On the other hand, Chinese arbitrators and Chinese parties are embedded in the *guanxi* system of relationships, which inevitably influences who and what the Chinese believe are the most credible and authoritative sources of information in different types of disputes. The U.S. tendency is to see arbitration process as a more insulated and isolated process, where decision-making is limited to the technical information presented in the arbitration documents and the parties' arguments in this particular case. Authoritative sources are "objective" and the traditionally authoritative legal sources, as recognized by Western conceptions of rule of law.[106] Similarly, the arbitrators' autonomy in decision-making is presumed.[107] Explicit or implicit messaging from the arbitral institution or other superior government-related entities to arbitrators, for instance, are off-limits. The process is assumed to be bottom-up rather than top-down.

Thus, Chinese values and their resulting decision mechanisms depart substantially from what the United States might expect. But how do these contrasting cultural values and decision mechanisms actually affect arbitration outcomes? Motivated cultural cognition theory indicates that Chinese arbitrators would unconsciously be influenced in ways that lead to their preferred outcomes. The following empirical evidence suggests that the theory is right on track.

III. Empirical Study

A. Description of Study

The author's past study of Chinese international business arbitrations from 1900-2000 is the first known empirical study of Chinese arbitrations of international business disputes.[108] That study opened the door to the black box of CIETAC arbitrations specifically and Chinese international arbitrations more generally. Based on 1,172 cases, randomly sampled from a comprehensive collection of over 4,000 arbitration awards, the study reveals characteristics of the disputes, the parties, and the arbitrators' decision-making patterns. While these disputes occurred between 1990-2000 and some CIETAC procedural rules have changed over time, information about arbitrators' practices remain currently relevant. As explained by recent studies of Chinese arbitration, arbitrators' approaches to the process, their reasoning, and their practices are enduring and continue to be prevalent today.[109]

106. *See e.g.*, Ann Sinsheimer et al., Legal Writing: A Contemporary Approach, 5–12 (2014) (describing U.S. legal system).

107. American Arbitration Association, *Rules, Forms & Fees: Commercial Arbitration Rules and Mediation Procedures*, R-18(a)(i) (Oct. 1, 2013), https://adr.org/sites/default/files/CommercialRules_Web.pdf ("Any arbitration shall be impartial and independent and . . . shall be subject to disqualification for (i) partiality or lack of independence . . .").

108. Chew, *supra* note 7 (discussing findings on types of disputes, types of claimants, location of arbitrations, compositions of arbitral panels, and arbitration outcomes).

109. Fan, *supra* note 66.

Among other key results in the author's original study is that Chinese claimants as a group are more successful than foreign claimants as a group in their arbitration awards.[110] The current study zooms in on this general finding of what appears to be a Chinese advantage over foreign parties by more carefully studying the specific nationalities of the foreign parties. In particular, it compares the experiences of parties from countries more culturally similar to China's and countries with cultures more dissonant from China's. Parties from over fifty countries participated in Chinese arbitrations.[111] Finally, this analysis extends and develops the model of motivated cultural cognition, revealing its far-reaching impact for international businesses and global economies.

B. Chinese Claimants are Better-Off than Foreign Claimants

Among all cases regardless of parties' nationalities, Chinese arbitrators have a distinctive decision-making pattern. As shown in Table 1, they are much more likely to award claimants partial wins than clear-cut win/lose outcomes. Only 30.5 percent of claimants' awards are either full wins (17 percent) or full losses (13.5 percent).[112] In contrast, 69.5 percent of the awards are compromise partial wins. This decision-making pattern is

110. Chew, *supra* note 7, at 259, 270.

111. In the interest of confidentiality, CIETAC did not identify the parties in these disputes by name, but the nationality of the claimants is usually identifiable from the facts of the case. Foreign parties are almost as likely as Chinese parties to be claimants and respondents. 42.5% of the claimants are foreign and 57.5% are Chinese. Most typically, one party to a dispute was Chinese and the other was foreign. Among the claimants, the top groups by nationality in the study are: China (55%), Hong Kong (21%), USA (4.1%), Japan (2.5%), South Korea (2.4%), Germany (1.5%), Singapore (1.5%), Taiwan (1.4%), Soviet Union (1%), UK (.9%), and Canada (.6%). Among the respondents, the top groups by nationality are: China (47.2%), Hong Kong (23.6%), USA (6.9%), Japan (2.6%), South Korea (3.2%), Germany (1%), Singapore (2.3%), Taiwan (2.3%), UK (.9%), Canada (1%).

112. If the arbitrators' award consisted of everything the claimant argued for, it was coded as a "full win;" if the claimant received some but not all of what it wanted, it was coded as a "partial win;" if the claimant received none of what it wanted, it was coded as a "full loss." Prior studies on arbitral award patterns sometimes described awards according to the percentage of the monetary amount of the claim that was awarded (e.g., 1-20%, etc.). This description of awards in the CIETAC study, however, was not possible or appropriate. While some claimants in CIETAC arbitrations stated their claims in monetary terms, that was often not the case. Instead, claimants often asked for some form of specific performance. For instance, in foreign investment disputes claimants asked for revocation of the joint venture agreement, altering the management structure, or compliance with the terms on intellectual property exchanges. In trade disputes, parties claimed, for example, return of the goods or compliance with quality controls or delivery terms. In other words, it was not possible to objectively quantify or monetize the claimants' demands or the arbitrations' awards, given the nature and variety of the claims themselves.

consistent with "harmonious arbitration" given that arbitrators appeared to recognize that both sides' position had some merit.[113]

Viewing partial wins as the arbitrators' default position allows us to turn our attention to the arbitrators' decision-making patterns on full wins and full losses. Given our large sample size, we have an ample data set for analysis of these outcomes. The arbitrators' decision to grant the claimant a full win or to impose a full loss is very strategically meaningful. From the claimant's perspective, the ideal outcome is a full win—a total victory because they got everything they wanted. Its least preferred outcome is a full loss—a total failure because they received nothing they wanted. Thus, in viewing claimants in the aggregate (and setting aside partial wins), claimants are "better off" when they have *more* full wins and *fewer* full losses. In other words, they are more successful. In contrast, claimants in the aggregate are "worse off" when they have *fewer* full wins and *more* full losses; namely, they would be less successful.

C. Cultural Dissonance and Outcomes

Consistent with motivated cultural cognition theory, the hypothesis is that parties from countries that are culturally similar to China would have results relatively comparable to the Chinese parties. In other words, these culturally similar parties would fare about the same as the Chinese parties, with comparable levels of success (about the same percentages of full-wins and full losses). Likewise, the hypothesis is that parties from countries that are culturally dissimilar to China would have different results from the Chinese parties. Furthermore, we would predict that the more dissimilar the cultures, the worse-off the parties. In other words, they would have significantly less full wins and significantly more full losses. As further explained below and shown in Table 1, the empirical analysis found exactly what these hypotheses predicted.[114]

113. *See* Chew, *supra* note 7, at 273 (describing Chinese arbitrators' tendency to be more like mediators).

114. A p value of less than or equal to .05 indicates that the association between the variables is statistically meaningful, while in contrast, a p value more than .05 indicates that the contrast is not statistically significant and is more likely to be occurring by chance. *See* Chew, *supra* note 7, at 259, 262–63, 268.

Table 1: Outcomes by Claimants' Nationality Groups

	Full Wins		Partial Wins		Full Losses		Totals	
	N	%	N	%	N	%	N	%
Chinese	115	19.3	423	71	58	9.7	596	100
All Foreign	61	13.9	297	67.5	82	18.6	440	100
Hong Kong	30	13.7	160	73.1	29	13.2	219	100
Developed Countries	22	15.2	88	60.7	35	24.1	145	100
U.S.	3	7.10	27	643	12	28.6	42	100
All Claimants	176	17	720	69.5	140	13.5	1036	100

P = .00 for all comparisons, except for analysis comparing outcomes for Chinese and Hong Kong claimants, where p=.09.

1. *Claimants from A Culturally-Similar Country*

Among the foreign parties in the arbitrations, Hong Kong has the culture that is most similar to China's. Their residents have a common ancestry and Hong Kong geographically borders mainland China, with citizens and businesses seamlessly crossing their border.[115] During most of Hong Kong's history, it was considered Chinese territory. Thus, while China technically categorizes Hong Kong as foreign, the two have much in common.

Most relevant here, these historical commonalities coincide with similar core values. While there are individuals in every country who do not fit the dominant cultural norms, the country as a whole identifies with and demonstrates characteristic values. As shown in Table 2, with a score of twenty-five (with zero being totally collectivist and 100 being totally individualist), Hong Kong, like China, is very collectivist. With a score of sixty-eight (with zero being totally egalitarian and 100 being totally hierarchical), Hong Kong is similar to but not identical with China, reflecting a comfort with power distance, but a little less so than China.

Table 2: Values by Countries[116]

	Collectivism/ Individualism*	Egalitarian/ Hierarchical**
China	20	80
Hong Kong	25	68
Japan	46	54
Germany	67	40
U.S.	91	35

* With continuum of Collectivist = 0 and Individualist = 100
** With continuum of Egalitarian = 0 and Hierarchical = 100

115. Marilyn B. Brewer, *Multiple Identities and Identity Transitions: Implications for Hong Kong*, 23 INT'L J. INTERCULTURAL REL. 187 (1999) (discussing the blurring of Chinese and Hong Kong identities); Kim-yee Law & Kim-ming Lee, *Citizenship, Economy & Social Exclusion of Mainland Chinese Immigrants in Hong Kong*, 36 J. CONTEMP. ASIA 217 (2007) (dual legacies).
116. Hofstede Insights, *supra* note 51.

Given their similar cultural values, one would predict that Chinese parties and Hong Kong parties would have fairly similar outcomes. In other words, the Hong Kong parties' similar values, attributes, and decision standards would be similar to those of the Chinese arbitrators. Thus, consistent with motivated cultural cognition, the Chinese arbitrators would unwittingly access, construct, and evaluate their positions selectively in ways that would benefit the Hong Kong party. Their identification with similar cognitive processes would shape the arbitrators' preferred outcome, prompting the arbitrators to appreciate the Hong Kong parties' positions and arguments, thereby leaving the other party with a less similarly motivated cultural cognition process that is disadvantaged by comparison.

The empirical analysis supports this prediction. Chinese claimants and Hong Kong claimants did not have statistically significant different outcomes (p=.09); the differences could have occurred by chance. Both Chinese claimants and Hong Kong claimants did have partial wins about 70 percent of the time. Chinese claimants are more likely to fully win (19.3 percent versus 13.7 percent) and less likely to fully lose (9.7 percent versus 13.2 percent) than Hong Kong claimants, but again, these differences are not statistically meaningful.[117]

Moreover, Hong Kong claimants are almost half as likely to receive full losses than other foreign claimants (13.2 percent versus 24.2 percent).[118] Thus, Hong Kong parties are notably better off than other foreign parties, suggesting Chinese arbitrators favor them to other foreign parties, although not quite as much as Chinese parties.

2. *Claimants from Culturally Dissonant Countries*

What if the cultures of the foreign parties are markedly different from China's? What if they are more individualistic and egalitarian? Consistent with multiple cultural cognition, the hypothesis is that their outcomes would be dissimilar to the Chinese parties, and further, that they would be less successful (worse-off) than the Chinese parties.

To offer an incremental cultural contrast, the study initially considers outcomes for the parties from developed countries and then follows with a study of the outcomes from U.S. parties alone. Developed countries are industrialized, capitalist countries within the Western European and U.S. "sphere of influence."[119] As compared to the Chinese arbitrators and Chinese parties, parties from developed countries are from countries with economic, political, and cultural values different from and fundamentally contrary to China's. But they do not have all the same identical values. There is some heterogeneity, for instance, with this group including Germany, Japan, and the United States.

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117. *See* Chew, *supra* note 7, at 258–59.

118. *Id.*

119. NATIONS ONLINE, COUNTRIES OF THE WORLD, *Countries of the First World*, http://www.nationsonline.org/oneworld/first_world.htm (last visited July 6, 2018).

As shown in Table 2, as examples of developed countries, Germany, Japan, and the United States are all notably more individualist-oriented than China, although the three counties illustrate a range on this dimension. The United States has the more extreme individualist orientation. Similarly, Germany, Japan, and the United States are also more egalitarian than China, with Germany and the United States being the most egalitarian and Japan being somewhat more hierarchical than the other two developed countries.

As predicted, the difference in arbitration outcomes for Chinese parties versus the outcomes for parties from the developed countries is highly significant. It was particularly more likely—well over twice as likely—for developed countries claimants than Chinese claimants to fully lose (24 percent versus 9.7 percent).[120] Outcomes for claimants in general and for developed countries claimants also contrasted. Further, claimants from developed countries are worse off than claimants in general, fully losing almost twice as often (24 percent versus 13.5 percent).[121] In other words, parties from developed countries are not as successful as Chinese parties.

3. *Chinese and U.S. Claimants*

China and the United States have the most markedly contrasting core cultural values.[122] Unlike the comparison with developed countries, where the countries represented a range of cultural values, the United States offers a direct head-to-head comparison. Among the countries considered, no two countries offer more of a contrast in these core values. With China's score of twenty and the United States' score of ninety-one, China is very collectivist-oriented, and the United States is very individualist-oriented. The contrast between hierarchical and egalitarian is also marked, although not quite as dramatic. With China's score of eighty and the United States' score of thirty-five, China is hierarchical, and the United States is more egalitarian than hierarchical, but not as extremely so.

Consistent with motivated cultural cognition, the hypothesis is that the outcomes would reflect this cultural dissonance more dramatically than the developed countries comparison. The empirical analysis strongly supports this prediction. First, as shown in Illustration 1 below, Chinese and U.S. claimants have very different outcome patterns: Chinese claimants are much more likely to get full wins (19 percent) and much less likely to get full losses (9.7 percent)—the best-off position. In contrast, U.S. claimants are much less likely to get full wins (7.1 percent) and much more likely to get full losses (28 percent of the time)—the worst-off position.

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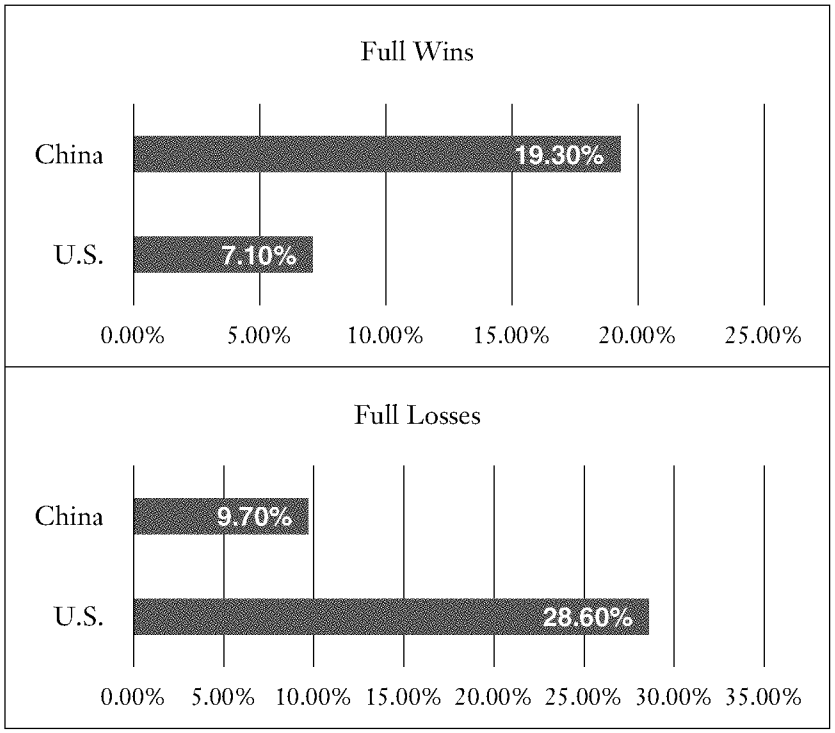
120. *See id.*; Chew, *supra* note 7, at 258.

121. *See* NATIONS ONLINE, *supra* note 119; Chew, *supra* note 7, at 258.

122. Despite these differences, China and the U.S. have been long-time trade and investment partners. In the formative 1990s, U.S. companies were among the first to trade and invest in China. Many U.S. companies believed in the upside profit potential of doing business with China, despite the considerable political and economic risks. Brown & Rogers, *supra* note 65, at 331–32.

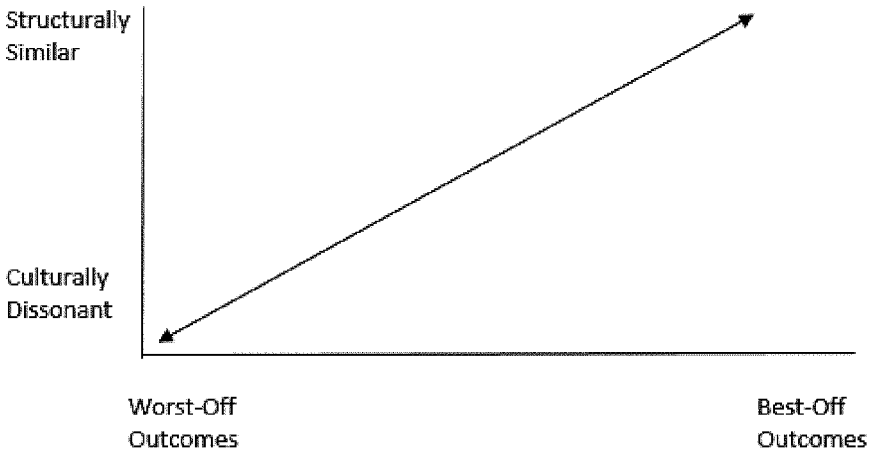
Illustration 1: Outcomes by Claimants Nationality



As compared to all foreign parties and even to developed countries claimants, U.S. claimants have the worst outcomes. U.S. claimants are more likely to fully lose (28.6 percent versus 18.6 percent of all foreign claimants and 24.1 percent of developed countries) and less likely to fully win (7.1 percent versus 13.9 percent of all foreign claimants and 15.2 percent of developed countries). Thus, considering all the data and analyses above, Chinese arbitrators award Chinese claimants the most favorable outcomes and U.S. claimants the least favorable outcomes of any other group analyzed in this study. In particular, Chinese arbitrators very infrequently give U.S. claimants full wins. In these ways, U.S. claimants are the most disadvantaged of any group of claimants.

In summary, the study shows that Chinese parties have better award outcomes than foreign parties. Assuming that all cases are comparably meritorious, these findings suggest Chinese parties have systemic advantages. But the degree of differences in outcomes varies with the nationalities of the foreigners. There is less difference between Chinese claimants and those from Hong Kong, for instance. In contrast, there are greater differences between Chinese claimants and those from developed countries, with a particularly dramatic disparity between outcomes for Chinese and U.S. claimants.

Illustration 2: Relationship Between Cultural Dissonance and Outcomes



As depicted in Illustration 2, our general hypothesis, consistent with motivated cultural cognition, also is supported. As cultural divergence between Chinese core values and a foreign party's core values increases, the Chinese arbitrators' motivated cultural cognition processes is more likely to disfavor those parties. More substantively, motivated cultural cognition theory offers an explanation for Chinese arbitrators' decision-making in these international business disputes and provides insights on their sense of justice.

III. Discussion and Conclusions

A. Chinese Arbitrations and Motivated Cultural Cognition

While American businesspeople and lawyers may describe Chinese international arbitration as an impossible-to-understand black box, this article finds that it may not be such a mystery after all. Motivated cultural cognition theory posits that Chinese arbitrators are unwittingly motivated by core cultural values and subsequent decision rules (cognitive mechanisms) that lead to their preferred outcomes; their process is normed by their culture.

Consider, for example, the following sample disputes:

Dispute One is between a Chinese manufacturer and a United States (U.S.) purchaser over a number of interrelated issues: The U.S. purchaser argues that the products (electronic toys) do not meet specified product quality specifications and the shipments missed original delivery schedule, thereby resulting in a decrease in profits (given customer cancellations). It argues a clear violation of their sales

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agreement, so they want damages and threaten the termination of the agreement.

The Chinese manufacturer offers all kinds of explanations, both internal (e.g., labor shortages) and external (e.g., unexpected storms delaying shipments), for product results and delayed shipments that do not technically comply although closely approximates contract terms. It argues these are all small problems inherent in the learning curve for foreign manufacturing and overseas shipment. It notes the parties' history of brief but good relations, and both parties' desire to continue to grow their businesses in this emerging industry.

Further, the Chinese party complains that the U.S. purchaser's payments are less than anticipated and slower than required for its seasonal business operations. The U.S. purchaser explains that volatile international currency exchange rates resulted in "effective" lowering and unforeseen complications in Chinese banking relationships and regulations have delayed payments. The U.S. party sees itself as a more experienced trader; the Chinese party as less sophisticated. The Chinese party thinks the U.S. party should have been clearer about external contingencies. Since it was not, it should be liable.

The Chinese parties' arguments in Dispute One are consistent with the Chinese arbitrators' cultural values and their cognitive mechanisms. It emphasizes social norms—doing what is fair and reasonable in these circumstances. It focuses on the parties' past and future relationship and what makes sense for direct foreign investment and foreign trade business (the success of which would benefit all concerned). Their *guanxi* networks help inform these norms and the needs of specific industries. In contrast, the U.S. party makes familiar arguments about strict enforcement of contract terms and legal principles. These technical arguments, however, while very consistent and persuasive to U.S. legal decision-makers, are not consistent with Chinese cultural values or persuasive to Chinese arbitrators.

Dispute Two is between joint venture partners who are feuding over the use of intellectual property (IP). The U.S. IP owner claims that the Chinese partner breached the licensing agreement by exceeding its use of the IP. (The licensing agreement is part of their broader joint venture arrangement.) The U.S. partner relies on specific contractual language and the general IP legal principles recognized in international treaties among Western countries. It thinks it important to clarify and enforce performance standards as specified in the licensing agreement, setting precedent for the future. It wants an injunction and damages.

The Chinese partner explains that its use of the IP was consistent with both parties' common goals for an ultimately successful joint venture and the assumed trust in their relationship. In fact, it is good news that business development was progressing so quickly that the IP was utilized earlier and more extensively than anticipated. Also, the Chinese party has its own counterclaims under emerging Chinese IP

law. It complains that the U.S. partner did not provide to them adequate training on the IP's use, and the U.S. party's proposed restrictiveness of its IP would substantially handicap the joint venture. Also, the U.S. party has not experienced real economic harm.

While both parties in Dispute Two agree that the joint venture is entitled to some IP, they disagree about the scope and terms of the use. Once again, the U.S. party presents technical legal and contract arguments, believing that should be the basis for the arbitrator's resolution. Recognizing that this is an international dispute, it cites international IP treaties. The U.S. party, consistent with U.S. IP law, views IP as a resource to be protected and restricted, with fears of others' exploitation. The Chinese arbitrators and Chinese parties, however, have a differing cultural perspective of IP. They see it as a valuable resource for the partners to tap and a compliment to the IP owner when it is used. They think more contextually and in the longer term about the success of their relationship and the joint venture, rather than isolating this specific immediate resource issue—in fact, the Chinese party wonders why the U.S. party would want to create obstacles to what appears to be very promising business venture for all.[123]

The empirical study of over 1,000 cases confirms this phenomenon. Further, it constructs an arbitration theorem of cultural similarity and dissonance: when arbitrators and a given party have similar cultural values and approaches to decision-making, the party fares better in arbitration; when cultural values and decision-making approaches diverge, the party fares worse. The result of this for business disputes in which the claimants are either Chinese or U.S., is that Chinese parties have the best outcomes and U.S. parties the worst.

Yet, Chinese arbitrators have strong incentives to appear as neutral as possible. Arbitrators must maintain their credibility so that the Chinese arbitral institution CIETAC and the parties find them acceptable and select them for their disputes. CIETAC's positive reputation is inevitably enhanced by arbitrators creating a good impression, which is dependent in part on all parties evaluating them as highly competent and fair. The importance of CIETAC's stature is further underscored by increasing numbers of competing arbitral forums. Given all these factors, Chinese arbitrators are likely to be very deliberative and systematic in their consideration of the dispute and the parties' arguments. Thus, the impact of motivated cultural cognition on the disproportionately positive outcomes for Chinese parties is even more notable.

Whether Chinese arbitrators' decision-making is problematic depends on one's vantage point. Consider, for instance, the vantage points of U.S. parties. Their presumed first reaction is that Chinese arbitrators are biased and unfair. Outcomes should not differ by the nationalities of the parties, and if they do, that is prima facie evidence of corrupt decision-makers.

123. *See generally* WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION, (Stanford Univ. Press 1995).

Chinese arbitrators' decision mechanisms, influenced by accumulated *guanxi* experiences and state priorities, are contrary to the established rules of law established by Western jurisprudence.

But Chinese and Hong Kong parties may react more moderately. While not necessarily agreeing with all of the Chinese arbitrator's decision mechanisms, they approach them within the context of Chinese history, culture, and jurisprudence. This pattern likely extends beyond China, with parties in other countries also benefiting from an arbitration "home court advantage." Among American arbitrators, for instance, the core cultural values of individualism and egalitarianism likely result in associated decision mechanisms and preferred outcomes for American parties.

When arbitration awards are announced, what determines whether the parties object or accept the decision? Perhaps, parties' reactions are outcome-driven. That is, if the arbitrators' decision-making process yields generally favorably outcomes for party X, then party X is inclined to accept that decision-making process as credible. If on the other hand, the process yields generally unfavorable outcomes for party X, then party X is inclined to critique that process and find it problematic.

Another explanation is that parties' evaluations are culture-driven, particularly shaped by cultural similarity and cultural dissonance. That is, if party X's cultural values are similar to the arbitrator's cultural values and its manifestations in the arbitrator's decision mechanisms, then party X is more inclined to find the arbitrator's reasoning, and therefore, his or her award outcome, more acceptable. In contrast, if party X's cultural values are dissonant to the arbitrator's, then party X will likely disagree with the arbitrator's reasoning and the award outcomes. Following this logic, a culturally dissonant party would be more inclined to find the process offensive and call for reforms.

Both the outcome-driven and culture-driven explanations are indeed consistent with the U.S. parties' and developed countries' expected rejection and the Chinese and Hong-Kong parties' general acceptance of the Chinese arbitrators' decision-making process. Indeed, as is true in so many facets of business and life, one's assessment of fairness, reasonableness, and justice ultimately depends on who is asking the question.

B. Strategic Concerns

Regardless of the answer to this difficult jurisprudential inquiry, Chinese arbitrators and foreign investors still face practical strategic concerns. For instance, Chinese arbitrators and Chinese arbitral institutions may be concerned about their reputation, given motivated cultural cognition theory and the empirical findings described in this article. If so, what can they do? Two possible strategies follow.

The first strategy is to defend and justify the existing dispute resolution approach, including the core cultural values and cognitive mechanisms. Every international arbitration forum has distinctive features, and savvy

parties learn about and adjust to those features. In the United States, for instance, lawyers are adept at considering the jurisprudential practices of every state in which they practice. To the extent there are differences in outcomes, motivated cultural cognition theory indicates they are not intentional but rather preconscious applications of culture. China's distinct dispute resolution approaches may be especially appropriate for some parties and some disputes. In fact, some may encourage Chinese arbitrators and CIETAC to embrace its distinctiveness, and to give notice of its features so that informed parties can take advantage of them.

The second, possibly concurrent, approach is for Chinese arbitrators and Chinese arbitral institutions to pause, evaluate, and consider reforms. Given this study's results, they could learn more about how motivated cultural cognition affects their decision-making. Making transparent political and cultural influences may minimize their impact in decision-making.[124] Studying the arbitrators' decision-making process may prompt discussions on whether and how to expand its decision mechanisms to reflect a broader range of cultural values. Expanding the roster of arbitrator candidates to include more diversity of all kinds, including arbitrators' nationalities, would broaden arbitrators' cultural values. Being actively involved in forums and organizations dedicated to improving the quality of international arbitration, while respecting cultural differences, could also be a constructive step.

Foreign investors, particularly those from the United States, on the other hand, want to know how to counter their apparent disadvantage in Chinese international arbitrations. They can consider these strategies:

1. *Informed Participant in Process*

Be as informed as possible about the choice of arbitral forum and potential arbitrators. To the extent there are choices as to forum, be knowledgeable about the differences. Even if you are limited to CIETAC, there are dozens of possible CIETAC arbitrators including a handful of non-Chinese ones.[125] Do your due diligence regarding their varied qualifications and inclinations. Given their particular backgrounds, ascertain to what extent they might adhere to core cultural values, institutional and state commitments, and the decision mechanisms described in this article.

2. *Cultural Adeptness*

Become part of Chinese culture, or at least more culturally adept. Work toward being "honorary" members of relevant *guanxi* networks. When appropriate, select Chinese partners who are well-connected and regarded. Research indicates that Chinese-foreign joint ventures benefit from their Chinese partners who utilize their *guanxi* networks on behalf of the

124. *See* Sood & Darley, *supra* note 17, at 1313.

125. For a roster of prospective arbitrators, *see* CIETAC Arbitrator Search, *supra* note 91.

business.[126] Be respectful and view Chinese lawyers and businesspeople as peers.

Learn more about Chinese cultural values and how they translate to business practices and dispute resolution. As in any dispute resolution process, understanding the decision-makers' logic (cognitive mechanisms) can help you shape your arguments so they are optimally persuasive. In other words, make arguments and take positions that make sense to Chinese arbitrators, rather than self-righteously defending your views. For example, in what ways are your arguments compatible with Chinese or emerging Chinese-foreign social norms?

3. *Innovating or Minimizing Culturally-Shaped Decision Mechanisms*

Consider if there are ways to introduce alternative decision-making standards and mechanisms or to minimize the impact of cognitive mechanisms that are harmful to your position. Consider if contract terms can be drafted with such clarity and mutual benefit that arbitrators do not have discretion in their interpretation. Consider working with other interested groups, including professional Chinese arbitration groups, on new arbitral practices and decision-making standards that serve everyone's interests. Working with other international arbitration groups may also be productive. The common aspirational goal could be identifying and implementing common values for international arbitration that are respectful of all kinds of cultures.

126. *See* Chen, *supra* note 84, at 187.